Judicial Commission of New South Wales

SENTENCING BENCH BOOK

Update 55

August 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 55

Update 55, August 2023

Update 55 amends the Bench Book to update and revise various chapters, and incorporate recent case law and legislative developments. The following chapters have been revised:

Purposes of sentencing

- [2-240] **To prevent crime by deterring the offender and other persons from committing similar offences: s 3A(b)** has been revised in relation to *R v Mauger* [2012] NSWCCA 51.

Conditional release orders (CROs)

- [4-720] **Procedures for making a CRO** has been revised in relation to *R v Mauger* [2012] NSWCCA 51.

Dismissal of charges and conditional discharge

- [5-010] **Power to make s 10(1)(b) orders operates with s 9** and [5-030] **Application of factors in s 10(3)** have been revised in relation to *R v Mauger* [2012] NSWCCA 51.

Setting terms of imprisonment

- [7-516] **Giving effect to finding of special circumstances** to add reference to *Harris v R* [2023] NSWCCA 44 regarding the application of s 44(2) *Crimes (Sentencing Procedure) Act* 1999 where a sentence is accumulated on an existing sentence.
- [7-600] **Exclusions from Division** to update the reference to the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020.

Standard non-parole period offences — Pt 4 Div 1A

- [7-890]ff **What is the standard non-parole period?** has been updated and substantially revised, with references added to the following cases:
  - *Tepania v R* [2018] NSWCCA 247 regarding the consideration of the standard non-parole period in sentencing.
  - *AC v R* [2023] NSWCCA 133*, GL v R* [2022] NSWCCA 202 and *Smith v R* [2022] NSWCCA 88 regarding exclusions and inclusions from Pt 4 Div 1A.

Objective and subjective factors at common law

- [9-710] **The difficulty of compartmentalising sentencing considerations** to add reference to *R v Eaton* [2023] NSWCCA 125 regarding the term "moral culpability" as used in *R v Whyte* (2002) 55 NSWLR 252.
- [9-720] **The aggravating/mitigating binary fallacy** to add reference to *Gibbons (a pseudonym) v R* [2019] NSWCCA 150 and *R v LS* [2020] NSWCCA 148 regarding the impact of the absence of factors elevating the seriousness of the offence.

Objective factors at common law

- [10-000]ff **Maximum penalty** has been updated and substantially revised, with references added to the following cases:
  - *FL v R* [2020] NSWCCA 114 regarding assessing the objective seriousness of an offence.
  - *Camilleri v R* [2023] NSWCCA 106, *Tepania v R* [2018] NSWCCA 247, *Paterson v R* [2021] NSWCCA 273 and *Lawrence v R* [2023] NSWCCA 110 regarding mental health or cognitive impairment and objective seriousness.

- *Kochai v R* [2023] NSWCCA 116 and *R v Eaton* [2023] NSWCCA 125 regarding objective seriousness findings.
- *R v Boyd* [2022] NSWCCA 120, *Tatur v R* [2020] NSWCCA 255 and *Paterson v R* [2021] NSWCCA 273 regarding the use of sentencing statistics and *Sharma v R* [2022] NSWCCA 190 regarding aggregate sentences and the use of sentencing statistics.

Subjective matters at common law

- [10-400]ff **Assessing an offender's moral culpability** has been updated and substantially revised, with references added to the following cases:
  - *Tepania v R* [2018] NSWCCA 247 and *Paterson v R* [2021] NSWCCA 273 regarding assessing an offender's moral culpability.
  - *Richards v R* [2023] NSWCCA 107 regarding sentencing where there is a gap in an offender's criminal history.
  - *Bhatia v R* [2023] NSWCCA 12 regarding an offender's good character and the application of s 21A(5A) *Crimes (Sentencing Procedure) Act*.
  - *Lawrence v R* [2023] NSWCCA 110 regarding where an offender's mental condition may be relevant to the objective seriousness of an offence.
  - *DR v R* [2022] NSWCCA 151, *Hoskins v R* [2021] NSWCCA 169, *R v Irwin* [2019] NSWCCA 133, *Judge v R* [2018] NSWCCA 203, *Ohanian v R* [2017] NSWCCA 268, *Nasrallah v R* [2021] NSWCCA 207, *Perkins v R* [2018] NSWCCA 62 and *Donovan v R* [2021] NSWCCA 323 regarding an offender's deprived background and specific applications of the principles in *Bugmy v The Queen* (2013) 249 CLR 571.

Parity

- [10-800] **Summary of relevant considerations** has been updated in relation to when co-offenders are sentenced by different judges.
- [10-801] **Introduction** to add reference to *R v Rosenberg* [2022] NSWCCA 295 and *R v Dyson* [2023] NSWCCA 132 regarding when co-offenders are sentenced by different judges on the basis of different facts.
- [10-807] **Co-offenders with joint criminal liability** to add new commentary regarding relative culpability of co-offenders by reference to their conduct in the joint criminal enterprise.

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- [12-215] **Broad scope of s 23(1)** to add reference to *Vaiusu v R* [2022] NSWCCA 283 regarding what constitutes an undertaking to assist for the purposes of s 23 *Crimes (Sentencing Procedure) Act* 1999.

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- [17-570] **Mitigating factors** to add reference to *Richards v R* [2023] NSWCCA 107 regarding where there is a delay in complaint in child sexual assault matters.

Children (Criminal Proceedings) Act 1987

- [15-070] **A court may direct imprisonment to be served as a juvenile offender** to update the reference to the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020.

Dangerous driving and navigation

- [18-300]ff **Statutory history** to add reference to *R v Eaton* [2023] NSWCCA 125 regarding the impact of changes in sentencing practice since the sentencing guideline set out in *R v Whyte* (2002) 55 NSWLR 252.
- [18-430] **Application of the guideline to dangerous navigation** to add reference to *R v Eaton* [2023] NSWCCA 125 regarding the relevance of the sentencing guideline set out in *R v Whyte* (2002) 55 NSWLR 252 to dangerous navigation involving a kayak.

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- [18-730] **Joint criminal enterprise and role** to add reference to *Rahman v R* [2023] NSWCCA 148 regarding taking into account injuries occasioned during offending involving a joint criminal enterprise.

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- [20-740] **Bestiality** to add reference to *Chesworth v R* [2023] NSWCCA 115 regarding the objective seriousness of bestiality offences.

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- [63-510] **Sentencing approach to domestic violence** to add reference to *Kennedy v R* [2022] NSWCCA 215 regarding the treatment of domestic violence victims and the moral culpability of offenders with deprived backgrounds.

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FILING INSTRUCTIONS OVERLEAF

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FILING INSTRUCTIONS

Update 55

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Introduction

Sentencing a person convicted of a criminal offence has always been difficult but it has become an increasingly technical task. The *Sentencing Bench Book* provides ready access to sentencing law. It is published as a looseleaf service in order to easily accommodate changes in the law.

Chief Justice Gleeson remarked in 1993 that:

> There is no aspect of the administration of justice in which public acceptance of judicial decision-making is more important, or more difficult to sustain, than the sentencing of offenders. Most judges and magistrates will say that they find sentencing one of the most difficult tasks confronting them. (*The Sydney Morning Herald*, 2 December 1993, extracted from "Sentencing: The Law's Communication Problem," a speech delivered to the Criminal Bar Association, 19 November 1993).

The High Court has described sentencing as "a synthesis of competing features which attempts to translate the complexity of the human condition and human behaviour to the mathematics of units of punishment usually expressed in time or money": *Weininger v The Queen* (2003) 212 CLR 629 at [24]. Later in *Markarian v The Queen* (2005) 228 CLR 357 at [27], the High Court explained that, ordinarily, there is no single route that a sentencer must take in arriving at an appropriate sentence:

> The judgment is a discretionary judgment and, as the bases for appellate review reveal, what is required is that the sentencer must take into account all relevant considerations (and only relevant considerations) in forming the conclusion reached. As has now been pointed out more than once, there is no single correct sentence [*Pearce v The Queen* (1998) 194 CLR 610 at 624 [46]]. And judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies [*Johnson v The Queen* (2004) 78 ALJR 616 at 618 [5] per Gleeson CJ, 624 [26] per Gummow, Callinan and Heydon JJ; 205 ALR 346 at 348, 356].

The primary object of the *Sentencing Bench Book* is to assist sentencers in individual cases to "[take] into account all relevant considerations … in forming the conclusion reached". Individualised justice is an important aspect of sentencing. In *R v Whyte* (2002) 55 NSWLR 252 at [147], Spigelman CJ said:

> The maintenance of a broad sentencing discretion is essential to ensure that all of the wide variations of circumstances of the offence and the offender are taken into account. Sentences must be individualised.

Consistency in sentencing is achieved by the proper application of the relevant legal principles: *Hili v The Queen* (2010) 85 ALJR 195 at [18], [49]; *The Queen v Pham* (2015) 256 CLR 550 at [28]. Intermediate appellate court cases are the most useful guidance for sentencing judges: *The Queen v Pham* at [28], [50]. Therefore, by articulating sentencing principles, the *Sentencing Bench Book* assists the courts to achieve consistency in imposing sentences. Consistency of approach in applying sentencing principles is essential if reasonable consistency (as referred to by Gleeson CJ in *Wong v The Queen* (2001) 207 CLR 584 at [6], *Hili v The Queen* at [18] and *The Queen v Pham* at [28]) is to be achieved. It is sometimes forgotten in debates about sentencing that judicial officers are bound by sentencing principles: M Gleeson, "A core value" (2007) 8(3) *TJR* 329.

Since the early 1990s there has been an increasing tendency of Parliament to legislate in the area of sentencing law. The High Court has emphasised the importance of following strictly the terms of exhaustive sentencing provisions. In *Adams v The Queen* (2008) 234 CLR 143 at [10], the court frowned upon "judicially constructed harm-based gradation of penalties" for particular kinds of drugs when "Parliament has made its own judgment as to an appropriate penal response to involvement in the trade in illicit drugs" through a quantity based statutory scheme. And in *Hili v The Queen* at [13], [37]–[38], the court disapproved of Court of Criminal decisions which accepted a "judicially determined norm" for non-parole period and recognizance release orders for Commonwealth offenders. Part IB *Crimes Act* 1914 (Cth) has made exhaustive provision for these subjects. On the other hand, in *Muldrock v The Queen* (2011) 244 CLR 120, the court held that the NSW Court of Criminal Appeal should not have attributed determinative significance to standard non-parole periods for selected NSW offences. The legislation required an approach to sentencing whereby the judge identifies *all* the factors that are relevant to the sentence, discusses their significance, and then makes a value judgment as to what is the appropriate sentence.

The *Crimes (Sentencing Procedure) Act* 1999 (NSW) consolidated and rationalised various sentencing statutes. The Act has been amended many times since it was first enacted. A key amendment was: the creation, in s 21A, of a list of aggravating and mitigating matters that a sentencer may take into account in setting an appropriate sentence. Section 21A proved to be the source of a significant amount of litigation in the Court of Criminal Appeal. In *Mapp v R* [2010] NSWCCA 269, Simpson J, in the context of these provisions, referred to "the increasing complexity that attends sentencing" (at [6]) and cautioned that this "complexity casts an undue burden on sentencing judges" (at [8]).

In the past it may have been more appropriate to provide a commentary on the common law in which statutes touching on sentencing appeared. However, the reverse is now more appropriate — a commentary on the statutes touching on sentencing in which the common law appears.

The *Sentencing Bench Book* contains commentary on five key sentencing statutes:

- *Crimes (Sentencing Procedure) Act* 1999 (NSW)
- *Children (Criminal Proceedings) Act* 1987 (NSW)
- *Crimes Act* 1914 (Cth)
- *Criminal Appeal Act* 1912 (NSW)
- *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 (NSW).

It also contains commentary on sentencing law for the following offence categories:

- assault, wounding and related offences
- break and enter offences
- car-jacking and car rebirthing offences
- Commonwealth drug offences
- damage by fire and related offences
- dangerous driving

- detain for advantage/kidnapping
- domestic violence offences
- *Drug Misuse and Trafficking Act* 1985 (NSW) offences
- firearms and prohibited weapons offences
- fraud offences
- manslaughter and infanticide
- murder
- public justice offences
- robbery
- sexual assault
- sexual offences against children.

The *Sentencing Bench Book*, like any looseleaf service, is a work in progress. More offence categories will be added where required.

I trust that judicial officers, practitioners and anyone interested in sentencing will find the *Sentencing Bench Book* to be both informative and useful.

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Director, Research and Sentencing
July 2016

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Purposes of sentencing

[2-200] The common law

Section 3A *Crimes (Sentencing Procedure) Act* 1999 sets out the purposes for which a court can impose a sentence. Given that s 3A does not depart from the common law (see further below), the starting point for any discussion of the purposes of punishment must be *Veen v The Queen (No 2)* (1988) 164 CLR 465 where Mason CJ, Brennan, Dawson and Toohey JJ said at 476:

> … sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.

In *R v Engert* (unrep, 20/11/95, NSWCCA) Gleeson CJ said at 68 after discussing *Veen v The Queen (No 2)*:

> A moment's consideration will show that the interplay of the considerations relevant to sentencing may be complex and on occasion even intricate. …
>
> It is therefore erroneous in principle to approach the law of sentencing 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.

The common law concept of retribution is discussed at **[2-297]**.

[2-210] Section 3A

Section 3A sets out the following seven purposes "for which a court may impose a sentence on an offender":

(a) to ensure that the offender is adequately punished for the offence,

(b) to prevent crime by deterring the offender and other persons from committing similar offences,

(c) to protect the community from the offender,

(d) to promote the rehabilitation of the offender,

(e) to make the offender accountable for his or her actions,

(f) to denounce the conduct of the offender,

(g) to recognise the harm done to the victim of the crime and to the community.

The High Court said of s 3A in *Muldrock v The Queen* (2011) 244 CLR 120 at [20]:

> The purposes there stated [in s 3A] are the familiar, overlapping and, at times, conflicting, purposes of criminal punishment under the common law [*Veen v The Queen (No 2)* at 476–477]. There is no attempt to rank them in order of priority and nothing in the Sentencing Act to indicate that the court is to depart from the principles explained in *Veen v The Queen (No 2)* [at 476] in applying them. [Relevant footnote references included in square brackets.]

In *Re Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) (No 2 of 2002)* (unrep, 20/12/2002, NSWCCA) Spigelman CJ at [57]–[60] raised the question of whether the terms of s 3A(e) and (f) constituted a change from the common law approach. The above statement in *Muldrock* suggests that s 3A does not depart from the common law. See also other comments to the same effect in *R v MA* [2004] NSWCCA 92 at [23]; *R v King* [2004] NSWCCA 444 at [130]; *R v MMK* [2006] NSWCCA 272 at [10].

It is an appellable error to fail to address the purposes of sentencing at all: *R v Stunden* [2011] NSWCCA 8 at [112]. A failure to expressly refer to each does not mean that they were not considered: *R v Stunden* at [113].

The following discussion will elaborate upon each of the subsections in s 3A.

[2-230] To ensure that the offender is adequately punished for the offence: s 3A(a)

Section 3A(a) incorporates the common law principle of proportionality, as acknowledged in *R v Scott* [2005] NSWCCA 152. Howie J, Grove and Barr JJ agreeing, said at [15]:

> There is a fundamental and immutable principle of sentencing that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed and the circumstances of the crime committed. This principle arose under the common law: *R v Geddes* (1936) SR (NSW) 554 and *R v Dodd* (1991) 57 A Crim R 349. It now finds statutory expression in the acknowledgment in s 3A of the *Crimes (Sentencing Procedure) Act* that one of the purposes of punishment is "to ensure that an offender is adequately punished". The section also recognises that a further purpose of punishment is "to denounce the conduct of the offender".

The principle of proportionality operates to guard against the imposition of unduly lenient or unduly harsh sentences. The principle 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* (2006) 66 NSWLR 566 at [15]; *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 477; *Hoare v The Queen* (1989) 167 CLR 348 at 354; *R v Dodd* (unrep, 4/3/91 NSWCCA) and *R v Whyte* (2002) 55 NSWLR 252 at [156]–[158].

In *R v Dodd* (unrep, 4/3/91 NSWCCA) the court explained that the process of applying the principle of proportionality involves assessing the relative seriousness of the crime. The court said at 354:

> As Jordan CJ pointed out in *Geddes* at 556, making due allowance for all relevant considerations, there ought to be a reasonable proportionality between a sentence and

> the circumstances of the crime, and we consider that it is always important in seeking to determine the sentence appropriate to a particular crime to have regard to the gravity of the offence viewed objectively, for without this assessment the other factors requiring consideration in order to arrive at the proper sentence to be imposed cannot properly be given their place. Each crime, as *Veen (No 2)* (1988) 164 CLR 465 at 472; 33 A Crim R 230 at 234 stresses, has its own objective gravity meriting at the most a sentence proportionate to that gravity, the maximum sentence fixed by the legislature defining the limits of sentence for cases in the most grave category. The relative importance of the objective facts and subjective features of a case will vary: see, for example, the passage from the judgment of Street CJ in *Todd* [1982] 2 NSWLR 517 quoted in *Mill* (1988) 166 CLR 59 at 64; 36 A Crim R 468. Even so, there is sometimes a risk that attention to persuasive subjective considerations may cause inadequate weight to be given to the objective circumstances of the case: *Rushby* [1977] 1 NSWLR 594.

[2-240] To prevent crime by deterring the offender and other persons from committing similar offences: s 3A(b)

Last reviewed: August 2023

Deterrence is, and remains, omnipresent in sentencing law. An argument that use of the word 'may' in s 3A operated to remove the long established sentencing principles relating to specific and general deterrence was firmly rejected in *Weribone v R* [2018] NSWCCA 172: [14], [54].

Section 3A(b) gives statutory recognition to the common law principles of specific and general deterrence. Deterrence theory is predicated on the assumption that the harsher the punishment the greater the deterrent effect. However, the utility of general deterrence has been questioned (see discussion below).

It is axiomatic that the purpose of the criminal law is to deter not only the offender but also others who might consider breaking the law. The Court of Criminal Appeal has consistently cited with approval the New Zealand decision of *R v Radich* [1954] NZLR 86 (first in *R v Goodrich* (1955) 72 WN (NSW) 42 and more recently in *R v Hamieh* [2010] NSWCCA 189 at [63]). The New Zealand Criminal Court of Appeal said at 87:

> … one of the main purposes of punishment … is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment.

The High Court in *Munda v Western Australia* (2013) 87 ALJR 1035 at [54] affirmed the place of general and specific deterrence in sentencing law (see below) and again in *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 304 ALR 186 at [65] on the question of setting deterrent civil penalties (see below).

In *R v Harrison* (unrep, 20/2/97, NSWCCA) at 320 Hunt CJ at CL said at 320:

> Except in well-defined circumstances such as youth or the mental incapacity of the offender … public deterrence is generally regarded as the main purpose of punishment, and the subjective considerations relating to the particular prisoner (however persuasive) are necessarily subsidiary to the duty of the courts to see that the sentence which is imposed will operate as a powerful factor in preventing the commission of similar crimes by those who may otherwise be tempted by the prospect that only light punishment will be imposed.

General deterrence might be regarded as important because of the notoriety or high profile of the offender (see for example, *R v Wilhelm* [2010] NSWSC 378 at [30] referred to in *R v Mauger* [2012] NSWCCA 51 at [38]). It has been held that weight should be given by a court to specific and general deterrence for a range of offences including:

- Armed robberies: *Tilyard v R* [2007] NSWCCA 7 at [22]; and when committed by young offenders in *R v Sharma* (2002) 54 NSWLR 300.
- Firearm offences: *R v Howard* [2004] NSWCCA 348 at [65]–[66]; and particularly when multiple shots were fired in *Haidar v R* [2007] NSWCCA 95 at [57].
- Drug offences: importing narcotics in *R v Bezan* [2004] NSWCCA 342 at [37]; and supplying prohibited drugs in *R v Ha* [2004] NSWCCA 386 at [20]; *Ma v R* [2007] NSWCCA 240 at [97].
- Fraud offences: defrauding the revenue in *R v Howe* [2000] NSWCCA 405 at [13]; social security fraud in *Johnsson v R* [2007] NSWCCA 192 at [40]; fraud by a public officer in *Studman v R* [2007] NSWCCA 263 at [11], [39]; insider trading in *R v Rivkin* (2004) 59 NSWLR 284 at [423]; *R v Hannes* (2002) 173 FLR 1; [2002] NSWSC 1182; and crimes involving the market or other forms of business dealings in *R v Pogson* (2012) 82 NSWLR 60 at [143]; calculated contravention of legislation where commercial profit is the driver of the contravening conduct: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* at [65].
- Offences committed against police officers acting in the course of their duty: *R v Adam* [1999] NSWSC 144 at [44]–[45]; *Curtis v R* [2007] NSWCCA 11 at [85].
- Offences against justice: *R v Nomchong* (unrep, 10/4/1997, NSWCCA) including contempt in *Field v New South Wales Crime Commission* [2009] NSWCA 144 at [20] quoting Kirby P's reference in *Registrar of the Court of Appeal v Maniam (No 2)* (1992) 26 NSWLR 309 at 314–315 to *DPP v John Fairfax & Sons Ltd* (1987) 8 NSWLR 732 at 741.
- Violent offences: committed in a domestic context: *Simpson v R* [2014] NSWCCA 23 at [35]; *Smith v R* [2013] NSWCCA 209 at [69]; *R v Hamid* [2006] NSWCCA 302 at [68]; and premeditated violence, particularly leading to grievous bodily harm, in *R v Najem* [2008] NSWCCA 32 at [33].
- Solicit to murder: *R v Potier* [2004] NSWCCA 136 at [56].
- Sexual offences involving children: *R v ABS* [2005] NSWCCA 255 at [26]; *R v CMB* [2014] NSWCCA 5 at [47]–[48]; and possession of child pornography in *R v Gent* [2005] NSWCCA 370 at [65]; *Minehan v R* [2010] NSWCCA 140 at [98].
- Sexual assaults: where the offender took advantage of the fact that the complainant was asleep in *Dean v R* [2006] NSWCCA 341 at [52].
- Offences committed in prisons: *R v Hoskins* [2004] NSWCCA 236 at [63].
- Drink driving offences: *Application by the Attorney-General Under Section 37 Crimes (Sentencing Procedure) Act For a Guideline Judgment Concerning the Offence of High-Range Prescribed Concentration of Alcohol Under Section 9(4) Road Transport (Safety and Traffic Management) Act 1999 (No. 3 of 2002)* (2004) 61 NSWLR 305 at [118]–[119].

- Offences dealt with on a Form 1 under s 33 *Crimes (Sentencing Procedure) Act*: *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (No 1 of 2002)* (2002) 56 NSWLR 146 at [42].
- Offences involving a breach of trust: white collar offenders in *R v El Rashid* (unrep, 7/4/95, NSWCCA) and *R v Pont* [2000] NSWCCA 419 at [36]; legal practitioners in *R v Pangallo* (unrep, 13/8/91, NSWCCA); police officers in *R v Patison* [2003] NSWCCA 171 at [45]; and priests in *R v Ryan (No 2)* [2003] NSWCCA 35 at [26].

Specific or personal deterrence is applicable where an offender has a prior criminal record which manifests a continuing attitude of disobedience, such that more weight should be given to retribution, personal deterrence or protection of the community: *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 477; *R v Rice* [2004] NSWCCA 384 at [26]; *R v Abboud* [2005] NSWCCA 251 at [33]; *R v McNaughton* (2006) 66 NSWLR 566 at [54].

The operation of general or personal deterrence can be affected by the prominence of other principles in the circumstances of the case. Some examples are:

- Evidence of rehabilitation may mitigate the need for personal deterrence: *Stanford v R* [2007] NSWCCA 73 at [19].
- The motive for the commission of the offence may have a mitigating effect on the need for personal deterrence, but the more serious the offence the less weight can be given to motive as a mitigating factor: *R v Mitchell* [2007] NSWCCA 296 at [31]–[32].
- Where an offender acts under duress, considerations of deterrence, rehabilitation, retribution and community protection may be "appreciably different" than in usual cases: *Papadopoulos v R* [2007] NSWCCA 274 at [176]–[177].
- The offender is a person with a very low risk of re-offending: *R v Mauger* [2012] NSWCCA 51 at [39].
- If the offender's moral culpability is reduced because of profound childhood deprivation (see *Bugmy v The Queen* (2013) 249 CLR 571) so general deterrence is of less significance, but greater emphasis to community protection may be necessary: *Dungay v R* [2020] NSWCCA 209 at [141].

Mental condition and deterrence

General deterrence is attributed little weight in cases where the offender suffers from a mental condition or abnormality because such an offender is not an appropriate medium for making an example of: *Muldrock v The Queen* (2011) 244 CLR 120 at [53]–[54]; *R v Anderson* [1981] VR 155; *R v Scognamiglio* (unrep, 23/8/91, NSWCCA). In *R v Wright* (unrep, 28/2/97, NSWCCA) at [51] Hunt CJ at CL said that, while this was an accepted principle, if the offender acts with knowledge of what he is doing and with knowledge of the gravity of his actions, the moderation need not be great. See also *R v Letteri* (unrep, 18/3/92, NSWCCA), *R v Israil* [2002] NSWCCA 255 per Spigelman CJ at [21]–[23] and *R v Matthews* [2004] NSWCCA 112 Wood CJ at CL at [22]–[27]. In *R v Lawrence* [2005] NSWCCA 91, Spigelman CJ, when considering a case involving an applicant with diagnoses of antisocial personality disorder and polysubstance abuse — recognised in the *Diagnostic and Statistical Manual of Mental Disorders DSM (IV)*, 4th edn, American Psychiatric Association, 2000, Washington

DC — concluded that it was by no means clear that such mental conditions should always justify reducing the application of general deterrence. At [23] the Chief Justice said:

> Although *DSM(IV)* has come to be widely used … it should not be assumed that … [by] affixing a label to a mental condition … [the] condition is such as to attract the sentencing principle that less weight is to be given to general deterrence …

See further "The relevance of an offender's mental condition" in **Subjective matters at common law** at **[10-460]**.

Arguments about the limited utility of general deterrence

The effectiveness of general deterrence has always been the subject of debate. King CJ in *Yardley v Betts* (1979) 1 A Crim R 329 at 333 remarked:

> The courts must assume, although the evidence is wanting, that the sentences which they impose have the effect of deterring *at least some people* from committing crime. [Emphasis added.]

In *Munda v Western Australia* (2013) 87 ALJR 1035 at [54], the High Court acknowledged that general deterrence may have limited utility in some circumstances:

> It may be argued that general deterrence has little rational claim upon the sentencing discretion in relation to crimes which are not premeditated. That argument has special force where prolonged and widespread social disadvantage has produced communities so demoralised or alienated that it is unreasonable to expect the conduct of individuals within those communities to be controlled by rational calculation of the consequences of misconduct. In such cases it may be said that heavy sentences are likely to be of little utility in reducing the general incidence of crimes, especially crimes of passion. That having been said, there are three points to be made in response. First, the proper role of the criminal law is not limited to the utilitarian value of general deterrence. The criminal law is more than a mode of social engineering which operates by providing disincentives directed to reducing unacceptably deviant behaviour within the community. To view the criminal law exclusively, or even principally, as a mechanism for the regulation of the risks of deviant behaviour is to fail to recognise the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence …

The court's second point (at [43]) was to agree with an observation by McLure P in the WA Court of Appeal (*Western Australia v Munda* [2012] WASCA 164 at [65]) that "addictions ordinarily increase the weight to be given to personal deterrence (and/or community protection) because of the associated increase in the risk of reoffending". The fact that the offence was committed where the abuse of alcohol is common must be taken into account in assessing his personal moral culpability, but that consideration must be balanced with the seriousness of the appellant's offending.

The court's third point was to affirm (at [58]) Gleeson CJ's observation in *R v Engert* (unrep, 20/11/95, NSWCCA) at [68] that the:

> … interplay of the considerations relevant to sentencing may be complex … 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 ...

> It is therefore erroneous in principle to approach the law of sentencing as though automatic consequences follow from the presence or absence of particular factual circumstances …

The High Court in *Munda* also affirmed (at [59]) a statement in *Wong v The Queen* (2001) 207 CLR 584 at [74]–[76] adopted by the joint judgment in *Markarian v The Queen* (2005) 79 ALJR 160 at [37] that the description of the balance struck by a sentence as an "instinctive synthesis" is not used:

> … to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which, in the case of an offence like the one now under discussion, balances many different and conflicting features.

In the later case of *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 304 ALR 186, the court held that general and specific deterrence must play a primary role in assessing the appropriate civil penalty in cases of calculated contravention of legislation for commercial profit: at [65].

