Judicial Commission of New South Wales

SENTENCING BENCH BOOK

Update 54

May 2023

SUMMARY OF CONTENTS OVERLEAF

Judicial Commission of New South Wales

Level 5, 60 Carrington Street, Sydney NSW 2000

GPO Box 3634, Sydney NSW 2001

SUMMARY OF CONTENTS

Update 54

Update 54, May 2023

Update 54 amends the Bench Book to incorporate recent case law and legislative developments. The following chapters have been revised:

Intensive correction orders (ICOs) (alternative to full-time imprisonment)

- The chapter at [3-610] **Power to make ICO subject to Pt 5** and following has been revised to incorporate the decisions of *Stanley v Director of Public Prosecutions (NSW)* [2023] HCA 3 and *Zheng v R* [2023] NSWCCA 64, and remove [3-690] **ICOs and home detention orders made before 24 September 2018**.

Setting terms of imprisonment

- [7-507] **Settled propositions concerning s 53A** to add reference to *Benn v R* [2023] NSWCCA 24 regarding aggregate sentences where there are multiple offences committed against multiple complainants.

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

- [10-430] **Age** to add references to *Liu v R* [2023] NSWCCA 30 and *Geraghty v R* [2023] NSWCCA 47 regarding advanced age as a mitigating factor at sentence.
- [10-450] **Health** to move discussion on foetal alcohol spectrum disorder to [10-460] **The relevance of an offender's mental health or cognitive impairment**.
- [10-460] **The relevance of an offender's mental health or cognitive impairment** updated and substantially revised, including reference to the following cases:
  - *Amante v R* [2020] NSWCCA 34 which provides a "classic example" of the requirement to make a "sensitive discretionary decision" in sentencing an offender with a mental health or cognitive impairment
  - *Wornes v R* [2022] NSWCCA 184, *R v SS (a pseudonym)* [2022] NSWCCA 258, *Choy v R* [2023] NSWCCA 23, *Blake v R* [2021] NSWCCA 258, *Anderson v R* [2022] NSWCCA 187, *DS v R* [2022] NSWCCA 156, *Moiler v R* [2021] NSWCCA 73 and *Wang v R* [2021] NSWCCA 282 regarding the application of sentencing principles where an offender has a mental health disorder
  - *Kapua v R* [2023] NSWCCA 14, *Wang v R*, *R v SS (a pseudonym)* and *Blake v R* regarding sentencing of an offender with a mental health disorder who acts with knowledge of what they are doing
  - *Eden v R* [2023] NSWCCA 31 and *Hiemstra v Western Australia* [2021] WASCA 96 regarding foetal alcohol spectrum disorder and its relevance in sentencing proceedings.
- [10-470] **Deprived background of offender** to add reference to *Hiemstra v Western Australia* [2021] WASCA 96 regarding the application of the principles in *Bugmy v The Queen* (2013) 249 CLR 571 where the offender had experienced significant childhood trauma and disadvantage, and had been diagnosed with foetal alcohol spectrum disorder.
- [10-570] **Deportation** to add reference to the CDPP's recently published *Sentencing of federal offenders in Australia: a guide for practitioners*, 6th edition, April 2023.

Sentencing Commonwealth offenders

- [16-000] **Introduction** to add reference to the CDPP's recently published *Sentencing of federal offenders in Australia: a guide for practitioners*, 6th edition, April 2023.

Dangerous driving and navigation

- [18-336] **Length of the journey** to add reference to *R v Russell* [2022] NSWCCA 294 where the length of the offender's intended journey was relevant to the assessment of the offender's moral culpability.

Mental Health and Cognitive Impairment Forensic Provisions Act 2020

- [90-000] **Introduction**, and following, substantially revised to incorporate relevant provisions of the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 which commenced on 27 March 2021, and to add reference to *Attorney General for NSW v Bragg (Preliminary)* [2021] NSWSC 439 regarding the preliminary extension of a limiting term.

Judicial Commission of New South Wales

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May 2023

FILING INSTRUCTIONS OVERLEAF

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FILING INSTRUCTIONS

Update 54

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Intensive correction orders (ICOs) (alternative to full-time imprisonment)

[3-600] Introduction

Last reviewed: May 2023

Section 7(1) *Crimes (Sentencing Procedure) Act* 1999 provides that a court that has sentenced an offender to imprisonment in respect of one or more offences may make an intensive correction order (ICO) directing that the sentence be served by way of intensive correction in the community.

Part 5 *Crimes (Sentencing Procedure) Act* sets out the sentencing procedures governing ICOs. The *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act* 2017, which commenced on 24 September 2018, restructured and amended the provisions relating to ICOs.

The changes made allow offenders to access intensive supervision as an alternative to a short prison sentence and "help courts ensure that offenders address their offending behaviour and are held accountable": Attorney General (NSW), the Hon M Speakman SC, Second Reading Speech for the Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill and cognate legislation, NSW, Legislative Assembly, *Debates*, 11 October 2017, p 2.

A feature of Pt 5 is that community safety is the paramount consideration when determining whether to make an ICO because, the Attorney General said, at p 2, "community safety is not just about incarceration" and "community supervision and programs are far more effective" at reducing re-offending.

The provisions in Pt 5 also:

- give the court more discretion to tailor the particular conditions to be imposed on the ICO to the individual offender
- require that an ICO be subject to two standard conditions and at least one additional condition (which may include home detention)
- further restrict the offences for which an ICO can be made.

An ICO cannot be backdated: see **Pronouncement of ICO by court, terms and commencement** at **[3-660]**.

Summary of significant ICO provisions

- The court must not make an ICO unless it has obtained an assessment report in relation to the offender, but the court is not bound by that report: ss 17D, 69(2). However, the court is not required to obtain a report if satisfied it has sufficient information available to justify making the ICO without one: s 17D(1A). See **[3-635]**.
- An ICO must not be made for a single offence if the term of imprisonment exceeds 2 years. If an ICO is made for multiple offences, or two or more ICOs are made, the term of the aggregate or effective sentence of imprisonment must not exceed 3 years: s 68. See **[3-610]**, **[3-620]**.
- ICOs are not available for certain offences, including manslaughter, murder, prescribed sexual offences, certain terrorism offences, breaches of serious crime prevention and public safety orders, and offences involving the discharge of a firearm: s 67. See **[3-620]**.
- An ICO must not be made for offenders under the age of 18 years: s 7(3). See **[3-620]**.
- An ICO can only be made for a domestic violence offence where the court is satisfied the victim of the offence and any person with whom the offender is likely to reside, will be adequately protected: s 4B. See **[3-620]**.
- In determining whether to make an ICO, community safety is the paramount consideration. When considering community safety, the court is to assess whether an ICO or full-time detention is more likely to address the offender's risk of reoffending: s 66. See **[3-632]** and the clear statement of the relevant principles from *Stanley v DPP* [2023] HCA 3 found in *Zheng v R* [2023] NSWCCA 64 below.
- An ICO must commence on the date it is made but may be reduced to take into account pre-sentence custody. See **[3-660]**.
- When making an ICO, the court is required to impose the standard conditions and at least one additional condition (unless there are exceptional circumstances) and may impose further conditions where necessary: ss 73, 73A, 73B. Home detention is available as an additional condition of an ICO: s 73A(2). See **[3-640]**.
- The court must not make an ICO or impose a home detention or community service work condition unless it has obtained a relevant assessment report in relation to the offender: ss 73A(3), 17D(2), (4). See **[3-635]**, **[3-640]**.
- A court cannot request an assessment report for a home detention condition until it has imposed a sentence of imprisonment: s 17D(3). See **[3-635]**.
- The Parole Authority may, in certain circumstances, impose, vary or revoke any conditions of an ICO, including those imposed by the court: *Crimes (Administration of Sentences) Act* 1999, s 81A. See **[3-635]**, **[3-640]**.

[3-610] Power to make ICO subject to Pt 5

Last reviewed: May 2023

See also **[3-300] Penalties of imprisonment.**

A court that has sentenced an offender to imprisonment in respect of one or more offences may make an ICO directing that the sentence be served by way of intensive correction in the community: s 7(1) *Crimes (Sentencing Procedure) Act* 1999. If such an order is made, the court must not set a non-parole period for the sentence: s 7(2).

Although s 7(1) is expressed in the past tense, "[a] court that has sentenced", s 7(4) makes it clear that the power under s 7(1) is "subject to the provisions of Part 5" of the Act. Part 5 is headed "Sentencing procedures for intensive correction orders" and applies when "a court is *considering*, or has made, an intensive correction order": s 64; *Stanley v DPP* [2023] HCA 3 at [68] [emphasis added].

For commentary regarding when a court needs to consider whether to make an ICO, see [3-630] **ICO is a form of imprisonment**.

[3-620] Restrictions on power to make ICO

Last reviewed: May 2023

Part 5, Division 2 *Crimes (Sentencing Procedure) Act* 1999 sets out specific restrictions on the power to make an ICO.

ICO not available for certain offences

Section 67(1) provides that an ICO must not be made in respect of a sentence of imprisonment for:

(a) murder or manslaughter

(b) a prescribed sexual offence

(c) a terrorism offence within the meaning of the *Crimes Act* 1914 (Cth) or under s 310J *Crimes Act* 1900

(d) an offence relating to a contravention of a serious crime prevention order under s 8 *Crimes (Serious Crime Prevention Orders) Act* 2016

(e) an offence relating to a contravention of a public safety order under s 87ZA *Law Enforcement (Powers and Responsibilities) Act* 2002

(f) an offence involving the discharge of a firearm

(g) an offence that includes the commission of, or an intention to commit, an offence referred to in paragraphs (a)–(f)

(h) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in paragraphs (a)–(g).

"Prescribed sexual offence" is defined in s 67(2) and encompasses a range of offences including offences under Pt 3, Divs 10–10A *Crimes Act* where the victim is under 16 years or the offence involves sexual intercourse and the victim is of any age; child prostitution; voyeurism offences where the victim is a child; State and Commonwealth child abuse material and child pornography offences; offences of trafficking children and procuring children for sexual activity under the Criminal Code (Cth) and some repealed offences under the *Crimes Act* 1914 (Cth).

Nor can an ICO be made with respect to an aggregate sentence of imprisonment in relation to two or more offences, where any one of the offences is an offence listed in s 67(1): s 67(3).

ICOs and domestic violence offences

An ICO must not be made in respect of a sentence of imprisonment for a domestic violence offence, or an aggregate sentence of imprisonment where any one or more of the offences is a domestic violence offence, unless the court is satisfied the victim of the domestic violence offence, and any person with whom the offender is likely to reside, will be adequately protected: s 4B(1). If the court finds a person guilty of a domestic violence offence, the court must not impose a home detention condition if the court reasonably believes the offender will reside with the victim of the domestic violence offence: s 4B(2).

ICOs not available for juvenile offenders

An ICO may not be made with respect to offenders under the age of 18 years: s 7(3).

ICOs not available where imprisonment exceeds limits

An ICO must not be made in respect of a single offence if the duration of the term of imprisonment for the offence exceeds 2 years: s 68(1). An ICO may be made in respect of an aggregate sentence of imprisonment, however the aggregate term must not exceed 3 years: s 68(2). Two or more ICOs may be made for two or more offences but the duration of any individual term of imprisonment must not exceed 2 years, and the duration of the term of imprisonment for all offences must not exceed 3 years: s 68(3); see *R v Fangaloka* [2019] NSWCCA 173 at [51].

A court cannot manipulate pre-sentence custody to bring a sentence within the jurisdictional ceiling for the imposition of an ICO: *R v West* [2014] NSWCCA 250. For commentary regarding taking into account pre-sentence custody, see **[3-660] Pronouncement of ICO by court, terms and commencement**.

ICOs not available for offenders residing in other jurisdictions

The court may not make an ICO in respect of an offender who resides, or intends to reside, in another State or Territory, unless the regulations declare that State or Territory to be an approved jurisdiction: s 69(3). No State or Territory is currently declared to be an approved jurisdiction.

[3-630] ICO is a form of imprisonment

Last reviewed: May 2023

An ICO is a "custodial sentence" referred to in Pt 2, Div 2 *Crimes (Sentencing Procedure) Act* 1999. Since it is a form of imprisonment, making an ICO requires a sentencing court to follow a three stage process before directing that the sentence can be served in that way: *Stanley v DPP* [2023] HCA 3 at [59]; *R v Fangaloka* [2019] NSWCCA 173 at [44]; *Mandranis v R* [2021] NSWCCA 97 at [22]–[28].

First, the court must be satisfied that, having considered all possible alternatives, no penalty other than imprisonment is appropriate: s 5(1) *Crimes (Sentencing Procedure) Act*; *Stanley v DPP* at [59]–[60]; *R v Douar* [2005] NSWCCA 455 at [70]; *R v Hamieh* [2010] NSWCCA 189 at [76].

Second, if a sentence of imprisonment is appropriate, the court determines the length of sentence without regard to how it is to be served: *Stanley v DPP* at [59]; *R v Douar* at [71]; *R v Zamagias* [2002] NSWCCA 17 at [26]; *Zreika v R* [2012] NSWCCA 44

at [56]. It is preferable for the court to articulate its conclusion as to the appropriate term: *R v Assaad* [2009] NSWCCA 182 at [33]. It is inappropriate to consider how the sentence will be served before determining its length: *R v Ryan* [2006] NSWCCA 394 at [1], [4].

The court must then consider whether any alternative to full-time imprisonment should be imposed: *Stanley v DPP* at [59]; *R v Zamagias* at [28]; *R v Foster* [2001] NSWCCA 215 at [30]; *Campbell v R* [2018] NSWCCA 87 at [47], [52]. The appropriateness of an alternative option depends on various factors, including whether such an alternative results in a sentence that reflects the objective seriousness of the offence and fulfils the purposes of punishment. Sight should not be lost of the fact that the more lenient the alternative the less likely it will do so: *R v Zamagias* at [28]; *R v Hamieh* at [76]; *R v Douar* at [72]. It is preferable to make clear that such alternatives have been considered and, if necessary, explain why they are not appropriate, although a failure to do so is not erroneous: *Casella v R* [2019] NSWCCA 201 at [63]–[65]; see also *Campbell v R* [2018] NSWCCA 87 at [53].

In considering the third step and whether an alternative to full-time imprisonment should be imposed, the court will come under a duty to consider whether to make an ICO where that matter is properly raised in the circumstances of the case: *Stanley v DPP* at [65]. Such an obligation may be enlivened where a cogent argument is advanced for taking that course: *Wany v DPP* [2020] NSWCA 318 at [52]; *Blanch v R* [2019] NSWCCA 304 at [68]–[69].

Inherently lenient or a substantial punishment?

An ICO has the capacity to operate as substantial punishment, but can also reflect a significant degree of leniency because it does not involve immediate incarceration: *R v Pullen* [2018] NSWCCA 264 at [53]*; R v Pogson* [2012] NSWCCA 225 at [108]; *Whelan v R* [2012] NSWCCA 147 at [120]; see also *Zheng v R* [2023] NSWCCA 64 at [296]; *R v Fangaloka* at [67].