Deterrence to be applied notwithstanding criticisms

Before the enactment of s 3A(b) (which affirms the continued relevance of deterrence), Spigelman CJ said in *R v Wong* (1999) 48 NSWLR 340 at [127]–[128] that legislation would be required to change the court's approach to deterrence:

> There are significant differences of opinion as to the deterrent effect of sentences, particularly, the deterrent effect of marginal changes in sentence. Nevertheless, the fact that penalties operate as a deterrent is a structural assumption of our criminal justice system. Legislation would be required to change the traditional approach of the courts to this matter.
>
> Deterrence only works to the extent to which knowledge is transmitted to potential offenders about actual sentencing practice. Guideline judgments are a mechanism for increasing the efficiency of the transmission of such knowledge. Deterrence is an appropriate basis for promulgation of a guideline. (See *Henry* [(1999) 46 NSWLR 346] at [41] and [205]–[211]; *Police v Cadd* (1997) 94 A Crim R 466 at 511; and my address "Sentencing Guideline Judgments" 11 *CICJ* 5 at 10–11; 73 *ALJ* 876 at 880–881).

In *R v Miria* [2009] NSWCCA 68 at [8], the sentencing judge erred by omitting to incorporate any reflection of general deterrence in his sentencing assessment. The sentencing judge echoed the first part of Spigelman CJ's comments in *R v Wong* concerning the "significant differences of opinion as to the deterrent effect of sentences", but did not heed the Chief Justice's qualification which recognised the legal imperative to acknowledge general deterrence: *R v Miria* at [13]. There is no legal authority permitting a judge to dismiss general deterrence as a factor for assessment in sentencing: *R v Miria* at [11].

General deterrence may be controversial in relation to some offences, but this is not the case with respect to crimes involving the market or other forms of business dealings: *R v Pogson* (2012) 82 NSWLR 60 at [143].

In the context of civil penalties, the High Court has held that pecuniary penalties should be fixed according to what might reasonably be thought as appropriate to

serve as a real deterrent to the corporate offender and to its competitors: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 304 ALR 186 at [66].

[2-250] To protect the community from the offender: s 3A(c)

Parliament did not intend by the enactment of s 3A(c) to introduce a system of preventative detention contrary to the principles expressed by the High Court in *Veen v The Queen (No 2)* (1988) 164 CLR 465: *Aslett v R* [2006] NSWCCA 49 at [137].

At common law it was accepted that the various purposes of punishment were said to achieve the single or main purpose, that of protecting the community from crime: *R v Goodrich* (1952) 70 WN (NSW) 42; *R v Radich* [1954] NZLR 96; *R v Cuthbert* (1967) 86 WN (Pt 1) (NSW) 272 at 274; *Munda v Western Australia* [2013] HCA 31 at [54]. In *R v Zamagias* [2002] NSWCCA 17 Howie J said at [32]:

> It is perhaps trite to observe that, although the purpose of punishment is the protection of the community, that purpose can be achieved in an appropriate case by a sentence designed to assist in the rehabilitation of the offender at the expense of deterrence, retribution and denunciation. In such a case a suspended sentence may be particularly effective and appropriate.

In *Veen v The Queen (No 2)* the court held that while protection of the community is a consideration in the sentencing of offenders, a sentence should not be increased beyond what is proportionate to the crime merely to protect the community from the risk of further offending by the offender: at [472], per Mason CJ, Brennan, Dawson and Toohey JJ. The court added 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.

Generally, giving substantial weight to general and specific deterrence also serves to further community protection, including from the offender: *R v Dong* [2021] NSWCCA 82 at [44], [48]. However, where there are circumstances making the offender a potential danger and also a poor candidate for general and specific deterrence, protecting the community from the offender may require separate and express consideration, albeit consistently with *Veen v The Queen (No 2)*: *R v Dong* at [48]. In *R v Dong* the respondent was mentally ill, committed premeditated murder for no apparent motive, had poor prospects of rehabilitation, limited insight into his condition and while in custody had been involved in violence and had, on occasion, not taken his medication. In those circumstances, the need to protect the community was a matter requiring express consideration and the judge's failure to do so was erroneous: at [53]–[54].

For statutory exceptions to the principle prohibiting preventative detention in NSW, see: *Habitual Criminals Act* 1957, *Crimes (High Risk Offenders) Act* 2006 and *Terrorism (High Risk Offenders) Act* 2017. Proclamations under the *Habitual Criminals Act* are extremely rare: *Strong v The Queen* (2005) 224 CLR 1. The High

Court discussed preventative detention legislation in Australia in *Buckley v The Queen* (2006) 80 ALJR 605 at [2]; see also *Minister for Home Affairs v Benbrika* [2021] HCA 4 where the court considered the continuing detention order scheme in Div 105A of the *Criminal Code Act* 1995 (Cth) for Cth terrorism offenders.

The prior criminal record of an offender is a powerful factor to be considered when having regard to retribution, personal deterrence and the protection of the community: *R v Baxter* [2005] NSWCCA 234 at [39]. Although fresh punishment may not be imposed for past offences, it is legitimate to take into account the antecedent criminal history of the offender when it shows his or her dangerous propensity: *Veen v The Queen (No 2)*.

Predicting dangerous behaviour

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 on the other hand discussed the unreliability of predictions of criminal dangerousness in *Fardon v Attorney General for the State of Queensland* at [124]–[125].

Findings as to future dangerousness and likelihood of reoffending do not need to be established beyond reasonable doubt: *R v SLD* (2003) 58 NSWLR 589 at [40]. In *R v SLD*, a case where the 13 year old offender fatally stabbed a three year old girl, the sentencing judge took into account that the applicant poses "a significant risk of recidivism and of being a serious risk to the community in terms of potentially killing again or committing sexual offences". 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 *Knight v R* [2006] NSWCCA 292 at [30]. Earlier, in *R v Harrison* (unrep, 20/2/97, NSWCCA) 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.

[2-260] To promote the rehabilitation of the offender: s 3A(d)

Rehabilitation as a purpose of sentencing is aimed at the renunciation by the offender of his or her wrongdoing and the offender's establishment or re-establishment as an honourable law-abiding citizen: *Vartzokas v Zanker* (1989) 51 SASR 277 at 279. It has long been recognised as an important consideration in sentencing offenders, even in cases where the seriousness of the objective circumstances call for a custodial sanction. The concept of rehabilitation includes ensuring that an offender will not re-offend

by addressing underlying issues that bear upon the risk of recidivism: *R v Pogson* (2012) 82 NSWLR 60 at [103]. However, rehabilitation as a concept is broader than merely avoiding re-offending. In *R v Pogson*, McClellan CJ at CL and Johnson J at [124]–[125], Price, RA Hulme and Button JJ agreeing at [152], [155]–[156], stated:

> [R]ehabilitation has as its purpose the remodelling of a person's thinking and behaviour so that they will, notwithstanding their past offending, re-establish themselves in the community with a conscious determination to renounce their wrongdoing and establish or re-establish themselves as an honourable law abiding citizen: *Vartzokas v Zanker* at 279 (King CJ).
>
> In this sense, every offender is in need of rehabilitation. Some may need greater assistance than others.

Rehabilitation has been described as one of the cornerstones of sentencing discretion: *R v Cimone* [2001] NSWCCA 98 per Beazley JA at [19]; and "[t]he prominence to be given to rehabilitation of the young in determining sentence is recognised to the point of being almost axiomatic": *R v Ponfield* (1999) 48 NSWLR 327 per Grove J at [38].

Voluntary cessation of criminal activity provides strong evidence of rehabilitation: *R v Burns* [2007] NSWCCA 228 at [30].

In *R v Groombridge* (unrep, 30/9/90, NSWCCA) Wood J, with whom Hunt and McInerney JJ agreed, said at [8]–[9]:

> Judges need to be astute to detect cases where, after a poor record, a turning point or watershed in the life of a young offender has been reached, see *R v Caridi* CCA, unreported, 3 December 1987.
>
> There is a strong public interest in rehabilitation, both for the benefit of the community and the individual. That interest of rehabilitation may properly be taken into account in determining whether or not to impose a fixed term. Additionally, if a minimum and additional term are imposed, it may also be taken into account in relation to each leg of the sentencing process. The force of rehabilitation is not confined to the minimum term to the exclusion of the additional term or vice versa, for the reasons explained by this court in *R v Moffitt*, unreported, 21 June 1990 and *R v Chee Beng Lian*, unreported, 28 June 1990.

Sentencing judges must be vigilant to ensure that submissions to the effect that an offender is "at a turning point in his or her life", "has seen the error of his or her ways", or "has excellent prospects of rehabilitation", are not accepted uncritically, or at face value: *R v Govinden* [1999] NSWCCA 118 at [35].

Rehabilitation while at large

Although genuine rehabilitation occurring while the offender has been at large after absconding is not to be ignored entirely, it cannot be given the same significance as rehabilitation during delay not brought about by the applicant: *R v Warner* (unrep, 7/4/97, NSWCCA) per Simpson J; and *R v Nahle* [2007] NSWCCA 40 at [25], where the court confirmed that the respondent could not receive full consideration for his rehabilitation, due to his conduct in absconding.

Rehabilitation and delay between offence and sentencing

Where there has been a substantial delay in prosecution and the offender is successfully rehabilitated and has refrained from re-offending, those matters will be relevant to

determining a sentence that is proportionate to the offence and appropriate to punish the offender: *AJB v R* [2007] NSWCCA 51 at [29]–[30] (delay of 24 years); *Kutchera v R* [2007] NSWCCA 121 at [27]–[28]; *Wright v R* [2008] NSWCCA 91 at [14].

The non-parole period and rehabilitation

The parole system is an important influence for reform of those in gaol, a basis of hope for earlier release and an incentive for rehabilitation of the offender: *Bugmy v The Queen* (1990) 169 CLR 525 at 536. Non-parole periods are to be seen as a mitigation of punishment in favour of rehabilitation through conditional freedom by parole, once the sentencing judge has determined the minimum period of custody appropriate to the circumstances of the offence: *Bugmy v The Queen* at 536.

The non-parole period should not be seen as the shortest time required for the Parole Board to assess the prospects of rehabilitation. It must represent the minimum period the offender must spend in custody having regard to the purposes of punishment and objective and subjective features of the case: *Bugmy v The Queen*; *Power v The Queen* (1974) 131 CLR 623.

Rehabilitation cannot be used to justify longer sentences

Allowance cannot be made for rehabilitation by lengthening the overall sentence above that which is appropriate to reflect the objective seriousness of the offence: *R v Royal* [2003] NSWCCA 275. See further discussion of special circumstances in **Setting terms of imprisonment** at **[7-510]**.

Rehabilitation in prison

In *Muldrock v The Queen* (2011) 244 CLR 120 at [57], the High Court held that the Court of Criminal Appeal had erred in determining the structure of the sentence upon a view that the appellant would benefit from treatment while in full-time custody. This was because "full-time custody is punitive" and the availability of rehabilitative programs in prison is a matter for the executive: at [57].

[2-270] To make the offender accountable for his or her actions: s 3A(e)

This purpose is directed to making the offender liable to be called to account for his or her deeds. It has been recognised as a purpose of punishment that must be fulfilled: *R v Pogson* (2012) 82 NSWLR 60 at [98]. Making the offender accountable is an important purpose of sentencing: *R v Dawes* [2004] NSWCCA 363 at [40].

[2-280] To denounce the conduct of the offender: s 3A(f)

The purpose of denunciation is to condemn the offender for his or her conduct. Kirby J said in *Ryan v The Queen* (2001) 206 CLR 267 at [118]:

> *Denunciation and impartiality*: A fundamental purpose of the criminal law, and of the sentencing of convicted offenders, is to denounce publicly the unlawful conduct of an offender. This objective requires that a sentence should also communicate society's condemnation of the particular offender's conduct. The sentence represents "a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law". In the case of offences against children, which involve derogations from the fundamental human rights of immature, dependent and vulnerable persons, punishment also has an obvious purpose of reinforcing the standards which society expects of its members.

The notion of denunciation first appeared in *R v MacDonald* (unrep, 12/12/95, NSWCCA), where Gleeson CJ, Hunt CJ at CL and Kirby P said:

> In a case such as the present, it is important to bear in mind the denunciatory role of sentencing. Manslaughter involves the felonious taking of human life. This may involve a wide variety of circumstances, calling for a wide variety of penal consequences. Even so, unlawful homicide, whatever form it takes, has always been recognised by the law as a most serious crime. (See *R v Hill* (1981) 3 A Crim R 397 at 402.) The protection of human life and personal safety is a primary objective of the system of criminal justice. The value which the community places upon human life is reflected in its expectations of that system.
>
> … Society was entitled to have the conduct of the respondent denounced at least in that fashion.

The court in *R v King* [2009] NSWCCA 117 at [1] made express reference to s 3A(f) and *R v MacDonald* and said:

> Society is entitled to have the sentence imposed denounce the criminal conduct of the offender and, if the sentence does not do so, there has been an error in the exercise of the sentencing discretion.

A suspended sentence for an offence of sexual intercourse with a child under 10 years of age fell "far short" of appropriately denouncing the crime: *R v King* at [1].

The purpose of denunciation should be given more weight than in ordinary cases where a person such as a police officer, who is involved directly in the administration of justice, acts in a way that perverts the course of justice: *R v Nguyen* [2004] NSWCCA 332 at [43].

[2-290] To recognise the harm done to the victim of the crime and the community: s 3A(g)

Last reviewed: August 2023

In *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) No 2 of 2002* (unrep, 20/12/02, NSWCCA) at [59], Spigelman CJ said that it is arguable s 3A(g) "introduces a new element into the sentencing task". This purpose permits the sentencer to set out the content of the victim impact statements of third parties providing the limitations upon the use of this evidence (as then referred to in *R v Previtera* (1997) 94 A Crim R 76) is acknowledged: *SBF v R* [2009] NSWCCA 231 at [89]–[90].

At common law, courts are always required to take into account the impact of criminal behaviour on victims for the purposes of determining the culpability of the offender: *Siganto v The Queen* (1998) 194 CLR 656.

Where a crime involves multiple victims, acknowledgment should be made of the harm done to each victim, and this may require at least partial accumulation of the sentences: *Baroudi v R* [2007] NSWCCA 48 at [52]–[53] referring to *R v Wilson* [2005] NSWCCA 219 at [38]. See also *Carlton v R* [2009] NSWCCA 231 at [122].

The law in relation to victims is further discussed at **Victims and Victim Impact Statements** at **[12-790]**ff.

[2-297] Retribution

Last reviewed: August 2023

In *R v Gordon* (unrep, 7/2/94, NSWCCA) Hunt CJ at CL said at 468:

> Retribution, or the taking of vengeance for the injury which was done by the offender, is also an important aspect of sentencing: *R v Goodrich* (1952) 70 WN 42 at 43; *R v Cuthbert* (1967) 86 WN (Pt 1) 272 at 274; *R v Rushby* [1977] 1 NSWLR 594 at 598.

Not only must the community be satisfied that the offender is given his just desserts, it is important that the victim, or those who are left behind, also feel that justice has been done: *Ryan v The Queen* (2001) 206 CLR 267 per McHugh J at [46].

In *R v Milat* (unrep, 27/7/96, NSWSC), Hunt CJ at CL seemed to treat "retribution" and "vengeance" as equivalent concepts:

> … above all, these truly horrible crimes of murder demand sentences which operate by way of retribution, or (as it is sometimes described) by the taking of vengeance for the injury which was done by the prisoner in committing them. Not only must the community be satisfied that the criminal is given his just desserts, it is important that those whom the victims have left behind also feel that justice has been done.

However, the Canadian Supreme Court in *The Queen v CAM* [1996] 1 SCR 500 queried the "unfortunate association" between retribution and vengeance. Chief Justice Lamer at [80] explained that vengeance represents:

> … an uncalibrated act of harm upon another, frequently motivated by emotion and anger, as a reprisal for harm inflicted upon oneself by that person.

By contrast, retribution represents:

> … an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct.

Retribution and Form 1 offences

When taking additional offences into account on a Form 1, the penalty should be increased to recognise, inter alia, the community's entitlement to retribution for each of the other offences, although the focus remains on the primary offence: *Watts v R* [2007] NSWCCA 153 at [4]; *Yin v R* [2007] NSWCCA 350 at [19]; *R v Hamid* [2006] NSWCCA 302 at [130]. In *Watts v R* at [5], the court held:

> In the interests of all the victims of the other [Form 1] offences the community was entitled to retribution, but again the large number of other offences did not bring commensurate arithmetic increase in penalty.

[The next page is 2601]

Conditional release orders (CROs)

[4-700] Introduction

Conditional release orders (CROs) were introduced as a sentencing option on 24 September 2018 by the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act* 2017. They replace the good behaviour bonds which could be imposed with or without conviction under either ss 9 or 10(1)(b) *Crimes (Sentencing Procedure) Act* 1999 as in force before that date.

In the Second Reading Speech for the Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill and cognate legislation, NSW, Legislative Assembly, *Debates*, 11 October 2017, p 2, the Attorney General (NSW), the Hon M Speakman SC, said CROs were: "a community-based sentence for the lowest level of offending".

This chapter deals with CROs made on conviction. For CROs made without proceeding to conviction under s 10(1)(b), see also **Section 10(1)(b) conditional release orders operate with s 9** at **[5-010]**.

Summary of significant CRO provisions

A CRO:

- may be made without first obtaining an assessment report: s 17C(1). See **[4-720]**.
- must not be made by the Local Court in the offender's absence: s 25(1). See **[4-720]**.
- may be imposed with or without conviction: s 9(1). See **[4-710]**.
- if imposed without conviction is made under s 10(1)(b). See **[5-010]**.
- cannot be imposed together with a fine for the same offence: s 9(3). See **[4-720]**.
- cannot exceed 2 years: s 95(2). See **[4-720]**.
- can only be made with respect to a domestic violence offender if the order includes a supervision condition (s 4A(3)) and the court has considered the safety of any victim of the offence/s (s 4B(3)). See [4-710] and **[63-505]**.
- must include the two **standard conditions** and may be supplemented by **additional and further conditions**: s 97. See **[3-500]**.

[4-710] The legislative requirements

The entire statutory scheme for the 2017 sentencing reforms is contained in the relevant provisions of the following:

- *Crimes (Sentencing Procedure) Act* 1999, s 9, Pt 8
- *Crimes (Sentencing Procedure) Regulation* 2017, Pt 3
- *Crimes (Administration of Sentences) Act* 1999, Pt 4C
- *Crimes (Administration of Sentences) Regulation* 2014, Pt 10.

Section 9 *Crimes (Sentencing Procedure) Act* 1999 empowers a court to make a conditional release order (CRO) either with or without proceeding to a conviction. A CRO is defined in s 3(1) to mean an order referred to in s 9.

A court can only impose a CRO for a domestic violence offence if the order includes a supervision condition: s 4A. A court must consider the safety of the victim of the domestic violence offence before making a CRO for a domestic violence offender: s 4B(3).

The sentence procedures associated with making a CRO are set out in Pt 8. An offender's obligations with respect to the order are set out in Pt 10 *Crimes (Administration of Sentences) Regulation*.

The Local Court cannot impose a CRO in the offender's absence: s 25(1)(e) *Crimes (Sentencing Procedure) Act*.

The powers of a court with respect to the breach of a CRO are in Pt 4C *Crimes (Administration of Sentences) Act*.

[4-720] Procedures for making a CRO

Last reviewed: August 2023

Assessment reports

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

Unlike other community-based sentence options such as an ICO, a court is not required to obtain an assessment report before imposing a CRO: s 17C(1)(a) *Crimes (Sentencing Procedure) Act* 1999. The times at which the request may be made are set out in s 17C(1)(b) and relevantly include:

- after an offender has been found guilty and before imposing sentence: s 17C(1)(b)(i)
- during proceedings to impose, vary or revoke an additional or further condition of a CRO made in respect of the offender: s 17C(1)(b)(iii)
- during proceedings to correct a sentencing error: s 17C(1)(b)(iv)
- during proceedings to re-sentence an offender after a court has revoked the offender's CRO: s 17C(1)(b)(v).

Deciding to convict the offender and make a CRO

Section 9(2) requires a court deciding whether to convict an offender and make a CRO to have regard to the following:

(a) the person's character, antecedents, age, health and mental condition

(b) whether the offence is of a trivial nature

(c) the extenuating circumstances in which the offence was committed

(d) any other matter the court thinks proper to consider.

As a "general proposition" the fact a conviction is recorded is a matter of special significance: *R v Mauger* [2012] NSWCCA 51 at [37]–[39]. Courts recognise that recording a conviction involves a more serious sentencing option and reflects the gravity of an offence. For example, the court in *TC v R* [2016] NSWCCA 3 held that

despite the impact of a conviction for the offences on the applicant's employment prospects, the seriousness of the conduct and circumstances of the offending meant the sentencing judge properly exercised his discretion to record a conviction: *TC v R* at [59], [85]; see also *Hoffenberg v District Court of NSW* [2010] NSWCA 142 at [20]. Similarly, in *R v Stephenson* [2010] NSWSC 779, Fullerton J held the principle of general deterrence would be undermined if a conviction was not recorded for an insider trading offence: *R v Stephenson* at [67].

Sections 9(2) and 10(3) require a court to have regard to the same factors when determining whether to impose a conditional release order under s 9(1) or not to proceed to conviction under s 10(1). Therefore, the case law concerning the operation of s 10(3) may therefore guide the approach a sentencing court should take to this provision: see **Application of factors in s 10(3)** at **[5-030]**.

Duration and commencement

The maximum term of a CRO is 2 years: s 95(2).

A CRO commences on the day it is made: s 96.

Only one "relevant order" can be in force for an offender at the same time for the same offence: s 17F(1). Relevant orders are defined as ICOs, CCOs or CROs: s 17E. If an offender is subject to multiple orders at the same time, conditions of an intensive correction order (ICO) and community correction order (CCOs) take priority over a CRO: s 17F(4).

See further **Multiple orders** at **[3-520]**.

Fixing appropriate conditions

Section 97 provides that a CRO is subject to the following conditions:

(a) the standard conditions under s 98

(b) any additional conditions, as to which see s 99

(c) any further conditions, as to which see s 99A.

The court may limit the period during which an additional or further condition on a CRO is in force: ss 99(4), 99A(3).

A CRO must include the standard conditions which are that the offender must not commit any offence and must appear before the court if called on to do so at any time during the term of the CRO: s 98(1), 98(2).

Section 99(1) provides that a court may impose additional conditions on a CRO which are identified in s 99(2) and include:

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

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

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

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

(e) a supervision condition.

A supervision condition may be made in relation to an offender who was under 18 years when the condition was imposed. They are supervised by a juvenile justice officer: s 99(2)(e)(ii).

The following cannot be a condition of a CRO pursuant to s 99(3):

- home detention
- electronic monitoring
- curfew
- community service work order.

Further conditions may be imposed at the time of sentence but any further conditions cannot be inconsistent with the standard conditions of a CRO or any of the additional conditions (whether or not imposed on the CRO): s 99A.

The court may limit the period during which either additional or further conditions on a CRO are in force: ss 99(4), 99A(3).

Explaining the order

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

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

[4-730] Variation and revocation of CRO conditions

A court may vary or revoke any additional or further conditions imposed by it on a CRO if a community corrections officer, juvenile justice officer or the offender makes an application: ss 99(1), 99A(1) *Crimes (Sentencing Procedure) Act* 1999.

The application does not have to be dealt with by the court as constituted at sentence: s 100(3).

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

If the offender makes the application under ss 99 (for additional conditions) or 99A (for further conditions) the court may refuse to consider it if satisfied it is without merit: s 100(1).

If the community corrections officer (or juvenile justice officer) ***and*** the offender consent, an application can be dealt with in the parties' absence, in open court or in the absence of the public: s 100(2).

The offender must be given notice of the outcome of the application: cl 13(7)(a). If the court imposes, adds or varies a condition, it must take reasonable steps to

provide the offender with an explanation of their obligations under the condition and the consequences that may follow from a failure to comply: cl 13(8). However, failing to comply with cl 13(8) does not invalidate the order: cl 13(9).

Notice must be given to Community Corrections if the court:

- adds, varies or revokes a condition of a CRO that is subject to a supervision or community service work condition, or
- imposes a supervision condition on a CRO: cl 13(7)(b).

[4-740] Transitional provisions for orders in force before 24 September 2018

Schedule 2, Pt 29, cl 75 *Crimes (Sentencing Procedure) Act* sets out the relevant transitional provisions.

A s 10(1)(b) good behaviour bond imposed before 24 September 2018 is taken to be a CRO made under s 9 without proceeding to conviction and subject to the standard conditions of a CRO, any conditions imposed on the original bond and any other conditions prescribed by the regulations. The order expires on the date set by the sentencing court which imposed the original bond.

[The next page is 3521]

Dismissal of charges and conditional discharge

Note: This chapter needs to be read with Conditional release orders (CROs) at [4-700]ff.

[5-000] Introduction

Section 10 *Crimes (Sentencing Procedure) Act* 1999 identifies the following three orders which may be made when a court decides not to convict an offender:

- s 10(1)(a) order, dismissing the relevant charges
- s 10(1)(b) order, discharging the person under a conditional release order (CRO)
- s 10(1)(c) order, discharging the person on condition of participation in an intervention program.

A CRO may be made under s 10(1)(b) if the court is satisfied under s 10(2):

(a) that it is inexpedient to inflict any punishment (other than nominal punishment) on the person, or

(b) that it is expedient to discharge the person under a CRO.

An order under s 10(1)(c) may be made if the court is satisfied that it would reduce the likelihood of the person committing further offences by promoting the treatment or rehabilitation of the person: s 10(2A).

Section 10(1) orders can be made with or without conditions: see **[4-720]** in **Conditional release orders (CROs)**.

Section 10(3) sets out the factors a court must consider when determining whether or not to make such an order: see **Application of factors in s 10(3)** at **[5-030]**.

In *Hoffenberg v District Court of NSW* [2010] NSWCA 142 at [8], Basten JA explained the structure of s 10:

> Section 10 is relevantly broken into three parts, the first conferring a power to make an order of a particular kind; the second prescribing that the order "may be made" if the court is satisfied of certain matters, although not stating that the court must be so satisfied to make such an order, and the third identifying factors which, in considering whether to make such an order, the court "is to have regard to". While the logic of the new structure is apparent, its effect is obscured.

[5-005] Orders made under s 10(1)(b) before 24 September 2018

A good behaviour bond imposed without proceeding to conviction pursuant to s 10(1)(b) was replaced with a conditional release order (CRO) on 24 September 2018 when the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act* 2017 commenced.

A s 10(1)(b) bond in force before 24 September 2018 is subject to the transitional provision in Sch 2, Pt 29, cl 75 *Crimes (Sentencing Procedure) Act* 1999, which provides that this type of good behaviour bond is taken to be a CRO made under s 9 without proceeding to conviction: cl 75(2). The order will expire on the date set by the sentencing court which imposed the original bond.

Pursuant to Sch 2, Pt 29, cl 75(3), s 10(1)(b) orders in force before 24 September 2018 are subject to:

- standard CRO conditions
- any conditions imposed on the original bond under s 95(c) in force before 24 September 2018 *and*
- any other conditions prescribed by the regulations.

[5-010] Power to make s 10(1)(b) orders operates with s 9

Last reviewed: August 2023

Under s 9 *Crimes (Sentencing Procedure) Act* 1999, a court may make a conditional release order (CRO) if it determines not to convict the offender but make an order under s 10(1)(b). A CRO, whether or not a conviction is recorded, is limited to a maximum period of 2 years: s 95(2). The only relevant distinction between a CRO made under s 9 and a s 10(1)(b) order is that a conviction is not recorded when the order is made under s 10(1)(b).

As a "general proposition", the fact a conviction is recorded is a matter of special significance: *R v Mauger* [2012] NSWCCA 51 at [37]–[39]. However, the fact a conviction is not recorded should not "dilute or downgrade the significance of the imposition of a [s 10] bond": *R v Mauger* per Harrison J (Beazley JA and McCallum J agreeing) at [37]. The court observed there were onerous consequences if an offender failed to comply with an order made under the previous s 10(1)(b) and it should not be assumed that because a court decided not to record a conviction that the sentence is automatically inadequate or lenient: *R v Mauger* at [37].

See **Procedures for making a CRO** at **[4-720]** for the various statutory requirements.

[5-020] Use of s 10 orders generally

Last reviewed: August 2023

The task of the court applying s 10 was described by McClellan CJ at CL as a "deliberative process" in *Hoffenberg v District Court of NSW* [2010] NSWCA 142 at [29].