In *R v Pullen* the court concluded that ICO's under the new scheme still involved substantial punishment given the multiple mandatory obligations attached to the standard conditions (see *Crimes (Administration of Sentences) Regulation* 2014, cll 186, 187 and 189) and that the degree of punishment involved, and its appropriateness in a particular case, should be assessed having regard to the number and nature of conditions imposed. In some cases, an ICO could be more onerous because of the significant number of obligations prescribed by the regulations: *R v Pullen* at [66].

In *R v Fangaloka*, the court, when discussing the effect of the competing purposes of sentencing on the consideration of whether a sentence of imprisonment should be served in custody or by way of an ICO, observed at [67];

> there will remain cases in which the significant element of leniency contained in an ICO is inconsistent with the imposition of an adequate penalty, so that an ICO is an unacceptable form of imprisonment.

[3-632] Mandatory considerations when determining whether to impose ICO

Last reviewed: May 2023

Community safety

Community safety must be the court's paramount consideration when determining whether to make an ICO: s 66(1) *Crimes (Sentencing Procedure) Act* 1999; *Stanley v DPP* [2023] HCA 3at [72]; *Zheng v R* [2023] NSWCCA 64 at [277], [282]. In *Zheng v R*, Gleeson JA (Hamill and Ierace JJ agreeing) at [281]–[286] provides a clear statement of the relevant principles from *Stanley v DPP* in the consideration of community safety pursuant to s 66:

1. [T]he power to make an ICO requires an evaluative exercise that treats community safety as the paramount consideration, with the benefit of the assessment mandated by s 66(2). The issue is not merely the offender's risk of reoffending, but the narrower risk of reoffending in a manner that may affect community safety: *Stanley v DPP* at [72], [75].
2. [Section] 66(2) is premised upon the view that an offender's risk of reoffending may be different depending upon how their sentence of imprisonment is served, and implicitly rejects any assumption that full-time detention of the offender will most effectively promote community safety: *Stanley v DPP* at [74].
3. [T]he nature and content of the conditions that might be imposed by an ICO will be important in measuring the risk of reoffending: *Stanley v DPP* at [75].
4. [T]he consideration of community safety required by s 66(2) is to be undertaken in a forward-looking manner having regard to the offender's risk of reoffending: *Stanley v DPP* at [74].
5. [W]hile community safety is not the sole consideration in the decision to make, or refuse to make, an ICO, it will usually have a decisive effect unless the evidence is inconclusive: *Stanley v DPP* at [76].

Consideration of community safety is mandatory, regardless of the weight it is ultimately given: *Stanley v DPP* at [72]; *Wany v DPP* [2020] NSWCA 318 at [56], [60]; *R v Fangaloka* [2019] NSWCCA 173 at [65]. This does not require express reference to s 66, but it must be apparent, even if by implication, that consideration has been given to ss 66(1) and (2): *Blanch v R* [2019] NSWCCA 304 at [60]–[62]; *Mourtada v R* [2021] NSWCCA 211 at [37], [43]. The obligation to consider s 66 only arises when the court is considering whether the sentence can be served by way of an ICO. If the proposed sentence exceeds 2 years, in the case of a sentence for an individual offence, or 3 years where an aggregate sentence is being contemplated, there is no requirement to consider s 66: s 68; *Cross v R* [2019] NSWCCA 280 at [26], [35].

While community safety can operate in different ways in different circumstances, the purpose of s 66 is "merely to ensure that the court does not assume that full time detention is more likely to address a risk of reoffending than a community-based program of supervised activity": *R v Fangaloka* at [66]; *Mourtada v R* at [25].

When considering community safety, the court must assess whether making the order or serving the sentence by way of full-time detention is more likely to address the offender's risk of re-offending: s 66(2). The sentencing court is to assess the possible impacts of an ICO or full-time imprisonment on the offender's risk of reoffending; to look forward to the future possible impacts of an ICO or full-time imprisonment: *Stanley v DPP* at [72]; also see *Zheng v R* at [285].

This requirement recognises community safety is not achieved simply by incarcerating an offender, but that incarceration may have the opposite effect; the concept of community safety is linked with considerations of rehabilitation, which is more likely to occur with supervision and access to programs in the community: *R v Pullen* [2018] NSWCCA 264 at [84]. Section 66(2) implicitly rejects any assumption that full-time imprisonment will most effectively promote community safety, and gives effect to Parliament's recognition that, in some cases, community safety will be better promoted by a term of imprisonment served in the community: *Stanley v DPP* at [74], [82]–[85]; also see *Zheng v R* at [283]. However, consideration of specific deterrence also plays an important role in making the assessment required by s 66(2): *Mourtada v R* at [23]–[24], [34].

Having reached a conclusion favouring an ICO under s 66(2), a sentencing court retains a discretion to refuse to make such an order. Of this, McCallum JA said, in *Wany v DPP*, at [64]:

> So much is made plain by s 66(3); and see the remarks of Basten JA in *Fangaloka* at [65]. But the point of the section is to require the sentencing court to consider that question without any preconception in favour of incarceration as the only path to rehabilitation.

Evidence to assist in determining an offender's risk of re-offending may be contained in an assessment report as the regulations require that this be addressed: cl 12A(1)(a) *Crimes (Sentencing Procedure) Regulation* 2017. However, subject to certain qualifications, not presently relevant, the court is not bound by the assessment report: s 69(2). *Zheng v R* is a case where the court relied upon, inter alia, the assessment report in its determination of the offender's risk of reoffending and community safety: at [287], [291].

When deciding whether to make an ICO, the court must also consider the purposes of sentencing in s 3A *Crimes (Sentencing Procedure) Act*, any relevant common law principles, and may consider any other matters thought relevant: s 66(3).

Section 3A and other considerations subordinate to community safety

When the court is deciding the discrete question whether or not to make an ICO, community safety is the consideration to which other considerations are to be subordinated, although other considerations must or may be taken into account as prescribed by s 66(3): *Stanley v DPP* at [73]; *Zheng v R* at [277], [291]; *R v Pullen* at [86]; *Mandranis v The Queen* [2021] NSWCCA 97 at [50]–[51].

Therefore, in accordance with s 66(3), community safety is the paramount, but not the sole, consideration. The power to make an ICO is an evaluative exercise that treats community safety as the paramount consideration, with the benefit of the assessment mandated by s 66(2): *Stanley v DPP* at [75]; *Zheng v R* at [282]. The s 66(2) assessment, however, is not determinative of whether an ICO should be made and, in this respect, the nature and content of the conditions that might be imposed by an ICO will be important in measuring the risk of offending. Notwithstanding, community safety will usually have a decisive effect on the decision to make, or refuse to make, an ICO, unless the evidence is inconclusive: *Stanley v DPP* at [75]–[76]; *Zheng v R* at [284], [286].

While aspects of community safety underpin some of the general purposes of sentencing in s 3A, such as specific and general deterrence and protection of the community from the offender, and will have been considered in deciding whether to

impose a sentence of imprisonment, community safety is required to be considered *again* and in a different manner under s 66 when considering whether to make an ICO. Here, it is given its principal content by s 66(2), namely, the safety of the community from harms that might result if the offender reoffends, whether while serving the term of imprisonment that has been imposed or after serving it: *Stanley v DPP* at [77]. Also see *Mandranis v R* at [50]–[51]; *Zheng v R* at [282]–[283], [287]–[291].

Controversy concerning a restrictive interpretation of s 66(2)

Cases since *R v Fangaloka* have expressed concern about what was described by Basten JA (Johnson and Price JJ agreeing) in *R v Fangaloka* at [63] as "an alternative reading of s 66" which was "restrictive rather than facilitative". His Honour said:

> Thus, the paramount consideration in considering whether to make an ICO is the assessment of whether such an order, or fulltime detention, is more likely to address the offender's risk of reoffending. *That is, unless a favourable opinion is reached in making that assessment, an ICO should not be imposed. At the same time, the other purposes of sentencing must all be considered and given due weight*. [emphasis added]

In *Casella v R* [2019] NSWCCA 20 at [108], Beech-Jones J (Bathurst CJ and N Adams J agreeing) expressed "significant doubts" about the correctness of the emphasised statement, observing "[n]othing in s 66 purports to operate as a prohibition to that effect": see also *Wany v DPP* at [62] (McCallum JA; Simpson AJA agreeing, Meagher JA not deciding) and *Mandranis v R* at [49] (Simpson AJA; Garling and N Adams JJ agreeing) which support this proposition.

Arguably, however, the impugned comments in *R v Fangaloka* do not represent Basten JA's concluded view on this issue as his Honour went on to state at [65]:

> *The better view* is that the legislature has, appropriately, acted upon the available evidence by requiring the court to have regard to a specific consideration, namely the likelihood of a particular form of order addressing the offender's risk of reoffending. That obligation, imposed by s 66(2), is not stated to be in derogation of the more general purposes of sentencing outlined in s 3A, nor in derogation of other relevant matters: s 66(3). Nor does the legislation limit the consideration of community safety to a means more likely to address the risk of reoffending; it merely identifies that as a mandatory element for consideration. [emphasis added]

In *Mourtada v R*, Basten JA, after acknowledging the controversy resulting from his observations at [63] of *R v Fangaloka*, went on to say:

> No doubt the judgment could have been more clearly expressed, but the view accepted at [65]–[66] did *not* include the proposition that a positive favourable opinion was required before an ICO should be imposed. Rather, a more nuanced approach was adopted to the weighing of the various considerations required to be taken into account under s 66. At [66] the reasoning noted that the purpose of s 66 was "to ensure that the court does not assume that full-time detention is more likely to address a risk of reoffending than a community-based program of supervised activity." The sentencing court was not required to favour an ICO over full-time custody but it was required to have specific regard to community protection and to bear in mind that short sentences were not necessarily effective as a means of deterring further offending.

An application for special leave to appeal against the "restrictive" interpretation of s 66 was refused by the High Court on the basis it had no prospect of success: *Fangaloka v The Queen* [2020] HCASL 12. The majority in the High Court decision of *Stanley*

v DPP does not comment on the "restrictive" interpretation of s 66, however, they state at [75]–[76] that although the s 66(2) assessment is not determinative of whether an ICO should be made, community safety will usually have a decisive effect on the decision to make, or refuse to make, an ICO, unless the evidence is inconclusive. Also see *Zheng v R* at [286].

[3-634] ICOs available for sentences of 6 months or less

Nothing in s 5(2) or Pt 5 of the *Crimes (Sentencing Procedure) Act* 1999 precludes imposing an ICO for a sentence of 6 months or less: *Casella v R* [2019] NSWCCA 201 at [105], [110]. In *Casella v R*, the applicant's appeal was allowed and he was re-sentenced to 6 months imprisonment which the court directed was to be served by way of an ICO. Beech-Jones J, with whom Bathurst CJ and N Adams J agreed, concluded that the statement in *R v Fangaloka* [2019] NSWCCA 173 at [56] that "in practice, Pt 5 is unlikely to be applied to very short sentences (for 6 months or a lesser period)" should not be regarded as having any binding effect on either the CCA or lower courts as this issue was not essential to the outcome in that case: at [105].

[3-635] ICO assessment reports

In deciding whether or not to make an ICO, the court is to have regard to the contents of an assessment report and such evidence from a community corrections officer as the court considers necessary: s 69(1) *Crimes (Sentencing Procedure) Act* 1999.

The relevant statutory requirements for assessment reports are contained Pt 2, Div 4B (ss 17B–17D) *Crimes (Sentencing Procedure) Act*.

An assessment report may be requested:

- after an offender has been found guilty and before imposing sentence: s 17C(1)(b)(i)
- during sentencing proceedings after a sentence of imprisonment has been imposed: s 17C(1)(b)(ii)
- during proceedings to correct a sentencing error: s 17C(1)(b)(iv).

If a sentence of imprisonment has been imposed and the court then requests an assessment report for the purpose of considering whether the sentence should be served by way of an ICO, the referral acts as a stay on the sentence and the offender should either be remanded in custody or granted bail: s 17C(2). If the offender subsequently fails to appear, the court may issue a warrant: *Bail Act* 2013, s 77A.

A court must not:

- make an ICO unless it has obtained a relevant assessment report in relation to the offender (although it is not required to obtain an assessment report if satisfied there is sufficient information before it to justify making the ICO): s 17D(1), s 17D(1A)
- impose a home detention or community service work condition on an ICO unless it has obtained an assessment report relating to the imposition of such a condition: s 17D(2), 17D(4)
- request an assessment report concerning the imposition of a home detention condition unless it has imposed a sentence of imprisonment on the offender for a specified term: s 17D(3).

It is important to comply with the mandatory requirements of s 17D(4) as that will enable proper consideration of the appropriate sentence: *RC v R* [2020] NSWCCA 76 at [223]–[228]. The court is not bound by the assessment report except in the circumstances identified in s 73A(3): s 69(2). Section 73A(3) provides that a court must not impose a home detention condition or community service work condition on an ICO unless an assessment report states the offender is suitable.

A court may form the view that an ICO is not appropriate where a report indicates the offender will be unable to comply with the conditions of an ICO or if he or she is likely to breach the conditions: *R v Zreika* [2012] NSWCCA 44 at [67].

For the matters the assessment report must address, see **Requirements for assessment reports** at **[3-510]**.

[3-640] ICO conditions

ICO conditions are imposed by the court under Pt 5, Div 4 *Crimes (Sentencing Procedure) Act* 1999, and may be imposed, varied or revoked by the Parole Authority or, in some circumstances, Community Corrections: *Crimes (Administration of Sentences) Act* 1999, ss 81, 81A, 164.

An ICO is subject to:

- standard conditions (s 72(3) *Crimes (Sentencing Procedure) Act*)
- additional conditions (s 73A)
- any further conditions imposed by the court (s 73B)
- any conditions imposed by the Parole Authority under ss 81A or 164 *Crimes (Administration of Sentences) Act* 1999.

The court must, at the time of sentence, impose on the ICO the standard conditions, at least one additional condition and may impose further conditions: s 73.

Range of conditions

Standard conditions

The court must, at the time of sentence, impose on an ICO the standard ICO conditions, which are that the offender must not commit any offence and must submit to supervision by a community corrections officer: s 73(1), 73(2).

Additional conditions

In addition to the standard conditions, the court must, at the time of sentence, impose at least one of the additional conditions referred to in s 73A(2), unless satisfied there are exceptional circumstances: s 73A(1A). In *Casella v R* [2019] NSWCCA 201, the fact that the offender had been on conditional bail while his appeal was pending was found to be an exceptional circumstance for the purposes of s 73A: at [100].

In *Zheng v R* [2023] NSWCCA 64, where the offender was sentenced for reckless wounding under s 35(4) *Crimes Act*, exceptional circumstances for the purposes of s 73A were also found as there had been no issues between the applicant and the

victim regarding contact with their son, and in light of the Community Corrections' supervision plan, the applicant's compliance with onerous bail conditions for over four years, that the offending was not drug or alcohol-related, and the applicant's low intellectual functioning and major depressive disorder: at [290].

The additional conditions available include:

(a) home detention

(b) electronic monitoring

(c) a curfew

(d) community service work requiring the performance of community service work for a specified number of hours

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

(f) abstention from alcohol or drugs or both

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

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

If the court determines not to impose an additional condition, it must record its reasons for doing so, however, the failure to record reasons does not invalidate the sentence: s 73A(1B).

The court must not impose a home detention or community service work condition on an ICO unless an assessment report states the offender is suitable to be the subject of such a condition: s 73A(3). The court may limit the period during which an additional condition is in force: s 73A(4).

Maximum hours and minimum periods for community service work

The maximum number of hours that may be specified for community service work in an additional condition of an ICO are set out in cl 14(1) *Crimes (Sentencing Procedure) Regulation* 2017:

(a) 100 hours for offences with a maximum term of imprisonment of 6 months or less

(b) 200 hours for offences with a maximum term of imprisonment exceeding 6 months but not 1 year

(c) 750 hours for offences with a maximum term of imprisonment exceeding 1 year.

The minimum period that a community service work condition of an ICO must be in force is set out in cl 14(2):

(a) 6 months if the hours of work do not exceed 100 hours

(b) 12 months if the hours of work exceed 100 hours but not 300 hours

(c) 18 months if the hours of work exceed 300 hours but not 500 hours

(d) 2 years if the hours of work exceed 500 hours.

Further conditions

The court may impose further conditions on an ICO but these must not be inconsistent with any standard or additional conditions (whether or not they are imposed on the particular ICO): s 73B.

Offenders' obligations under ICO conditions

The obligations of offenders subject to the standard ICO conditions are set out in cll 186, 187 *Crimes (Administration of Sentences) Regulation* 2014: s 82 *Crimes (Administration of Sentences) Act*. Their specific obligations with respect to home detention, electronic monitoring, curfew, community service work, rehabilitation or treatment, abstention, non-association, and place restriction conditions are set out in cll 189–189G.

Power of Parole Authority and Community Corrections to vary conditions

The Parole Authority may, on application of a community corrections officer or the offender, impose, vary or revoke any conditions of an ICO, including those imposed by the sentencing court: s 81A(1) *Crimes (Administration of Sentences) Act*. However, the Parole Authority must not vary or revoke a standard condition, or impose or vary any other condition unless the sentencing court could have imposed or varied the condition under Pt 5 *Crimes (Sentencing Procedure) Act*: s 81A(2). If the Parole Authority revokes an additional condition on an ICO, it must replace it with another additional condition, unless there is already another additional condition in force with respect to the order, or unless there are exceptional circumstances: s 81A(3)–(4).

The Parole Authority must not impose a period of home detention or a condition requiring community service work unless a report from a community corrections officer states that imposing such a condition is appropriate: s 81A(2)(d).

A condition of an ICO relating to supervision, curfew, non-association and place restriction (ss 73(2)(b), 73A(2) *Crimes (Sentencing Procedure) Act*) may be suspended by a community corrections officer: s 82A. The factors to be taken into account before suspending a supervision condition are found in cl 189I *Crimes (Administration of Sentences) Regulation* 2014.

An ICO expires at the end of the sentence to which it relates unless it is sooner revoked: s 83.

Care must be exercised in the administration of the conditions. The capacity to direct the offender must be confined to a legitimate purpose in furtherance of the specific court order: *R v Pogson* [2012] NSWCCA 225 at [101]. For example, requiring an offender to submit to breath testing where the offender is not subject to a court-ordered condition prohibiting the use of alcohol may be beyond power: *R v Pogson* at [101].

[3-650] Multiple orders

Last reviewed: May 2023

Only one "relevant order" can be in force for an offender at the same time for the same offence: s 17F(1). "Relevant order" is defined as an ICO, CCO or CRO: s 17E. If an offender is subject to multiple orders at the same time, an ICO (and its conditions) prevails over a CCO (and its conditions) and a CCO (and its conditions) prevails over a

CRO (and its conditions): s 17F(3),(4). Despite this, a standard condition prevails over a condition that is not standard: s 17F(4)(c). For community service work and curfew conditions under multiple orders, see **Multiple orders** at **[3-520]**.

[3-660] Pronouncement of ICO by court, terms and commencement

Last reviewed: May 2023

The form of order is that the court pronounces the offender is sentenced to a term of imprisonment for a particular duration and then directs that it be served by way of an ICO. The court must not set a non-parole period: s 7(2). At the time of sentence, the court must impose on the ICO the standard conditions, additional conditions and any further conditions: s 73.

The Local Court cannot make an ICO in the offender's absence: s 25(1)(b) *Crimes (Sentencing Procedure) Act* 1999.

The term of an ICO is the same as the term of imprisonment in respect of which the order is made: s 70; s 83 *Crimes (Administration of Sentences) Act* 1999.

An ICO must commence on the date it is made (unless it is made in relation to a sentence of imprisonment that is to be served consecutively, or partly consecutively, with another sentence of imprisonment the subject of an ICO): s 71. It cannot be backdated: *Mandranis v R* [2021] NSWCCA 97 at [55]–[56]; *R v Edelbi* [2021] NSWCCA 122 at [79]–[80]. The term of the ICO may be reduced for pre-sentence custody to enable the ICO to commence on the day that sentence is imposed: *Mandranis v R* at [61]; *Zheng v R* [2023] NSWCCA 64 at [298]; see also **[12-500] Counting pre-sentence custody**.

An offender may not be subject to two or more ICOs to be served concurrently or consecutively (or partly concurrently and partly consecutively) where the date at which the new sentence will end is more than 2 years after the date on which it was imposed: s 68(1).

Explaining the order

The court must ensure that all reasonable steps are taken to explain to the offender the ICO obligations and the consequences of a failure to comply: s 17I(1).

A court must cause written notice of the order to be given to the offender and to Corrective Services as soon as practicable after making an ICO: s 17J(1).

[3-670] Breaches of ICOs

Last reviewed: May 2023

Where the Commissioner of Corrective Services or a community corrections officer is satisfied an offender has failed to comply with his or her obligations under an ICO, a community corrections officer may, pursuant to s 163(2) *Crimes (Administration of Sentences) Act* 1999:

- record the breach and take no formal action
- give an informal warning to the offender
- give a formal warning that further breaches will result in referral to the Parole Authority

- give a direction about the non-compliant behaviour
- impose a curfew.

If the breach is more serious, the Commissioner or a community corrections officer can refer the breaches to the Parole Authority: s 163(3). In that case, where the Parole Authority is satisfied an offender has failed to comply with his or her obligations under an ICO (s 164(1)), it may, pursuant to s 164(2):

- record the breach and take no further action
- give a formal warning
- impose any conditions on the ICO
- vary or revoke the conditions of the ICO, including those imposed by the court
- revoke the ICO.

Section 164(6) prescribes certain restrictions on the power of the Parole Authority to vary, revoke or impose conditions following the breach of an ICO. They are the same as those applying where the Parole Authority varies, revokes or imposes conditions generally (without a breach) under s 81A: see **ICO conditions** at **[3-640]**.

Where an ICO is revoked, a warrant is issued for the offender's arrest and the sentence ceases to run. A revocation order takes effect on the date on which it is made or on such earlier date as the Parole Authority thinks fit: s 164A(1). The earliest date on which the revocation order may take effect is the first occasion on which it appears to the Parole Authority that the offender failed to comply with his or her obligations under the order: s 164A(2). If an offender is not taken into custody until after the day on which the revocation order takes effect, the term of the offender's sentence is extended by the number of days the person was at large after the order took effect: s 164A(3).

[3-680] Federal offences

Last reviewed: May 2023

Sentencing alternatives under State or Territory law are available to federal offenders if prescribed under s 20AB *Crimes Act* 1914 (Cth) and/or reg 6 *Crimes Regulations* 1990 (Cth). The *Crimes Amendment Regulations* 2010 (No 4) (Cth) amended reg 6 *Crimes Regulation* 1990 (Cth) to enable an ICO to be imposed for a Commonwealth offence.

Section 20AB provides, inter alia, "such a sentence or order may in *corresponding cases* be passed or made" [emphasis added]. The question that arises is the extent to which the phrase "corresponding cases" in s 20AB can be read to refer to equivalent State offences.

Neither reg 6 C*rimes Regulation* nor s 20AB exclude specific offences from an ICO. However, s 67(1) *Crimes Sentencing Procedure Act* 1999 (NSW) purports to exclude a number of Commonwealth offences from an ICO: see **Restrictions on power to make ICO** at **[3-620]**.

Section 20AC *Crimes Act* 1914 addresses the circumstance where a Commonwealth offender has failed to comply with an ICO, made under s 20AB(1).

[3-710] Additional references

Last reviewed: May 2023

- P Mizzi, "The sentencing reforms — balancing the causes and consequences of offending with community safety" (2018) 30 *JOB* 73
- Judicial Commission of NSW, Local Court Bench Book, 1988–, "Intensive correction orders" at [16-340]
- H Donnelly, "Fitting intensive correction orders within the statutory scheme" (2010) 22 *JOB* 90.

[The next page is 3401]

Setting terms of imprisonment

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

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

Last reviewed: May 2023

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

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

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

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

> To determine, initially, the non-parole period, before determining the total sentence, would, in my opinion, (where special circumstances are then found) be conducive

> to error of the kind exposed in *Huynh* [[2005] NSWCCA 220]. A finding of special circumstances, after the determination of the non-parole period, would provoke an extension, beyond proper limits, of the balance of term. Sentencing judges need to be wary of taking a course that might lead to that error.

Section 44(1) error in pronouncement of individual sentence

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

Considerations relevant to setting the non-parole period

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

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

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

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

In *R v Hall* [2017] NSWCCA 313, the offender was sentenced to an aggregate sentence of 5 years with a non-parole period of 1 year for historical offences of violence and sexual assault. The judge said the head sentence recognised the objective seriousness

of the offences and the non-parole period reflected "considerations of leniency". That approach was found by the CCA to be contrary to the principles in *Power v The Queen* and *R v Simpson*: *R v Hall* at [90].

[7-505] Aggregate sentences

Last reviewed: May 2023

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

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

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

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

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

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

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

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

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

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

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

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

[7-507] Settled propositions concerning s 53A

Last reviewed: May 2023

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

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

SHR v R [2014] NSWCCA 94 is an example of a case where a sentencing judge took pleas of guilty into account only in relation to the aggregate sentence, and not in relation to the indicative sentence. This was held (at [42]) to be in breach of the requirement in s 53A(2)(b) …

4. It is still necessary in assessing the indicative sentences to have regard to the requirements of *Pearce v The Queen* [1998] HCA 57; 194 CLR 610. The criminality involved in each offence needs to be assessed individually. To adopt an approach of making a "blanket assessment" by simply indicating the same sentence for a number of offences is erroneous: *R v Brown* [2012] NSWCCA 199 at [17], [26]; *Nykolyn v R*, supra, at [32]; [56]–[57]; *Subramaniam v R* [2013] NSWCCA 159 at [27]–[29]; *SHR v R*, supra, at [40]; *R v Lolesio* [2014] NSWCCA 219 at [88]–[89]. It has been said that s 53A(2) is "clearly directed to ensuring transparency in the process of imposing an aggregate sentence and in that connection, imposing a discipline on sentencing judges": [*Khawaja v R*, [2014] NSWCCA 80] at [18].
5. The imposition of an aggregate sentence is not to be used to minimise the offending conduct, or obscure or obliterate the range of offending conduct or its totality: *R v MJB*, supra, at [58]–[60].
6. One reason why it is important to assess individually the indicative sentences is that it assists in the application of the principle of totality. Another is that it allows victims of crime and the public at large to understand the level of seriousness with which a court has regarded an individual offence: *Nykolyn v R*, supra, at [58]; *Subramaniam v R*, supra, at [28]. A further advantage is that it assists when questions of parity of sentencing as between co-offenders arise: *R v Clarke*, supra, at [68], [75].
7. Non-parole periods need not be specified in relation to indicative sentences except if they relate to an offence for which a standard non-parole period is prescribed: ss 44(2C) and s 54B(4); *AB v R* [2014] NSWCCA 31 at [9].
8. Specification of commencement dates for indicative sentences is unnecessary and is contrary to the benefits conferred by the aggregate sentencing provisions: *AB v R*, supra, at [10]. Doing so defeats the purpose of a court availing itself of the power to impose an aggregate sentence: *Behman v R* [2014] NSWCCA 239 at [26]. See also *Cullen v R*, supra, at [25]–[26].
9. If a non-custodial sentence is appropriate for an offence that is the subject of the multiple offence sentencing task, it should be separately imposed as was done in *Grealish v R* [2013] NSWCCA 336. In my respectful view, there was error involved in *Behman v R* [2014] NSWCCA 239 where an offence with an indicative, but unspecified, non-custodial sentence was included in an aggregate sentence imposed by this Court. The provision for imposing an aggregate sentence in s 53A appears within Part 4 of the *Crimes (Sentencing Procedure) Act* which is headed "Sentencing procedures for imprisonment", and within Division 1 of that Part which is headed "Setting terms of imprisonment".

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

Purpose of indicative sentences (proposition 2)

Indicative sentences are required for the purpose of understanding the components of the aggregate sentence in general terms but have no practical operation: *Vaughan*

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

Aggregate sentencing and applying discounts (proposition 3)

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

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

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

There is no requirement to disclose the precise degree of accumulation between the indicative sentences since that would undermine the legislative purpose of the aggregate sentencing scheme: *Berryman v R* at [50]; *Vaughan v R* at [97]; *Noonan v R* [2021] NSWCCA 35 at [33]. Of this, RA Hulme J said in *Vaughan v R*, at [117], that:

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

Nor is there a requirement, where there are multiple offences committed against multiple complainants, to identify and state by use of "numbers" the notional cumulation internally for each complainant as well as the notional cumulation as between complainants: *Benn v R* [2023] NSWCCA 24 at [142].

As a result there may be less transparency than when imposing separate sentences: *Kliendiest v R* at [84]; *ZA v R* at [88]. Further, the degree of transparency achieved

will vary between cases: *PW v R* [2019] NSWCCA 298 at [6]–[10]. For example, in *PW v R*, the indicative sentences provided "limited assistance" in understanding the aggregate sentence because the offences were committed in a single, brief episode of criminal conduct where moral culpability and objective seriousness overlapped.