Sentencers should be particularly cautious in the use of s 10 orders since excessive or inappropriate use can undermine confidence in the administration of justice. Section 10 provides a useful safety valve for ensuring that justice can be served in circumstances where, despite a breach of the law, there are such extenuating circumstances or the matter is so trivial that punishment does not seem appropriate. In *R v Ingrassia* (1997) 41 NSWLR 447 at 449, Gleeson CJ said of the statutory predecessor of s 10, s 556A *Crimes Act*:

> The legal and social consequences of being convicted of an offence often extend beyond any penalty imposed by a court. As Windeyer J said in *Cobiac v Liddy* (1969) 119 CLR 257 at 269, "a capacity in special circumstances to avoid the rigidity of inexorable law is of the very essence of justice".

In *R v Mauger* [2012] NSWCCA 51, the court applied *R v Ingrassia* and held that the legal and social consequences of recording a conviction far outweighed the requirements of punishment, denunciation and (specific and general) deterrence: *R v Mauger* at [40]; see also **[5-030] Application of factors in s 10(3)** .

Impermissible to use s 10 order merely to circumvent operation of statute

It is improper and undesirable to dismiss a matter under s 10(1) without a conviction merely to avoid some other legislative provision which is otherwise applicable: *R v Fing* (unrep, 4/10/94, NSWCCA); *R v Stephenson* [2010] NSWSC 779 at [66]. In *R v Fing*, the former s 229 *Corporations Law* 1989 (Cth) provided that a person convicted of serious fraud could not, within five years after conviction, manage a corporation without the leave of the court (see now Pt 2D.6 *Corporations Act* 2001 (Cth)). The recording of a conviction in effect prevented the applicant from being involved in the management of corporations he established. He argued that it was an added penalty which should be avoided by applying the statutory predecessor of s 10, s 556A. The court rejected this submission, holding that if the appropriate penalty is a fine (other than a nominal fine), the appropriate course is to convict the offender and impose a fine rather than apply s 556A (rep).

[5-030] Application of factors in s 10(3)

Last reviewed: August 2023

Section 10(3) provides:

> In deciding whether to make an order referred to in subsection (1), the court is to have regard to the following factors:
>
> (a) the person's character, antecedents, age, health and mental condition,
>
> (b) the trivial nature of the offence,
>
> (c) the extenuating circumstances in which the offence was committed,
>
> (d) any other matter that the court thinks proper to consider.

The court *must* have regard to all of the factors set out in s 10(3) in deciding whether to make an order under s 10. Notwithstanding the phrase "the court is to have regard to", the factors in s 10(3) are not in truth mandatory considerations as para (d) includes "any other matter that the court thinks proper to consider" and, as such, the purpose of s 10 is to ensure that the court considers the full range of factors it considers relevant: *R v Mauger* at [41]. Care must still be taken to expressly consider each s 10 factor: *R v Paris* [2001] NSWCCA 83 at [42]. It is impossible and inappropriate to delineate all the situations that could warrant an order under s 10 notwithstanding the objective seriousness of the offence. Extenuating circumstances may or may not justify an order under s 10. For example, where a person is suddenly compelled in an emergency situation to drive someone to hospital.

In *R v Mauger*, the subjective feature of the offender's employment, where his contract of employment enabled the termination of his employment upon being charged with a criminal offence if his employer reasonably believed his employment could be negatively affected was found to be a matter the court was entitled to take into account pursuant to s 10(3)(d): at [28]. The court rejected the Crown's argument that being charged automatically led to dismissal and therefore was not relevant to the court's assessment of the impact of a conviction: *R v Mauger* at [27]–[28].

The scope for the application of s 10 decreases where the offence is objectively serious and general deterrence and denunciation are important factors in sentencing for the offence: *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 (the High Range PCA Guideline Judgment) per Howie J at [131]–[132] (see, for example, *TC v R* [2016] NSWCCA 3 at [58] involving historical child sexual assault committed by a juvenile offender where a conviction and s 9 good behaviour bond (as was then available) was held not to be unreasonable or plainly unjust).

However, the focus must be on the particular conduct of the offender and the circumstances of the offending, rather than the "abstract" offence itself: *R v Mauger* at [19] applying *Walden v Hensler* (1987) 163 CLR 561 at 577. At times, the requirement of punishment, denunciation or deterrence are outweighed by the non-recording of a conviction: *R v Mauger* at [40]. See also, for example, the "unique" case of *R v AB* [2022] NSWCCA 3 at [53]–[54], [60] where a conditional release order without conviction under s 10(1)(b) imposed for a number of child sexual offences was held not to be manifestly inadequate.

First offenders

It has been held that the dismissal of charges against first offenders in certain circumstances is appropriate. This power reflects the willingness of the legislature and the community to provide first offenders, in certain circumstances, a second chance to maintain a reputation of good character: *R v Nguyen* [2002] NSWCCA 183 at [50]. In *R v Ingrassia* (1997) 41 NSWLR 447 at 449, the court acknowledged that the "legal and social consequences of being convicted of an offence often extend beyond any penalty imposed by a court" and the fact that a person is subject to these additional adverse consequences is a relevant consideration in the exercise of the statutory discretion.

"Mental condition" in s 10(3)(a)

For a court to take into account "mental condition" in s 10(3)(a), it is not necessary that "the illness was causally connected with the offence": *David Morse (Office of State Revenue) v Chan* [2010] NSWSC 1290 at [66]. Nor is it restricted to the offender's mental condition at the time of the offence: *Morse v Chan* at [66]. Section 10(3)(a) permits consideration of the consequences of suffering the mental condition and allows the court to have regard to offender's condition "at the time of sentence": *Morse v Chan* at [74].

"Trivial nature of the offence" in s 10(3)(b)

The decision of *Walden v Hensler* (1987) 163 CLR 561, which dealt with a materially similar provision to s 10 (s 675A Criminal Code (Qld), as it was then), has been used to inform the meaning of "the trivial nature of the offence". Brennan J said, at [25]:

> Triviality must be ascertained by reference to the conduct which constitutes the offence for which the offender is liable to be convicted and to the actual circumstances in which the offence is committed. It was erroneous to ascertain the triviality of the offence by reference simply to the statutory provision which prescribes the maximum penalty.

In *R v Paris* [2001] NSWCCA 83 at [42], Simpson J said:

> It is not necessary to the application of s 10 that the offence be characterised as trivial; the four factors mentioned in subs 3 are, in my view, intended to be disjunctive and nonexhaustive.

R v Paris is to be contrasted with the majority view in *R v Piccin (No 2)* [2001] NSWCCA 323 at [22] where the court held it is necessary to find that the offence is trivial before a s 10 order can be made. But in *Chin v Ryde City Council* [2004]

NSWCCA 167, the court accepted the appellant's submission, based upon Hulme J's dissenting opinion in *R v Piccin (No 2)* at [25]. Hodgson JA said, in *Chin v Ryde City Council*, at [38]: "… s 10 may be applied even if the offence is not found to be trivial".

In *Morse v Chan*, above at [65], Schmidt J observed that the approach to the construction of s 10(3) by the majority in *R v Piccin (No 2)* does not accord with the High Range PCA Guideline Judgment at [131] (quoted below).

[5-035] Corporations and s 10 orders

Section 21(1) *Interpretation Act* 1987 provides that "person" in any Act or instrument includes an individual, a corporation and a body corporate or politic. Section 10 dismissals have been imposed on corporations: see *DPP (NSW) v Roslyndale Shipping Pty Ltd* (2003) 59 NSWLR 210; *Environment Protection Authority v Allied Industrial Services Pty Ltd* [2005] NSWLEC 501 at [35].

The Commonwealth equivalent to s 10 — s 19B *Crimes Act* 1914 (Cth) — has also been applied to corporations: see *R v On Clinic Australia Pty Ltd* (unrep, 6/11/96, NSWCCA).

For a discussion of the application of s 10 to corporations, see *Environment Protection Authority v Fernando* [2003] NSWLEC 281 at [32].

Section 10 orders with conditions have not been imposed on corporations. An order with conditions may present practical problems including how proceedings for any breach of a condition would be conducted.

[5-040] Use of s 10 orders for particular offences

High range PCA offences

It has been held that an order dismissing a charge under s 10 has been used too frequently in high range prescribed content of alcohol (PCA) cases and a guideline for sentencing for this offence has been promulgated: *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 (the High Range PCA Guideline Judgment). In that case, Howie J (Spigelman CJ, Wood CJ at CL, Grove and Dunford JJ agreeing) said at [130]–[132]:

> I accept that s 10 must apply to the offence of high range PCA and there may be cases where, notwithstanding the objective seriousness of the offence committed, it is appropriate in all the circumstances to dismiss the charge or to discharge the offender. But those cases must in my view be rare. They must be exceedingly rare for a second or subsequent offence. I accept that the court must concentrate on the particular conduct of the offender and the circumstances of offending rather than on the nature of the offence in determining whether the particular offence before the court is trivial: *Walder v Hensler* (1987) 163 CLR 561 at 577. I am prepared to acknowledge the possibility that there may be cases where the offending is technical (rather than trivial), there being no real risk of damage or injury arising from the driving, so that the highly exceptional course in making an order under the section would be justified.
>
> The court must also have regard to all of the criteria in s 10(3) in determining whether a dismissal of the offence or a discharge of the offender is appropriate: *R v Paris* [2001] NSWCCA 83. I recognise that there can be cases where there were such

> extenuating circumstances that a dismissal or a discharge under s 10 might be justified. It is impossible and inappropriate to delineate the situations in which an order under s 10 might be warranted notwithstanding the objective seriousness of the offence. One example might be where the driver becomes compelled by an urgent and unforseen circumstance to drive a motor vehicle, say, to take a person to hospital.
>
> But where the offence committed is objectively a serious one and where general deterrence and denunciation are important factors in sentencing for that offence, the scope for the operation of the section decreases. The section must operate in the context of the general principle that the penalty imposed for any offence should reflect the objective seriousness of the offence committed. To recognise this fact is not to impose an undue restriction upon the section or to change the criteria for its operation on an offence by offence basis. Such an approach would clearly be erroneous. It is simply to apply normal sentencing principles to the offence under consideration. However, just as the discretion inherent in the section cannot be limited by the application of some overreaching general principle, neither can it be broadened simply because a court does not agree with Parliament's view of the seriousness of a particular offence or believes that in general the penalties imposed under the scheme of the legislation are unduly harsh or unpalatable.

A study by the Judicial Commission of NSW in 2005 found that since the High Range PCA Guideline Judgment, and the empirical research and educational programs leading up to it, there had been a decline in the use by magistrates of s 10 dismissals for high range PCA offences: P Poletti, "Impact of the High Range PCA Guideline Judgment on sentencing drink drivers in New South Wales", *Sentencing Trends & Issues*, No 35, Judicial Commission of NSW, 2005. This trend was confirmed in a later study: M Karpin and P Poletti, "Common offences in the NSW Local Court: 2007", *Sentencing Trends & Issues*, No 37, 2008.

Intentionally or recklessly destroying or damaging property

In *Hoffenberg v District Court of NSW* [2010] NSWCA 142 at [25], it was held that a finding of the Chief Judge (in a severity appeal from the Local Court) that a deliberate act of vandalism placed the s 195(1)(a) *Crimes Act* 1900 offence beyond the "trivial" was open. The Chief Judge discharged the obligation to consider the statutory factors in s 10(3) and "there was no error in the deliberative process followed": per McClellan CJ at CL at [29].

Aggravated break and enter with intent to commit a serious indictable offence

In *R v Lord* [2001] NSWCCA 533 at [18], it was held that the sentencing judge erred in finding extenuating circumstances under s 10(3). There was a failure to approach s 10 with the required two-step process. Nor did her Honour identify the provision within s 10 to which she had regard. Inadequate weight was given to the objective seriousness of the offence by reason of the offender's subjective circumstances.

Affray

In *R v Goh* [2002] NSWCCA 234, a Crown appeal where a charge of affray was dismissed pursuant to the provisions of s 10, Blanch AJ (Spigelman CJ and Adams J agreeing) observed at [15]:

- the exercise of a discretion not to record a conviction under s 10 is not common for an offence tried on indictment
- there are strong policy reasons for imposing sentences reflecting general deterrence where an affray takes place in an area with an unfortunate history of violence.

However, taking into account the respondent's antecedents and youth, the extenuating circumstances, and the sentencing judge's characterisation of the offence as at the bottom of the scale of seriousness, it could not be said that the order of the judge was manifestly inadequate: *R v Goh* at [15].

Marine pollution

There is no practice in cases of marine pollution for a "blameless" master to be discharged without conviction whenever the company is convicted. Each case requires the exercise of discretion on the basis of the entire circumstances: *Thorneloe v Filipowski* (2002) 52 NSWLR 60 at [113]. It was further held in that case that even in the context of a strict liability offence like s 27 *Marine Pollution Act* 1987, the risk to which society was subjected is a proper matter to be taken into account when considering whether the charge should be dismissed under s 10: *Thorneloe v Filipowski* at [156].

Thorneloe v Filipowski was applied in *DPP (NSW) v Roslyndale Shipping Pty Ltd* (2003) 59 NSWLR 210, where the court held that a dismissal of a strict liability pollution offence was a permissible sentencing option. The sentencing judge's conclusion that "neither of the defendants could have done anything to avert the event that occurred" was open to her Honour. There was no visible warning of a character sufficient, in all the circumstances, to put the respondent on notice of a likely equipment failure: *DPP (NSW) v Roslyndale* at [21], [23].

Sexual intercourse with child between the age of 10 and 16 yrs

In *R v KNL* (2005) 154 A Crim R 268, the court held that the sentencing judge erred in the manner he approached the imposition of the s 10 bond (as then available) by failing to observe the factors a court is to have regard to in deciding whether to make an order under s 10. One of these factors is whether the offence is trivial: s 10(3)(b). The Crown referred to *R v McClymont* (unrep, 17/12/92, NSWCCA) where the general policy underlying the response to offences of this nature was said to reside in the need to protect children from sexual conduct, even though they may be willing participants. The NSWCCA re-sentenced the respondent by recording a conviction and imposing a s 9 bond (as then available).

[5-050] Meaning and effect of s 10 orders

Section 10(4) provides:

> An order under this section has the same effect as a conviction:
>
> (a) for the purposes of any law with respect to the revesting or restoring of stolen property, and
>
> (b) for the purpose of enabling a court to give directions for compensation under Part 4 of the *Victims Compensation Act 1996*, and
>
> (c) for the purpose of enabling a court to give orders with respect to the restitution or delivery of property or the payment of money in connection with the restitution or delivery of property.
>
> **Note.** Certain other Acts and regulations contain provisions to the effect that an order under this section made in respect of an offence is to be treated as a conviction for certain

> purposes of the legislation concerned. Accordingly, those provisions apply to an order under subsection (1)(b) in respect of the offence and a conditional release order made pursuant to that paragraph.

A person subject to a s 10 order "has the same right to appeal on the ground that the person is not guilty of the offence as the person would have had if the person had been convicted of the offence": s 10(5).

In *R v Ingrassia* (1997) 41 NSWLR 447 at 450, Gleeson CJ stated, albeit in the context of s 556A (long since repealed), that:

> … it is contrary to common law principle that a person who has not been convicted of an offence should be punished by order of a court.

It follows that conditions which may be imposed in respect of a conditional release order made under s 10(1)(b) should not be of such a nature that they involve further punishment.

There may be statutory exceptions to this common law principle. These include those specifically referred to in s 10(4). For example, a condition that an offender pay a donation cannot be made under s 10(1)(b): *R v Ingrassia* (1997) 41 NSWLR 447 at 450. Chief Justice Gleeson said of the statutory predecessor of s 10 that it "is not a provision to be used for the purpose of soliciting gifts, whether to the revenue, to charities, or to anyone else": *R v Ingrassia* at 451.

[5-060] Demerit points and s 10 orders

Section 31(4) *Road Transport Act* 2013 states that the Authority (as defined in s 4(1) *Road Transport Act*) cannot record demerit points against a person in respect of an offence if the court makes an order under s 10 *Crimes (Sentencing Procedure) Act* 1999.

[5-070] Restriction on use of s 10 orders for s 203 Road Transport Act 2013

Under s 203 *Road Transport Act* 2013 — a section dealing with a court's power to impose penalties and disqualify offenders from holding a driver's licence — there is a restriction on the court's power to make an order under s 10 where the offender has had the benefit of one in the previous five years.

Section 203 provides:

> (1) Section 10 of the *Crimes (Sentencing Procedure) Act* 1999 does not apply if a person is charged before a court with a applicable offence if, at the time of or during the period of 5 years immediately before the court's determination in respect of the charge, that section is or has been applied to or in respect of the person in respect of a charge for another applicable offence (whether of the same or a different kind).
>
> (2) Each of the following is an "applicable offence" for the purposes of subsection (1):
>
> (a) an offence against section 110, 111, 112(1), 118 or 146 or clause 16(1)(b), 17 or 18 of Schedule 3,
>
> (b) an offence against section 117(1) of driving negligently (being driving occasioning death or grievous bodily harm),
>
> (c) an offence against section 117(2) of driving a motor vehicle on a road furiously or recklessly or at a speed or in a manner which is dangerous to the public,

(d) an offence under section 52AB of the *Crimes Act* 1900,

(e) (repealed)

(f) (repealed)

(g) an offence against a provision of an Act or statutory rule that is a former corresponding provision in relation to a provision referred to in paragraph (a), (b), (c) or (d),

(h) an offence of aiding, abetting, counselling or procuring the commission of an offence referred to in paragraph (a), (b), (c), (d) or (g).

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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: August 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 Court of Criminal Appeal 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: August 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: August 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: August 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: August 2023

Section 44(2) and (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 which case reasons must be recorded for the decision).

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: August 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: August 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 **Aggregate sentences** at **[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] 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: August 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]; *GP v R* [2017] NSWCCA 200 at [16]; *Harris v R* [2023] NSWCCA 44 at [19], [30]; *Rizk v R* [2020] NSWCCA 291 (which also considers s 44(2B)).

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]; *Harris v R* [2023] NSWCCA 44 at [19]. 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: August 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: August 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: August 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. Section 46(1) does not apply if a court imposes an aggregate sentence of imprisonment in respect of two 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: August 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: August 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: August 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: August 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: August 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: August 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: August 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 and Cognitive Impairment Forensic Provisions Act* 2020: s 54 *Crimes (Sentencing Procedure) Act*.

[The next page is 4721]

Standard non-parole period offences — Pt 4 Div 1A

Unless stated otherwise, section numbers below refer to the *Crimes (Sentencing Procedure) Act* 1999.

[7-890] What is the standard non-parole period?

Last reviewed: August 2023

The standard non-parole period is a legislative guidepost to be considered when sentencing. Section 54A(2) provides it represents the non-parole period for an offence "that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness." The standard non-parole period for an offence is the non-parole period set out in the Table in Pt 4, Div 1A: s 54A(1).

"Objective factors" is not defined in the statute and, when assessing objective seriousness, general sentencing principles apply. See **Factors relevant to assessing objective seriousness** at **[10-012]**.

The Table

The offence to which a particular standard non-parole provision applies is identified by the section of the statute which is found opposite the standard non-parole period in the particular Table item: *Hosseini v R* [2009] NSWCCA 52 at [48]. The words within the brackets in the Table items do not identify or limit in any way the offence to which the standard non-parole period applies: *Hosseini v R* at [48]. Consequently, the judge did not err by finding in *Hosseini v R* that item 17 in the Table applies to the offence of knowingly taking part in the manufacture of a prohibited drug when the words in brackets in the Table described the offence under s 24(2) as "manufacture or production of commercial quantity of prohibited drug".

[7-900] Consideration of the standard non-parole period in sentencing

Last reviewed: August 2023

Section 54B governs how a court is to consider a standard non-parole period in the sentencing exercise and provides as follows:

> **54B(1)** This section applies when a court imposes a sentence of imprisonment for an offence, or an aggregate sentence of imprisonment with respect to one or more offences, set out in the Table to this Division.
>
> **54B(2)** The standard non-parole period for an offence is a matter to be taken into account by a court in determining the appropriate sentence for an offender, without limiting the matters that are otherwise required or permitted to be taken into account in determining the appropriate sentence for an offender.
>
> **54B(3)** The court must make a record of its reasons for setting a non-parole period that is longer or shorter than the standard non-parole period and must identify in the record of its reasons each factor that it took into account.
>
> **54B(4)** When determining an aggregate sentence of imprisonment for one or more offences, the court is to indicate and make a written record of, for those offences to

> which a standard non-parole period applies, the non-parole period that it would have set for each such offence to which the aggregate sentence relates had it set a separate sentence of imprisonment for that offence.
>
> **54B(5)** If the court indicates under subsection (4) that it would have set a non-parole period for an offence that is longer or shorter than the standard non-parole period for the offence, the court must make a record of the reasons why it would have done so and must identify in the record of its reasons each factor that it took into account.
>
> **54B(6)** A requirement under this section for a court to make a record of reasons for setting a non-parole period that is longer or shorter than a standard non-parole period does not require the court to identify the extent to which the seriousness of the offence for which the non-parole period is set differs from that of an offence to which the standard non-parole period is referable.

The removal of the phrase "is to set" from s 54B(2) evinces an intention that a standard non-parole period is not to have determinative significance in the sentencing exercise. Section 54B(2) (quoted above) provides it is "a matter to be taken into account by a court in determining the appropriate sentence".

The standard non-parole period is to take its place as a legislative guidepost in accordance with *Muldrock v The Queen* (2011) 244 CLR 120 at [27]. The High Court in *Muldrock* at [26] advocated a holistic reading and application of s 54B consistent with the approach described by McHugh J in *Markarian v The Queen* (2005) 228 CLR 357 at [51] whereby the judge identifies all the factors that are relevant to the sentence, discusses their significance, and then makes a value judgment as to what is the appropriate sentence.

The following terms of s 54B(2) are particularly important: "… *without limiting the matters that are otherwise required or permitted to be taken into account in determining the appropriate sentence for an offender*", accommodating the separate but related assessments of the objective seriousness of an offence and the moral culpability of an offender as part of the exercise of instinctive synthesis: *Tepania v The Queen* [2018] NSWCCA 247 at [112]–[119]. The section also acknowledges that other sentencing factors, sometimes powerful, can impact upon the sentence reached by the court: *Bugmy v The Queen* (2013) 249 CLR 571 at [44]–[46]. For further discussion of the separate but related assessments of objective seriousness and moral culpability see:

- **Objective and subjective factors at common law** at **[9-700]**;
- **Factors relevant to assessing objective seriousness** at **[10-012]**; and
- **Subjective matters at common law** at **[10-400]**.

[7-920] Findings as to where an offence fits relative to the middle of the range

Last reviewed: August 2023

The High Court held in *Muldrock v The Queen* (2011) 244 CLR 120 at [28] that Div 1A does not require or permit a court to embark upon a two-stage approach to sentencing, involving first assessing whether the offence falls in the middle range of objective seriousness and, if it does, asking whether there are matters which warrant a longer or shorter non-parole period.

Section 54B(6) puts that into legislative effect. It provides that the requirement to give reasons for setting a non-parole period that is longer or shorter than the standard

non-parole period does not require the court to "identify the extent to which the seriousness of the offence for which the non-parole period is set differs from that of an offence to which the standard non-parole period is referable".

While a sentencing judge is still required to assess the objective seriousness as an essential element of instinctive synthesis, they are not obliged to specify the seriousness of an offence by reciting "some mantra invoking comparisons about where the sentence… falls on some hypothetical arithmetical or geometrical continuum of seriousness". While it would not be an error to do so, a failure to do so does not constitute error: *DH v R* [2022] NSWCCA 200 at [31]–[33]; s 54B(6). Yehia J agreeing also stated there is no requirement for a sentencing judge to utilise the concept of mid-range offending and assess where on the scale of seriousness the offending, for the offences carrying a standard non-parole period, lay: at [58]–[60]; *Muldrock v The Queen* at [29].

See also "Judge's findings of objective seriousness of offence" in **Factors relevant to assessing objective seriousness** at **[10-012]**.

[7-930] Exclusions and inclusions from Pt 4 Div 1A

Last reviewed: August 2023

The standard non-parole scheme does not apply to:

- offences dealt with summarily: s 54D(2)
- the sentencing of an offender to imprisonment for life or for any other indeterminate period, or to detention under the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020: s 54D(1)
- offenders who were under 18 years at the time the offence was committed: s 54D(3) (inserted by the *Crimes Amendment (Sexual Offences) Act* 2008, which commenced on 1 January 2009). If a court is sentencing an offender who was under 18 years at the time a standard non-parole period offence was committed, it is to "disregard [the standard non-parole] … entirely" and even "oblique usage … entails error": *BP v R* (2010) 201 A Crim R 379 at [36]; citing *McGrath v R* (2010) 199 A Crim R 527 at [37], [60]; *AE v R* [2010] NSWCCA 203 at [23].

Standard non-parole periods apply to the offences listed in the Table from the specific date each was inserted: *R v Lane* [2011] NSWSC 289 at [60]–[61] (see legislative history at **[7-970]** below). It is an error to take into account a standard non-parole period where the statutory scheme does not apply: *R v Ohar* (2004) 59 NSWLR 596 at [84]; *R v Wilkinson* [2004] NSWCCA 468 at [24].

When sentencing for child sexual assault offences, the standard non-parole period is the standard non-parole period (if any) that applied at the time of the offence: s 25AA(2). This includes where a standard non-parole period was increased after the offence was committed, and particular transitional provisions appear to provide otherwise: *AC v R* [2023] NSWCCA 133; *GL v R* [2022] NSWCCA 202 (both in relation to offences under s 61M(2) (rep) *Crimes Act*); see also *Smith v R* [2022] NSWCCA 88.

Generally standard non-parole periods do not apply to attempts, under s 344A *Crimes Act* 1900, to commit offences in the Table: *R v DAC* [2006] NSWCCA 265 at [10].

Nor do they apply to offenders charged with conspiracy to commit an offence: *Diesing v R* [2007] NSWCCA 326 at [53], [55]; *SAT v R* [2009] NSWCCA 172 at [51]. However, where the attempt or conspiracy is part of the substantive offence, for example, attempt to murder contrary to ss 27, 28, 29 or 30 *Crimes Act*, conspiracy to murder contrary to s 26 *Crimes Act*, or attempt to supply a commercial or large commercial quantity of prohibited drug under ss 3(1) (definition of "supply") and 25(2) *Drug Misuse and Trafficking Act* 1985, the standard non-parole period provisions will apply: *Amiri v R* [2017] NSWCCA 157 at [6]–[9].

The courts are yet to determine whether the standard non-parole period provisions apply to attempts, under s 51CA *Firearms Act* 1996, to commit the *Firearms Act* offences specified in the Table: *Amiri v R* at [9].

The CCA has considered the effect of a judge making reference to a standard non-parole period which is inapplicable: *Nguyen v R* [2017] NSWCCA 39 at [105]–[112]; *Potts v R* [2017] NSWCCA 10 at [2]–[3], [8]–[10], [37]–[41]; *HJ v R* [2014] NSWCCA 21. Mere reference to a standard non-parole period by itself, and without more, does not always carry with it a finding of material error leading to re-sentencing: *Nguyen v R* at [103]–[104], [113]; *HJ v R* at [49]–[53]. The proper approach is for the CCA to enquire into all the facts and circumstances of the matter, the terms in which the standard non-parole period has been mentioned, erroneously, and to ask whether this court is satisfied that the erroneous reference had any effect upon the sentence. That effect does not have to be, but may be, a direct effect: *Nguyen v R* at [117].

[7-940] Use of cases decided before Muldrock v The Queen

Last reviewed: August 2023

The Court of Criminal Appeal has accepted that for comparative sentencing purposes cases decided before *Muldrock v The Queen* (2011) 244 CLR 120 "should be approached with caution": *Toole v R* (2014) 247 A Crim R 272 per Hulme AJ at [78]; see also *Atai v R* [2014] NSWCCA 210 at [14]–[18]. The court presumes "that most, if not all of them, were influenced by the erroneous *R v Way* principles": *Wang v R* [2017] NSWCCA 61 per RA Hulme J at [16] applying Simpson J in *Davis v R* [2015] NSWCCA 90 at [32]–[33]. This is because it is not to be lightly concluded that a sentencing judge, during the relevant period between *R v Way* (2004) 60 NSWLR 168 and *Muldrock v The Queen*, departed from the principles in *R v Way*. This is particularly so where the offender's conviction is after trial: see *R v Way* at [122]. Even if the language of *R v Way* is not reproduced in the sentencing remarks, there is a strong likelihood that it governed the sentencing: *Davis v R* at [33].