Specifying non-parole periods (proposition 7)

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

Separately imposing a non-custodial sentence (proposition 9)

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

Sentencing for backup and related charges

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

Aggregate sentencing and Commonwealth offences

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

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

[7-508] Appellate review of an aggregate sentence

Last reviewed: May 2023

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

> 10. Another benefit of the aggregate sentencing provision is that it makes it easier on appeal to impose a new aggregate sentence if one of the underlying convictions needs to be quashed …
>
> 11. The indicative sentences recorded in accordance with s 53A(2) are not themselves amenable to appeal, although they may be a guide to whether error is established in relation to the aggregate sentence …
>
> 12. Even if the indicative sentences are assessed as being excessive, that does not necessarily mean that the aggregate sentence is excessive …
>
> 13. A principle focus of determination of a ground alleging manifest inadequacy or excess will be whether the aggregate sentence reflects the totality of the criminality involved … This Court is not in a position to analyse issues of concurrence and accumulation in the same way that it can analyse traditional sentencing structures …

14. Erroneous specification by a sentencing judge of commencement dates for indicative sentences (such as there being gaps between the expiry of some indicative sentences and the commencement of subsequent sentences) are immaterial and may be ignored as being otiose …

15. A failure of a judge to specify a non-parole period in the indicative sentence for a standard non-parole period offence will not lead to an appeal being upheld. Failure to do so does not invalidate the sentence: s 54B(7). Setting non-parole periods for the indicative sentences for standard non-parole period offences would have no effect upon the aggregate sentence imposed

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

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

Last reviewed: May 2023

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

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

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

Balance of term in excess of one-third

There is no corresponding rule that the balance of term must not be less than one-third of the non-parole period: *Musgrove v R* [2007] NSWCCA 21 at [27]; *DPP (NSW) v RHB* [2008] NSWCCA 236 at [17], [19]; *Wakefield v R* [2010] NSWCCA 12 at [26]. However, it is advisable for the court to explain why a ratio in excess of 75% was selected to avoid an inference that an oversight must have occurred: *Wakefield v R* at [26]; *Briggs v R* [2010] NSWCCA 250 at [34] cited in *Russell v R* [2010] NSWCCA

248 at [41]; *Etchell v R* [2010] NSWCCA 262 at [49]–[50]; *Maglovski v R* [2014] NSWCCA 238 at [28]; *Brennan v R* [2018] NSWCCA 22 at [69]. An express comment is preferable because it makes clear the judge is aware of the impact of any accumulation: *GP v R* [2017] NSWCCA 200 at [22]. This is more than simply a salutary discipline; offenders should not be left to wonder whether the term of their incarceration was affected by inadvertent oversight or whether it was fully intended: *Huang v R* [2019] NSWCCA 144 at [52]. For example, the judge's silence in *Briggs v R* left "a sense of disquiet that he may have overlooked giving appropriate focus to the statutory ratio": per Fullerton J at [34]; see also *Huang v R* at [53] and *Hardey v R* [2019] NSWCCA 310 at [34]. This is especially the case where consecutive sentences are imposed: *Dunn v R* [2007] NSWCCA 312. The reasons do not need to be lengthy. In *Brennan v R*, the judge gave "short but adequate reasons" for imposing a non-parole period greater than 75%: at [40].

Even in circumstances where there is no specific reference to the requirements of s 44(2), consideration of the reasons as a whole may indicate there was no oversight. For example, in *Sonter v R* [2018] NSWCCA 228 at [23], the court found that although there was no specific reference to the ratio between the non-parole period and the head sentence, a number of factors identified by the judge during his reasons, including a specific reference to the need to have regard to totality, overwhelmingly pointed to a conclusion that no oversight had occurred.

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

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

[7-512] Special circumstances generally

Last reviewed: May 2023

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

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

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

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

A finding of special circumstances permits an adjustment downwards of the non-parole period, but it does not authorise an increase in the term of the sentence: *R v Tobar* [2004] NSWCCA 391 at [36]–[37]; *R v Huynh* [2005] NSWCCA 220 at [35]–[39]; *Markham v R* [2007] NSWCCA 295 at [29]. As with the statutory predecessor (s 5(2) *Sentencing Act* 1989 (rep)), ss 44(2) and 44(2A) should not be understood as statutory norms (75% or 3:1) in the sense that variation in either direction, up or down, absent special circumstances is contrary to law: *R v GDR* (1994) 35 NSWLR 376 at 380. The extent of the adjustment is not determined by any "norm" and the court is to be guided by general sentencing principles: *Caristo v R* at [28].

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

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

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

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

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

offender" (defined in s 3(1) *Crimes (Administration of Sentences) Act* 1999) that the period of supervision may be extended by, or a further period of supervision imposed of, up to 3 years at a time.

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

[7-514] What constitutes special circumstances?

Last reviewed: May 2023

The full range of subjective considerations is capable of warranting a finding of special circumstances: *R v Simpson* (2001) 53 NSWLR 704 at [46], [60]. It will be comparatively rare for an issue to be incapable, as a matter of law, of ever constituting a "special circumstance": *R v Simpson* at [60]. Findings of special circumstances have become so common that it appears likely that there can be nothing "special" about many cases in which the finding is made: *R v Fidow* [2004] NSWCCA 172 at [20].

Rehabilitation

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

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

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

Risk of institutionalisation

The risk of institutionalisation, even in the face of entrenched and serious recidivism, may justify a finding of special circumstances: *Jackson v R* [2010] NSWCCA 162 at [24]; *Jinnette v R* [2012] NSWCCA 217 at [103]. However, the existence of the factor does not require a finding: *Dyer v R* [2011] NSWCCA 185 at [50]; *Jinnette v R*

at [98]. If institutionalisation has already occurred, the focus may be on ensuring that there is a sufficient period of conditional and supervised liberty to ensure protection of the community and to minimise the chance of recidivism: *Jinnette v R* at [103].

Drug and alcohol addiction

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

First custodial sentence

It is doubtful whether the fact a sentence represents an offender's first time in custody may alone justify finding special circumstances: *Collier v R* [2012] NSWCCA 213 at [36]; *Singh v R* [2020] NSWCCA 353 at [79]; *R v Kaliti* [2001] NSWCCA 268 at [12]; *R v Christoff* [2003] NSWCCA 52 at [67]; *Langbein v R* [2008] NSWCCA 38 at [112]; *Clarke v R* [2009] NSWCCA 49 at [12]. Although such a finding may be made in combination with other factors: *Leslie v R* [2009] NSWCCA 203 at [37]; *R v Little* [2013] NSWCCA 288 at [30].

Ill health, disability or mental illness

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

Accumulation of individual sentences

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

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

Protective custody

A court cannot find special circumstances on account of protective custody unless the offender provides evidence that his or her conditions of incarceration will be more

onerous than usual: *RWB v R* [2010] NSWCCA 147 at [192]–[195]; *Langbein v R* [2008] NSWCCA 38 at [113] and cases cited therein: *Mattar v R* [2012] NSWCCA 98 at [23]–[25].

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

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

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

Age

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

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

Hardship to family members

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

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

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

Self-punishment

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

Parity

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

Sentencing according to past practices

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

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

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

Last reviewed: May 2023

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

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

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

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

On the other hand, the court found error in *Sabongi v R* [2015] NSWCCA 25, where the sentencing judge failed to give effect to an intention to vary the overall ratio to take

account of the applicant's mental condition, the need for rehabilitation and supervision, and the accumulation of sentences. See also *Woods v R* [2020] NSWCCA 219 at [71], [73].

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

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

[7-518] Empirical study of special circumstances

Last reviewed: May 2023

A 2013 study by the Judicial Commission examined sentencing cases finalised in the NSW District and Supreme Courts for the period 1 January 2005 to 30 June 2012: P Poletti and H Donnelly, "Special circumstances under s 44 of the Crimes (Sentencing Procedure) Act 1999", *Sentencing Trends & Issues*, No 42, Judicial Commission of NSW, 2013.

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

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

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

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

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

Last reviewed: May 2023

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

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

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

Where the court declines to set a non-parole period, it must make a record of its reasons for declining to do so: s 45(2). *R v Parsons* [2002] NSWCCA 296 and *Collier v R* [2012] NSWCCA 213 at [55] are examples of cases where the sentencing judge erred by not fixing a non-parole period and not giving reasons as to why he declined to do so. The discretion in s 45(1), construed literally, is simply a discretion to decline to set a non-parole period: *Collier v R* at [58]. However, the weight of authority (both in relation to s 45(1) and its statutory predecessor under s 6 *Sentencing Act* 1989) supports the view that where a fixed term is imposed it should be set at an equivalent level, or equate to, what the non-parole period would have been: *Collier v R* at [56]–[58], citing *R v Dunn* [2004] NSWCCA 346 at [161]. The question whether s 45(1) also permits a court to impose a fixed term to reduce an otherwise appropriate sentence may be a future topic for resolution: *Collier v R* at [62]; see further below.

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

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

Indicative sentences: fixed term or term of sentence?

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

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

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

The approach taken by the court in *McIntosh v R* in relation to fixed terms and indicative sentences was the subject of comment in (2015) 22(8) *CrimLN* 127 at [3572] where it was argued that the "fixed term" indicative sentence approach begs error because it, inter alia, "may lead a court into error in not having regard to the full sentence for an offence in comparison to its maximum penalty" and prevents the community, particularly victims, from being informed "of the court's sentencing response to an individual offence". It is to be also noted that it is permissible under s 45(1) for a court to impose an aggregate fixed term sentence.

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

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

Last reviewed: May 2023

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

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

[7-540] Commencement of sentence

Last reviewed: May 2023

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

On the issues of:

- how to count pre-sentence custody and the necessity of backdating see [12-500] **Counting pre-sentence custody**
- forward dating sentences of imprisonment see [7-547]
- what time should be counted including offences committed whilst the offender was on parole see [12-510] **What time should be counted?**
- taking into account participation of the offender in intervention programs see [12-520] **Intervention programs**
- quasi-custody bail conditions such as the MERIT program see [12-530] **Quasi-custody bail conditions**
- having regard to the fact the offender will be serving his or her sentence in protective custody see [10-500] **Hardship of custody**.

[7-545] Rounding sentences to months

Last reviewed: May 2023

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

[7-547] Forward dating sentences of imprisonment

Last reviewed: May 2023

Section 47(2)(b) *Crimes (Sentencing Procedure) Act* 1999 provides that a court may direct that a sentence of imprisonment commences "on a day occurring after the

day on which the sentence is imposed, but only if the sentence is to be served consecutively (or partly concurrently and partly consecutively) with some other sentence of imprisonment".

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

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

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

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

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

Section 47(5) focuses on the expiration of the non-parole period of the "other sentence" set by the first court and does not distinguish between the scenarios where the offender is in custody, parole not having been granted, or in custody following the grant of parole and its subsequent revocation: *White v R* [2016] NSWCCA 190 at [7], [118]–[119]. Therefore, a sentence of imprisonment may not be post-dated later than the earliest date on which the offender will become entitled or eligible to release on parole for the first sentence: *White v R* at [118]. Basten JA dissented in *White v R* at [27] on the basis that the:

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

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

[7-550] Information about release date

Last reviewed: May 2023

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

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

(ii) the non-parole periods (if any) for that and any other sentence of imprisonment to which the offender is subject.

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

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

In *Farkas v R* [2014] NSWCCA 141, there was a division of opinion as to the appropriate eligibility date of parole. Campbell J at [103] (with whom RA Hulme J agreed at [40]) amended the proposed sentencing orders of Basten JA at [2] so that the applicant's eligibility for parole fell one day later. Basten JA considered the operation of ss 47 and 48 of the Act, and stated that the parole date which should be specified is that of the day prior to the anniversary of commencement of the sentence: *Farkas v R* at [29]. His Honour held that there is an inconsistency between the examples set out in the note to s 48 (which assume that the person becomes eligible to be released on parole on the day before the anniversary of the commencement of the sentence) and the language of s 47(6) ("ends at the end of the day on which it expires"). Basten JA opined at [29] that the inconsistency should be resolved by following the approach adopted in the note to s 48 which is consistent with the conventional approach taken in *Ingham v R* [2014] NSWCCA 123, but see *R v Nilsson* [2005] NSWCCA 34 at [24], [27]–[29]. While Campbell J or RA Hulme J altered the sentencing orders, neither expressly addressed the operation of s 48.

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

[7-560] Restrictions on term of sentence

Last reviewed: May 2023

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

(1) The term of a sentence of imprisonment (other than an aggregate sentence of imprisonment):

(a) must not be more than the maximum term of imprisonment that may be imposed for the offence, and

(b) must not be less than the shortest term of imprisonment (if any) that must be imposed for the offence.

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

[7-570] Court not to make parole orders

Last reviewed: May 2023

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

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

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

Sections 126 and 158 *Crimes (Administration of Sentences) Act* are relevant. Section 158(2) provides that a statutory parole order in relation to a sentence is conditional on the offender being eligible for release on parole in accordance with s 126 *Crimes (Administration of Sentences) Act* at the end of the non-parole period of the sentence. Section 158(3) provides that if the offender is not eligible for release at that time, they are entitled to be released on parole as soon as they become so eligible. Section 158(4) provides that:

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

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

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

Mixture of Commonwealth and State offences

In the case of Commonwealth offences, Pt IB *Crimes Act* 1914 (Cth) makes exhaustive provision for fixing non-parole periods and making recognizance release orders: *Hili v The Queen* (2010) 242 CLR 520 at [22]. When a court imposes a sentence of 3 years or less (or sentences in aggregate that do not exceed 3 years) on a federal offender, the court must make a recognizance release order in respect of the instant sentence(s) and must not fix a non-parole period: s 19AC(1). The court need not

comply with s 19AC(1) if satisfied such an order is not appropriate: s 19AC(4). For further guidance on sentencing, where there is a mixture of Commonwealth and State offences, see [16-050] **Fixing non-parole periods and making recognizance release orders** under "Mixture of Commonwealth and State offences".