In *KB v R* [2015] NSWCCA 220 the sentencing judge had regard to two comparable cases (*RJA v R* (2008) 185 A Crim R 178 and *Ingham v R* [2011] NSWCCA 88) subsequently reconsidered following *Muldrock v The Queen*. The sentences in both cases were set aside: *KB v R* at [26]. The court held that it was necessary to reconsider KB's sentence on the basis that the judge took into account the original uncorrected CCA decisions in *Ingham v R* and *RJA v R*: *KB v R* at [27].

The **SNPP Appeals** on JIRS separates cases for each item in the Table according to whether they were decided before or after the *Muldrock* decision.

For a before and after comparison of sentencing patterns, see P Poletti and H Donnelly, *The impact of the standard non-parole period sentencing scheme on sentencing patterns in New South Wales*, Research Monograph 33, Judicial Commission of NSW, 2010.

[7-950] Fixed terms and aggregate sentences

Last reviewed: August 2023

Section 45(1A) provides that a court may decline to set a non-parole period (ie impose a fixed term) for an offence to which a standard non-parole period applies only if the term of the sentence is at least as long as the term of the non-parole period that the court would have set for the sentence if a non-parole period had been set. Prior to the insertion of s 45(1A) by the *Justice Portfolio Legislation (Miscellaneous Amendments) Act* 2016 on 25 October 2016, the text in brackets in s 45(1) "other than an offence or offences set out in the Table to Division 1A of this Part" precluded the imposition of a fixed term for the offences listed in the Table: see *Collier v R* [2012] NSWCCA 213 at [24], including where the offender pleads guilty: *Aguirre v R* [2010] NSWCCA 115 at [32].

Where an aggregate sentence is imposed by the court and one or more of the offences is a standard non-parole period offence, the court must indicate and make a written record of, for those offences to which a standard non-parole period applies, the non-parole period that it would have set for each such offence to which the aggregate sentence relates had it set a separate sentence of imprisonment for that offence: s 54B(4). The court is still obliged to make a record of its reasons for departure from the standard non-parole period where an aggregate sentence is imposed and must identify in the record of its reasons each factor that it took into account: s 54B(5).

A failure to comply with s 54B does not invalidate the sentence: s 54B(7).

[7-960] Court to give reasons if non-custodial sentence imposed

Last reviewed: August 2023

For a standard non-parole period offence, it is still permissible for the court to impose a non-custodial sentence (a sentence referred to in Pt 2 Div 3 *Crimes (Sentencing Procedure) Act* or a fine). The court must make a record of its reasons for doing so and identify in its record each mitigating factor it took into account: s 54C(1). Failure to comply does not invalidate the sentence: s 54C(2), but it can result in the erroneous exercise of the sentencing discretion: *R v Thawer* [2009] NSWCCA 158 at [41]. "Non-custodial sentence" in s 54C means a sentence referred to in Pt 2 Div 3 or a fine: s 54C(3).

Complying with s 54C

A court does not comply with s 54C simply by giving reasons for sentence but must according to Howie J in *R v Thawer* at [39]:

> … explain why it is that, despite the fact that the offence falls within the provisions dealing with the standard non-parole period, a sentence without a non-parole period is being imposed.

This statement from *Thawer* needs to be approached with some care because it reflects the previous approach whereby the court was required to make a finding as to where

an offence fell relative to the mid-range: *R v Dungay* [2012] NSWCCA 197 at [32]. Although *Thawer* held that a judge, under s 54C, had to give reasons as to why a non-custodial sentence is imposed for an offence which carries a standard non-parole period, "[t]he significance of that statutory fact [that is, the standard non-parole period] has been diluted [by *Muldrock v The Queen* (2011) 244 CLR 120] since *Thawer*": *R v Dungay* at [33]. A judge will not fail to comply with s 54C simply by omitting to explain why it is that a sentence without a non-parole period is being imposed "despite the fact" the offence carries a standard non-parole period: *R v Dungay* at [33]. However, a sentencing judge may not overlook the relevance of a standard non-parole period, which is to be taken into account as a guide: *R v Dungay* at [34]. Section 54C must be read being mindful of the context in which judges give their reasons: *R v Dungay* at [29].

[7-970] Brief history of Pt 4 Div 1A

Last reviewed: August 2023

Part 4 Div 1A (entitled "Standard non-parole periods") was inserted into the *Crimes (Sentencing Procedure) Act* by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002.

The provisions created standard non-parole periods for several offences in a table located at the end of s 54D (the Table). The original items in the Table only apply to offences committed on or after 1 February 2003. The Table is reproduced at **[8-000]** with an additional column containing cross-references to commentary on specific offences in this publication. Legislative amendments relevant to the Table are outlined at **[8-100]**. Caution must be applied to Court of Criminal Appeal decisions decided before *Muldrock v The Queen* (2011) 244 CLR 120.

Part 4 Div 1A has been amended since 2003 to include more offences and to increase the standard non-parole period for existing offences.

Crimes (Sentencing Procedure) Amendment Act 2007

New standard non-parole periods were created for a further 11 offences by the *Crimes (Sentencing Procedure) Amendment Act* 2007. The amendments commenced on 1 January 2008. The amendments also increased the standard non-parole period for an offence under s 61M(2) *Crimes Act* 1900 (indecent assault — child under 10 years) from 5 to 8 years. For amendments and items added by this amending Act, the transitional provisions found at Sch 2 Pt 17 cl 57 state:

> The amendments made to this Act by the *Crimes (Sentencing Procedure) Amendment Act* 2007 apply to the determination of a sentence for an offence whenever committed, unless:
>
> (a) the court has convicted the person being sentenced of the offence, or
>
> (b) a court has accepted a plea of guilty and the plea has not been withdrawn,
>
> before the commencement of the amendments [1 January 2008].

The 2007 Act, which added items to the Table, does not apply to offences committed before 1 February 2003: *R v Lane* [2011] NSWSC 289 at [60]–[61]. However, the increases to the standard non-parole periods for offences that were already in the Table committed after that date apply retrospectively: *GSH v R* [2009] NSWCCA 214 at [46]–[47]. It was held in *GSH v R* that the judge erred by referring to the 5-year

standard non-parole period that existed at the time the offence was committed rather than the later (increased) 8-year standard non-parole period. However, see also *AC v R* [2023] NSWCCA 133; *GL v R* [2022] NSWCCA 202 discussed at **[7-930] Exclusions and inclusions from Pt 4 Div 1A**.

Crimes Amendment (Sexual Offences) Act 2008

This amending Act, which commenced on 1 January 2009, introduced a new aggravated offence of sexual intercourse with a child under the age of 10 years under s 66A(2). The maximum penalty for the aggravated offence is life imprisonment, while the maximum penalty for the basic offence under s 66A(1) is 25 years. The amending Act assigned a standard non-parole period of 15 years for both offences.

The Act amended s 54D to make it clear that standard non-parole periods do not apply to persons under 18 years: see exclusions below.

Muldrock v The Queen (2011) 244 CLR 120

Special Bulletin 2, published at the time the judgment was delivered, explains the case in more detail. Given that Parliament amended the key standard non-parole period provisions after *Muldrock* (see below), it is only necessary to recount the key aspects of the case which remain relevant. The full Bench of the High Court in *Muldrock* held that *R v Way* (2004) 60 NSWLR 168 was wrongly decided. At the time s 54B(2) of the Act provided that "the court is to set the standard non-parole period as the non-parole period for the offence unless the court determines that there are reasons for setting a non-parole period that is longer or shorter". All justices of the High Court in a single judgment held, in *Muldrock* at [25]:

> … it was an error [of the court in *R v Way*] to characterise s 54B(2) as framed in mandatory terms. The court is not required when sentencing for a Div 1A offence to commence by asking whether there are reasons for not imposing the standard non-parole period nor to proceed to an assessment of whether the offence is within the midrange of objective seriousness.

The court said, at [26]: "It is a mistake to give primary, let alone determinative, significance to so much of s 54B(2) as appears before the word 'unless'." And at [32]:

> The Court of Criminal Appeal erred by treating the provision of the standard non-parole period as having determinative significance in sentencing the appellant.

The court held fixing the appropriate non-parole period is not to be treated as if it were the necessary starting point or the only important end-point in framing a sentence to which Div 1A applies: at [17].

Since the common law is preserved by the Act, sentencing for Div 1A offences must be consistent with the approach to sentencing described by McHugh J in *Markarian v The Queen* (2005) 228 CLR 357 at [51] whereby the judge identifies all the factors (including those at common law) that are relevant to the sentence, discusses their significance, and then makes a value judgment as to what is the appropriate sentence given all the factors of the case: at [26].

The standard non-parole period and the maximum penalty are legislative guideposts (at [27]):

> The [standard non-parole period] requires that content be given to its specification as "the non-parole period for an offence in the middle of the range of objective seriousness". Meaningful content cannot be given to the concept by taking into account

> characteristics of the offender. The objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders. It is to be determined wholly by reference to the nature of the offending.

Section 54B(4) requires the court to make a record of its reasons for increasing or reducing the standard non-parole period. This does not require the court "… to attribute particular mathematical values to matters regarded as significant to the formation of a sentence that differs from the standard non-parole period, or the need to classify the objective seriousness of the offending": at [29].

The High Court rejected the proposition advanced by counsel for Mr Muldrock that the standard non-parole period only "applies" to offenders convicted following trial where the offence falls in the middle range of objective seriousness: at [24]. At [29], it was held that the obligation to give reasons

> … *applies* in sentencing for all Div 1A offences *regardless of whether the offender has been convicted after trial* or whether the offence might be characterised as falling in the low, middle or high range of objective seriousness for such offences. [Emphasis added.]

The position before *Muldrock* that the standard non-parole period applied to offenders convicted after trial as stated in *R v Way* at [68] and *FB v R* [2011] NSWCCA 217 at [150] is no longer good law. There are no gradations of application of the standard non-parole periods — it is a legislative guidepost for all cases

Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act 2013

Special Bulletin 5 explains the *Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act* 2013 in detail and there is a further discussion of the current law at **[7-890]** above. The amending Act was the legislative response by the NSW Parliament to the High Court decision of *Muldrock*. The amendments clarified the role of the standard non-parole period following the decision in *Muldrock*. The following notable provisions of Pt 4 Div 1A were repealed by the amending Act:

- **Section 54A(2)**, which provided "For the purposes of sentencing an offender, the standard non-parole period represents the non-parole period for an offence in the middle of the range of objective seriousness for offences in the Table to this Division".
- **Section 54B**, including:
  - **s 54B(2)**, which provided "When determining the sentence for the offence (not being an aggregate sentence), the court *is to set* the standard non-parole period as the non-parole period for the offence unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period". [emphasis added]

    [The term "is to set" in s 54B(2) was a source of contention in *Muldrock* see: [25], [26], [32].]
  - **s 54B(3)**, which provided "The reasons for which the court may set a non-parole period that is longer or shorter than the standard non-parole period are only those referred to in s 21A".

The repeal of s 54B(2) and the phrase "is to set" evinces an intention that a standard non-parole period is not to have determinative significance in the sentencing exercise.

Under the new s 54B(2) (quoted above at **[7-900]**), it is "a matter to be taken into account by a court in determining the appropriate sentence". The standard non-parole period is to take its place as a legislative guidepost in accordance with *Muldrock* at [27].

The repeal of s 54B(3) was not surprising. The utility of s 54B(3) and its reference to s 21A was always questionable given the wide scope of matters that can be taken into account under s 21A. The High Court observed in *Muldrock* at [19] that s 54B(3) did not restrict the courts because the matters that can be taken into account under s 21A are extremely broad and include the common law.

Crimes Legislation Amendment (Child Sex Offences) Act 2015

This amending Act introduced standard non-parole periods for 13 child sexual offences. The amendments commenced on 29 June 2015 and apply to those 13 child sexual offences committed on or after that date. The Act also repealed the basic and aggravated offences of sexual intercourse with a child under 10, under ss 66A(1) and 66A(2), and replaced them with one consolidated offence, carrying a maximum penalty of life imprisonment. The standard non-parole period of 15 years continues to apply.

[7-980] Correcting sentences imposed pre-Muldrock

Last reviewed: August 2023

Muldrock v The Queen (2011) 244 CLR 120 resulted in a review by Legal Aid of cases to ascertain whether their clients were sentenced according to the erroneous principles in *R v Way* (2004) 60 NSWLR 168. See discussion in *Davis v R* [2015] NSWCCA 90 at [70]–[71]. Below describes the litigation that occurred after *Muldrock* and the means by which the cases were reviewed.

Re-opening not available

Section 43 *Crimes (Sentencing Procedure) Act* 1999 empowers a court to re-open sentence proceedings where it has imposed a penalty that is contrary to law. Section 43 cannot be used to correct a purported sentencing error of applying *R v Way* (2004) 60 NSWLR 168, that is, it should not be used as an alternate to an appeal and to review standard non-parole period cases decided before *Muldrock v The Queen* (2011) 244 CLR 120: *Achurch v R (No 2)* (2013) 84 NSWLR 328 at [67] approved in *Achurch v The Queen* (2014) 253 CLR 141 at [37]. The appropriate course for cases decided before *Muldrock* is for an application for leave to appeal to the Court of Criminal Appeal to be made out of time: *Achurch (No 2)* at [67]. Section 43 cannot be used by first instance courts to review *Muldrock* appeals because a penalty is not "contrary to law" within the terms of the section only because it is reached by a process of erroneous legal reasoning or factual error: *Achurch v The Queen* at [37].

Applications for leave to appeal out of time

Section 10(1)(b) *Criminal Appeal Act* 1912 provides the court may, at any time, extend the time within which a notice of intention to appeal is required to be given to the court or, if the rules of court so permit, dispense with the requirement for such a notice. An applicant for an extension of time to apply for leave to appeal against sentence is not required to demonstrate that substantial injustice was occasioned by the sentence and the CCA in *Abdul v R* [2013] NSWCCA 247 erred by imposing this requirement in *Muldrock* error cases: *Kentwell v The Queen* (2014) 252 CLR 601. The CCA must

consider what the interests of justice require. The merits of appeal and prospects of success are relevant to extension of time applications and should be addressed by reference to s 6(3) *Criminal Appeal Act*.

A contention by the Crown that "no *Muldrock* error is established" in respect of a sentence imposed in the relevant period is a contention that the sentencing judge failed to sentence in accordance with sentencing principles as they stood at that time: *Davis v R* [2015] NSWCCA 90 at [33]. The High Court in *Muldrock v The Queen* has declared the sentencing principles of NSW courts to have been fundamentally wrong. The interests of justice are not served by the Crown standing in the way of correction of the errors in sentencing that followed: *Davis v R* at [34]. Simpson J (Beazley P and Adamson J agreeing) held in *Aytugrul v R* [2015] NSWCCA 139 at [20]–[21] that if judges "sentenced in accordance with the law as it was then understood and stated in *Way*, then, axiomatically, by reason of *Muldrock*, they were in error. … It does not serve the administration of justice for the Crown to maintain that such error has not been shown".

The approach taken in *Davis v R*, and the cases which have applied it, is to be contrasted to earlier decisions such as *Butler v R* [2012] NSWCCA 23 at [26] and *McDonald v R* [2015] NSWCCA 80 which drew a clear distinction between cases where the standard non-parole period was applied by the judge following a trial from cases where it was used as a guidepost in guilty plea cases. The presumption of error approach in *Davis v R* can also be distinguished from the approach taken in *Aldous v R* (2012) 227 A Crim R 184 at [2], [10], [31]; *Zreika v R* (2012) 223 A Crim R 460 at [43]; *Bolt v R* [2012] NSWCCA 50 at [35]; *Black v R* [2013] NSWCCA 265 at [41]. It was accepted, however, that if a judge has placed too much significance on the standard non-parole period, resulting in a sentence that is not warranted in law, the court will intervene: *Ross v R* [2012] NSWCCA 161 at [22]; *Essex v R* [2013] NSWCCA 11 at [31]; *ZZ v R* [2013] NSWCCA 83 at [93]; *GN v R* [2012] NSWCCA 96 at [4], [12], [36].

If error is established, the court must exercise its discretion afresh to determine whether a lesser sentence is warranted in law: *Kentwell v The Queen*. See further the discussion in **Appeals** at **[70-020]**.

Part 7 Crimes (Appeal and Review) Act 2001

Section 78(1) *Crimes (Appeal and Review) Act* 2001 allows an application for an inquiry into a conviction or sentence to be made to the Supreme Court where appeal avenues have been exhausted. Section 79(2) provides that action may only be taken by the Supreme Court "if it appears that there is a doubt or question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case". The text of s 79(2) includes errors of law such as adopting the two-stage approach to sentencing advocated in *R v Way*, later disapproved in *Muldrock*: *Sinkovich v Attorney General of NSW* (2013) 85 NSWLR 783. An error of law in the sentencing process which affected the severity of the sentence is capable of satisfying s 79(2): *Sinkovich v Attorney General of NSW* at [86].

Section 86 provides:

> On receiving a reference under section 77(1)(b) or 79(1)(b), the Court is to deal with the case … in the *same way as if the convicted person had appealed against the conviction or sentence under the Criminal Appeal Act* 1912 … [Emphasis added.]

Application by Jason Clive McCall pursuant to s 78 of the Crimes (Appeal and Review) Act 2001 [2014] NSWSC 1620 is an example of a referral for a purported *Muldrock* error.

CCA and referrals under s 79

Following the referral of the matter pursuant to s 79, where the CCA has previously allowed a Crown appeal, the proceedings are to be approached as though the CCA's substituted sentence was itself the subject of an appeal under s 5(1)(c) *Criminal Appeal Act* 1912: *Louizos v R* [2014] NSWCCA 242 at [6]. If error is detected, it is for the CCA to impose the appropriate sentence pursuant to s 6(3). The result of error is not restoring the original sentence; it is the exercise of the power under s 6(3), made applicable by ss 79(1)(b) and 86 *Crimes (Appeal and Review) Act* 2001: *Louizos v R* at [6].

The closing words of s 79(1)(b) and of s 86 (italicised above) give rise to a new statutory creature, a "quasi-appeal", which closely resembles an appeal created by the *Criminal Appeal Act*. The effect of ss 79(1)(b) and 86 is that the CCA has authority to review and, if appropriate, set aside the sentence it itself imposed in the past. The effect of s 79(1)(b), read with s 86, is that the past sentence imposed by the CCA is deemed to be the sentence to be dealt with following a reference: *Louizos v R* at [16]. The natural meaning of the *Criminal Appeal Act* is for the procedure created by ss 79(1)(b) and 86 to be determined by way of rehearing of the sentence imposed following the Crown appeal, and whose success depends on the identification of error: *Louizos v R* at [17], [37].

Section 78(1) *Crimes (Appeal and Review) Act* inquiries are identified in the SNPP appeal list on JIRS.

[7-990] Further reading

Last reviewed: August 2023

Articles

H Donnelly, "The diminished role of standard non-parole periods" (2012) 24(1) *JOB* 1

RA Hulme, "After Muldrock — sentencing for standard non-parole period offences in NSW" (2012) 24(10) *JOB* 81

Papers

R Wilson, "Sentencing since Muldrock", Public Defender Office Conference 2013

H Donnelly, Director, Research and Sentencing, Judicial Commission of NSW, "Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act 2013", CLE talk, Aboriginal Legal Service (NSW/ACT), Redfern, 5 December 2013

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Objective and subjective factors at common law

[9-700] The interaction between s 21A(1) and the common law

Section 21A(1) *Crimes (Sentencing Procedure) Act* 1999 provides that in determining an appropriate sentence, the aggravating and mitigating factors referred to in s 21A(2) and (3) respectively are "in addition to" to any other matters required and/or permitted to be taken into account by the court under any Act or rule of law. In particular, s 21A(1)(c) provides the court is to take into account "any other objective or subjective factor that affects the relative seriousness of the offence".

The High Court in *Muldrock v The Queen* (2011) 244 CLR 120 at [18] found s 21A(1) "preserves the entire body of judicially developed sentencing principles, which constitute 'law' for the purposes of both s 21A(1) and s 21A(4)".

The High Court also made it clear in *Markarian v The Queen* (2005) 79 ALJR 1048 at [27]:

> what is required is that the sentencer must take into account all relevant considerations … in forming the conclusion reached. As has now been pointed out more than once, there is no single correct sentence.

For a discussion of some of these discrete components, see:

- **Standard Non-Parole Period Offences — Pt 4 Div 1A** at **[7-890]**
- **Factors relevant to assessing objective seriousness** at **[10-012]**
- **Subjective matters at common law** at **[10-400]**
- **Mental health or cognitive impairment** at **[10-460]**
- **Deprived background** at **[10-470]**
- **Section 21A — aggravating and mitigating factors** at **[11-000]**.

[9-710] The difficulty of compartmentalising sentencing considerations

The task of sentencing an offender involves making a complex discretionary decision: Gleeson CJ in *R v Gallagher* (1991) 23 NSWLR 220 at 230. Sentencing is not an area amenable to bright-line distinctions and "it is important to avoid introducing 'excessive subtlety and refinement' to the task of sentencing": *Weininger v The Queen* (2003) 212 CLR 629 at [24], citing *R v Storey* [1998] 1 VR 359 at 372 with approval.

A good illustration of the difficulties faced in compartmentalising concepts in sentencing are the separate but related assessments of the objective seriousness of an offence and the moral culpability of an offender which form part of the process of instinctive synthesis: see *Muldrock v The Queen* (2011) 244 CLR 120 at [58], *Bugmy v The Queen* [2013] HCA 37 at [44]–[46], *Munda v Western Australia* (2013) 249 CLR 600 at [57]. For example, some factors that are personal to an offender, such as a significant mental health impairment, may affect both the assessments of the objective seriousness of the offence and the moral culpability of the offender in some circumstances: *R v Way* (2004) 60 NSWLR 168 at [86]; *DS v R; DM v R* [2022]

NSWCCA 156 at [96]. Motive, provocation, non-exculpatory duress and an offender's mental state are also potentially relevant to both assessments: *Paterson v R* [2021] NSWCCA 273 at [29]; *Yun v R* [2017] NSWCCA 317 at [40]–[47]. See **Factors relevant to assessing objective seriousness** at **[10-012]**.

As Wilson J (dissenting) in *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 486 observed, there is an "… ease with which obscurity of meaning can infect this area of discourse". Over time other terms have developed to take on new meanings in response to changes in the sentencing regime and practice: *Stanton v R* [2021] NSWCCA 123 at [29]. For example, in the dangerous driving guideline judgment, *R v Whyte* (2002) 55 NSWLR 252, the "moral culpability" of an offender is a reference to the objective criminality of the offending and, in light of the current case law, using the expression "moral culpability" when dealing with objective seriousness, while consistent with *R v Whyte*, is apt to cause confusion: *R v Eaton* [2023] NSWCCA 125 at [56].

Regardless of the terms used and their categorisation, as the Court in *DS v R; DM v R* [2022] NSWCCA 156 at [92] stated:

> The discussion of [objective seriousness and moral culpability] is not meant to burden sentencing judges but to assist them by inviting, and to an extent requiring, them to determine the seriousness of the offence and how much moral blame the offender bears, but only as part of a consideration of the weight to be attached to the various sentencing factors and for the purpose of undertaking the instinctive synthesis described in *Markarian*.

[9-720] The aggravating/mitigating binary fallacy

In *Weininger v The Queen* (2003) 212 CLR 629 the plurality said at [22]:

> The matters that must be taken into account in sentencing an offender include many matters of and concerning human behaviour. It is, therefore, to invite error to present every question for a sentencer who is assessing a matter which is to be taken into account as a choice between extremes, one classified as aggravating and the opposite extreme classified as mitigating. Neither human behaviour, nor fixing of sentences is so simple.

Therefore it is too simplistic and sometimes unhelpful to characterise a factor as either mitigating or aggravating.

The courts have also recognised what can be described as an aggravating/mitigating binary fallacy. It is a well established common law sentencing principle that the absence of a factor which would elevate the seriousness of offending in a particular case is not a matter of mitigation. What has been done by an offender is not less serious because it could have been worse: *Saddler v R* [2009] NSWCCA at [3]; *R v Woods* [2009] NSWCCA 55; *Faehringer v R* [2017] NSWCCA 248 at [49]–[50]; *Yaman v R* [2020] NSWCCA 239 at [120]; *Gibbons (a pseudonym) v R* [2019] NSWCCA 150 at [30]; *R v LS* [2020] NSWCCA 148 at [150].

The logical extension of proposing that the absence of aggravating features justifies a downward revision in the assessment of objective gravity is that the greater the number of aggravating features missing from the commission of an offence, the lower its objective criminality will be, which is problematic: *R v Woods* at [52]. In *R v Louizos* [2009] NSWCCA 71, the judge erred in his approach by finding "the absence of comprehensible motivation causes me to impose a lesser non-parole

period": at [93]–[94]. The very serious nature of the offence of soliciting to murder made it unlikely that the respondent's motive would significantly reduce the objective seriousness of the crime or her culpability, unless the judge concluded there was a motive that could truly be characterised as mitigating: at [90].

Section 21A uses an aggravating/mitigating binary outcome for various factors. It has been criticised by the courts. Grove J said *Van Can Ha v R* [2008] NSWCCA 141 at [4]:

> … the language of [s 21A] is that of command but I would stress that the scope of the mandate should not be misunderstood and any compliance is dependent upon the existence of relevant evidence of any particular factor.

The discussion of the common law begins with what can loosely be defined as objective factors. Some of the factors listed because of their complexity are also relevant to subjective considerations (see **[9-710] The difficulty of compartmentalising sentencing considerations** above).

[The next page is 5501]

Objective factors at common law

[10-000] Maximum penalty

Last reviewed: August 2023

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

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

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

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

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

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

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

Increase in statutory maximum

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

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

Decrease in the maximum penalty

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

Maximum penalties and the jurisdiction of the Local Court

For magistrates exercising summary jurisdiction, the maximum penalty for the offence, *not* the lower jurisdictional limit, is the starting point for determining the appropriate sentence: *Park v The Queen* (2021) 273 CLR 303 at [23]. The Local Court jurisdictional limit cannot regarded as some form of maximum penalty or a penalty reserved for the worst case: *R v El Masri* [2005] NSWCCA 167 at [30]. In *R v Doan* (2000) 50 NSWLR 115 at [35], Grove J (Spigelman CJ and Kirby J agreeing) stated that a jurisdictional maximum is:

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

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

[10-005] Cases that attract the maximum

Last reviewed: August 2023

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

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

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

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

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

[10-010] Objective seriousness and proportionality

Last reviewed: August 2023

Assessing the objective seriousness of an offence is a critical component of instinctive synthesis in the sentencing process: *R v Campbell* [2014] NSWCCA 102 at [27], [29]; *FL v R* [2020] NSWCCA 114 at [58]. It sets the parameters of an appropriate sentence, ensuring the sentence is proportionate to the offence: *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 472, 485–486, 490–491, 496; *Hoare v The Queen* (1989) 167 CLR 348 at 354; *R v McNaughton* (2006) 66 NSWLR 566 at [15].

Assessing the objective seriousness of an offence is a separate but related task to assessing the moral culpability of an offender: *Muldrock v The Queen* (2011) 244 CLR 120 at [27], [54]; *Bugmy v The Queen* (2013) 249 CLR 571 at [44]; *Munda v Western Australia* (2013) 249 CLR 600 at [57]; *DS v R* (2022) 109 NSWLR 82 at [77]. See also **Subjective matters at common law** at **[10-400]**.

The principle of proportionality

In *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 472, Mason CJ, Brennan, Dawson and Toohey JJ said:

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

Assessing the objective seriousness of an offence, is required to observe the principle of proportionality, ensuring the offender is "adequately punished" in accordance with s 3A *Crimes (Sentencing Procedure) Act* 1999: *FL v R* [2020] NSWCCA 114 at [58]. The imposition of a proportionate sentence is a purpose of the process of instinctive synthesis: *R v Dodd* (1991) 57 A Crim R 349 at 354; *Khoury v R* [2011] NSWCCA 118 at [71]; *Zreika v R* [2012] NSWCCA 44 at [46].

The proportionality principle requires that a sentence should not exceed what is required to reflect the objective seriousness of the crime regardless of how poor the offender's subjective case: *Veen v The Queen (No 2)* at 472, 485–486, 490–491, 496; *Hoare v The Queen* (1989) 167 CLR 348 at 354; *R v Whyte* (2002) 55 NSWLR 252 at [156]–[158]; *DS v R* (2022) 109 NSWLR 82 at [68]. Nor should the sentence be less than the objective seriousness of the crime: *R v Whyte* at [156]; *R v McNaughton* (2006) 66 NSWLR 566 at [15].

To achieve proportionality, regard must be had to the "gravity of the offence viewed objectively" because "without this assessment the other factors requiring consideration in order to arrive at the proper sentence to be imposed cannot properly be given their place": Jordan CJ in *R v Geddes* (1936) 36 SR (NSW) 554 at 556. Elaborating on this, the court in *R v Dodd* said at 354:

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

Following *The Queen v Kilic* (2016) 259 CLR 256, the quote above should be qualified to the extent that the description "most grave category" is now to be avoided (see the discussion at **[10-005]**).