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

Last reviewed: May 2023

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

[7-590] Warrant of commitment

Last reviewed: May 2023

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

[7-600] Exclusions from Division

Last reviewed: May 2023

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

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Sentencing procedures generally

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Correction and adjustment of sentences

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

[10-400] Prior record

Last reviewed: May 2023

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

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

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

Section 21A(4) provides:

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

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

1. The common law principle of proportionality requires that a sentence should neither exceed nor be less than the gravity of the crime having regard to the objective circumstances: *R v McNaughton* at [15]; *Veen v The Queen (No 2)* (1988) 164 CLR 465; *Hoare v The Queen* (1989) 167 CLR 348 at 354.
2. Prior offending is *not* an "objective circumstance" for the purposes of the application of the proportionality principle: *R v McNaughton* at [25]; *Veen v The Queen (No 2)*; *Baumer v The Queen* (1988) 166 CLR 51. It is not open for a court to use prior convictions to determine the upper boundary of a proportionate sentence.
3. Prior convictions are pertinent to deciding where, within the boundary set by the objective circumstances, a sentence should lie: *R v McNaughton* at [26].
4. Prior record is not restricted only to an offender's claim for leniency: *R v McNaughton* at [20]; *Veen v The Queen (No 2)* at 477. As stated in *Veen v The Queen (No 2)* at 477, prior record is also relevant:

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

5. There is a difficulty with the reference in *Veen v The Queen (No 2)* to prior convictions "illuminating" the offender's "moral culpability": *R v McNaughton*

at [26]. Taking into account in sentencing for an offence all aspects, both positive and negative, of an offender's known character and antecedents, is not to punish the offender again for those earlier matters: *R v McNaughton* at [28]. As Gleeson CJ, McHugh, Gummow and Hayne JJ explained in *Weininger v The Queen* (2003) 212 CLR 629 at [32]:

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

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

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

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

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

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

Undetected or ongoing criminal offending

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

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

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

Gap in history of criminal offending

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

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

Subsequent offending/later criminality

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

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

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

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

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

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

Prior convictions subject of pending appeal

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

Spent convictions

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

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

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

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

Section 10 bonds

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

The absence of a prior record as a mitigating factor

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

Proof of prior convictions

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

Foreign convictions

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

Federal offenders

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

Child offenders

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

Recording a conviction

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

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

Admission of evidence of prior offences

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

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

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

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

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

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

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

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

Duty of Crown to furnish antecedents

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

[10-410] Good character

Last reviewed: May 2023

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

Special rule for child sexual offences

There is a statutory exception to this rule introduced by the *Crimes Amendment (Sexual Offences) Act* 2008. An offender's good character or lack of previous convictions is not to be taken into account as a mitigating factor for a child sexual offence if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence: s 21A(5A). Section 21A(5A) has effect despite any Act or rule of law to the contrary: s 21A(5B). "Child sexual offence" is defined in s 21A(6). The exception applies to the determination of a sentence for an offence whenever committed unless, before the commencement of the amendments on 1 January 2009, a court has convicted the person being sentenced of the offence or accepted a plea of guilty (which has not been withdrawn): Sch 2 Pt 19 cl 59 *Crimes (Sentencing Procedure) Act* 1999.

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

O'Brien v R at [40]. Similarly, in *R v Stoupe* [2015] NSWCCA 175, the court held the respondent's good character assisted him to hold the position of a childcare worker which he abused by committing the offences against the victim. The case fell squarely within the terms of s 21A(5A): *R v Stoupe* at [86].

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

Circumstances where good character may carry less weight

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[10-420] Contrition

Last reviewed: May 2023

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

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

> everyday existence. Ordinary human experience would suggest that it is only natural that a person who has committed some misdeed would wish to make the most favourable impression possible in seeking to make amends for it.

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

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

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

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

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

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

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

[10-430] Age

Last reviewed: May 2023

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

Advanced age

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

of the offence: *R v Gallagher* (unrep, 29/9/95, NSWCCA); *R v McLean* [2001] NSWCCA 58 at [44]; *R v Knight* [2004] NSWCCA 145 at [33]; *Des Rosiers v R* [2006] NSWCCA 16 at [32].

Advanced age may affect the type or length of penalty to be imposed, and may be relevant in combination with other factors at sentence such as health. Age and health are "relevant to the length of any sentence but usually of themselves would not lead to a gaol sentence not being imposed if it were otherwise warranted": *R v Sopher* (1993) 70 A Crim R 570 at 573. See further **Health** at **[10-450]**. Age is not a licence to commit an offence: *R v Holyoak* (1995) 82 A Crim R 502 at 507, following *R v DCM* (unrep, 26/10/93, NSWCCA).

The extent of any mitigation that results from advanced age will depend on the circumstances of the case, including the offender's life expectancy and any treatment needed: *R v Sopher* at 573. Where "serving a term of imprisonment will be more than usually onerous", age may entitle the offender to some discount on sentence: *R v Mammone* [2006] NSWCCA 138 at [45]; *R v Sopher* at 574.

The relevant principles to be applied were accurately summarised in *Gulyas v Western Australia* [2007] WASCA 263 at [54]: *Liu v R* [2023] NSWCCA 30 at [39]. They are nuanced and not capable of mechanical operation, and accordingly, age as a mitigating factor does not necessarily have a demonstrable effect upon each component of the sentence imposed: *Liu v R* at [40], [47]. In that case, it was permissible for the sentencing judge to have regard to advanced age as a special circumstance which had a real and tangible effect upon the minimum time to be served and avoided double counting in the offender's favour: at [47]–[48].

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

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

A court cannot overlook that each year of a sentence of imprisonment may represent a substantial proportion of an offender's remaining life: *R v Hunter* (1984) 36 SASR 101 at 104. However, the sentence may unavoidably extend for all or most of the offender's life expectancy in order to reflect the objective seriousness of the offence: *Goebel-McGregor v R* [2006] NSWCCA 390 at [128]; see also *R v Walsh* [2009] NSWSC 764 at [43]. Adherence to the principle of proportionality may have the practical effect of imposing a "de facto" life sentence on a person of advanced age: *Barton v R* [2009] NSWCCA 164 at [22]. In *R v Holyoak*, Allen J stated at 507:

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

A sentence should not be "crushing" in the sense that it "connotes the destruction of any reasonable expectation of useful life after release": *R v Yates* (1984) 13 A Crim R 319 at 326; [1985] VR 41 at 48; *R v MAK* [2006] NSWCCA 381; also see **Imposition of a crushing sentence** at **[8-220] Totality and sentences of imprisonment**. Notwithstanding, age is but one consideration and cannot justify the imposition of an erroneously lenient sentence: *Geraghty v R* [2023] NSWCCA 47 at [116].

[10-440] Youth

Last reviewed: May 2023

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

[10-450] Health

Last reviewed: May 2023

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

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

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

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

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

In *R v Higgins* [2002] NSWCCA 407, the applicant suffered from the HIV virus. The court held that the criminal system could not give priority to the applicant's health

and must tailor the sentence with an eye to the overriding concern of the welfare and protection of the community generally, as far as common humanity will allow: per Howie J at [32].

Physical disability and chronic illness

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

Special circumstances

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

For commentary regarding foetal alcohol spectrum disorder, see **[10-460] The relevance of an offender's mental health or cognitive impairment**.

[10-460] The relevance of an offender's mental health or cognitive impairment

Last reviewed: May 2023

Note: The language used in the common law to describe a mental health impairment, cognitive impairment or mental illness for the purposes of sentencing has, over time, developed. The *Crimes (Sentencing Procedure) Act* 1999 does not provide or define terminology in this respect. Although not strictly relevant to sentencing, ss 4 and 5 of the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 contain definitions of "mental health impairment" and "cognitive impairment", respectively, and ss 4(1) and 14 of the *Mental Health Act* 2007 contain definitions of "mental illness" and "mentally ill persons", respectively. These may provide some guidance in the use of appropriate terminology in the context of sentencing.

The fact that an offender was has "a mental illness, intellectual handicap or other mental problems" may be taken into account at sentencing: *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [177]; *R v Verdins* [2007] VSCA 102 at [32] cited.

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

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

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

The High Court continued at [54]:

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

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

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

See *Amante v R* [2020] NSWCCA 34 for a "classic example" of the scenario presented by Gleeson CJ in *R v Engert*: *Amante v R* at [85].

Intermediate appellate court consideration

In *DPP (Cth) v De La Rosa*, McClellan CJ at CL summarised at [177] the principles developed by courts to be applied when sentencing an offender who is suffering from "a mental illness, intellectual handicap or other mental problems" (case references omitted):

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

McClellan CJ at CL further stated at [178]:

> … the mental health problems of an offender need not amount to a serious psychiatric illness before they will be relevant to the sentencing process. The circumstances may indicate that when an offender has a mental disorder of modest severity it may nevertheless be appropriate to moderate the need for general or specific deterrence.

The principles in *DPP (Cth) v De La Rosa* have been "often-cited" and applied: *Wornes v R* [2022] NSWCCA 184 at [25]; see also *R v SS (a pseudonym)* [2022] NSWCCA 258; *Biddle v R* [2017] NSWCCA 128 at [89]–[90]; *Laspina v R* [2016] NSWCCA 181 at [39]; *Aslan v R* [2014] NSWCCA 114 at [33] and *Jeffree v R* [2017] NSWCCA 72 at [30]. However, the above principles are not absolute in their terms and there is no presumption as to their application. They merely direct attention to considerations that experience has shown commonly arise in such cases: *Choy v R* [2023] NSWCCA 23 at [74]; *Alkanaan v R* [2017] NSWCCA 56 at [108].

Where a principle does apply, it remains a matter for the judge to make a discretionary evaluation as to the extent of its significance: *Blake v R* [2021] NSWCCA 258 at [42]. In *Blake v R*, the court held it was open for the sentencing judge, in sentencing the offender for serious offences of violence against his ex-partner and her new partner including specially aggravated enter dwelling, to find that general deterrence remained important, albeit diminished "to some extent", and the offender's moral culpability "reduced somewhat", as a result of the offender's major depressive illness: [44]. The sentencing judge must examine the facts of the specific case to determine whether the mental condition has an impact on the sentencing process: *Aslan v R* at [34]; *Jeffree v R* at [31].

It should not be assumed that all the mental conditions recognised by the *Diagnostic and Statistical Manual of Mental Disorders DSM (IV)*, 4th edn, American Psychiatric Association, 2000, Washington DC, attract the sentencing principle that less weight is given to general deterrence: *R v Lawrence* [2005] NSWCCA 91. Some conditions do not attract the principle. Spigelman CJ cited literature on the limitations of *DSM (IV)* at [23] and said at [24]:

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

Note: *Diagnostic and Statistical Manual of Mental Disorders DSM-5*, 5th edn, (Text Revision DSM-5-TR, 2022) is now available.

Heeding Spigelman CJ's point, in *Anderson v R* [2022] NSWCCA 187, the court held uncritical reliance should not be placed upon DSM-labelled conditions for any of the sentencing considerations that may be engaged in cases of mental disorder as identified in *DPP v De La Rosa*: at [35]. In *Anderson v R*, a psychologist reported the offender likely had borderline intellectual function, and the court held Spigelman CJ's caution is still more important as the DSM-5 refers to this as a subject of clinical focus and does not purport to recognise a mental disorder of that name: at [33]–[34].

However, in *Wornes v R*, the court held that the sentencing judge erred by failing to take the offender's personality disorder, with a history of hallucination and "schizoid" symptoms, into account: at [30], [32]–[33]. The judge's opinion a personality disorder

ought not attract the principles in *DPP (Cth) v De La Rosa* as a matter of law constituted a significant departure from orthodoxy: *Wornes v R* at [26], [29]–[30], citing *Brown v R* [2020] VSCA 212 at [26].

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

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

Also see *DS v R* [2022] NSWCCA 156 at [95]. Further, for such a causal connection to have a bearing on the sentence it need not be the direct or precipitating cause of offending: *Moiler v R* [2021] NSWCCA 73 at [59].

Another factor that may be relevant is whether there is a serious risk that imprisonment will have a significant adverse effect on the offender's mental health: *R v Verdins* [2007] VSCA 102 at [32]; *Courtney v R* [2007] NSWCCA 195 at [14]–[15].

Crimes (Sentencing Procedure) Act 1999

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

Offender acts with knowledge of what they are doing

The moderation of general deterrence when sentencing an offender with a mental disorder need not be great if they act with knowledge of what they are doing and with knowledge of the gravity of their actions. In *R v Wright* (1997) 93 A Crim R 48, the applicant's psychotic state was self-induced by a failure to take medication and a deliberate or reckless taking of drugs. Hunt CJ at CL stated at 52:

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

R v Wright was referred to in passing by the High Court in *Muldrock* (at fn 68). *Wright* has been applied in a number of cases including *R v SS* at [95]; *Wang v R* [2021] NSWCCA 282 at [98]; *Blake v R* at [43]–[44]; *R v Burnett* [2011] NSWCCA 276; *Cole v R* [2010] NSWCCA 227 at [71]–[73]; *Benitez v R* [2006] NSWCCA 21 at [41]–[42]; *Taylor v R* [2006] NSWCCA 7 at [30]; *R v Mitchell* [1999] NSWCCA 120 at [42]–[45]; *R v Hilder* (1997) 97 A Crim R 70 at 84.

In *Kapua v R* [2023] NSWCCA 14, the court held it was open for the sentencing judge to find the offender's post-traumatic stress disorder with psychotic features did not reduce her moral culpability because the offending, which involved significant fraud, required "planning, coordination and persistence" and was motivated (in part) to fund a drug habit: at [112]–[113].

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

Relevance to rehabilitation

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

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

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

Protection of society and dangerousness

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

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

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

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

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

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

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

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

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

Fact finding for dangerousness and risk of re-offending

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

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

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

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

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

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

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

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

Foetal alcohol spectrum disorder

In *LCM v State of Western Australia* [2016] WASCA 164, the Western Australian Court of Appeal considered the medical condition of foetal alcohol spectrum disorder

(FASD) and how its relevance in sentencing proceedings. FASD is a mental impairment and as such engaged sentencing principles relating to an offender's mental condition: *LCM v State of Western Australia* at [121]. The case contains a comprehensive discussion of Australian and overseas cases and literature. Mazza JA and Beech J at [123] (Martin CJ agreeing at [1] with additional observations at [2]–[25]) cautioned against the use of generalisations about FASD:

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

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

In *Eden v R* [2023] NSWCCA 31, evidence of the offender's FASD was sought to be relied upon on the sentence appeal when such evidence was not before the sentencing judge. The report was not admitted on appeal and the court held the offender's FASD was one factor, amongst others, that affected the offender's decision making, and that affixing a label to an offender's condition does not automatically find expression in sentence: *Eden v R* at [37] citing *Anderson v R* at [33]–[35]. If there was a causal connection between the impairment as a result of the offender's FASD and the offence, the nature of the impairment, the nature and circumstances of the offence, and the degree of connection between them, must be considered in the assessment of the offence's objective gravity: *Eden v R* at [38] citing *DS v R* [2022] NSWCCA 156 at [96]. Further, such evidence had the capacity to impact the offender's moral culpability as well as inform the weight to be given to the need for specific deterrence: *Eden v R* at [39], [41]. Also see **Intermediate appellate court consideration** above.

In *Hiemstra v Western Australia* [2021] WASCA 96, an offender's FASD was considered in the context of their traumatic childhood and the principle in *Bugmy v The Queen* (2013) 249 CLR 571. See **Specific applications of the principle of Bugmy v The Queen** below.

Relevance to other proceedings

See **[90-000] Mental Health and Cognitive Impairment Forensic Provisions Act 2020** for commentary regarding penalty options available under Pts 4 and 5 of that Act.

See **[30-000] Inquiries under the Mental Health and Cognitive Impairment Forensic Provisions Act** in the *Local Court Bench Book* for commentary regarding diversion in summary proceedings.

See **[4-300] Procedure for fitness to be tried (including special hearings)** in the *Criminal Trial Courts Bench Book* for commentary regarding unfitness and special hearings in the District and Supreme Courts.

See **[6-200] Defence of mental health impairment or cognitive impairment** in the *Criminal Trial Courts Bench Book* regarding the defence of mental health and/or cognitive impairment and the special verdict of act proven but not criminally responsible.