[10-012] Factors relevant to assessing objective seriousness

Last reviewed: August 2012

The task of assessing the objective seriousness of an offence requires the court to identify factors relevant to the "nature of the offending" and consider where in the range of conduct covered by the offence the offending falls: *Muldrock v The Queen* (2011) 244 CLR 120 at [27]; *Baumer v The Queen* (1988) 166 CLR 51 at 57. The "nature of the offending" is assessed or "measured" against legislative guideposts, namely the maximum penalty and, where applicable, the standard non-parole period: *R v Moon* [2000] NSWCCA 534 at [70]. The court must also assess the "nature of the offending" in the case against other instances of such offending: *R v Campbell* [2014] NSWCCA 102 at [27]–[29]. See also **Maximum penalty** above at **[10-000]**, **Mandatory life sentences under s 61** at **[8-600]**, **Standard non-parole period offences — Pt 4 Div 1A** at **[7-890]** and **Consistency** at **[10-020]**.

The following factors are to be considered, when known and present, when assessing objective seriousness:

- the offending conduct (for example, in relation to the offence of sexual intercourse without consent, the range of acts that can constitute "sexual intercourse" as defined)
- the offender's mental state (or fault element) at the time of the commission of the offence (ranging from intention to lesser mental states such as recklessness), and
- the consequences of the offending.

See, for example, *Muldrock v The Queen* at [27]; *R v Way* (2004) 60 NSWLR 168 at [86]; *Yun v R* [2017] NSWCCA 317 at [35]; *SKA v R* [2009] NSWCCA 186

at [129]–[137]. See also more detailed discussion about particular features of offending conduct and its consequences in **Premeditation and planning** at **[10-040]**; **Degree of participation** at **[10-050]**; **Breach of trust** at **[10-060]**; **Impact on the victim** at **[10-070]**; and **Co-offenders with joint criminal liability** at **[10-807]**.

Since *Muldrock v The Queen*, whether matters personal to an offender form part of the "nature of the offending" and should also be considered when assessing objective seriousness has been the subject of debate: *DS v R* (2022) 109 NSWLR 82 at [71]. The decisions of *DS v R* at [96]; *Paterson v R* [2021] NSWCCA 273 at [29]; *Yun v R* at [40]–[47]; *Tepania v R* [2018] NSWCCA 247 at [112], suggest that the following personal factors *may* in some circumstances be relevant to assessing both the objective seriousness of an offence and the moral culpability of an offender:

- motive
- provocation
- non-exculpatory duress
- the offender's mental illness, mental health impairment or cognitive impairment
- the offender's age.

In *R v Way* (2004) 60 NSWLR 168 at [85], a decision pre-*Muldrock v The Queen*, in the context of a standard non-parole period offence, the court held a personal factor would only impact on objective seriousness where it was "causally related to the commission of the offence, in so far as the offender's capacity to reason, or to appreciate fully the rightness or wrongness of a particular act, or to exercise appropriate powers of control has been affected". While in *DS v R* at [96], the court stated the "nature of the impairment, the nature and circumstances of the offence, and the degree of connection between the former and the latter" are determinative considerations.

Consistent with *Muldrock v The Queen* and *Bugmy v The Queen* (2013) 249 CLR 571, in *R v Eaton* [2023] NSWCCA 125 at [49], the Court held that, for a personal factor to impact on the assessment of objective seriousness, more than a simple or indirect causal connection is required between the relevant subjective feature of the case and the offending.

See also **Objective and subjective factors at common law** at **[9-700]**; **Subjective matters at common law** at **[10-400]**.

Mental health or cognitive impairment and objective seriousness

An offender's mental health or cognitive impairment *may* be relevant to the assessment of objective seriousness where it is causally related to an offence: *DS v R* (2022) 109 NSWLR 82 at [63]; *Paterson v R* [2021] NSWCCA 273 at [29]–[31]; *R v Way* (2004) 60 NSWLR 168 at [86]; cf *Subramaniam v R* [2013] NSWCCA 159 at [56]–[57]; *Badans v R* [2012] NSWCCA 97 at [53]. The circumstances in which a mental health or cognitive impairment will inform the objective seriousness of the offence in addition to be considered in assessing the offender's moral culpability are "few and confined": *Lawrence v R* [2023] NSWCCA 110 at [75].

In *DS v R* at [96] the Court stated:

> The most obvious such circumstance is where the mental impairment is effectively a constituent element of the crime, such as manslaughter involving a substantial impairment within the meaning of s 23A of the *Crimes Act*. Another example may be

> where an offender damaged property during a period of psychosis or while suffering delusions but in circumstance that fall short of that which might establish a mental illness defence. In such a case, it could be said that the objective seriousness of the offending was reduced perhaps substantially. Such an offence would not be premeditated or planned, and the offender would not have sought or derived any advantage from their offending or possessed any malice in doing do. On the other hand, where an offender suffered from depression that impaired their decision making, it is very difficult to accept that the objective seriousness of a sexual assault they committed is somehow reduced even though it might be said that their depression materially contributed to their inability to overcome their own impulse to commit the offence. Such circumstances might warrant a reduction in their moral culpability which would in turn warrant further consideration be given to the weight attached to various sentencing factors, although it would not necessarily result in a reduction in their sentence.

In *Camilleri v R* [2023] NSWCCA 106, a jury convicted an offender of manslaughter on the basis she was substantially impaired by a mental condition at the time of the offence (*Crimes Act*, s 23A), as an alternative to murder. The applicant had a longstanding, complex psychiatric history including intellectual disability, and autism spectrum and explosive disorders. Hamill J (Cavanagh J agreeing in large part) found the assessment of the extent to which the applicant was affected by her mental condition is to be made from the starting point that her mental responsibility was substantially impaired, and the role played by her cognitive or neurological impairment or mental illness on a proper assessment of objective criminality should not be diminished: at [138], [142]. Hamill J at [133] (Cavanagh J agreeing at [220]) also found the offender's mental condition and resultant loss of self-control impacted objective seriousness, because it meant the offence was truly spontaneous and unplanned. Adamson JA dissenting, found that while the offender's mental condition was *potentially* relevant to objective seriousness, it had been open to the sentencing judge to only take it into account when assessing moral culpability: at [26]–[28].

In*Lawrence v R*, the sentencing judge took the applicant's background and mental conditions into account to reduce his moral culpability for domestic violence offences committed against his former partner. The court observed while mental conditions "may" reduce the objective seriousness of an offence, there is no principle that a related impairment "must" do so: at [75]. The court found the offender's mental condition was not relevant to the objective seriousness of the offences which were "committed over a prolonged period that involved the assault, intimidation, and degradation of a former de facto spouse": at [79].

See also **Mental health or cognitive impairment** at **[10-460]**.

Provocation and objective seriousness

Where provocation is established such that it is a mitigating factor under s 21A(3)(c), it is a fundamental quality of the offending which may reduce its objective seriousness: *Williams v R* [2012] NSWCCA 172 at [42]. It may be that whether a factor such as provocation is categorised as an objective or subjective factor will have little practical impact on the ultimate sentence: *Williams v R* at [43] See also **Section 21A(3)(c) — the offender was provoked by the victim** at **[11-230]**.

Non-exculpatory duress and objective seriousness

The weight and characterisation of non-exculpatory duress as impacting on the assessment of objective seriousness will depend upon the form and duration of the

offender's criminal conduct, the nature of the threats made, and opportunities available to the offender to report the matters to the authorities: *Tiknius v R* [2011] NSWCCA 215 at [40]–[49]; see also *Giang v R* [2017] NSWCCA 25. See also **Section 21A(3)(d) — the offender was acting under duress** at **[11-240]**.

Age and objective seriousness

In *IE v R* [2008] NSWCCA 70 at [20], the court held an offender's youth is a subjective factor that could not bear upon the assessment of objective seriousness. However, in *R v AA* [2017] NSWCCA 84 at [55], the court found, in some circumstances, an offender's age may bear upon an assessment of objective seriousness, and can be relevant to an explanation of the context in which the offending occurred. For example, in respect of the age difference between a sexual offender and their victim: *DS v R* (2022) 109 NSWLR 82 at [129]. See also **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]**; **Relevance of youth at sentence** at **[15-015]**.

Standard non-parole period offences

The principles discussed in *DS v R* (2022) 109 NSWLR 82 at [63]–[96] also apply to the application of standard non-parole periods: *Tepania v R* [2018] NSWCCA 247; *Yun v R* [2017] NSWCCA 317; cf *Stewart v R* [2012] NSWCCA 183 at [37]. See also **Standard non-parole period offences — Pt 4 Div 1A** at **[7-890]**.

Factors that cannot be taken into account

It is not permissible to take into account the absence of a circumstance which, if present, would render the offence a different offence. This is irrelevant to, and likely to distort, the assessment of objective seriousness: *Nguyen v The Queen* (2016) 256 CLR 656 at [30], [43], [60]. Similarly, a comparison of the gravity of the subject offence with a hypothesised offence is erroneous: *Nguyen v The Queen* at [59].

The following factors, which are personal to an offender, do not bear upon the assessment of the objective seriousness of an offence:

- prior criminal record: *R v McNaughton* (2006) 66 NSWLR 566 at [25]; *Lawrence v R* [2023] NSWCCA 110 at [57]–[58]
- a plea of guilty (and its timing): *Lovell v R* [2006] NSWCCA 222 at [61], [66]
- the liberty status of an offender at the time of the commission of the offence (for example, on bail or parole): *Simkhada v R* [2010] NSWCCA 284 at [25]; *Martin v R* [2011] NSWCCA 188 at [7], [17]; *Sharma v R* [2017] NSWCCA 85 at [65]–[67]
- the offender committed multiple offences: *R v Reyes* [2005] NSWCCA 218 at [43].

Regardless of whether the personal factors discussed above may be considered in the assessment of objective seriousness, they may be relevant to the assessment of moral culpability and for other sentencing purposes. See **Subjective matters at common law** at **[10-400]**.

[10-013] Objective seriousness findings

Last reviewed: August 2023

A sentencing judge must "identify fully the facts, matters and circumstances which the judge concludes bear upon the judgment that is reached about the appropriate sentence to be imposed": *Muldrock v The Queen* (2011) 244 CLR 120 at [29].

The judge's assessment of the objective seriousness of an offence must be clear upon a fair reading of the sentencing remarks and mere recitation of the facts of an offence is unlikely to be sufficient: *Kearsley v R* [2017] NSWCCA 28 at [64]–[66]; *R v Van Ryn* [2016] NSWCCA 1 at [133], [134]; *R v Cage* [2006] NSWCCA 304 at [17]. In *Kochai v R* [2023] NSWCCA 116, it was "tolerably clear" the sentencing judge was satisfied the offending was objectively serious because they had enumerated all of the relevant factors, and all of those factors elevated the seriousness of the offending: [46], [54].

Since the introduction of standard non-parole periods it has been increasingly common for sentencing judges to place their findings of objective seriousness in a range or on a scale: *R v Eaton* [2023] NSWCCA 125 at [57]; *Cargnello v Director of Public Prosecutions (Cth)* [2012] NSWCCA 162 at [88]. Even for offences carrying a standard non-parole period a failure to assess objective seriousness on a "hypothetical arithmetical or geometrical continuum of seriousness" does not indicate error: *R v Eaton* at [57]; *DH v R* [2022] NSWCCA 200 at [33]; [56]; [58]–[60]. Further, that the parties dispute where on a scale the offences fall will not necessarily place an obligation on a judge to place the offending on a scale: *Kochai v R* at [52].

The characterisation of objective seriousness on a scale from low range, through to mid and high ranges "is often unhelpful …" and "is likely to lead to confusion and misinterpretation" for offences not carrying a standard non-parole period: Basten JA in *Cargnello v Director of Public Prosecutions (Cth)* at [88]; Howie AJ in *Georgopolous v R* [2010] NSWCCA 246 at [30]. In *DH v R*, Yehia J at [60] stated the use of descriptors such as "lower end of the middle of the range", "upper end of the middle of the range" or, "just below or above the midpoint" add nothing of value to the process of instinctive synthesis and the determination of a proportionate sentence.

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

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

Last reviewed: August 2023

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

Poor treatment of a deceased person's body can be taken into account in homicide cases for the purpose of assessing the seriousness of the offence: *R v Yeo* [2003] NSWSC 315 at [36]; *Knight v R* [2006] NSWCCA 292 at [28]. Examples of aggravating post-offence conduct in murder and manslaughter cases include: infliction of further injury knowing the victim is already dead (*R v Hull* (1969) 90 WN (Pt 1) (NSW) 488 at 492); callous and disrespectful treatment of the body (*Colledge v State*

of Western Australia [2007] WASCA 211 at [10] and [15], where the body was left for weeks before being buried with lime to hasten its decomposition); concealing the body (*R v Lowe* [1997] 2 VR 465 at 490, where a deceased child was hidden in a storm-water drain); dumping the body in a remote spot (*R v Von Einem* (1985) 38 SASR 207 at 218); disposing of the deceased's possessions in different locations "to blur the trail" (*Bell v R* [2003] WASCA 216 at [16] and [25]); and incinerating the body (*R v Schultz* (1997) 68 SASR 377 at 384). In *DPP v England*, the sentencing judge erred by reasoning that acts after death could not amount to aggravating circumstances as the crime of murder was complete upon death: *DPP v England* at [14], [35]. It is not "double-counting" to have regard to post-offence conduct as adding an aggravating dimension to the crime, as well as indicating a lack of remorse: *DPP v England* at [37]; *Bell v R* at [25].

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

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

[10-020] Consistency

Last reviewed: August 2023

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

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

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

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

drug offences (see **Achieving consistency** at **[65-150]**). The issue of consistency and the use of statistics is discussed further within the chapters dealing with particular offences at **[17-000]**ff.

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

Last reviewed: August 2023

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Strict limits apply as to the use that can be made of sentences imposed in other cases. The court must make its own independent assessment of the particular case: *R v F* [2002] NSWCCA 125 at [38]. The court must identify the limits of the discretion by reference to the facts of the case before it: *Robertson v R* at [23]. Ultimately, the

sentencing discretion is individual and must be exercised by the judge in respect of the individual offender and the particular offending: *Gavin v R* at [41]; *DPP (Cth) v De La Rosa* at [304], [305]; *Hili v The Queen* at [54].

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

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

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

At best, other cases do no more than become part of a range for sentencing, and in the case of manslaughter, this range is wider than for any other offence: *R v George* [2004] NSWCCA 247 at [48]; *Robertson v R* at [18], [20]. Therefore, in manslaughter cases, an examination of the results in other decided cases does not illuminate "in any decisive manner the decision to be reached in a particular case" and is "unhelpful and even dangerous": *BW v R* [2011] NSWCCA 176 at [61]; *R v Vongsouvanh* [2004] NSWCCA 158 at [38]; *CW v R* [2011] NSWCCA 45 at [131]. In *R v Hoerler* [2004] NSWCCA 184 at [41]; *Abbas v R* [2014] NSWCCA 188 at [38]–[42]; *R v Loveridge* [2014] NSWCCA 120 at [226]–[227]; and *R v Trevenna* at [98]–[100], it was held that it was not possible to extrapolate a sentencing pattern from past manslaughter cases.

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

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

[10-024] Use of sentencing statistics

Last reviewed: August 2023

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

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

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

The Queen v Pham (2015) 256 CLR 550

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

The plurality (French CJ, Keane and Nettle JJ) said the case illustrated the inutility of the presentation of sentences imposed on federal offenders using the numerical tables, bar charts and graphs referred to in *Hili v The Queen* (at [48], see above): *The Queen v Pham* at [32], [33]. Presentations in these forms should be avoided: *The Queen v Pham*

at [28]. The statistical analysis was also flawed by treating the weight of drug imported as "the only variable factor affecting offence seriousness" and assuming that "courier" status was of uniform significance: *The Queen v Pham* at [37].

Bell and Gageler JJ did not agree with the plurality on this point and held that even if the Court of Appeal misused the table of 32 cases to determine the objective seriousness of the offence it does not demonstrate that presentation of this type of material is impermissible: *The Queen v Pham* at [45]. *Hili v The Queen* and *Barbaro v The Queen* are concerned not only with the consistent application of sentencing principles but also with reasonable consistency in sentencing outcomes: *The Queen v Pham* at [42], [46]. In *Hili v The Queen*, the court said it is not useful to use statistical material which only refers to the lengths of sentences passed because it says nothing about why sentences were fixed: *The Queen v Pham* at [46].

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

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

CCA statements concerning the use of statistics

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

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

The limited use that should be made of Judicial Commission statistics has been recognised previously: *Ross v R* [2012] NSWCCA 161 at [19]. Statistics do no more than establish the range of sentences imposed, without establishing that the range is the correct range or that the upper or lower limits are the correct upper or lower limits: *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [303]; *R v Boyd* [2022]

NSWCCA 120 at [139]; *Holohan v R* [2012] NSWCCA 105 at [51]. A failure by a court to consider Judicial Commission statistics does not in itself amount to error in the sentencing process: *Lawson v R* [2012] NSWCCA 56 at [13]. Sentencing statistics are a blunt instrument when seeking to establish manifest excess in a sentencing appeal: *Windle v R* [2011] NSWCCA 277 at [62] and an opaque tool for providing insight into a sentencing range in a sentencing appeal: *R v Nikolovska* [2010] NSWCCA 169 at [70]. For many offences, culpability varies over so wide a range that the statistics are of limited utility for a particular case and undue weight should not be given to them: *Fogg v R* [2011] NSWCCA 1 at [59].

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

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

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

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

> is unduly harsh. As a matter of common sense, there will always be one sentence which constitutes the longest sentence imposed for particular offending: *Jolly v R* [2013] NSWCCA 76 at [75].

The decisions of *Sharma v R* at [78]–[82], *R v Boyd* at [122], [139]–[143] and *Tatur v R* [2020] NSWCCA 255 at [46]–[47] reiterate some of these principles.

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

Generally, for offences involving the manufacture and supply of drugs, the utility of sentencing statistics are of limited weight because they do not record: the broad range of weight and purity of the drug involved; the role of the offender; and, whether there were aggravating features: *R v Chidiac* at [40]; see also *R v Boyd* at [169]; *Bao v R* [2016] NSWCCA 16 at [70]–[74]. The aggravating feature of being on conditional liberty at the time of the offending is not recorded in the statistics: *Sparkes v R* at [30].

It has been said that statistics can be used as broad support for a conclusion that a custodial sentence is appropriate: *Mitchell v R* [2013] NSWCCA 318 at [27]–[31]; *Peiris v R* [2014] NSWCCA 58 at [96]. However, the comparison of sentencing statistics becomes complicated where Form 1 offences have been taken into account: *R v Lenthall* [2004] NSWCCA 248; see also *Bao v R* at [70]–[74].

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

As with the use of comparable cases, the myriad circumstances of manslaughter offences means it is unhelpful to speak in terms of a range of sentences, or a tariff, for a particular form of manslaughter: *Leung v R* [2014] NSWCCA 336 at [120]; *R v Wood* [2014] NSWCCA 184 at [56]. Sentencing statistics for manslaughter cases are of such limited assistance to sentencing judges that they should be avoided: *R v Wood* at [59].

However, in *Robertson v R* [2015] NSWCCA 251, Basten JA said such statistics (and comparable cases) should be approached cautiously: at [18]–[23]. In *Chandler v R* [2023] NSWCCA 59, a sentence appeal for an offence of manslaughter (using a motor vehicle), N Adams J (Hamill J agreeing; Beech-Jones CJ at CL dissenting), in determining a sentence manifestly excessive, had regard to such sentencing statistics as well as those for the offence of murder where the weapon was a motor vehicle (in addition to comparable cases): at [101]–[107], [112], [118], [124]–[126], [128]. In *Paterson v R* [2021] NSWCCA 273 at [42]–[49], the Court also had regard to sentencing statistics (and comparable cases) in the determination of a sentence appeal for manslaughter.

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

Aggregate sentences and JIRS statistics

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

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

Selecting the statistical variable "multiple offences" was of no real utility where an offender is sentenced for multiple counts of the same offence because "multiple offences" does not limit the database to multiple instances of the same offence. It includes instances where there was one or more offences of *any type*: *Knight v R* at [7]. *Knight v R* was referred to by Bell and Gageler JJ in *The Queen v Pham* (2015) 256 CLR 550 at [49].

Further, an approach to a complaint of manifest excess involving consideration of the "undiscounted aggregate" sentence is contrary to principle as discounts are applied to indicative, not aggregate, sentences: *Sharma v R* [2022] NSWCCA 190 at [72].

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

Last reviewed: August 2023

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

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

> The sentencing statistics can be a very valuable tool if properly understood and used appropriately. Once again, I can only implore practitioners to read the "Explaining the Statistics" document before relying upon statistics in any court, including this Court.

[10-026] Enhancements to JIRS statistics

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

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

The JIRS statistics now provides the following additional information:

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

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

> The Judicial Commission has provided enhancements to the statistics in recent times, partly in response to what the High Court has said in cases such as *Hili v The Queen; Jones v The Queen* [2010] HCA 45; 244 CLR 520 and *The Queen v Pham* [2015] HCA 39; 256 CLR 550. They include the provision of statistics for "Aggregate/Effective" terms of sentence and non-parole periods. But there are limitations on the utility of these.
>
> Another enhancement is the provision of further information about individual cases which make up the database. Sometimes it is limited but where published judgments

are available there is a very helpful hyperlink to them (and sometimes to summaries of them). It is, unfortunately, rarely apparent in this Court that counsel who are relying upon the statistics have made use of this facility.

[10-027] Recent changes to JIRS statistics

Last reviewed: August 2023

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

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

[10-030] Isolated incidents and offences not charged

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

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

This method of taking into account representative counts does not infringe the principle that a person should not be punished for a crime for which he or she has

not been convicted. There is a distinction between not increasing a penalty based on aggravation and not granting leniency on account of the fact that the events as charged were not isolated incidents: *R v JCW* per Spigelman CJ at [68], applying *Siganto v The Queen* (1998) 194 CLR 656.

Approach to sentencing

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

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

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

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

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

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

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

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

[10-040] Premeditation and planning

Last reviewed: August 2023

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

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

The armed robbery guideline in *R v Henry* at [162] refers to the circumstance of a "a limited degree of planning" (see **Robbery** at **[20-250]**). Planning is also referred to as a factor in the break, enter and steal guideline (see **Break and enter offences** at **[17-020]** and cases at **[17-070]**). For fraud offences a distinction has been drawn between offences where there has been planning with a degree of sophistication and those committed on impulse: see *R v Araya* [2005] NSWCCA 283 at [96]; *R v Tadrosse* (2005) 65 NSWLR 740; *Golubovic v R* [2010] NSWCCA 39 at [23]. In such cases, general deterrence is an important factor in sentencing: *R v Pont* [2000] NSWCCA 419 at [43].

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

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

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

[10-050] Degree of participation

Last reviewed: August 2023

Where more than one offender is involved in the commission of an offence, a consideration of sentencing is the degree of participation of the offender in the offence: *Lowe v The Queen* (1984) 154 CLR 606 per Gibbs CJ at 609; *R v Pastras* (unrep, 5/3/93, VSC). See also **Co-offenders with joint criminal liability** at **[10-807]**.

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

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

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

[10-060] Breach of trust

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

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

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

[10-070] Impact on the victim

Last reviewed: August 2023

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

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

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

Age of victim

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

The younger the victim, the more serious the criminality: *R v BJW* [2000] NSWCCA 60 at [21]; *MLP v R* [2006] NSWCCA 271 at [22]; *R v PWH* (unrep, 20/2/92, NSWCCA). A child aged 13 years or under is virtually helpless in a family unit when abused by a step-parent, and all too often the child is afraid to inform on the step-parent: *R v BJW* per Sheller JA at [21].

[10-080] Possibility of summary disposal

Last reviewed: August 2023

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

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

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

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

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

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

An example is where the Crown withdraws an indictable offence following committal or where the offender is found not guilty of a purely indictable offence and the District Court is left with offences which — but for the serious offence — would have been dealt with in the Local Court: *Zreika v R* at [103]–[104] citing *McCullough v R* [2009] NSWCCA 94 at [22]–[23] and *R v El Masri* [2005] NSWCCA 167 at [30]; and see *Peiris v R* at [4] where the offender was acquitted of an offence charged under s 61J *Crimes Act* 1900 but found guilty of two counts of indecent assault under s 61M *Crimes Act*.

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

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

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

However, in an appeal to the Court of Criminal Appeal against sentence, the court in *Zreika v R* held at [83] the fact that an offender's legal representative does not raise the issue in the District Court is "a very practical barometer as to whether such an

argument was realistically available". In determining whether the factor was taken into account, although not explicitly mentioned, the experience of the judge is a relevant matter: *Hendra v R* [2013] NSWCCA 151 at [18].

In *Baines v R* [2016] NSWCCA 132, the court found the fact the charges could all have been dealt with in the Local Court was of no significance in circumstances where criminal liability was in issue. Liability in that case turned upon acceptance of the evidence of several female complainants and it was within the discretionary judgment of the Director of Public Prosecutions to elect that these issues be tried by jury: *Baines v R* at [133].

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

[10-085] Relevance of less punitive offences

Last reviewed: August 2023

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

The holding in *Elias v The Queen* supports the view of the NSWCCA that a sentence imposed in the exercise of State judicial power on conviction for the State offence is not to be reduced to conform to a lesser maximum penalty applicable to a Commonwealth offence: *R v El Helou* [2010] NSWCCA 111 at [90]; *Standen v DPP (Cth)* [2011] NSWCCA 187 at [29].

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Subjective matters at common law

Subjective factors are personal to the offender and include the offender's age, health, background, and some post-offence conduct. They are relevant to sentencing purposes including punishment, personal deterrence, rehabilitation, and the protection of society: *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 476; *Crimes (Sentencing Procedure) Act* 1999, s 3A. A range of subjective factors may also be relevant to the assessment of the offender's "moral culpability" for an offence.

[10-400] Assessing an offender's moral culpability

Last reviewed: August 2023

In *Muldrock v The Queen* (2011) 244 CLR 120 at [58], *Bugmy v The Queen* (2013) 249 CLR 571 at [44]–[46], *Munda v Western Australia* (2013) 249 CLR 600 at [57] and *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 477, the High Court separated the notion of an offender's moral culpability from the objective seriousness of the crime and, accordingly, in Court of Criminal Appeal cases decided after *Muldrock v The Queen*, an assessment of an offender's moral culpability has been treated as a distinct but important part of the sentencing exercise: *Tepania v R* [2018] NSWCCA 247 at [112]; *Paterson v R* [2021] NSWCCA 273 at [29]; *DS v R; DM v R* [2022] NSWCCA 156 at [77], [82]–[88].

In *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 477, *Muldrock v The Queen* (2011) 244 CLR 120 at [58] and *Bugmy v The Queen* (2013) 249 CLR 571 at [44]–[46], the High Court found that, in relation to the respective offender, their moral culpability was diminished, lessened or reduced by various subjective factors. In *DS v R; DM v R* [2022] NSWCCA 156 at [91], the court noted this raises the issue as to from what an offender's moral culpability is reduced, and "[t]he short answer is from a moral culpability that corresponds or substantially corresponds with the objective seriousness (or gravity) of the offence."

While an assessment of moral culpability is important, there is no requirement for a sentencing judge to use the phrase "moral culpability" provided it is clear they have considered all relevant matters going to sentence: *TA v R* [2023] NSWCCA 27 at [86]; see also *DS v R; DM v R* [2022] NSWCCA 156 at [91]–[93].

The line between the assessment of the objective seriousness of the offence and the offender's moral culpability is not always straight-forward, with some subjective factors in some circumstances being relevant to both assessments: *DS v R; DM v R* [2022] NSWCCA 156 at [94]–[96]. See also **The difficulty of compartmentalising sentencing considerations** at **[9-710]**; **Factors relevant to assessing objective seriousness** at **[10-012]**; and taking into account subjective features on sentence below, particularly, **Mental health or cognitive impairment** at **[10-460]**; **Deprived background** at **[10-470]**.

[10-405] Prior record

Last reviewed: August 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.

There is also a distinction between taking into account in mitigation a period of no further convictions recorded from a certain point in time, and a positive finding there has not, as a matter of fact, been any offending since that time: *Richards v R* [2023] NSWCCA 107 at [83]. Noting *Richards v R* involved historical child sexual offending, if an offender seeks to be sentenced on the basis they have ceased offending from a particular time, this must be proved on the balance of probabilities and, if there is no evidence either way, the court may neither sentence on the basis offending has continued, nor ceased: *Richards v R* at [85].