See **[6-500] Substantial impairment because of mental health impairment or cognitive impairment** in the *Criminal Trial Courts Bench Book* regarding the partial defence to murder in s 23A *Crimes Act* 1990.

[10-470] Deprived background of an offender

Last reviewed: May 2023

Introduction and background

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

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

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

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

R v Fernando (1992) 76 A Crim R 58

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

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

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

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

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

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

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

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

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

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

The High Court in *Bugmy v The Queen* at [38] affirmed the proposition in *R v Fernando* that a lengthy term of imprisonment might be particularly burdensome for an Aboriginal offender because of his or her background or "lack of experience

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

Taking into account the deprived background of an offender

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

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

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

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

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

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

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

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

Specific applications of the principle of Bugmy v The Queen

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

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

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

However, in *Hiemstra v Western Australia* [2021] WASCA 96, the offender had experienced significant childhood trauma and disadvantage, and had been diagnosed with foetal alcohol spectrum disorder (FASD). The court held the sentencing judge erred in the application of the principle in *Bugmy v The Queen* by failing to give full weight to the offender's traumatic childhood including his FASD as it decreased his moral blameworthiness for the offending: [111]–[112], [118]–[119]. For further commentary concerning the consideration of FASD on sentence, see **Foetal alcohol spectrum disorder** at **[10-460] The relevance of an offender's mental health or cognitive impairment**.

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

The plurality in *Bugmy v The Queen* did not talk in terms of general deterrence having no effect, but referred to that factor being "moderated in favour of other purposes of punishment" depending upon the particular facts of the case: *Kiernan v R* at [63]. The CCA in *Kiernan v R* concluded (at [64]) the judge understood and applied *Bugmy v The Queen*.

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

[10-480] Intoxication

Last reviewed: May 2023

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

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

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

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

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

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

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

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

> The propositions stated in *Fernando* are largely directed to the significance of the circumstance that the offender was intoxicated at the time of the offence. As Wood J explained, drunkenness does not usually operate by way of excuse or to mitigate an offender's conduct. However, his Honour recognised that there are Aboriginal communities in which alcohol abuse and alcohol-related violence go hand in hand. His Honour considered that where an offender's abuse of alcohol is a reflection of the environment in which he or she was raised it should be taken into account as a mitigating factor. … [Footnotes excluded.]

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

As an equivocal or aggravating factor

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

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

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

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

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

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

Where the offender becomes intoxicated voluntarily and embarks on a course that is criminal conduct, such as dangerous driving, the reason that the offender was intoxicated is generally irrelevant: *Stanford v R* [2007] NSWCCA 73 at [53]. This is due to the fact that "the offence is not concerned with punishing the drinking of alcohol but with the driving thereafter": *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the*

Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002) (2004) 61 NSWLR 305 at [142]; see also *R v Doyle* [2006] NSWCCA 118 at [30]. Subsequent offences will be treated more seriously: *Stanford v R* at [54].

Where intoxication is the basis upon which an aggravated version of dangerous driving is charged, it should not be double-counted as an aggravating factor: *R v Doyle* at [25]. The same double counting problem would arise if a court took into account an offender's intoxication as an aggravating factor where it is an ingredient of the crime such as the offence of assault causing death while intoxicated under s 25A(2) *Crimes Act*. For intoxication and dangerous driving, see also [18-340] in **Dangerous driving and navigation**.

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

[10-485] Drug addiction

Last reviewed: May 2023

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

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

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

Addiction is "not an excuse" but a choice

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

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

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

Persons who choose a course of addiction must be treated as choosing its consequences: *R v Henry* per Spigelman CJ at [198]. Not all persons who suffer from addiction commit crime, therefore to do so involves a choice: per Spigelman CJ at [200]; per Wood CJ

at CL at [250]. There is no warrant in assessing a crime that was induced by the need for funds to feed a drug addiction, as being at the lower end of the scale of moral culpability or lower than other perceived requirements for money (such as gambling): *R v Henry* per Spigelman CJ at [202]. The proposition has been followed and applied repeatedly: *Toole v R* [2014] NSWCCA 318 at [4]; *R v SY* [2003] NSWCCA 291; *Jodeh v R* [2011] NSWCCA 194.

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

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

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

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

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

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

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

Addiction attributable to some other event

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

Drug addiction at a very young age

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

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

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

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

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

Self-medication

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

into the "rare category" of circumstances in which an addiction to drugs will be a mitigating factor: *Jodeh v R* at [28]–[29]. Similarly, in *Bichar v R*, the court observed at [23]–[24]:

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

Compulsory Drug Treatment Correctional Centre Act 2004

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

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

[10-490] Hardship to family/dependants

Last reviewed: May 2023

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

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

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

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

It is only where circumstances are "highly exceptional" — and where it would be inhumane to refuse to do so — that hardship to others in sentencing can be taken

into account: *R v Edwards*. Hardship to employees did not justify the suspension of a sentence in *R v MacLeod* [2013] NSWCCA 108 at [49] where full-time imprisonment should have been imposed. The evidence neither established "extreme hardship" nor extraordinary circumstances: *R v MacLeod* at [50]–[52], [55].

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

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

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

Pregnancy, young babies

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

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

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

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

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

[10-500] Hardship of custody

Last reviewed: May 2023

Protective custody

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

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

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

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

Safety of prisoners

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

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

At [32] McHugh J further said:

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

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

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

Former police

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

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

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

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

Foreign nationals

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

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

[10-510] Entrapment

Last reviewed: May 2023

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

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

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

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

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

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

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

Role of undercover police officers

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

[10-520] Extra-curial punishment

Last reviewed: May 2023

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

R v Wilhelm [2010] NSWSC 378 per Howie J at [21]. The court in *Silvano v R* at [26]–[33] collected several authorities on the subject. The weight to be given to any extra-curial punishment will depend on all the circumstances of the case and in some cases, extra-judicial punishment attracts little or no weight: *R v Daetz* [2003] NSWCCA 216 at [62].

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

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

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

Self-inflicted injuries

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

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

Public humiliation

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

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

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

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

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

Media coverage

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

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

Professional ramifications

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

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

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

In *Einfeld v R* [2010] NSWCCA 87, the court noted there was an element of uncertainty as to whether the concept of extra-curial punishment "includes legal consequences of a kind which flow directly from the conviction or the sentence, such as disqualification from holding an office, remaining in an occupation or holding a licence": *Einfeld v R* at [86]. However, their Honours found that the fact the offender would lose his practising certificate and be struck off the roll of solicitors could be taken into account: *Einfeld v R* at [95]. Such a conclusion was consistent with earlier authority: *Oudomvilay v R* [2006] NSWCCA 275 at [19]; *R (Cth) v Poynder* [2007] NSWCCA 157 at [86].

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

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

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

[10-530] Delay

Last reviewed: May 2023

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

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

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

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

Rehabilitation during a period of delay

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

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

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

Delay — state of uncertain suspense

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

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

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

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

Relevance of onerous bail conditions during delay

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

Circumstances in which delay may not entitle an offender to leniency

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

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

Sentencing practice after long delay

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

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

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

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

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

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

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

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

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

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

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

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

[10-540] Restitution

Last reviewed: May 2023

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

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

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

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

Availability

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

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

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

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

Effect of acquittal

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

Subject matter

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

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

Restitution for offences taken into account

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

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

Third party interests

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

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

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

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

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

Good behaviour bonds and restitution

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

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

Victims Rights and Support Act 2013

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

Children's Court

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

[10-550] Conditional liberty

Last reviewed: May 2023

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

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

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

It is considered an abuse of freedom "by taking the opportunity to commit further crimes": *R v Richards* (1981) 2 NSWLR 464 at 465. Where the offender breaches

a non-custodial sentencing option there is a "very real risk that the whole regimen of non-custodial sentencing options will be discredited": *R v Morris* (unrep, 14/7/95, NSWCCA), where the offender had committed offences which amounted to a breach of the recognizance.

Impact on rehabilitation

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

Status of an escapee

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

On appeal

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

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

[10-560] Ameliorative conduct or voluntary rectification

Last reviewed: May 2023

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

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

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

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

> The reasons in *Phelan* were clearly appropriate in the context of a crime involving the loss of money. They, however, emphasise that something special is required for ameliorative conduct to result in mitigation of sentence. Merely taking a step to redress the effect of a crime on victims is not of itself enough.
>
> In the present case that special additional element is to be found in the fact that it does appear that the applicant's immediate recognition of his wrongful act played a significant, and quite possibly decisive role, in saving the victim's life.

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

[10-570] Deportation

Last reviewed: May 2023

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

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

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

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

Sentencing structure including setting a non-parole period

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

sentence of imprisonment was required, but fully suspended the sentence to facilitate the offender's immediate deportation. The South Australian Court of Appeal found it was wrong in principle to impose a "lesser sentence than is appropriate": at [61]–[69].

Deportation is also not generally a relevant consideration in determining whether or not to fix a non-parole period: *The Queen v Shrestha* (1991) 173 CLR 48 at 71; see also *He v R* [2016] NSWCCA 220 at [23]; *R v Calica* [2021] NTSCFC 2 at [77]–[78], [140]. A primary benefit of parole is the offender's rehabilitation. A non-citizen offender who is likely to be deported should also receive this benefit by being eligible for release on parole. Deane, Dawson and Toohey JJ said at 71:

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

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

Deportation as a matter in mitigation

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

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

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

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

Further, the migration status of a non-citizen offender who has been residing in Australia is often unresolved until well after imposing the sentence so there may be practical difficulties quantifying the prospects of deportation: *Hanna v EPA* at [97]. If the longstanding position in NSW is to be challenged, the evidence about the applicant's likely deportation needs to be more than a speculative possibility:

Kristensen v R at [35]. In *Kristensen v R* potential deportation was considered speculative because the mandatory cancellation of the offender's visa was subject to the offender applying to have it revoked. See also *R v Calica* at [157].

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

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

These different "state-based" approaches have been followed regardless of whether the offences are State or Commonwealth offences: *Sentencing of federal offenders in Australia — a guide for practitioners*, Commonwealth Director of Public Prosecutions, 6th edition, April 2023, at [458]ff. See for example, *Kristensen v R*. However, in obiter remarks, the five-judge Bench in *R v Calica* said deportation should be able to be taken into account in mitigation in appropriate Commonwealth cases: at [155].

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

Structuring a sentence

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

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

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

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

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

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

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Sentencing Commonwealth offenders

See also *Sentencing of federal offenders in Australia — a guide for practitioners*, Commonwealth Director of Public Prosecutions, 6th edition, April 2023.

[16-000] Introduction

Part IB *Crimes Act* 1914 (Cth) sets out procedural requirements and penalty options for sentencing offenders who commit Commonwealth offences. However, Pt IB is not a code.

The High Court in *Putland v The Queen* (2004) 218 CLR 174 rejected the "proposition that Pt IB 'covered a field' as an exhaustive statement of the will of the Parliament with respect to sentencing for federal offences": per Gummow and Heydon JJ at [53]; compare Gleeson CJ at [12].

As the Australian Law Reform Commission (ALRC) noted in its report, *Same crime, same time: sentencing of federal offenders*, ALRC Report 103, April 2006, there is a potential for Commonwealth offenders to receive different sentences for the same offence, depending on the jurisdiction in which they are sentenced because State and Territory courts will apply their own laws in relation to procedure and have alternative sentencing options available to them: at [3.1]. This is a consequence of the application of s 68 *Judiciary Act* 1903 (Cth) which applies State and Territory procedural laws to federal prosecutions in State and Territory courts. The procedure for sentence assessment reports and the manner in which the totality principle is applied can differ when a court picks up local provisions: see the ALRC review of Pt IB in *Same crime, same time* at [14.46] in relation to pre-sentence reports.

In *Putland v The Queen* at [7], the High Court held that s 68 has no operation if "a Commonwealth law expressly or by implication made contrary provision, or … there [is] a Commonwealth legislative scheme … which is complete on its face", citing *The Queen v Gee* (2003) 212 CLR 230 at [62]. It has been held that:

- Div 4 Pt IB *Crimes Act* 1914 makes exhaustive provision for the fixing of non-parole periods and the making of recognizance release orders: *Hili v The Queen* (2010) 242 CLR 520 at [22].
- Div 8 Pt 1B *Crimes Act* 1914, incorporating s 20BQ (diverting persons suffering a mental illness or intellectual disability), was "intended to be an exhaustive statement of the Commonwealth Parliament's response to the issue [of diversion from the criminal justice system by reference to mental illness] leaving no room for the operation of the cognate State provision … to be picked up as federal law": *Kelly v Saadat-Taleb* (2008) 72 NSWLR 305 at [29], [31], [48], [55].

It should be noted that s 20C *Crimes Act* 1914 provides that children and young persons may be tried and punished for federal offences in accordance with the law of the State or Territory in which they were charged or convicted. See **Children and young offenders** at [16-080].

Note: The terms Commonwealth offences and federal offences are used interchangeably below. The main interpretation section in the *Crimes Act* 1914, s 3, defines "Commonwealth offence" to mean (except in Pt IC) "an offence against a law

of the Commonwealth"; while for the purposes of Pt IB, s 16 defines "federal offence" as "an offence against the law of the Commonwealth".

[16-002] Relevance of decisions of other State and Territory courts

See also the extensive discussion concerning the issue of consistency, the use of other cases and the use of statistics in **Objective Factors (cf s 21A(1))** at [10-020]ff and at [10-024]ff.

Sentencing principles

It is implicit in Pt IB *Crimes Act* 1914 that the sentencing court must have regard to the sentences imposed in all States and Territories: *The Queen v Pham* (2015) 256 CLR 550 at [23], [41]. The Commonwealth Sentencing Database (available through JIRS) contains information about the sentences imposed nationally for Commonwealth offences dealt with by the Commonwealth Director of Public Prosecutions.

In *The Queen v Pham*, the plurality (French CJ, Keane and Nettle JJ) said at [24]:

> a federal offence is, in effect, an offence against the whole Australian community and so the offence is the same for every offender throughout the Commonwealth. Hence, in the absence of a clear statutory indication of a different purpose or other justification, the approach to the sentencing of offenders convicted of such a crime needs to be largely the same throughout the Commonwealth. Further, as Gleeson CJ stated in *Wong*, the administration of criminal justice functions as a system which is intended to be fair, and systematic fairness necessitates reasonable consistency. And, as was observed by the plurality in *Hili*, the search for consistency requires that sentencing judges have regard to what has been done in comparable cases throughout the Commonwealth. [Footnotes excluded.]

Earlier in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, the High Court, citing *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, stated at [135]:

> Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong.

The High Court expressly applied the *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* principle to the *Crimes Act* 1914 in *Hili v The Queen* (2010) 242 CLR 520 at [57]. *Hili* at [57] was applied in *The Queen v Pham* at [18], [36].

The construction of all Commonwealth criminal legislation is subject to this principle.

The principle also applies to common law (sentencing) principles: *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390 at [50]; *R v NZ* (2005) 63 NSWLR 628 at [165]. See also *Tillman v AG (NSW)* (2007) 70 NSWLR 448 per Giles JA and Ipp JA at [105]:

> Commonwealth legislation, uniform national legislation and the common law have obvious claims to national certainty and predictability. The first and third are truly nation-wide, the secondly is effectively nation-wide, and there should be consistent decision-making throughout Australia notwithstanding the existence of separate legal jurisdictions. Perpetuation of egregious error is countered by departure from the prior

Dangerous driving and navigation

[18-300] Statutory history

Last reviewed: May 2023

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

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

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

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

Last reviewed: May 2023

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

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

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

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

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

Further offences may be committed when the relevant dangerous driving offence causes the loss of a foetus of a pregnant woman: see ss 54A and 54B. These provisions

only apply to offences allegedly committed on, or after, 29 March 2022: *Crimes Legislation Amendment (Loss of Foetus) Act* 2021, Sch1[2]. If the offence is a "relevant GBH provision" (defined in s 54A(7)), the maximum penalty is the total of the maximum penalty and 3 years imprisonment: ss 54A(3). For example, an offence against s 52A(3) would be a relevant GBH provision. As such, the maximum penalty would be a total of 10 years imprisonment (7 years imprisonment being the maximum penalty for an offence against s 52A(3) plus the 3 years specified in s 54A(3)). If the victim of the offence is a pregnant woman and the relevant conduct constitutes an offence under a "homicide provision" (defined in s 54B(6) to include offences against ss 52A(1), 52A(2) and 52AB(1)), the maximum penalty is 3 years imprisonment: s 54B(3).

[18-320] Guideline judgment

Last reviewed: May 2023

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

A typical case

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

(i) young offender

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

(iii) death or permanent injury to a single person

(iv) the victim is a stranger

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

(vi) genuine remorse

(vii) plea of guilty of limited utilitarian value.

Guideline with respect to custodial sentences

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

Aggravating factors

(i) extent and nature of the injuries inflicted

(ii) number of people put at risk

(iii) degree of speed

(iv) degree of intoxication or of substance abuse

(v) erratic or aggressive driving

(vi) competitive driving or showing off

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

(viii) ignoring of warnings

(ix) escaping police pursuit

(x) degree of sleep deprivation

(xi) failing to stop.

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

Guideline with respect to length of custodial sentences

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

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

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

Spigelman CJ said at [228]:

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

The guideline is a check or indicator

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

The guideline is not a comprehensive checklist

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

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

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

Further, while the guideline outlines a list of frequently recurring aggravating factors, there may be other circumstances of aggravation, not found in the guideline, which may also be taken into account: *R v Tzanis* [2005] NSWCCA 274 at [24]-[25]; *Kerr v R* at [96]. For example, speed may be taken into account as an aggravating factor where

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

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

Impact of changes in sentence practice since guideline

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

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

Last reviewed: May 2023

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

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

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

Assessing moral culpability and abandonment of responsibility

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

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

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

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

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

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

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

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

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

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

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

[18-332] Momentary inattention or misjudgment

Last reviewed: May 2023

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

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

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

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

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

[18-334] Prior record and the guideline

Last reviewed: May 2023

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

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

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

In *Rummukainen v R* [2020] NSWCCA 187 at [29], it was permissible for the judge to take a prior drink driving offence into account in a "limited way … as a matter of context".

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

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

[18-336] Length of the journey

Last reviewed: May 2023

The guideline provides that an aggravating factor is the "[l]ength of the journey during which others were exposed to risk": see item (vii) in **[18-320]**. This permits the judge to take into account the distance travelled and the distance intended to be travelled before detection: *R v Takai* [2004] NSWCCA 392 at [39]. In *R v Russell* [2022] NSWCCA 294, the offender towed a grossly overloaded caravan for 130 km into a planned 250 km journey before it began swaying, causing a fatal collision. Even though the dangerousness of that journey did not manifest until the caravan began to sway (and regardless of the foreseeability of that occurring) the Court of Criminal Appeal found others were exposed to risk for 130 km, and that the intended journey was relevant to the assessment of the offender's moral culpability: at [57], [68], [115].

There is no absolute demarcation of what is a "long journey", a "not long journey" or a "short journey". The danger created by the length of the journey will vary according to other circumstances, such as the time at which the journey is undertaken, the amount of traffic, and the locale: *R v Takai* at [39]; *R v Shashati* [2018] NSWCCA 167 at [28].

[18-340] General deterrence

Last reviewed: May 2023

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

> This court has held that a number of considerations which had to be taken into account when sentencing for culpable driving must also be taken into account when sentencing for this new offence of dangerous driving:
>
> 1. The legislature has always placed a premium upon human life, and the taking of a human life by driving a motor vehicle dangerously is to be regarded as a crime of some seriousness.
> 2. The real substance of the offence is not just the dangerous driving; it is the dangerous driving in association with the taking of a human life.
> 3. Such is the need for public deterrence in this type of case, the youth of any offender is given less weight as a subjective matter than in other types of cases.

4. The courts must tread warily in showing leniency for good character in such cases.
5. So far as youthful offenders of good character who are guilty of dangerous driving, therefore, the sentence must be seen to have a reasonable proportionality to the objective circumstances of the crime, and persuasive subjective circumstances must not lead to inadequate weight being given to those objective circumstances.
6. Periodic detention has a strong element of leniency built into it and, as presently administered, it is usually no more punitive than a community service order.
7. The statement made by this court in relation to the previous offence of culpable driving — that it cannot be said that a full-time custodial sentence is required in every case — continues to apply in relation to the new offence of dangerous driving. As that offence is committed even though the offender has had no more than a momentary or casual lapse of attention, there must always be room for a non-custodial sentence (although that does not mean that a non-custodial sentence is ordinarily appropriate in such a case), but the case in which a sentence other than one involving full-time custody is appropriate must be rarer for this new offence.

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

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

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

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

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

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

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

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

[18-350] Motor vehicle manslaughter

Last reviewed: May 2023

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

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

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

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

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

When sentencing for motor vehicle manslaughter, it is "unproductive" to consider what might have been the appropriate sentence for an offence of aggravated dangerous driving occasioning death, which is a much less serious offence, carrying a maximum penalty of 14 years imprisonment compared to 25 years for manslaughter: *R v Cameron* [2005] NSWCCA 359 at [26]; *R v Cramp* [1999] NSWCCA 324 at [108]. Of the relationship between these offences, Howie J in *R v Borkowski* [2009] NSWCCA 102 said, at [58] that:

> [I]n cases of motor manslaughter, in my opinion, the sentence to be imposed must also take into account the fact that there is a structure of offences dealing with the occasioning of death through driving and that manslaughter stands at the very pinnacle

> of that structure as the most serious offence. In particular the sentence must take into account that there is a less serious offence of causing death by driving under s 52A(2) of the *Crimes Act* that carries a maximum penalty of imprisonment for 14 years.

Examples of cases include: *Director of Public Prosecutions v Abdulrahman* [2021] NSWCCA 114 (a particularly serious example); *Smith v R* [2020] NSWCCA 181 at [49]–[78], *Day v R* [2014] NSWCCA 333 at [17]–[28], *Spark v R* [2012] NSWCCA 140 at [48] and *Bombardieri v R* [2010] NSWCCA 161 at [41]–[55]. The conduct in *Davidson v R* [2022] NSWCCA 153 was considered to be an unprecedented and "very serious" example of criminally negligent conduct with "catastrophic consequences" involving, as it did, one act of criminally negligent driving causing the death of four children walking on a public footpath and injury to three other children: [40] (Brereton JA); [138] (Adamson J); [333]–[334] (N Adams J). The offender's appeal on the basis of manifest excess was allowed, by majority, and he was re-sentenced to an aggregate sentence of 20 years with a non-parole period of 15 years (reduced from 28 years with a non-parole period of 21 years).

[18-360] Grievous bodily harm

Last reviewed: May 2023

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

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

[18-365] Victim impact statements

Last reviewed: May 2023

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

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

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

[18-370] Application of the De Simoni principle

Last reviewed: May 2023

The statutory hierarchy

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

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

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

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

Nonetheless, in the statutory hierarchy of offences, manslaughter should be treated as a most serious offence for the purposes of the principle in *The Queen v De Simoni* (1981) 147 CLR 383: *SBF v R* at [118]. The distinction between the extent of culpability for an offence of manslaughter and an offence of dangerous driving causing death may be a fine one: *R v Vukic* [2003] NSWCCA 13 at [10]; *Thompson v R* [2007] NSWCCA 299 at [15].

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

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

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

Facts constituting a more serious offence

It is not an error to take into account other circumstances of aggravation different from the circumstances supporting the charge. The offence of dangerous driving causing death under s 52A(1) has three variations: driving under the influence, driving at a

speed dangerous, and driving in a manner dangerous. Each variation carries the same penalty. The *De Simoni* principle can have no application in a case where the so-called matters of aggravation are merely variations of the same offence and do not render the offender to a greater penalty: *R v Douglas* (1998) 29 MVR 316.

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

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

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

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

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

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

Conduct of the victim

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

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

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

[18-380] Mitigating factors

Last reviewed: May 2023

Youth

Generally, deterrence is given less weight in cases involving young offenders and there is a greater emphasis on rehabilitation. This is often not the case for dangerous

driving offences because there is a prevalence of these offences among young drivers and the courts have a duty to seek to deter this behaviour: *R v Smith* (unrep, 27/8/97, NSWCCA).

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

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

However, even where the relevant dangerous driving offences are close to the worst kind, youth remains a relevant factor. In *Conte v R* [2018] NSWCCA 209*,* the 20 year old applicant's offending demonstrated an atrocious abandonment of responsibility — he was disqualified from driving, under the influence of drugs, and seen to be driving in what witnesses described as "the most reckless form of driving imaginable": at [40]. However, Payne JA and Button J (Schmidt J dissenting) concluded an aggregate sentence of 14 years imprisonment with a non-parole period of 10 years 6 months, did not appropriately reflect the applicant's youth or his deprived upbringing, the fact the offences (against ss 52A(2), 52A(4) and 52AB(1)) arose from one incident, and that the maximum penalty for aggravated dangerous driving causing death is 14 years imprisonment, compared to manslaughter which is 25 years: at [23].

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

> The message must be sent in unequivocal terms that motor vehicles are not playthings or dodgem cars to be raced by young people for fun or thrills and with impunity. They

> are to be used responsibly and strictly in accordance with the rules of the road … The holding of a driver's licence conferring the right to drive a motor vehicle is a privilege which carries heavy responsibilities.

Good character

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

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

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

Extra-curial suffering

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

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

In *Hughes v R* [2008] NSWCCA 48 at [23], Grove J emphasised that "leniency does not derive from the mere fact that the deceased was not a stranger: *R v Howcher* [2004] NSWCCA 179, but from the consequential quality and depth of the remorse and shock". The despair and depression experienced by the applicant was a significant element of mitigation: *Hughes v R* at [25].

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

Injuries to the offender

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

Family hardship

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

Payment of damages

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

[18-390] Other sentencing considerations

Last reviewed: May 2023

Section 21A Crimes (Sentencing Procedure) Act 1999

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

Basten JA said at [10]:

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

Howie J said at [43]:

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

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

Section 21A(2)(g), that "the injury, emotional harm, loss or damage caused by the offence was substantial", cannot be taken into account as an aggravating factor of an offence causing death. Spigelman CJ said in *R v Tzanis* [2005] NSWCCA 274 at [11]

that: "[i]n the case of death there can be no issue of fact and degree. The injury was necessarily 'substantial'". The seriousness of the injuries to the victim of the grievous bodily harm remains relevant to the objective seriousness of the offence: *R v Tzanis* at [12]–[13].

[18-400] Totality

Last reviewed: May 2023

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

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

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

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

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

Worst cases

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

A determination of whether or not offences fall into the worst class of case is not dependent precisely on whether all of the matters referred to in s 52A(7) are present, but is to be determined on a consideration of all objective and subjective features: *R v Black* (unrep, 23/7/98, NSWCCA), per Ireland J. For examples of the most serious cases (causing grievous bodily harm), see *R v Austin* [1999] NSWCCA 101 and *R v Scott* [1999] NSWCCA 233. Examples of serious cases of offences of aggravated dangerous driving causing death include *R v Wright* [2013] NSWCCA 82 where the offence was described, at [86], as "close to the worst type of offence of its kind" and *Conte v R* [2018] NSWCCA 209 where the offending was said, at [7], to demonstrate an atrocious abandonment of responsibility and was towards the upper end of the scale.

[18-410] Licence disqualification

Last reviewed: May 2023

In all cases of dangerous driving and failing to stop and provide assistance (a "major offence" as defined in s 4 *Road Transport Act* 2013), licence disqualification is

mandatory and additional to any penalty imposed for the offence: s 205 *Road Transport Act* 2013. In determining a disqualification period for these offences (pursuant to s 205(2) or (3)), the court must consider whether or not to vary the automatic disqualification period: *Pearce v R* [2022] NSWCCA 68 at [56]–[57].

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

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

[18-415] Failure to stop and assist

Last reviewed: May 2023

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

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

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

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

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

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

[18-420] Dangerous navigation

Last reviewed: May 2023

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

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

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

Last reviewed: May 2023

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

One of the potentially aggravating factors listed in *R v Whyte* at [216] is the length of the journey. Although an extended journey elevates the period of risk, a short journey in a vessel or a brief period spent at the helm does not become a matter of mitigation. To postulate a factor which might make an offence worse does not mean its absence lessens the seriousness of the offence: *R v Reynolds; R v Small* at [49].

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

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Other Acts

para

Mental Health and Cognitive Impairment Forensic Provisions Act 2020

[The next page is 50051]

Mental Health and Cognitive Impairment Forensic Provisions Act 2020

[90-000] Introduction

Last reviewed: May 2023

The interaction between persons suffering mental health conditions and the criminal justice system is well documented as being difficult and often requiring what former Chief Justice Gleeson described in *R v Engert* (1996) 84 A Crim R 67 as a "sensitive discretionary decision". This chapter discusses the penalty options available to the court when dealing with persons with a mental health or cognitive impairment, as set out in Pts 4 and 5 of the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 (the Act). For a discussion regarding the application of the Act to summary proceedings (Pt 2 of the Act) see the *Local Court Bench Book* at **[30-000]**.

The Act, which commenced on 27 March 2021, replaced the *Mental Health (Forensic Provisions) Act* 1990 (the 1990 Act) and relevantly applies to:

- proceedings which had commenced but were not completed before 27 March 2021 if the defendant's unfitness to be tried was raised before then
- an inquiry or special hearing which commenced under the 1990 Act but was not completed before 27 March 2021: Sch 2, Pt 2, cl 7.