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.

Section 14(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: August 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).

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]. A similar situation arose in *Bhatia v R* [2023] NSWCCA 12 where the court held that s 21A(5A) did not apply because there was no evidence the offender actively used his good character to commit the offence, nor that it played any role in allowing access to the victim: at [133], [136]–[137], [143], [146]. Whether s 21A(5A) applies will turn on the facts and circumstances of the case: *Bhatia v R* at [129].

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 — advanced age and youth

Last reviewed: August 2023

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].

Youth

See discussion of s 6 *Children (Criminal Proceedings) Act* 1987 in **Section 21A(3)(j) — the offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability** at **[11-300]**; **Principles relating to the exercise of criminal jurisdiction** at **[15-010]**; **Relevance of youth at sentence** at **[15-015]**; and **Sentencing principles applicable to children dealt with at law** at **[15-090]**. See also **Factors relevant to assessing objective seriousness** at **[10-012]**.

[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] HCA 19. 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] NSWCCA 186 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] Mental health or cognitive impairment**.

[10-460] Mental health or cognitive impairment

Last reviewed: August 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].

In some "few and confined" circumstances an offender's mental condition may also be relevant to assessing the objective seriousness of the offence: *Lawrence v R* [2023] NSWCCA 110 at [75]. In *DS v R; DM v R* [2022] NSWCCA 156 at at [96]. See also "Mental health or cognitive impairment and objective seriousness" in **Factors relevant to assessing objective seriousness** at **[10-012]**.

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

Bugmy v The Queen (2013) 249 CLR 571

In *Bugmy v The Queen* at [40] the High Court said:

> … 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.

Simpson J (as her Honour then was) in *R v Millwood* [2012] NSWCCA 2 at [69] (Bathurst CJ and Adamson J agreeing), which was decided before *Bugmy v The Queen*, put it this way:

> I am not prepared to accept that an offender who has the start in life that the respondent had bears equal moral responsibility with one who has had what might be termed a 'normal' or 'advantaged' upbringing. Common sense and common humanity dictate that such a person will have fewer emotional resources to guide his (or her) behavioural decisions...

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 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].

The above principles have been applied in a number of Court of Criminal Appeal decisions including *DR v R* [2022] NSWCCA 151 at [37], [40]; *Hoskins v R* [2021] NSWCCA 169 at [54]; *Ohanian v R* [2017] NSWCCA 268 at [24]–[26]; *Kiernan v R* [2016] NSWCCA 12 at [63].

The Court of Criminal Appeal's approach to Bugmy v The Queen

While the High Court in *Bugmy v The Queen* referred to "profound" childhood deprivation, there is no "magic" in the word "profound" or any requirement to characterise an offender's childhood as one of "profound deprivation" before the principle that social disadvantage may reduce an offender's moral culpability is engaged: *Hoskins v R* [2021] NSWCCA 169 at [57].

In *Nasrallah v R* [2021] NSWCCA 207, the majority held it was open to the sentencing judge to find the offender, who had as a child been the victim of attempted sexual assault by an uncle, and of kidnapping and physical assault by a person she met online, did not disclose a history of profound deprivation in accordance with *Bugmy v The Queen*: Bell P (as his Honour then was) at [6], [18]–[19], [25]; Price J at [48], [50]–[52]; Hamill J dissenting at [86]–[87], [97]. Notwithstanding, Bell P at [21]–[22] and Price J at [46] found the judge had regard to the applicant's background and adolescence in mitigation.

In *Ingrey v R* [2016] NSWCCA 31 at [34]–[35], the court held that the use of the word "may" by the plurality in *Bugmy v The Queen* at [40] did not mean that 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 confined to an immediate family context or early childhood. The principle has been applied in other cases including 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]. The principle was also applied where an offender had a stable and secure upbringing with his extended family until the age of 13 when he discovered his biological mother's identity, after which, he was exposed to an environment where violence and substance abuse were normalised: *Hoskins v R* at [62]–[63].

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].

However, in *Kliendienst v R* [2020] NSWCCA 98, there was uncontested evidence before the sentencing judge of the applicant's deprived upbringing and exposure to violence, trauma and drug abuse, including associated expert evidence. Although no submission was put to the sentencing judge that the applicant's moral culpability could

be substantially reduced because of his background, the principles in *Bugmy v The Queen* were applicable as there was uncontested evidence of the factual basis for raising them: *Kliendienst v R* at [67]–[68].

Causal link between deprived background and offending

The plurality in *Bugmy v The Queen* did not determine one way or the other whether a causal link between an offender's deprived background and the offending is required for it to be taken into account on sentence: at 579, 581. However, there has been some tension in the approaches taken since, and it is a question in respect of which differing views have been expressed: *Noonan v R* [2020] NSWCCA 346 at [49].

A number of Court of Criminal Appeal decisions have held a causal link between an offender's deprived background and the offending is not required for it to be taken into account in mitigation on sentence. N Adams J (Bell P (as his Honour then was) and Davies J agreeing) in *Dungay v R* [2020] NSWCCA 209 at [153] held, after reviewing the authorities:

> …the absence of such a link does not mean that the Court does not give full weight to a childhood of profound deprivation if that is established on the evidence.

McCallum J (as her Honour then was) (Hamill and Cavanagh JJ agreeing) in *Lloyd v R* [2022] NSWCCA 18 at [27] agreed, stating:

> The prevailing view appears to be that it is not necessary to establish the existence of a causal connection with the offending before having regard to *Bugmy* factors.

The decisions of *R v Hoskins* at [57], *R v Irwin* [2019] NSWCCA 133 at [116] and *Judge v R* [2018] NSWCCA 203 at [29]–[32] also support this view. In *Perkins v R* [2018] NSWCCA 62, White JA at [82]–[88]; Fullerton J at [95]–[111]; Hoeben CJ at CL dissenting at [42], left the possibility open that such a causal relationship was not required for deprived background to be taken into account, and it was a matter for individual assessment.

However, in the Court of Criminal Appeal decisions of *Katsis v R* [2018] NSWCCA 9 at [105], *R v Wong* [2018] NSWCCA 20 at [73], *Crowley v R* [2017] NSWCCA 99 at [43]–[44], *Taysavang v R; Lee v R* [2017] NSWCCA 146 at [42]–[43], and *KAB v R* [2015] NSWCCA 55 at [61]–[68], amongst other decisions, the court held such a causal link is required.

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].

In *Donovan v R* [2021] NSWCCA 323, despite accepting the offender's profound childhood deprivation, the sentencing judge rejected the application of *Bugmy v The Queen* due to the offender's prosocial behaviour and positive social achievements at the time of offending, as he was able to "rise above it": at [84]. The judge's reasoning was held to overlook the essence of the evidence, particularly regarding the link between the offender's childhood exposure to abuse and the offending: at [85]–[89].

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].

Related principles

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*) should be considered in light of 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 and should be considered in such cases (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].

[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 **[7-890]**.

[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 **[7-890] 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].

[The next page is 5621]

Parity

[10-800] Summary of relevant considerations

Last reviewed: August 2023

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

[10-801] Introduction

Last reviewed: August 2023

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

Sentencing courts, prosecutorial bodies and defence counsel should take steps to ensure related offenders are sentenced by the same sentencing judge, preferably at the same time: *Dwayhi v R* [2011] NSWCCA 67 at [44]–[45]. As a matter of practice, it is in the highest degree desirable that co-offenders be sentenced by one judge: *Postiglione v The Queen* (1997) 189 CLR 295. If this occurs, the judge is then in a position to consider the interrelationship between the objective and subjective features of the offenders in an overarching way: *Usher v R* [2016] NSWCCA 276 at [73].The desirability of this practice has been repeatedly emphasised on the basis that it serves the public interest in consistent and transparent sentencing of related offenders: *Dwayhi v R* at [33]–[43], [46]; *Ng v R* [2011] NSWCCA 227 at [77]–[78]; *Adams v R* [2018] NSWCCA 139 at [81]; *R v Lembke* [2020] NSWCCA 293 at [55]. Many of the parity problems that arise on appeal could be avoided if co-offenders were sentenced at the same time by the same judge.

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

In *R v Rosenberg* [2022] NSWCCA 295, the court stated that in such cases, leaving aside any consideration of parity and absent agreement to the contrary, each offender is to be sentenced on the content of the statement of facts tendered against them without regard to what might be said about them in any other statement of facts tendered against a co-offender: at [10]. The court in *R v Dyson* [2023] NSWCCA 132, applying *R v Rosenberg*, found a sentence to be manifestly inadequate as the sentencing judge had regard to a co-offender's sentence imposed in the Local Court in respect of different facts: at [55]. Sweeney J (Button and Hamill JJ agreeing) summarised the relevant principles in respect of such cases: *R v Dyson* at [54].

[10-805] A justifiable sense of grievance

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

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

See also Gibbs CJ at 609, Brennan J at 617 and Mason J at 610. There is also an exposition of the principle by Dawson and Gaudron JJ in *Postiglione v The Queen*

(1997) 189 CLR 295 at 301. In *Green v The Queen* (2011) 244 CLR 462, the High Court considered the application of the parity principle in sentence appeals (see further below).

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

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

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

[10-807] Co-offenders with joint criminal liability

Last reviewed: August 2023

Where co-offenders agree to commit a crime, they will be liable for each other's actions when committing the crime as well as additional offences they foresaw might be committed: see *McAuliffe v The Queen* (1995) 183 CLR 108 at 114–115; *Criminal Trial Courts Bench Book* at **[2-740] Joint Criminal Liability**.

Although participants in a joint criminal enterprise are equally liable for the same crime, different sentences may be imposed after considering objective and subjective factors. Gibbs CJ in *Lowe v The Queen* (1984) 154 CLR 606 stated at 3:

> It is obviously desirable that persons who have been parties to the commission of the same offence should, if other things are equal, receive the same sentence, but other things are not always equal, and such matters as the age, background, previous criminal history and general character of the offender, and the part which he or she played in the commission of the offence, have to be taken into account.

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

Some of these issues are highlighted in *Rahman v R* [2023] NSWCCA 148 where the offender was sentenced with a co-offender for two counts of specially aggravated

kidnapping in company occasioning actual bodily harm pursuant to s 86(3) *Crimes Act* 1900 committed on the basis of a joint criminal enterprise to abduct and steal from the victims. The co-offender inflicted grievous bodily harm on one of the victims by striking them to the head with a handgun and it was accepted the applicant did not foresee this. Button J at [77]–[80] (McNaughton J agreeing) held that, as the injury was an objective feature of the offence's consequences, and there was no "greater" offence (such as kidnapping occasioning grievous bodily harm) it was correctly taken into account in the offender's case.

Whatever the consequences of an offence, the state of knowledge, belief, intention, recklessness, other form of foresight, or other states of mind (including complete inadvertence) on the part of an offender, constitute important matters on sentence feeding into the question of degrees of culpability, and appropriate punishment: *Rahman v R* at [79] (Button J (McNaughton J agreeing)).

In cases where a court cannot differentiate between the roles each offender played, the offender is to be sentenced on the basis they are criminally responsible for the full range of criminal acts, even though it is not known whether they personally performed them: *Beale v R* [2015] NSWCCA 120 at [59]; see also *GAS v The Queen* (2004) 217 CLR 198 at [22].

For a detailed discussion of the sentencing principles applied for joint liability see A Dyer and H Donnelly, "Sentencing in complicity cases — Part 1: Joint criminal enterprise", *Sentencing Trends and Issues*, No 38, Judicial Commission of NSW, 2009.

The application of principles relating to the sentencing of offenders with joint liability is also discussed in the context of particular offences including: **Detain for advantage/kidnapping** at **[18-730]**; **Drug Misuse and Trafficking Act 1985 (NSW) offences** at **[19-870]**; **Robbery** at **[20-290]**; **Murder** at **[30-070]**; **Manslaughter** at **[40-050]**.

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

Last reviewed: August 2023

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

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

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

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

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

In *Dunn v R* [2018] NSWCCA 108, the parity principle did not apply where the offender was sentenced for an offence but his co-offenders had the same offence taken into account on a Form 1. No relevant comparison can be made between a sentence imposed for an offence and an unspecified increase in a sentence resulting from the charge being taken into account on a Form 1: *Dunn v R* at [16].

The parity principle will apply where co-offenders are charged with a different number of offences and where an aggregate sentence has been imposed on one offender but not another. However, in such cases, a primary consideration in applying the parity principle will be the indicative sentence for the equivalent offence: *R v Clarke* [2013] NSWCCA 260 at [68]; *Miles v R* [2017] NSWCCA 266 at [59]–[60]; *Bridge v R* [2020] NSWCCA 233 at [45]–[46].The application of the parity principle can depend on findings of facts about the role of individual offenders in a crime and the subjective features of individual offenders: *R v JW* (2010) 77 NSWLR 7. See **Co-offenders with joint criminal liability** at **[10-807]**.

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

[10-820] Juvenile and adult co-offenders

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

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

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

> The principles relating to parity, where the comparison is with a young offender, have been gathered by Wood CJ at CL in *R v Boney* [2001] NSWCCA 432. A number of propositions can be stated:
>
> - First, in fashioning a sentence for an adult involved in the same crime, it is relevant to have regard to a sentence imposed by the Children's Court upon a co-offender.
> - Second, the worth of that comparison, however, will be limited given the different sentencing objectives and other considerations in the Children's Court.
> - Third, in determining whether there is a justifiable sense of grievance, it must be recognised that a stage can be reached where the inadequacy of the sentence imposed upon a co-offender is such that any sense of grievance engendered by it cannot be regarded as legitimate (*R v Diamond* (NSW, CCA, 18.2.93, per Hunt CJ at CL).
> - Fourth, at an appellant level, where there is a justifiable sense of grievance in the adult offender, that does not oblige the court to intervene. It has a discretion to intervene. It should not intervene where to do so would produce a sentence which does not reflect the objective gravity of the crime.

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

[10-830] Parity and totality

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

because it is out of step with the parity principle or it may offend the totality principle because it is not "just and appropriate", as in the case of a "crushing" sentence. Any adjustments to sentence, his Honour observed "involve subtle considerations which defy precision either of description or implementation": at 901.

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

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

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

[10-840] Severity appeals and parity

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

> The sense of grievance necessary to attract appellate intervention [in a severity appeal] with respect to disparate sentences is to be assessed by objective criteria. The application of the parity principle does not involve a judgment about the feelings of the person complaining of disparity. The court will refuse to intervene where disparity is justified by differences between co-offenders such as age, background, criminal history, general character and the part each has played in the relevant criminal conduct or enterprise.
>
> A court of criminal appeal deciding an appeal against the severity of a sentence on the ground of unjustified disparity will have regard to the qualitative and discretionary judgments required of the primary judge in drawing distinctions between co-offenders. Where there is a marked disparity between sentences giving rise to the appearance of injustice, it is not a necessary condition of a court of criminal appeal's discretion to intervene that the sentence under appeal is otherwise excessive.

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

However, no objection can be taken to the words "gross" or "glaring", if they are used to emphasise that in circumstances where the same judge sentenced both offenders and took the question of parity into account, an appellate court should be cautious to intervene; when considering whether there is a marked disparity to justify an objective

sense of grievance, what is being reviewed are qualitative and discretionary judgments: *Borg v R* [2019] NSWCCA 129 at [88], [89] (Bathurst CJ; Hamill and N Adams JJ agreeing). It is not a further or additional requirement on appeal that the disparity be gross or glaring: at [90]. Whether an appellant has established that there is an unjustifiable disparity between their sentence and a co-offender's is a question of substance rather than form: *Kadwell v R* [2021] NSWCCA 42 at [13].

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

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

[10-850] Crown appeals and parity

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

> … a powerful consideration against allowing a Crown appeal would be the resultant creation of unjustifiable disparity between any new sentence and an unchallenged sentence previously imposed upon a co-offender. The question would then arise: would the purpose of Crown appeals under s 5D be served by allowing the appeal? If the result of doing so would be a sentence "adequate" on its face, but infected by an anomalous disparity which is an artifact of the Crown's selective invocation of the Court's jurisdiction, the extent of the guidance afforded to lower courts may be questionable.

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

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

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

In *Green v The Queen*, the High Court held that the Court of Criminal Appeal erred in failing to give adequate weight "to the purpose of Crown appeals and the importance

of the parity principle": *Green v The Queen* at [4]. The court also erred in taking into account its opinion that the sentence imposed upon a co-offender was manifestly inadequate. The sentence had not been raised by a Crown appeal and had not been the subject of argument by the parties at the hearing of the appeal: *Green v The Queen* at [76].

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

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Power to reduce penalties for assistance to authorities

In *York v The Queen* (2005) 225 CLR 466, Gleeson CJ at [3] observed:

> It is common sentencing practice to extend leniency, sometimes very substantial leniency, to an offender who has assisted the authorities, and, in so doing, to take account of any threat to the offender's safety, the conditions under which the offender will have to serve a sentence in order to reduce the risk of reprisals, and the steps that will need to be taken to protect the offender when released. The relevant principles are discussed, for example, in *R v Cartwright* (1989) 17 NSWLR 243; *R v Gallagher* (1991) 23 NSWLR 220.

The basis of a court's power to discount any sentence for a State offence where the offender has provided assistance to law enforcement authorities is found in s 23(1) *Crimes (Sentencing Procedure) Act* 1999.

For the statutory provisions and principles applicable to sentencing Commonwealth offenders who have provided assistance, see **General sentencing principles applicable** at **[16-010]**.

[12-200] Statutory provision

Last reviewed: August 2023

Section 23 *Crimes (Sentencing Procedure) Act* 1999 provides as follows:

> **23 Power to reduce penalties for assistance provided to law enforcement authorities**
>
> (1) A court may impose a lesser penalty than it would otherwise impose on an offender, having regard to the degree to which the offender has assisted, or undertaken to assist, law enforcement authorities in the prevention, detection or investigation of, or in proceedings relating to, the offence concerned or any other offence.
>
> (2) In deciding whether to impose a lesser penalty for an offence and the nature and extent of the penalty it imposes, the court must consider the following matters:
>
> (a) (repealed)
>
> (b) the significance and usefulness of the offender's assistance to the authority or authorities concerned, taking into consideration any evaluation by the authority or authorities of the assistance rendered or undertaken to be rendered,
>
> (c) the truthfulness, completeness and reliability of any information or evidence provided by the offender,
>
> (d) the nature and extent of the offender's assistance or promised assistance,
>
> (e) the timeliness of the assistance or undertaking to assist,
>
> (f) any benefits that the offender has gained or may gain by reason of the assistance or undertaking to assist,
>
> (g) whether the offender will suffer harsher custodial conditions as a consequence of the assistance or undertaking to assist,
>
> (h) any injury suffered by the offender or the offender's family, or any danger or risk of injury to the offender or the offender's family, resulting from the assistance or undertaking to assist,

(i) whether the assistance or promised assistance concerns the offence for which the offender is being sentenced or an unrelated offence,

(j) (repealed)

(3) A lesser penalty that is imposed under this section in relation to an offence must not be unreasonably disproportionate to the nature and circumstances of the offence.

(4) A court that imposes a lesser penalty under this section on an offender because the offender has assisted, or undertaken to assist, law enforcement authorities must:

(a) indicate to the offender, and make a record of the fact, that the lesser penalty is being imposed for either or both of those reasons, and

(b) state the penalty that it would otherwise have imposed, and

(c) where the lesser penalty is being imposed for both reasons — state the amount by which the penalty has been reduced for each reason.

(5) Subsection (4) does not limit any requirement that a court has, apart from that subsection, to record the reasons for its decisions.

(6) The failure of a court to comply with the requirements of subsection (4) with respect to any sentence does not invalidate the sentence.

[12-205] Rationale

Last reviewed: August 2023

Frequently the only source of information about an actual or contemplated crime comes from other criminals, and it is in the public interest to encourage offenders to supply such information to authorities, including the police, and to give evidence against other offenders. Section 23 is the statutory expression of the policy to encourage the supply of full and frank information to authorities by granting an offender an appropriate reward regardless of whether the assistance was motivated by genuine remorse or self-interest: see *R v Cartwright* (1989) 17 NSWLR 243 per Hunt and Badgery-Parker JJ at 252; endorsed in *R v XX* [2017] NSWCCA 90 at [46].

If the giving of assistance is motivated by genuine remorse or contrition, then even greater leniency may be extended to the offender under normal sentencing principles and as to these, and other considerations relevant to the rationale for the discount, in *R v Cartwright* at 252, their Honours said:

> It is clearly in the public interest that offenders should be encouraged to supply information to the authorities which will assist them to bring other offenders to justice, and to give evidence against those other offenders in relation to whom they have given such information.
>
> In order to ensure that such encouragement is given, an appropriate reward for providing assistance should be granted whatever the offender's motive may have been in giving it, be it genuine remorse (or contrition) or simply self-interest. What has to be encouraged is a full and frank co-operation on the part of the offender, whatever be his motive. The extent of the discount will depend to a large extent upon the willingness with which the disclosure is made. The offender will not receive any discount at all where he tailors his disclosure so as to reveal only the information which he knows is already in the possession of the authorities. The discount will rarely be substantial unless an offender discloses everything which he knows. To this extent, the enquiry is into the subjective nature of the offender's co-operation. If, of course, the motive with which the

> information is given is one of genuine remorse or contrition on the part of the offender, that is a circumstance which may well warrant even greater leniency being extended to him, but that is because of normal sentencing principles and practice. The contrition is not a necessary ingredient which must be shown in order to obtain the discount for giving assistance to the authorities.
>
> Again, in order to ensure such encouragement is given, the reward for providing assistance should be granted if the offender has genuinely co-operated with the authorities whether or not the information supplied objectively turns out in fact to have been effective. The information which he gives must be such as *could* significantly assist the authorities. The information must, of course, be true; a false disclosure attracts no discount at all. What is relevant here is the potential of the information to assist the authorities as comprehended by the offender himself. [emphasis in original]

The rationale for the discount as explained in *R v Cartwright* remains valid, despite the enactment of s 23: *AGF v R* [2016] NSWCCA 236 at [35]–[36].

[12-210] Procedure

Last reviewed: August 2023

Presenting evidence of assistance

It is incumbent on the offender to establish that a discount for assistance should be provided: *R v SS* [2021] NSWCCA 56 at [74]; *Ahmad v R* [2021] NSWCCA 30 at [36]. However, the Crown has an obligation to assist the offender discharge this burden as a matter of public interest and practicality because it may be difficult for an offender to adduce such evidence: *R v Cartwright* (1989) 17 NSWLR 243 at 254–255; *R v Bourchas* [2002] NSWCCA 373 at [99].

Evidence of assistance is typically in the form of an affidavit, or letter, of assistance by a senior law enforcement officer who identifies the assistance provided and makes an assessment as to its value. A statement taken from an offender provided on the basis the evidence contained in it will not be used against them (an induced statement) may also be tendered to demonstrate to the sentencing court the extent of their assistance for the purpose of mitigation. When the offender's statement is tendered it is encumbent on the parties to identify for the sentencing court any limitations on its use: *Macallister (a pseudonym) v R* [2020] NSWCCA 306 at [39]–[41].

A statement of assistance is tendered for the sole purpose of s 23. As is the case when an offender's induced statement is tendered, the basis for tendering an affidavit, or letter, of assistance should be agreed and clearly stated and the question of whether there is any restriction on its use identified: *Neil Harris (a pseudonym) v R* [2019] NSWCCA 236 at [61]. The same caution used when considering an induced statement should also be exercised when a letter of assistance is tendered for the sole purpose of s 23: *Neil Harris (a pseudonym) v R* at [61] applying the principles in *R v Bourchas* at [99]. See further **Offender's induced statement cannot be used adversely** below.

Maintaining confidentiality of material

Evidence of assistance relied on in sentence proceedings must be dealt with carefully to maintain its confidentiality. It is prudent to raise with the parties the approach to be taken in an individual case.

Appropriate non-publication orders should be tailored to ensure the offender has the opportunity to consider and test the accuracy of the evidence and to make submissions. Depending on the nature of the material, this may require providing an offender's counsel with access to the material on certain terms: *HT v The Queen* (2019) 269 CLR 403 at [45]–[46], [57], [66]–[67]. In *HT v The Queen* the High Court concluded the appellant was denied procedural fairness during the Crown sentence appeal because she was not provided with access to the affidavit of assistance provided by police. The fact the affidavit was not adverse to her was irrelevant: *HT v The Queen* at [25]. See also **[1-349] Closed court, suppression and non-publication orders** in the *Criminal Trial Courts Bench Book*.

There is a tension in s 23 between the obligation to provide reasons in open court and the need to protect confidentiality. Revealing the fact or detail of assistance may put an offender or their family at risk, and undermine or destroy the benefits law enforcement authorities may obtain from that assistance. In a sentencing judgment it is preferable to do no more than indicate that consideration has been given to the material and draw conclusions about its utility. Providing a detailed exposition of the factors in s 23(2) may defeat the purpose of the statutory provision: *Greentree v R* [2018] NSWCCA 227 at [55]–[56]. For example, in *Greentree v R* the court found it was not an error for the judge to refer to the "significance and the usefulness" of the assistance without elaboration. Such an approach appropriately balanced the obligation to provide reasons with the need to protect confidentiality: at [56].

Offender's induced statement cannot be used adversely

An offender's induced statement, while it may be admitted in the offender's sentence proceedings, cannot be used against them: *R v Bourchas* at [99].

In *R v Bourchas*, the appellant entered a guilty plea at the earliest opportunity and provided significant assistance to the authorities. On sentence, the Crown tendered, over objection, his long and detailed statement, which was made following a promise that it would not be used against him. The sentencing judge admitted the statement and took information in it into account when sentencing the appellant, including information unfavourable to him, which was not otherwise in evidence.

The court held that the judge erred in taking into account the appellant's statement otherwise than as evidence of his assistance to authorities: at [100]. Giles JA, at [99], summarised his findings in relation to the issue as follows:

1. The offender carries the burden of proving assistance to the authorities, as a matter going to mitigation.
2. The Crown should assist the offender in the discharge of that burden.
3. The assistance may extend to the Crown tendering the evidence of assistance to the authorities, but the Crown should not do so over the objection of the offender.
4. A statement made by way of assistance to the authorities on an undertaking that the information in it will not be used against the offender may properly be admitted on the basis that the information in it will not be used against the offender, and with its use restricted accordingly.
5. When the offender tenders a statement made by way of assistance to the authorities, or accepts the Crown's assistance in tendering such a statement, it is

prudent that the basis of the tender be agreed and stated showing any restriction on the use of the information in the statement; if there is disagreement, a ruling can be made in the normal way.

6. In the absence of an agreed basis of tender or a ruling at the time of admission, whether use of a statement made by way of assistance to the authorities is restricted will depend on the circumstances, but normally the information in the statement cannot be used against the offender.

See also *JMS v R* [2010] NSWCCA 229 at [29]; *Govindaraju v R* [2011] NSWCCA 55 at [66].

[12-215] Broad scope of s 23(1)

Last reviewed: August 2023

Section 23 takes an expansive approach to what constitutes "assistance": *R v XX* [2017] NSWCCA 90 at [53].

Assistance to authorities most commonly occurs in the form of implicating accomplices and/or giving evidence as a Crown witness: see for example, *Abbas v R* [2013] NSWCCA 115; *R v DW* [2012] NSWCCA 66. However, voluntary disclosure to law enforcement authorities of otherwise unknown guilt also falls within the ambit of s 23: *CMB v Attorney General for NSW* (2015) 256 CLR 346 at [41], [71]; *Panetta v R* [2016] NSWCCA 85 at [33]–[34]; *Le v R* [2019] NSWCCA 181 at [50]–[52]; *Ahmad v R* [2021] NSWCCA 30 at [24]. A discount granted for this type of assistance is commonly referred to as an *Ellis* discount (from *R v Ellis* (1986) 6 NSWLR 603 discussed further below at **[12-218] Voluntary disclosure of unknown guilt — Ellis discounts**.

Another situation where a discount was afforded arose in *RJT v R* [2012] NSWCCA 280 where an offender being sentenced for two child sexual assault offences told police he was sexually assaulted by his grandfather as a child. It was held that while s 23 extended to assistance of this kind the level of discount should be more limited than otherwise applied (10% was found to be appropriate): at [9]–[10].

However, not all information provided by an offender amounts to assistance for the purposes of s 23. For example, the mere fact an offender participates in a recorded interview and makes admissions about the offence does not amount to assistance within the meaning of s 23(1): *Le v R* [2019] NSWCCA 181 at [53]–[54], [56]; *Browning v R* [2015] NSWCCA 147 at [123].