The 1990 Act continues to apply to "existing proceedings" which are criminal proceedings in which the court has, before 27 March 2021, nominated a limiting term but not made an order under s 27 of the 1990 Act: Sch 2, Pt 2, cl 7A; see discussion of limiting terms at **[90-040]**. A person who, immediately before 27 March 2021, was a forensic patient under the 1990 Act is taken to be a forensic patient within the meaning of the Act: Sch 2, Pt 2, cl 9.

Unless otherwise specified, references to sections below are references to sections of the *Mental Health and Cognitive Impairment Forensic Provisions Act*.

Cases decided before the Act commenced, addressing those aspects of the 1990 Act which were unchanged, remain useful. The references in those cases to the old provisions have been updated to reflect the current legislation.

For detailed commentary on unfitness and special hearings, see the *Criminal Trial Courts Bench Book*: **Procedures for fitness to be tried (including special hearings)** at **[4-325]**ff.

[90-010] Part 4 — Criminal proceedings in the Supreme and District Courts

Last reviewed: May 2023

Part 4 of the Act applies to criminal proceedings in the Supreme Court (including criminal proceedings within the summary jurisdiction of the Supreme Court) and criminal proceedings in the District Court: s 35.

[90-020] Section 42(4) dismissals

Last reviewed: May 2023

Section 42(4) of the Act provides that where a question of fitness to be tried arises the court may determine not to hold an inquiry, dismiss the charge and order that the defendant be released if it is inappropriate to inflict any punishment because of:

(a) the trivial nature of the charge or offence, or

(b) the nature of the defendant's mental health impairment or cognitive impairment, or

(c) any other matter the court thinks proper to consider.

Punishment includes the recording of a conviction and the orders of the court after a special hearing: *Newman v R* [2007] NSWCCA 103 at [41].

The section is expressly directed to the appropriateness of the infliction of punishment: *Newman v R* at [36]. The court is required to approach s 42(4) assuming there would be a finding of guilt by either of the two courses which can flow from a fitness hearing: a conviction at trial if a person is found to be fit to be tried; or a qualified finding of guilt at a special hearing if a person is found to be unfit. If the court would not impose any punishment, the proceedings should be dismissed without the need for a fitness hearing: *Newman v R* at [46]. The purpose of s 42(4) is to avoid the expense and delays associated with fitness hearings where the court would ultimately not inflict any punishment: *Newman v R* at [40].

Section 42(4) is in similar terms to s 10(3) of the *Crimes (Sentencing Procedure) Act* 1999. In each case, the ultimate power of the court is to dismiss a charge that has been, or may be, proven. An equivalent test of "inexpedient" to inflict any punishment applies under s 10(2) *Crimes (Sentencing Procedure) Act*. The list of matters to which the court may have regard is also similar, including the nature of the person's condition and the trivial nature of the charge: s 42(4); s 10(3) *Crimes (Sentencing Procedure) Act*; *Newman v R* at [46].

Newman v R was applied in *R v Chanthasaeng* [2008] NSWDC 122, a drug supply case, where an application for a s 10(4) (now s 42(4)) order was refused.

[90-030] Special hearings and sentencing options

Last reviewed: May 2023

Special hearings aim to ensure that a defendant who is found unfit to stand trial is acquitted unless it can be proved that they committed the offence charged: s 54. For this reason, the defendant is taken to have pleaded not guilty to the offence charged (s 56(5)) and the special hearing is conducted as "nearly as possible" to a regular criminal trial (s 56(1)).

A verdict that the defendant committed the offence (or an alternative offence) charged (s 59(1)(c), (d)) is a "qualified finding of guilt" made in the absence of a conviction (s 62(a)). If such a qualified finding of guilt is made, and the court would have imposed a sentence of imprisonment if the special hearing had been an ordinary trial, the court must nominate a term it would have imposed on the defendant (a "limiting term"): s 63(2). See **[90-040] Limiting terms**.

If a court indicates that it *would not* have imposed a sentence of imprisonment, it may impose any other penalty or make any other order it might have made on conviction of the person for the relevant offence in ordinary criminal proceedings:

s 63(3). The phrase "any other penalty" includes sentencing options found in the *Crimes (Sentencing Procedure) Act* 1999: *Smith v R* [2007] NSWCCA 39 at [61]; but not imprisonment and its alternative forms: *Warren v R* [2009] NSWCCA 176 at [19]–[20]. Where the court indicates it would not have imposed a sentence of imprisonment, it must notify the Mental Health Review Tribunal (the Tribunal) that a limiting term is not to be nominated in respect of the person: s 63(6).

In determining a limiting term or other penalty, the court:

- must take into account that, because of the defendant's mental health impairment and/or cognitive impairment, they may not be able to demonstrate mitigating factors for sentencing or make a guilty plea for the purposes of obtaining a sentencing discount: s 63(5)(a), and
- may apply a discount of a kind that represents part or all of the sentencing discounts that are capable of applying to a sentence because of those factors or a guilty plea: s 63(5)(b), and
- must take into account periods of the defendant's custody or detention before, during and after the special hearing that related to the offence: s 63(5)(c).

Reports about defendant

Following a verdict being reached at a special hearing, the court may request a report by a forensic psychiatrist or other person of a class prescribed by the regulations, who is not currently involved in treating the defendant, as to the condition of the defendant and whether the release of the defendant is likely to seriously endanger the safety of the defendant or any member of the public: s 66(1). The court may consider the report before making orders about the defendant: s 66(2).

[90-040] Limiting terms

Last reviewed: May 2023

Limiting terms are sentences imposed by Supreme and District Courts at the conclusion of special hearings. Section 63(2) defines a limiting term as the best estimate of the sentence the court would have imposed if the special hearing had been an ordinary trial and the person had been fit to be tried for the offence. A person serving a limiting term is a forensic patient: ss 3, 72(1)(b).

Purpose of limiting terms

A limiting term is the period beyond which a person cannot be detained for the offence which was the subject of the special hearing: *R v Mitchell* [1999] NSWCCA 120 at [30]. As the court in *R v Mailes* (2004) 62 NSWLR 181 at [32] said, the purpose of a limiting term:

> … is not to punish the person who has not been convicted of any crime, but to ensure that he or she is not detained in custody longer than the maximum the person could have been detained if so convicted following a proper trial …

A limiting term is a sentence for the purposes of s 5(1)(c) *Criminal Appeal Act* 1912 by reason of the definition of "sentence" in s 2 of that Act: *R v AN* [2005] NSWCCA 239 at [2]. In determining the limiting term for a particular offence, courts should adopt and apply all the statutory and common law principles that apply to the sentencing

of a person convicted of that offence: *R v AN* at [13]. This includes the purposes of sentencing under s 3A *Crimes (Sentencing Procedure) Act* 1999, ensuring the offender is adequately punished (s 3A(a)): *R v Mailes* at [32]; *R v AB* [2015] NSWCCA 57 at [41]. It should also be borne in mind that the purposes of general deterrence and denunciation under s 3A may be irrelevant to an offender with a mental illness or disability: *R v AB* at [42], [45]. Where the accused is a child, the principles relating to the exercise of criminal jurisdiction in respect of a child contained in s 6 *Children (Criminal Proceedings) Act* 1987 will be relevant: *R v AN* at [21].

Non-parole periods not applicable

Section 63(2) of the Act only requires the nomination of a total term and does not permit the imposition of a non-parole period. Section 64(2)(a) further provides that a "… sentence of imprisonment imposed in an ordinary trial of criminal proceedings may be subject to a non-parole period but a limiting term is not." *R v Mitchell* at [21]; *R v Mailes* at [22] and [29]; *R v AN* at [13] dealing with the similar provisions of the 1990 Act supported this proposition.

Standard non-parole periods

The standard non-parole period statutory scheme does not apply to the sentencing of an offender to detention under the *Mental Health and Cognitive Impairment Forensic Provisions Act*: s 54D(1)(b) *Crimes (Sentencing Procedure) Act*.

Limiting terms not to be reduced because of absence of non-parole period

The absence of a non-parole period does not affect the term of the head sentence that would otherwise have been imposed and in relation to which the limiting term is to be set: *R v Mailes* at [43]. There is no logical reason for reducing it simply because there is no provision for a non-parole period: *R v Mailes* at [43]. To do so ignores and undermines the different features and objectives of regular sentences and limiting terms: *R v Mailes* at [44]; *R v Mitchell* at [32].

Limiting terms not to be reduced because of poor prospects of early release

Evidence of practical issues concerning the difficulties faced by persons serving limiting terms in obtaining early release does not affect the requirement in s 63(2) to set limiting terms by reference to the head sentence that would have been imposed following a guilty verdict in a proper trial: *R v Mailes* at [43]; *R v Mitchell* at [31], [64]. The court should not attempt to make any estimate of the degree of likelihood of an offender being released: *R v AN (No 2)* (2006) 66 NSWLR 523 at [74]; *R v AN* at [65].

Relevance of mental health or cognitive impairment to length of limiting terms

An offender's mental health impairment or cognitive impairment is relevant to the length of the limiting terms in at least three ways:

- the applicant's culpability
- the likelihood of re-offending
- the protection of the community.

Precisely how each affects the length of a limiting term depends on the circumstances of each case: *R v AN* at [3], affirming *R v Engert* (1995) 84 A Crim R 67. In *R v AN*

the uncontradicted evidence about the offender's mental condition and its impact on his offending meant that, when determining the length of the limiting term to be imposed, the offender's mental condition was a "highly significant" consideration: at [38]. The protection of the community is often an important consideration. The level of danger which a mentally ill offender presents to the community is a countervailing consideration to all other relevant sentencing principles: *Courtney v R* [2007] NSWCCA 195 at [26], [59], [83]; *Agha v R* [2008] NSWCCA 153 at [24].

McClellan CJ at CL said of the sentencing exercise in *Bhuiyan v R* [2009] NSWCCA 221 at [30]:

> … although in most cases the serious mental illness will have deprived an offender of their usual capacity for reason and control it must not be allowed to overwhelm appropriate consideration of the circumstances of the offence and the other subjective features of the offender. The particular difficulties faced by an offender which may have contributed to the offence will be addressed by the Mental Health Review Tribunal which in appropriate circumstances may release the offender before the limiting term has expired.

Date of commencement, concurrency and consecutiveness

In determining a limiting term, the court must take into account periods of the defendant's custody before, during and after the special hearing relating to the offence: s 63(5)(c).

A limiting term takes effect from when it is nominated unless the court:

(a) determines it is taken to have effect from an earlier time, after taking into account periods of the defendant's custody or detention before, during and after the special hearing that related to the offence, or

(b) directs that the term commence at a later time so as to be served consecutively with (or partly concurrently and partly consecutively with) some other limiting term nominated for the person or sentence of imprisonment imposed on the person: s 64(1).

When making a direction that the term commence at a later time, the court is to take into account that:

- a sentence of imprisonment imposed in an ordinary trial of criminal proceedings may be subject to a non-parole period, a limiting term is not (s 64(2)(a)); and,
- in an ordinary trial of criminal proceedings, consecutive sentences of imprisonment are imposed with regard to non-parole periods (s 64(2)(b)).

Limiting terms and alternative forms of imprisonment

Section 63(2) of the Act requires the nomination of a limiting term and does not contemplate the imposition of alternative forms of imprisonment: *Warren v R* [2009] NSWCCA 176 at [20].

Limiting terms and referral to Tribunal

The court must refer the defendant to the Tribunal if it nominates a limiting term and must notify the Tribunal of the orders it makes: s 65(1). The court may order the defendant be detained in a mental health facility, correctional centre, detention centre or other place pending the review of the defendant by the Tribunal: s 65(2).

Extension and expiration of limiting terms

When a person's limiting term expires (where that term is less than life), they will cease to be a forensic patient: s 101(e). However, the Minister administering the Act may apply to the Supreme Court for an extension order against a forensic patient where they are subject to a limiting term or an existing extension order: ss 123, 124(1). Such an application may not be made more than six months before the end of the forensic patient's limiting term or expiry of the existing extension order: s 124(2). The Supreme Court may order an extension if satisfied to a high degree of probability that the forensic patient poses an unacceptable risk of causing serious harm to others, and that risk cannot adequately be managed by less restrictive means: ss 121, 122.

The requirements for an application for an extension order are set out in s 125, and pre-hearing procedures are set out in s 126. If, following a preliminary hearing, the Supreme Court is satisfied the matters alleged in the supporting documentation would, if proved, justify making an extension order, the court must make orders appointing certain qualified persons to conduct examinations: s 126(5). In determining whether an extension order should be made or the application should be dismissed under s 127(1), the court is to consider a number of factors including the safety of the community, the reports received, and the forensic patient's level of compliance with any obligations they were subject to: s 127(2).

In *Attorney General for NSW v Bragg (Preliminary)* [2021] NSWSC 439, the Attorney General made an application for an extension order under s 123. In ordering a three-month extension, Wright J considered aspects of the relevant provisions and stated the following propositions (citations omitted):

- The "high degree of probability" referred to in s 122 indicates the existence of the risk in question must be proved to a higher degree than the normal civil standard of proof of "more probable than not", but does not have to be proved to the criminal standard of "beyond reasonable doubt": [25].
- The "serious harm" which must be considered is not limited to physical harm and it may include psychological harm. Whether such harm is "serious" within the meaning of s 122(1) will depend on whether it is such harm as should attract consideration given the objects, scope and terms of Pts 5 and 6 of the Act: [26].
- Whether the risk of causing serious harm to others is "unacceptable" is to be judged according to its ordinary or everyday meaning and the right of a person to their personal liberty at the expiry of a limiting term is not a relevant consideration in the determination of whether the person poses an "unacceptable risk": [27].
- The nature of the risk posed has to be assessed by reference to past conduct, the seriousness of the possible future conduct and the period over which the risk may come to fruition, based on an absence of protective measures: [28].
- In order to determine that the person poses an unacceptable risk of causing serious harm to others, the court need not be satisfied that the risk is more likely than not: [30]; s 122(2) of the Act.

Wright J also observes in *Attorney General of NSW v Bragg (Preliminary)* at [18] that the provisions concerning preliminary hearings in the Act do not differ in material respects from the corresponding provisions in the *Crimes (High Risk Offenders)*

Act 2006 and, accordingly, authorities concerning that other legislation can be of considerable assistance in applying the Act's provisions, having regard to the different circumstances and context in which the latter Act operates.

An extension order commences when it is made, or when the limiting term expires, whichever is the later: s 128(1)(a). It cannot exceed 5 years, but a second or subsequent application for extension can be made: s 128(1)(b), 128(2).

When a person's limiting term expires and no extension application is made, they must be discharged unless classified as an involuntary patient under Ch 3 of the *Mental Health Act* 2007: ss 107(1), 108, (also see Note in s 122). Under the review process established in Pt 5, Div 3, a person may be released by the Tribunal prior to the expiration of their limiting term: ss 81–85.

[90-050] Part 2 — Summary proceedings

Last reviewed: May 2023

See **[30-000] Inquiries under the Mental Health and Cognitive Impairment Forensic Provisions Act 2020** in the *Local Court Bench Book* for detailed commentary of such proceedings.