In *Vaiusu v R* [2022] NSWCCA 283, it was held that the offender, who had entered into negotiations with police for the surrender of unlawful firearms, was not entitled to a discount as a concluded agreement had not been reached, and he had not "undertaken to assist" in accordance with s 23(1): at [67].

The court in *R v XX* [2017] NSWCCA 90 made the following observations (at [32]–[35]) about s 23(1) in light of the text of the provision and the historic and extrinsic materials:

- "Assistance" is not defined in the provision and the meaning should be approached as being relatively expansive. The only limitations are that the assistance be given to "law enforcement authorities" in the "prevention, detection or investigation, or in proceedings relating to" an offence;

- The reference to "any other offence" in the text of the provision clearly contemplates that the assistance may have been provided in relation to an offence other than the one for which the offender is being sentenced;
- Nothing in s 23(1) suggests that the assistance must have been provided after the offender's arrest; past assistance, provided prior to arrest or even the offender's commission of the subject offence, is therefore capable of falling within the provision.

The court went on to note that not all conduct of an offender which helps the authorities falls within s 23(1), citing unwitting assistance (*R v Calderoni* [2000] NSWCCA 511 at [9]) and pre-trial disclosure (s 22A *Crimes (Sentencing Procedure) Act 1999*) as examples: at [32], [39].

Section 23(1) confers a discretion and not an obligation on a sentencing judge to proffer a discount when assistance has been provided: *R v XX* at [31]. The factors listed under s 23(2) are relevant not only to an assessment of the level of discount that must be provided, they must also be considered as part of the assessment of whether any discount should be provided: *R v XX* at [61]; *Le v R* at [55].

In noting the example given by RA Hulme J in his dissent in *RJT v R* at [40], of where an offender seeks a discount on the basis that he reported a home burglary to police many years before, the court stated that even if that situation fell within s 23(1), a proper application of the criteria in s 23(2) would compel the conclusion that no lesser penalty should be imposed: *R v XX* at [53].

The sentencing judge in *R v XX* erred by allowing the respondent a 15% discount under s 23 in circumstances where, six or seven years before his arrest for child sexual offences, he had assisted in the prosecution of a conspiracy to murder charge: *R v XX* at [63]. Although that assistance was within the scope of s 23(1), the proper exercise of the discretion could only have led to a refusal to impose a lesser sentence. The assistance and the subject offence were entirely unrelated, there was no ongoing risk of reprisals and the respondent had already derived a benefit ($17,000) from providing that assistance (all matters under s 23(2)(i), (g) and (f) respectively): *R v XX* at [62].

Because s 23 applies to *Ellis* discounts, it follows that a sentencing court must also consider the factors in s 23(2) when determining whether to proffer the discount: *R v AA* [2017] NSWCCA 84 at [45]. The sentencing judge in that case erred by failing to do so before stating he was granting the offender a "further *Ellis* type discount": at [49].

[12-218] Voluntary disclosure of unknown guilt — the Ellis principle

Last reviewed: August 2023

In *R v Ellis* (1986) 6 NSWLR 603, decided before the enactment of s 23, the court held that an offender who voluntarily discloses their involvement in serious crime about which the police had no knowledge was entitled to a "significant added element of leniency". In *R v Ellis*, not only did the respondent plead guilty, but he voluntarily disclosed to police for the first time his involvement in seven armed robberies. The degree of leniency afforded to an offender in cases of this kind will vary depending on the likelihood of discovery of the offence: *R v Ellis*, per Street CJ at 604.

Although since at least *CMB v Attorney General for NSW* (2015) 256 CLR 346, it has been accepted that assistance of this kind may entitle an offender to a reduced sentence under s 23, *R v Ellis* and the cases which have considered it provide guidance as to why such assistance may justify a sentence discount under s 23: see *R v SS* [2021] NSWCCA 56 at [43]–[44], and the discussion at [59]–[65].

In *Ryan v The Queen* (2001) 206 CLR 267, McHugh J discussed the extent to which leniency may be extended pursuant to *R v Ellis*, saying at [15], that:

> The statement in *Ellis* that "the disclosure of an otherwise unknown guilt of an offence merits a significant added element of leniency" is a statement of a general principle or perhaps more accurately of a factor to be taken into account. It is not the statement of a rule to be quantitatively, rigidly or mechanically applied. It is an indication that, in determining the appropriate sentence, the disclosure of what was an unknown offence is a significant and not an insubstantial matter to be considered on the credit side of the sentencing process. How significant depends on the facts and circumstances of the case.

In *R v GLB* [2003] NSWCCA 210, the court held at [33] that, although some discount should be allowed:

> a sentencing judge is not required, in every case in which there has been a voluntary disclosure of guilt by the offender, to allow a considerable or significant discount because of the voluntary disclosure of guilt or to say in the judge's remarks on sentence that the judge has allowed a considerable or significant discount on this ground.

Howie J said in *Lewins v R* [2007] NSWCCA 189 at [18]:

> Although the leniency referred to in these decisions extends to those cases where the offender volunteers additional criminality otherwise unknown to the police, the extent of the leniency will obviously not be of the same significance as in those cases where the police are unaware of any criminal offences committed by the offender. It is a matter of degree. In some cases the known criminality might be so great that little leniency can be shown for the further offences revealed by the offender.

In *Panetta v R* [2016] NSWCCA 85, the applicant was entitled to considerable leniency for his confession in circumstances where there was no prospect of the offence (murder) or the offender's involvement in it coming to light: at [70]. On the other hand, in *R v SS*, the offender was not entitled to leniency for assistance because of his admissions as there was independent evidence of his guilt: at [83].

The entitlement to a discount applies, albeit to a lesser extent, where (precipitated by the co-offender) the police are close to identifying the offender and then the offender voluntarily surrenders and confesses: see *R v Hasan* [2005] NSWCCA 21 at [23].

Relevance to remorse and contrition

The voluntary confession of criminality will also be relevant to other, more general considerations such as remorse, the prospects of rehabilitation and the likelihood of further offending: *Lewins v R* at [18]; see also **[10-420] Contrition** and **[11-290] Section 21A(3)(i) — remorse shown by the offender**. In *R v SS*, although the applicant was not entitled to a discount for assistance, his admission supported a finding of genuine remorse: at [85]. The court can also take into account that there has been a long delay between the commission of the crime and sentencing, and that the offender

had since been rehabilitated. On the other hand, a lengthy period of concealment and lying to the police are factors not to be ignored: *R v Baldacchino* (unrep, 3/11/98, NSWCCA).

[12-220] "Unreasonably disproportionate" penalty — s 23(3)

Last reviewed: August 2023

A court is required to consider all the matters listed under s 23(2) *Crimes (Sentencing Procedure) Act* 1999 and must not reduce a sentence so that it becomes unreasonably disproportionate to the nature and circumstances of the offence: s 23(3). Hence, there is a limit to the value provided by assistance to authorities. In *R v Chaaban* [2006] NSWCCA 107 at [3] Hunt AJA said:

> In *Regina v Gallagher* (1991) 23 NSWLR 220 at 232 — well before s 23(3) was enacted — Gleeson CJ (with whom I expressly agreed on this issue, at 234), after pointing out that discounts of this kind are for the benefit of both the Crown and the offender, and that there is usually no-one to put an opposing or qualifying point of view, said:
>
> > "Public confidence in the administration of criminal justice would be diminished if courts were to give uncritical assent to arguments for leniency, which are being jointly urged by both the prosecution and the defence, in circumstances which may call for a close examination of the alleged assistance. *Care must also be taken to ensure that the ultimate sentencing result that is produced is not one that is so far out of touch with the circumstances of the particular offence and the particular offender that, even understood in the light of the considerations of policy which supports [the discounts given], it constitutes an affront to community standards.* If sentencing principles are capable of producing an outcome of that kind, then that calls into question their legitimacy." [emphasis added in Hunt AJA's judgment.]

Section 23(3) is the statutory enactment of this principle from *R v Gallagher*. The term "unreasonably" in s 23(3) is given a wide operation: *CMB v Attorney General of NSW* (2015) 256 CLR 346 at [78].

It is inappropriate to apply a discount for assistance to the authorities "wholly to the non-parole period [as such] an approach [is] only likely to skew the whole sentencing exercise, particularly after a large discount has been given for the guilty pleas when fixing the head sentences": *R v MacDonnell* [2002] NSWCCA 34 at [48]. Where an aggregate sentence is imposed the discount must be applied to each indicative sentence, not the aggregate sentence: *TL v R* [2017] NSWCCA 308 at [102]–[103].

Necessity of court to scrutinise the information

It is common in cases where leniency is being sought on behalf of a person who has co-operated with the authorities that the argument in favour of such leniency comes from the Crown as well as the offender.

The prosecuting authorities themselves have gained, or hope to gain, from the assistance in question, and it is understandable that they regard it as advancing the interests which they represent to see that such assistance is suitably and publicly rewarded. There is, however, usually no-one to put an opposing or qualifying point of view. This raises the need for special care on the part of the court, which must be astute to ensure it is being given accurate, reliable, and complete information concerning the alleged assistance and the benefits said to flow from it: *R v Gallagher* at 232; *R v Fisk* (unrep, 21/7/98, NSWCCA).

An inquiry relating to the quality of the assistance should be dealt with in a broad and general way and not descend into minute detail lest it subvert the benefit otherwise afforded to the public interest: *R v Cartwright* (1989) 17 NSWLR 243 at 253. Where information given to assist authorities is only partly true and does in fact assist the authorities, the fact it was partly false does not itself disentitle the offender from a reduction in sentence: *R v Downey* (unrep, 3/10/97, NSWCCA).

Resolving assertions on appeal that sentence unreasonably disproportionate

In a Crown appeal against sentence where a lesser sentence has been imposed to take into account the offender's assistance to law enforcement authorities, the issue for the Court of Criminal Appeal is not whether it regards the sentence as "unreasonably disproportionate" within the meaning of s 23(3), but whether it was open to the sentencing judge to decide that the sentence actually imposed was not unreasonably disproportionate. The focus is on whether the primary judge's conclusion was open. Whether a sentence is unreasonably disproportionate is a judgment about which reasonable minds may differ: *CMB v Attorney General (NSW)* at [78].

See also **Appeals** at **[70-000]**ff.

[12-225] Requirement to indicate reduction for assistance — s 23(4)

Last reviewed: August 2023

Section 23(4) requires a court, which imposes a lesser penalty because the offender has assisted or has undertaken to assist, to indicate that a lesser penalty is being imposed. The court must state the penalty that otherwise would have been imposed and the amount by which the sentence is reduced.

The text of s 23(4)(b) — that the court is to "state the penalty that it would otherwise have imposed" — refers to the appropriate penalty disregarding only the assistance to the authorities: *R v Ehrlich* [2012] NSWCCA 38 per Basten JA at [11] and Adams J at [33]. Where full time imprisonment is imposed, compliance with s 23(4) will generally, if not invariably, permit the discount to be identified, even if not expressly stated, by calculating the proportion of the sentence imposed of that which would otherwise have been imposed, each of which are to be stated: *R v Ehrlich* at [9]. Where the court imposes a more lenient sentencing option because of the offender's assistance, the court should state what the harsher option would have been had the offender not assisted.

Because s 23 also applies to *Ellis* discounts, the court is required under s 23(4) to state the nature and extent of any reduction of the sentence which would otherwise have been imposed absent that disclosure of guilt and quantify the discount separately: *Panetta v R* [2016] NSWCCA 85 at [1], [33]–[34], [60]; *R v AA* [2017] NSWCCA 84 at [43].

Where a discount is given for a guilty plea, and past and future assistance, in most cases the court will be required to indicate the discount for all three to comply with s 23(4): *LB v R* [2013] NSWCCA 70 at [44]. Compliance with ss 23(3) and 23(4) cannot be fulfilled by a statement of individual discounts followed by a process of "compression" to achieve a result that does not contravene s 23(3): *LB v R* at [45].

In *R v AA*, the court considered the impact of a failure to comply with s 23(4), noting that while s 23(6) provides that the failure to comply with s 23(4) does not "invalidate

the sentence", s 101A of the Act provides that a "failure to comply with a provision of this Act may be considered by an appeal court in any appeal against sentence even if this Act declares that the failure to comply does not invalidate the sentence". The combined effect of the provisions is therefore that a failure to comply with s 23(4) is not a jurisdictional error but complaints about such failures fall to be considered as part of the appellate process: *R v AA* at [44].

A court must also avoid double counting an element on sentence, for example when assistance also reflects contrition: *R v Ehrlich* per Basten JA at [13]–[14]; *Hamzy v R* [2014] NSWCCA 223 at [73]. While the discount for assistance must be quantified, the discount for contrition is generally not quantified: s 23(4); see **[10-420] Contrition**.

[12-230] Applying the discount

Last reviewed: August 2023

The factors in s 23(2) are relevant not only to an assessment of the level of discount that must be provided. They must also be considered as part of the assessment of whether any discount should be provided: *R v XX* [2017] NSWCCA 90 at [61]; *Le v R* [2019] NSWCCA 181 at [55]. If a sentencing court is to reduce a sentence because of an offender's assistance, regard must be paid to the mandatory considerations in s 23(2) and the discount must be specified: *Ahmad v R* [2021] NSWCCA 30 at [36], [41]. Even if a court chooses not to impose a lesser penalty for the assistance given regard must still be had to the matters identified in s 23(2): *Ahmad v R* at [41]; *R v AA* [2017] NSWCCA 84 at [45].

Method of calculation of discount — combined or separate?

Section 23(4) does not prescribe a method or manner in which the discounting is to be achieved: *R v Ehrlich* [2012] NSWCCA 38 at [7]. Although Gleeson CJ's remarks in *R v Gallagher* (1991) 23 NSWLR 220 are qualified by s 23(4) their "tenor is not diminished": *R v Ehrlich* per Basten JA at [7]. Gleeson CJ said in *R v Gallagher* at 230:

> … it is essential to bear in mind that what is involved is not a rigid or mathematical exercise, to be governed by "tariffs" derived from other or different cases but, rather, one of a number of matters to be taken into account in a discretionary exercise that must display due sensitivity towards all the considerations of policy which govern sentencing as an aspect of the administration of justice.

Different approaches have been taken to discounting: *R v Ehrlich* per Basten JA at [11]; Adams J at [33]. There is authority which permits discounts to be separately identified and then applied consecutively: *R v Ehrlich* at [11]. Another commonplace approach is to identify individual discounts and add them so as to achieve a single global figure: *R v Ehrlich* at [11]–[12].

Neither approach is erroneous because s 23(4) "says nothing as to the manner in which the discounting is to be achieved. Indeed, on one view, the manner in which it is achieved is irrelevant: the selected reduction can be expressed in a number of different ways, none of which is prohibited": *R v Ehrlich* per Basten JA at [11]. The real issue with respect to the allowance of a discount on two bases is to avoid double counting of a particular element: *R v Ehrlich* per Basten JA at [13]–[14]; *Hamzy v R* [2014] NSWCCA 223 at [73]. While the discount for assistance must be quantified, the discount for contrition is generally not quantified: s 23(4); see **[10-420] Contrition**.

The court in *CM v R* [2013] NSWCCA 341 at [45] held that there was no reason for the judge to confine the discount to just one of the five sentences. Rather, the judge should have discounted each sentence which should have had a modest bearing on the overall term: *CM v R* at [48]. When there is a degree of accumulation of multiple sentences it is necessary to ensure that any discount is not eroded by the process of accumulating sentences: *CM v R* at [44]. Discounts applied to individual sentences need not be reflected with mathematical precision in the overall or effective term. There is, however, a need for some proportionality: *CM v R* at [48].

Level of discount

It is not helpful to speak of a level of discount as being generally available: *R v Ehrlich* per Basten JA at [11]; *Hamzy v R* at [74]. It makes assumptions about the matters to which the court must have regard in s 23(2) and runs the risk of selective reliance on authorities to the exclusion of others. There are decisions such as *R v NP* [2003] NSWCCA 195 at [29] and *Z v R* [2014] NSWCCA 323 at [43] which permitted a discount for assistance of up to 50%. As Gleeson CJ said in *R v Gallagher* at 230 "what is involved is not a rigid or mathematical exercise, to be governed by 'tariffs' derived from other and different cases": *R v Ehrlich* at [6]; see also *Buckley v R* [2021] NSWCCA 6 at [1]. The process embarked upon in reducing a sentence for assistance is not one of arithmetic calculation or the blind application of percentage discounts: *Haouchar v R* [2014] NSWCCA 227 per Rothman J at [39]. Beazley JA said in *R v Z* [2006] NSWCCA 342 at [88]:

> the focus should not be so much upon the precise numerical value of the discount but rather upon the question whether, after all relevant matters have been taken into account, the sentence imposed is appropriate.

The relevant restraint derives from the requirement in s 23(3) that the sentence not be disproportionate to the nature and circumstances of the offence: *Buckley v R* at [1]; [87].

In *SZ v R* [2007] NSWCCA 19 at [44], the court held that generally only a single, combined discount for both a guilty plea and assistance should be given because applying two discrete discounts may lead to error "unless the court is conscious of the overall discount being given and considers whether a discount of that degree can result in a sentence that does not infringe s 23(3): at [11], [44]. This approach was confirmed in *Panetta v R* [2016] NSWCCA 85.

Some guidance about the constraint in s 23(3), that the sentence not be unreasonably disproportionate to the nature and circumstances of the offence as it applies to a combined discount for a plea of guilty and assistance, may be obtained from:

- Generally, a combined discount of more than 50% will not comply with s 23(3) and rarely will a discount of more than 60% be appropriate: *SZ v R* at [11]; *Z v R* at [33]; *Panetta v R* at [75], [7].
- A combined discount of 50% incorporates an offender serving their sentence in more onerous conditions, otherwise the combined discount should not normally exceed 40%: *Brown v R* [2010] NSWCCA 73 at [38]; *Haouchar v R* [2014] NSWCCA 227 at [37].
- In *SZ v R*, the judge erred by giving a combined discount of 62.5%, reflecting a 25% discount for a guilty plea and 50% discount for assistance. However, given the

unusual circumstances in *Panetta v R* (a voluntary confession to murder where the applicant's involvement was unlikely to have been discovered) a combined discount of 60% (50% for assistance and 10% for his guilty plea) was appropriate: at [7], [76]. See also *R v NP* [2003] NSWCCA 195 at [30] involving a 60% combined discount for plea of guilty and assistance.

However, the court in *Buckley v R*, while acknowledging that earlier cases such as *SZ v R*and *Z v R*expressed and endorsed the view that a single combined discount should not normally exceed 50%, reiterated the importance of assessing the facts and circumstances of the particular case, including most significantly, s 23(3), concluding that the effective constraint is not a rigid mathematical rule but the constraint established by s 23(3): at [1]; [87]. In *McKinley v R* [2022] NSWCCA 14, Rothman J (Macfarlan JA and Dhanji J agreeing) addressed this more directly, observing, at [48]–[49], that cases such as *R v Sukkar* [2006] NSWCCA 92, *SZ v R* and *FS v R* [2009] NSWCCA 301, which said it would be a rare case where a combined discount of more than 60% would not result in a manifestly inadequate sentence, "probably did not withstand later authority criticising an arithmetic approach to sentencing." His Honour emphasised at [50] that determining "the reduction for assistance pursuant to the terms of s 23 … depends on assessment of the mandatory considerations prescribed by s 23(2)."

Ultimately, the sentencing judge must stand back and ask whether the resulting sentence is just and reasonable, not only to the offender but also to the community at large after taking into account the various statutory and common law principles and applying such discounts that arise on the particular facts: *SZ v R* at [5]. The court in *SZ v R* also held that it is important to avoid double counting in cases of assistance by finding special circumstances after the non-parole period has already been reduced: at [11].

The advent of more standardised discounts, such as the utilitarian value of a guilty plea being as high as 25%, following the decision of *R v Thomson and Houlton* (2000) 49 NSWLR 383, means courts have less scope to give a discount for assistance in cases of an early plea: *SZ v R* at [9]. The statutory fixed discounting scheme for the utilitarian value of a guilty plea in matters dealt with on indictment in Pt 3, Div 1A, *Crimes (Sentencing Procedure) Act*1999 may operate to similar effect: see **Guilty plea discounts for offences dealt with on indictment** at **[11-515]** and **Combining the plea with other factors** at **[11-530]**.

See also **Combining the plea with other factors** at **[11-530]**.

Assistance and not guilty pleas

Z v R [2014] NSWCCA 323 held that *SZ v R* [2007] NSWCCA 19 does not govern the scenario where an offender pleads not guilty and provides substantial assistance to authorities. It is wrong to proceed on the basis that *SZ v R* prescribes a ceiling for the level of discount in such a case; the primary judge had therefore erred in construing s 23 with an implied algorithm to conclude a discount for assistance alone was confined to 25%: *Z v R* at [33]. The court stated that "[t]o construe the Act with that level of mathematical rigidity would come close to punishing some offenders who offer assistance for not pleading guilty": *Z v R* at [34].

[12-240] Promised assistance

Last reviewed: August 2023

Appeals following a failure to provide promised assistance

The Crown may appeal against the reduced sentence if the person fails to fulfil their promise of assistance: s 5DA *Criminal Appeal Act* 1912. In *R v KS* [2005] NSWCCA 87 Wood CJ at CL said at [19]:

> The ability of the Crown to invoke this section is a very important part of the criminal justice system. Persons who give undertakings and who receive the benefit of those undertakings by way of a discounted sentence can, subject to exceptional circumstances, expect to have their sentences increased if they renege on their undertaking to give evidence. The departure from an undertaking of that kind is not to be regarded lightly and it will normally justify appellate intervention.

Where the undertaking is to give evidence, adherence to that undertaking requires more than simply attending court: *R v X* [2016] NSWCCA 265 at [43]. In *R v X*, the respondent gave an undertaking to give evidence as a Crown witness in accordance with an earlier police statement. Although he attended court and gave evidence, in some respects the evidence was diametrically opposed to what he had told police in his statement: *R v X* at [44]–[46]. See also *R v MG* [2016] NSWCCA 304 at [42].

In *R v James* [2014] NSWCCA 311, where the failure to wholly or partly fulfil an undertaking was disputed between the parties, it was accepted that the court would at least have to be "comfortably satisfied" the undertaking had not been fulfilled, which it was not in the circumstances. Although it was not necessary to determine in light of that conclusion, the court questioned whether parity of reasoning with *The Queen v Olbrich* (1999) 199 CLR 270 would require satisfaction of that fact beyond reasonable doubt: *R v James* at [46].

Exercising the 5DA discretion

The appellate court's power to vary a sentence under s 5DA(2) is discretionary, and the court may exercise its discretion not to intervene in an appropriate case, despite an offender not fulling their promise to assist: *CC v R* [2021] NSWCCA 71 at [68]–[71]; see also *R v Skuthorpe* [2015] NSWCCA 140 at [36].

The exercise undertaken by the court is not one of punishment, but of withdrawing an unearned benefit from a person who entered into a bargain and then failed to fulfil it: *R v Dimakos (a pseudonym)* [2018] NSWCCA 78 at [50]; see also *CC v R* at [67] and the cases there cited. There are obvious systemic reasons why such a person should, except in unusual circumstances, suffer consequences as a result: *R v Dimakos* at [53].

In *R v OE* [2018] NSWCCA 83 the court, at [55], summarised the proper approach to reversing or adjusting a sentence to take account of a failure to adhere to an undertaking upon which a discount has been given as follows:

1. remove all the discounts to find the starting point of the head sentence at first instance;
2. apply any discount for a guilty plea and any remaining discount for assistance to calculate the head sentence; and
3. apply the same ratio of non-parole period to head sentence as fixed by the first instance sentencing judge.

See also: *R v GD* [2013] NSWCCA 212 at [48]–[52]; *R v Shahrouk* [2014] NSWCCA 87 at [65].

Difficulties may arise where the reason advanced for not fulfilling an offer of assistance is that the respondent has been threatened. In *R v Bagnall and Russell* (unrep, 10/6/94, NSWCCA), the court exercised its discretion not to disturb the sentences even though the respondents failed to comply with their undertakings because the authorities had failed to provide reasonable protection for them. Simpson J said of cases where threats have been made in *R v El-Sayed* (2003) 57 NSWLR 659 at [32]–[35]:

> Generally speaking (apart from situations such as that which arose in *Bagnall and Russell*) the reason for any failure to honour the undertaking is of little materiality. Where, as is here put forward, the reason for the failure to honour the undertaking lies in an understandable fear resulting from threats, that circumstance does not affect the fact that the undertaking has not been honoured. The basis for the discount lies in a factual assumption — that certain evidence will be given. If the evidence is not given, then the factual underpinning for the discount disappears. The discount has been given on a premise which has subsequently been proven to be false …
>
> …
>
> It would be anomalous if an offender, such as the present respondent, who was, at the time of sentencing, willing and able to give assistance, but subsequently, by reason of threats of the same kind, found himself or herself unable or unwilling to do so, could retain the benefit given. There is no reason of principle why the two offenders should be distinguished and one should receive a reduction in sentence and the other be denied it, merely by reason of the timing of the threats. In my opinion, the fact that the threats were made does not justify the court in declining to exercise the s 5DA(2) discretion in favour of the Crown.

However, each case must be decided on its own facts and the discretion to dismiss an appeal is not limited to cases where the authorities fail to provide the prisoner with reasonable protection: *R v Chaaban* [2006] NSWCCA 352 at [47] and [55].

The power under s 5DA does not allow the court to review the sentence generally: *R v Waqa* [2004] NSWCCA 405 at [26]; *R v Douar* [2007] NSWCCA 123 at [32]. Given s 5DA(2) empowers the court to re-sentence "as it thinks fit", the court is not limited to merely reapplying the discount given for an unfulfilled promise to give future assistance: *R v GD* at [41] per Button J, *R v Shahrouk* at [51]. Subsequently however, in *R v OE*, Button J emphasised that *R v GD* was to be read "in the unusual context of that appeal; namely the failure of the sentencing judge to provide any allocation between past and future assistance": at [61].

Co-operation post sentencing

Assistance rendered *after* sentence is a matter for the Executive, not the courts, except (rarely) to correct an erroneous basis of sentencing: *R v Moreno* (unrep, 4/11/94, NSWCCA). Therefore, an offender appealing against the severity of their sentence may not seek a reduction of sentence on the ground of assistance given to authorities after the date of sentencing: *Khoury v R* [2011] NSWCCA 118 at [111]–[112]. The appeal court must find error before evidence of post-sentencing events, such as unanticipated

assistance to authorities, may be taken into account: *R v Gallagher* (1991) 23 NSWLR 220; *R v Willard* [2001] NSWCCA 6 per Simpson J at [24]–[27]; *Douar v R* [2005] NSWCCA 455 at [126].

[The next page is 5961]

Children (Criminal Proceedings) Act 1987

The *Children (Criminal Proceedings) Act* 1987 governs the jurisdiction of the Children's Court and sets out the main provisions relating to criminal proceedings against children. Unless otherwise specified, references to sections below are references to sections of the *Children (Criminal Proceedings) Act*.

[15-000] Jurisdiction of the Children's Court

Subject to some exceptions, the Children's Court has jurisdiction to deal with offences alleged to have been committed by a person who was a child when the offence was committed and was under the age of 21 years when charged before the Children's Court: s 28(1). A child is a person under the age of 18 years: s 3(1). There is a conclusive presumption that no child under the age of 10 years can be guilty of an offence (s 5) and a rebuttable presumption that a child between the ages of 10 and 14 years does not bear criminal responsibility: *C (A Minor) v Director of Public Prosecutions* [1996] 1 AC 1; *R v CRH* (unrep, 18/12/96, NSWCCA); *BP v R* [2006] NSWCCA 172 at [27].

The court may, if it is satisfied that no other evidence of the person's age is readily available, rely on the apparent age of the person: s 7A.

The Children's Court has jurisdiction to hear and determine:

- all summary offences, except certain traffic offences, as described in s 28(2),
- indictable offences other than:
  - "serious children's indictable offences" as defined in s 3, and
  - indictable offences dealt with "according to law" following exercise of the residual discretion under s 31(3) of the Act.

There is no such discretion for "serious children's indictable offences" and these must be dealt with according to law in the higher courts: s 17.

A "serious children's indictable offence" is defined in s 3 and includes indictable offences prescribed by the regulations as such an offence for the purposes of the Act. Clause 4 *Children (Criminal Proceedings) Regulation* 2016 prescribes as a serious children's indictable offence, an offence against s 80A of the *Crimes Act* 1900 (sexual assault by forced manipulation), if the victim was under 10 years old when the offence occurred.

A principal in the second degree to a serious children's indictable offence is dealt with in the same way as the principal in the first degree: *R v PJP* (unrep, 8/6/94, NSWCCA).

For indictable offences other than "serious children's indictable offences", the discretion under s 31(3) enables the Children's Court to choose between committing a child charged with an indictable offence to a higher court to be dealt with according to law, or to deal with the matter itself under the less harsh regime of Div 4 of Pt 3 of the Act. See **Div 4, Pt 2, Penalties**, below at [15-040].

[15-010] Principles relating to the exercise of criminal jurisdiction

Section 6 sets out the following principles to which regard must be had in the exercise of criminal jurisdiction with respect to children:

(a) Children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them.

(b) Children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance.

(c) It is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption.

(d) It is desirable, wherever possible, to allow a child to reside in his or her own home.

(e) The penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind.

(f) It is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties.

(g) It is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparations for their actions.

(h) Subject to the other principles described above, consideration should be given to the effect of any crime on the victim.

Where these principles conflict with the general purposes of sentencing (expressed in s 3A *Crimes (Sentencing Procedure) Act* 1999), any tension should be resolved through an "intuitive synthesis" based on "a judgment of experience and discernment": *R v AS* [2006] NSWCCA 309 at [25]–[26].

A failure to refer to the section or its terms in the sentencing remarks does not of itself constitute error: *R v MHH* [2001] NSWCCA 161; *R v AD* [2005] NSWCCA 208; *SS v R* [2009] NSWCCA 114 at [64]. It is preferable the statement of principles is referred to in sentencing remarks: *SS v R* at [64]; *SBF v R* [2009] NSWCCA 231 at [141]; *SJ v R* [2011] NSWCCA 160 at [31]. However, it should not be readily assumed that well-known sentencing principles have been overlooked simply because no specific reference has been made to them: *R v AN* [2005] NSWCCA 239; *R v Sanoussi* [2005] NSWCCA 323. But a failure to refer to s 6 might also indicate that a proper consideration has not been given to the principles which apply: *DB v The Queen* [2007] NSWCCA 27 .

Due regard must be paid to ss 6(c) and (d) which are aimed at allowing a child's education to continue without interruption and the desirability of a child residing in their own home: *R v JDB* [2005] NSWCCA 102.

Generally, the relevance of the principles in s 6 to each individual case depends on the seriousness of the offence and the offender's age and circumstances: *SBF v R* at [142].

[15-015] Relevance of youth at sentence

In *KT v R* [2008] NSWCCA 51 at [22]ff, McClellan CJ at CL summarised the rationale behind s 6 and collected the leading cases on the relevance of youth at sentence:

> The principles relevant to the sentencing of children have been discussed on many occasions. Both considerations of general deterrence and principles of retribution are, in most cases, of less significance than they would be when sentencing an adult for the same offence. In recognition of the capacity for young people to reform and mould their character to conform to society's norms, considerable emphasis is placed on the need to provide an opportunity for rehabilitation. These principles were considered in *R v GDP* (1991) 53 A Crim R 112 at 115-116 (NSWCCA), *R v E (a child)* (1993) 66 A Crim R 14 at 28 (WACCA) and *R v Adamson* (2002) 132 A Crim R 511 at [30].
>
> The law recognises the potential for the cognitive, emotional and/or psychological immaturity of a young person to contribute to their breach of the law. Accordingly, allowance will be made for an offender's youth and not just their biological age (*R v Hearne* (2001) 124 A Crim R 451 at [25]). The weight to be given to the fact of the offender's youth does not vary depending upon the seriousness of the offence (*Hearne* at [24]). Where the immaturity of the offender is a significant factor in the commission of the offence, the criminality involved will be less than if the same offence was committed by an adult (*Hearne* at [25]; *MS2 v The Queen* (2005) 158 A Crim R 93 at [61]).
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> …
>
> The emphasis given to rehabilitation rather than general deterrence and retribution when sentencing young offenders, may be moderated when the young person has conducted him or herself in the way an adult might conduct him or herself and has committed a crime of violence or considerable gravity (*R v Bus* (unreported, Court of Criminal Appeal, NSW, No 60074 of 1995, 3 November 1995); *R v Tran* [1999] NSWCCA 109 at [9]-[10]; *R v TJP* [1999] NSWCCA 408 at [23]; *R v LC* [2001] NSWCCA 175 at [48]; *R v AEM* [2002] NSWCCA 58 at [96]-[98]; *R v Adamson* (2002) 132 A Crim R 511 at [31]; *R v Voss* [2003] NSWCCA 182 at [16]). In determining whether a young offender has engaged in "adult behaviour" (*Voss* at [14]), the court will look to various matters including the use of weapons, planning or pre-meditation, the existence of an extensive criminal history and the nature and circumstances of the offence (*Adamson* at [31]-[32]). Where some or all of these factors are present the need for rehabilitation of the offender may be diminished by the need to protect society.
>
> The weight to be given to considerations relevant to a person's youth diminishes the closer the offender approaches the age of maturity (*R v Hoang* [2003] NSWCCA 380 at [45]). A "child-offender" of almost eighteen years of age cannot expect to be treated substantially differently from an offender who is just over eighteen years of age (*R v Bus*; *R v Voss* at [15]). However, the younger the offender, the greater the weight to be afforded to the element of youth (*Hearne* at [27]).

However, an offender's youth does not automatically lead to a reduced sentence. The greater the objective gravity of an offence, the less likely it is that retribution and general deterrence will cede to the interests of rehabilitation: *IE v R* (2008) 183 A Crim R 150 at [16]; *MJ v R* [2010] NSWCCA 52 at [37]–[39]; and *JT v R* [2011] NSWCCA 128 at [34]–[35] where the offender and another had bashed a 14 year old into insensibility during a prolonged attack. When the circumstances of a particular juvenile offender and of a particular offence indicate that general deterrence and retribution should play a lesser role the principles in s 6 should be given their full expression: *IE v R* at [16]; *SBF v R* [2009] NSWCCA 231 at [142]-[143].

See also *YS v R* [2010] NSWCCA 98 at [22] where Rothman J reiterated that the violence of an offence does not, of itself, establish that a juvenile was acting as an adult; *MW v R* [2010] NSWCCA 324 at [51].

[15-020] Hearings

The protective purposes of the Act are reflected in those provisions applying to the conduct of hearings. Section 10(1) excludes the general public from criminal proceedings to which children are a party, subject to specified exceptions. See also "Children in criminal proceedings" in **Closed courts** at [1-358] in the Criminal Trial Courts Bench Book.

Section 15A prohibits publishing or broadcasting the names of children involved as offenders, witnesses, or brothers and sisters of victims in criminal proceedings subject to exceptions set out in ss 15B–15F.

Section 12(1) provides that a court hearing proceedings against a child must take such measures as are reasonably practicable to ensure the child understands the proceedings. The court is required to give the child the fullest opportunity practicable to be heard and to participate in the proceedings: s 12(3).

Recording a conviction

Section 14 restricts the circumstances in which a conviction can be recorded so as to, as far as possible, avoid stigmatising the child. Section 14(1) provides that a court shall not record a conviction against a child under the age of 16 years and has a discretion to record a conviction against a child who is of or above 16 years of age.

Section 14(1) does not limit any power of a court to proceed to, or record such a finding as, a conviction in respect of a child who is charged with an indictable offence that is not disposed of summarily: s 14(2). In *R v JP* [2014] NSWSC 698 at [163], the court recorded a conviction for manslaughter notwithstanding that the offender was 15 years old at the time of the offence and 18 at sentence.

A finding of guilt by the Children's Court is taken to be a conviction for the purposes of any provision of the "road transport legislation" (defined in s 6 *Road Transport Act* 2013): s 33(6).

Admissibility of evidence of prior offences

Offences for which a conviction is recorded are not admissible as prior convictions in subsequent proceedings, including proceedings as an adult, unless the requirements of s 15 are met. This does not apply to criminal proceedings in the Children's Court: s 15(2).

Section 15(1) limits the admission of evidence of prior offences, as to guilt or penalty imposed, in subsequent criminal proceedings if:

(a) a conviction was not recorded against the person, and

(b) the person has not, within the period of two 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.

In *R v Tapueluelu* [2006] NSWCCA 113, Simpson J (Grove and Howie JJ agreeing) considered the purpose of s 15 observing, at [30], that the only logical way to read it was as:

> 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, … become[s] admissible, or at least they are not subject to the prohibition otherwise contained in s 15.

In *Siddiqi v R* [2015] NSWCCA 169, a 19-year-old offender was sentenced for a drug offence. He had been before the Children's Court seven years prior, where three offences were found proven but no convictions were recorded. The sentencing judge contravened s 15(1) by considering those prior offences and concluding they did not entitle the offender to much leniency: at [60], [63].

However, evidence of prior offences may be admissible when tendered for a purpose other than establishing guilt or the penalty imposed. For example, in *Dungay v R* [2020] NSWCCA 209, evidence of the offender's criminal history as a child, which would have otherwise been excluded by s 15(1), was tendered to demonstrate his disadvantaged childhood but the court concluded the sentencing judge erred by failing to limit the circumstances in which his Children's Court matters were taken into account, by treating them as a "record" of offences: at [88].

Section 15(3) prohibits the admission into evidence in any subsequent criminal proceedings the fact a person has been dealt with by a warning, caution or youth justice conference under the *Young Offenders Act* 1997 in respect of an alleged offence committed when the person was a child. Any record of a warning given under s 17 *Young Offenders Act* 1997 is to be destroyed as soon as reasonably practicable after the person reaches 21 years: s 17(3).

[15-040] Pt 2 Div 4 Penalties

This Division deals with the disposition of criminal proceedings against children in the higher courts. While serious children's indictable offences must be dealt with at law (s 17), there is a discretion to deal with other indictable offences either at law or according to the more lenient provisions of Pt 3 Div 4 of the Act.

Part 2 Div 4 of the Act encompasses ss 16–21, inclusive. It applies to a person described in s 16 as one:

(a) who has pleaded guilty to an indictable offence in, or has been found guilty or convicted of an indictable offence by, a court other than the Children's Court,

(b) who was a child when the offence was committed, and

(c) who was under the age of 21 years when charged before the court with the offence.

Other indictable offences

Where a child has been committed by the Children's Court in relation to "other indictable offences", the Act gives a court a discretion to deal with them either:

- according to law: s 18(1)(a), or
- in accordance with Pt 3 Div 4: s 18(1)(b).

While s 18 does not expressly impose an obligation to consider and determine which course to adopt, it may be inferred that a court is obliged to make a determination as to which way to proceed: *BT v R* [2012] NSWCCA 276 at [18]. In *BT v R*, the applicant argued the proceedings had miscarried because the judge had failed to explicitly consider the alternatives under s 18: at [19]. The court acknowledged that a failure to exercise the discretion under s 18 could constitute an error but, in the circumstances of that case, held that the provision was clearly in the judge's mind although, given the nature of the offence, there was no choice other than to proceed according to law: at [21].

Criteria for exercise of discretion

In exercising this discretion a court must have regard to the following matters set out in s 18(1A):

(a) the seriousness of the indictable offence concerned,

(b) the nature of the indictable offence concerned,

(c) the age and maturity of the person at the time of the offence and at the time of sentencing,

(d) the seriousness, nature and number of any prior offences committed by the person,

(e) such other matters as the court considers relevant.

Section 18(2) provides that a court, in dealing with a person in accordance with Pt 3 Div 4, has and may exercise the functions of the Children's Court as if:

(a) the court was the Children's Court, and

(b) the offence was an offence to which that Div applies.

When such a court makes an order of a good behaviour bond or probation it may vary the order in the same way as the Children's Court under s 40.

In the Crown appeal of *R v Bendt* [2003] NSWCCA 78 the respondent was aged 17 years and nine months. While technically a child under the Act, the Court of Criminal Appeal held that the objective criminality of the respondent's offence and his subjective circumstances did not justify the departure from the obvious course of dealing with him according to law: per Meagher JA at [16]–[18].

Care needs to be taken in the exercise of the discretion to ensure irrelevant considerations are not taken into account. In *R v MSS* [2005] NSWCCA 227 the sentencing judge's sentencing discretion miscarried when he took into account the issue of parity of sentencing regimes between the applicant and a co-offender when deciding to deal with the applicant at law. Howie J, (Spigelman CJ and Hunt AJA agreeing), said at [18]:

> Although s 18(1A)(e) requires the court to take into account "any other matters as the court considers relevant" it was, in my view, not a relevant matter that the applicant's co-offender was to be sentenced at law because the offence committed by him was a "serious children's indictable offence" and, therefore, the judge had no discretion as to the manner in which he was to be sentenced. The applicant was entitled to have the judge apply his mind to the question of whether the applicant should be dealt with at law or not without having regard to the situation of the co-offender in light particularly of the marked difference between the offences for which they were to be sentenced.

In *PD v R* [2012] NSWCCA 242, the Court of Criminal Appeal held that when addressing the exercise of the discretion conferred by s 18(1) in relation to a particular offence or offences, it was open to a judge to consider the entirety of the juvenile offender's criminal conduct. This is particularly so when one of the offences is a "serious children's indictable offence" which must be dealt with according to law, since determining to deal with the other offences under Pt 3, Div 4 would involve the simultaneous application of two different sentencing regimes: at [62].

[15-070] A court may direct imprisonment to be served as a juvenile offender

Last reviewed: August 2023

If a court sentences a person under 21 years of age to imprisonment for an indictable offence the court may direct that the whole or any part of the term of sentence be served as a juvenile offender: s 19(1). However, the court may not make such a direction in relation to a person who is 18 years or over and who is currently serving, or who has previously served, the whole or any part of a term of imprisonment in a correctional centre, unless a finding of special circumstances is made: s 19(1A). A finding of special circumstances may only be made on one or more of the grounds set out in s 19(4). These are described below.

In certain circumstances such a person may subsequently be transferred to a juvenile correctional centre pursuant to an order under s 28 *Children (Detention Centres) Act* 1987.

A person is not eligible to serve a sentence of imprisonment as a juvenile offender after the person has attained the age of 21 years (s 19(2)) unless:

(a) where a non-parole period has been set, the non-parole period will end within six months after the person has attained that age; or

(b) where a non-parole period has not been set, the term of the sentence of imprisonment will end within six months after the person has attained that age: *R v WM* [2004] NSWCCA 53.

Section 19(3) provides that a person who is sentenced to imprisonment in respect of a serious children's indictable offence is not eligible to serve a sentence of imprisonment as a juvenile offender after attaining the age of 18 years unless:

(a) the sentencing court is satisfied that there are special circumstances justifying detention of the person as a juvenile offender after that age, or

(b) in the case of a sentence for which a non-parole period has been set, the non-parole period will end within six months after the person has attained that age, or

(c) in the case of a sentence for which a non-parole period has not been set, the term of the sentence of imprisonment will end within six months after the person has attained that age.

In determining whether there are special circumstances, the court may rely on one or more of the following grounds listed in s 19(4) and not otherwise:

(a) that the person is vulnerable on account of illness or disability (within the meaning of the *Anti-Discrimination Act* 1977),

(b) that the only available educational, vocational training or therapeutic programs that are suitable to the person's needs are those available in detention centres, or

(c) that, if the person were committed to a correctional centre, there would be an unacceptable risk of the person suffering physical or psychological harm, whether due to the nature of the person's offence, any assistance given by the person in the prosecution of other persons or otherwise.

Special circumstances may not be found solely on the ground of an offender's youth or because the non-parole period of their sentence will expire while they are still eligible to serve the sentence as a juvenile: s 19(4A). If a finding of special circumstances is made, reasons must be recorded: s 19(4B).

A person who is subject to an order under this section that ceases or ceased to apply upon them attaining the age of 18 years may apply to the sentencing court for a further order under this section: s 19(5).

The statutory scheme was discussed at length in *JM v R* [2012] NSWCCA 83. The court (Whealy JA, Hoeben J agreeing, Simpson J dissenting) held that it is contrary to principle to select a shorter non-parole period for the purpose of avoiding the operation of the statute to ensure that an offender remains in a juvenile detention centre: *JM v R* at [22], [156]. This is so whether the offender's conditions of custody are taken into account as one factor or whether it is the sole reason for adjusting the non-parole period: *JM v R* at [22], citing *R v Zamagias* [2002] NSWCCA 17 and *TG v R* [2010] NSWCCA 28 at [24]–[25]. Simpson J (in dissent at [131]) held that some limited weight could be attributed to the factor, but acknowledged that a sentence cannot be framed solely for the purpose of avoiding a period in adult custody.

In *R v YS* [2014] NSWCCA 226, the Crown argued that specific error could be inferred from the fact the sentencing judge fixed a non-parole period to expire two months prior to the offender's 21st birthday. The court held there was no error in the structure of the sentence. The judge had taken the correct approach of determining the appropriate sentence before turning to consider the options as to how the sentence was to be served: at [86]; see also *TG v R* [2010] NSWCCA 28 at [24]–[25].

The judge's findings relating to s 19(4)(a) were challenged in *JM*. It was not open to the judge to make a finding under s 19(4)(a) that the applicant was vulnerable on account of illness or disability to support the finding of special circumstances under s 19(3): at [18], [154]. The diagnosis of attention deficit disorder did not fit the definition of disability in the *Anti-Discrimination Act* 1977. Nor was there evidence of vulnerability on account of the applicant's attention deficit disorder: at [18].

There have been cases where the Crown has (in the court's view) erroneously agreed to give an offender the advantage of an order under s 19(3): *R v MD* [2005] NSWCCA 342 at [55]–[56].

Nothing in s 19 prevents a person subject to a limiting term under the *Mental Health (Forensic Provisions) Act* 1990 (now *Mental Health and Cognitive Impairment*

Forensic Provisions Act 2020) from serving their term in a juvenile detention centre: *AN (No 2) v R* (2006) 66 NSWLR 523 at [73]. Section 19 only applies to sentences of imprisonment.

Remission of persons to the Children's Court for punishment

A court may remit a person dealt with under this Division to the Children's Court, in respect of any indictable offence other than a serious children's indictable offence, so as to enable the Children's Court to impose a penalty on the person with respect to the offence, but only in respect of a person who is under 21 years old: s 20. While there is no right of appeal against an order for remittal under s 20, any right of appeal a person may have against any finding of guilt or conviction pursuant to which an order of remittal under that section has been made is not affected: s 21.

Where a District Court has erroneously failed to deal with a person under the *Children (Criminal Proceedings) Act* 1987, the person should be remitted to that court for re-sentencing. It would be inappropriate for a court of appeal to act as a primary sentencing court under such circumstances: *DPN v R* [2006] NSWCCA 301.

Subject to some qualifications, the Supreme Court and District Courts may direct that any sentence of imprisonment, or part thereof, be served in a detention centre: s 19.

[15-080] Background reports

An important mandatory requirement when a court is considering the imposition of a control order under s 33(1), or a term of imprisonment on a person who was a child when the offence was committed and who was under the age of 21 years when charged before the court with the offence, is the preparation of a background or juvenile justice report: s 25. A failure to comply with s 25 invalidates the sentence: *CTM v R* [2007] NSWCCA 131 at [153]; *CO v DPP* [2020] NSWSC 1123 at [28]–[31]. A background report is not a sentence assessment report by another name. It is a report that deals with such matters "as are relevant to the circumstances surrounding the commission of the offence" which do not alter with time. Section 25 confers an implied power on any court sentencing a juvenile to order the preparation of a further background report: *MG v R* [2007] NSWCCA 260 at [15].

Clause 6 *Children (Criminal Proceedings) Regulation* 2016 provides that, for the purposes of s 25(2)(a) of the Act, a background report must be in such form as the Attorney General approves and must deal with such of the following matters, as are relevant to the circumstances surrounding the commission of the offence concerned:

(a) the child's family background,

(b) the child's employment,

(c) the child's education,

(d) the child's friends and associates,

(e) the nature and extent of the child's participation in the life of the community,

(f) the child's disabilities (if any),

(g) the child's antecedents,

(h) any other matters that the Children's Court may require, and

(i) any other matters that the prosecutor considers appropriate to include in the report.

When addressing the child's antecedents, a report must only deal with offences for which the person has pleaded guilty, been found guilty or has been convicted: *MG v R* at [14]. Any other offences will be outside of the scope of the Act and Regulation.

Dealing with matters that may change over time

Matters that are not in existence at the time of the offence must not be taken into account in the preparation of a background report. While cl 6 *Children (Criminal Proceedings) Regulation* 2016 stipulates that a background report must deal with matters that may change over time, such as the person's family background, employment, education, and friends and associates, if the regulation required the report to deal with matters that were not in existence at the time of the commission of the offence it would be beyond power. Section 32 *Interpretation Act* 1987 requires it to be read down so as not to exceed the regulation-making power: *Roos v DPP* (1994) 34 NSWLR 254 at 260.

In *R v CVH* [2003] NSWCCA 237 the court, in dealing with an appeal where a pre-sentence report only was prepared in relation to a juvenile offender convicted of manslaughter, noted that an examination of the report showed that there had not been strict compliance with what are now cl 6(d)–(f) in the 2016 regulation. The report was not prepared by a juvenile justice officer but by the then Probation and Parole Service.

Although many of the aspects required by the regulation were complied with, there was not adequate coverage of the matters required by the mandatory provisions of the Act and therefore there was error in failing to comply with s 25: at [17].

Disputed reports

In *R v MD* [2005] NSWCCA 342, the Crown submitted that the sentencing exercise miscarried because the reports prepared by the Department of Juvenile Justice pursuant to s 25 and tendered in the proceedings contained errors. The court said at [77]:

> It is important to appreciate that it was the Crown that tendered the reports and at the sentencing hearing the Crown did not indicate that there was to be any dispute with regard to their contents and made no submission that they should not be given full weight.

The court drew a parallel with *R v Elfar* [2003] NSWCCA 358 and said at [79]:

> In our opinion, the same approach should be taken in the present case. It is important to appreciate that s 25 of the *Children (Criminal Proceedings) Act* 1987 (NSW) makes it mandatory that a background report covering the circumstances of the commission of the offence be tendered (s 25(2)(a)). It is also mandatory that the report address a number of subjective matters (reg 6). Accordingly, without the tender of the report in evidence sentencing error would occur. It could hardly be the case that a report which was mandatory could not be relied upon in the sentencing process. Of course, if errors are identified, this may suggest that the report should carry little weight.

[15-090] Sentencing principles applicable to children dealt with at law

The principle of giving special consideration to an offender's youth has been long accepted. In *R v C* (unrep, 12/10/89, NSWCCA), Gleeson CJ accepted a submission that "in sentencing young people … the consideration of general deterrence is not as important as it would be in the case of sentencing an adult and considerations of rehabilitation should always be regarded as very important indeed."

When a child is dealt with at law, rather than under the more lenient provisions of Pt 3 Div 4 *Children (Criminal Proceedings) Act*, the special principles applicable to children under s 6 of the Act still have to be taken into account: *R v SDM* (2001) 51 NSWLR 530. However their application depends upon the nature of the offence charged as well as upon the age, circumstances and conduct of the offender: *R v Voss* [2003] NSWCCA 182; *R v AEM* [2002] NSWCCA 58.

While it is accepted that considerations of punishment and general deterrence should be regarded as subordinate to affording the opportunity and encouragement for rehabilitation, the significance of this factor diminishes as an offender approaches adulthood: *R v Hearne* [2001] NSWCCA 37. Notwithstanding the specific provisions of the Act, relative youth remains a factor to be taken into account in sentencing: *MW v R* [2010] NSWCCA 324.

In *R v Pham* (unrep, 17/7/91, NSWCCA), Lee CJ at CL, with whom Gleeson CJ and Hunt J agreed, said in the context of one offender who was 17 and another who was 19, at 135:

> It is true that courts must refrain from sending young persons to prison, unless that course is necessary, but the gravity of the crime and the fact that it is a crime of violence frequently committed by persons even in their teens must be kept steadfastly in mind otherwise the protective aspect of the criminal court's function will cease to operate. In short, deterrence and retribution do not cease to be significant merely because persons in their late teens are the persons committing grave crimes, particularly crimes involving physical violence to persons in their own homes.

The principle in *R v Zamagias* [2002] NSWCCA 17 applies when a juvenile offender is being sentenced at law. A judge must determine the sentence and then consider whether it is necessary and appropriate to make an order under s 19: *TG v R* [2010] NSWCCA 28 at [25].

Applicability of guideline judgments to children

In *R v SDM* (2001) 51 NSWLR 530, it was held that the guideline judgment in *R v Henry* (1999) 46 NSWLR 346 applied to juvenile offenders dealt with according to the law. It was a "sounding board" and could be taken into account (making allowances for the age of the child) along with the principles of s 6 *Children (Criminal Proceedings) Act* 1987 and general sentencing principles: at [19]–[20]. *R v SDM* has been applied in *JT v R* [2011] NSWCCA 128 at [38] and *R v Mawson* [2004] NSWSC 561 at [52].

Parity

See **Parity** at [10-800]ff and "Juvenile and adult co-offenders" at [10-820].

[15-100] Pt 3 — Criminal proceedings in the Children's Court

Part 3 *Children (Criminal Proceedings) Act* 1987 applies to the disposition of criminal proceedings against children in the Children's Court. It also applies in the higher courts when the discretion under s 18 is exercised to deal with a child under this more lenient regime.

Section 27 stipulates the basis on which the *Criminal Procedure Act* 1986 and other Acts relating to the functions of the Local Courts or magistrates, or to criminal proceedings before them, apply to the Children's Court.

Jurisdiction of the Children's Court

Section 28(1) provides that the Children's Court has jurisdiction to hear and determine:

(a) proceedings in respect of any offence (whether indictable or otherwise) other than a serious children's indictable offence, and

(b) committal proceedings in respect of any indictable offence (including a serious children's indictable offence),

if the offence is alleged to have been committed by a person:

(c) who was a child when the offence was committed, and

(d) who was under the age of 21 years when charged before the Children's Court with the offence.

Section 28(2) provides that the Children's Court does not have jurisdiction to hear or determine proceedings in respect of a traffic offence that is alleged to have been committed by a person unless:

(a) the offence arose out of the same circumstances as another offence that is alleged to have been committed by the person and in respect of which the person is charged before the Children's Court, or

(b) the person was not, when the offence was allegedly committed, old enough to obtain a licence or permit under the *Road Transport Act* 2013 or any other applicable Act authorising the person to drive the motor vehicle to which the offence relates.

Section 29 sets out the circumstances under which the jurisdiction of the Children's Court is exercised in respect of two or more co-defendants who are not all children.

Hearings

There is a rebuttable presumption arising from s 31(1) that charges against children in respect of all but serious children's offences will be dealt with in the Children's Court under Pt 3 Div 4. However, nothing in the Act either expressly or impliedly limits the jurisdiction of the District Court "in respect of all indictable offences": *PM v The Queen* (2007) 232 CLR 370 at [20], [95]. The provisions of s 31 apply only to the Children's Court, and therefore do not affect the jurisdiction of any other court: *PM v The Queen* at [25]. When considering whether proceedings should be dealt with in the Children's Court or at law the court should have regard to the seriousness of the offence and to the age and maturity of the offender: *JIW v DPP (NSW)* [2005] NSWSC 760 at [55]–[57].

The High Court in *PM v The Queen* held that the Act does not displace the broad powers of the Director of Public Prosecutions to file an ex officio indictment — preserved by s 8(2) *Criminal Procedure Act* 1986 — against a child in the absence of committal proceedings in the Children's Court: *PM v The Queen* at [42], [92]–[93]. Whilst the issue of a Court Attendance Notice is the recommended mode of commencing proceedings under the Act, it is neither mandatory nor exclusive: *PM v The Queen* per Kirby J at [88].

In *JIW v DPP* (NSW) [2005] NSWSC 760, Kirby J considered whether the list of issues in s 18 of the Act should inform the exercise of the magistrate's discretion under s 31(3). While he concluded at [53] that the catalogue of issues identified in s 18(1A)

provide some guidance in respect to the construction of s 31(3)(b)(ii) the extent to which subjects identified in s 18(1A) may be regarded as material will depend upon the circumstances of the particular case.

While a failure of the court to consider a person's prior criminal record under s 18(1A) would amount to an error of law, a failure to consider that issue in the context of s 31 may or may not amount to an error of law depending upon the nature of the offence. Previous good character will not protect an offender from a custodial sentence if other factors are present: at [54].

[15-110] Penalties

Section 32 provides that the penalties in Pt 3 Div 4 of the Act apply to any proceedings that are being dealt with summarily or in respect of which a person has been remitted to the Children's Court under s 20.

In addition, a higher court, when dealing with a child committed for a serious indictable offence, other than a serious children's indictable offence, has a discretion to apply this more lenient sentencing regime rather than to deal with the child according to law: s 18(1A).

Section 33(1) provides that if the Children's Court finds a person guilty of an offence to which Div 4 applies, it shall make one of the following orders:

(a) either

(i) dismissing the charge (in which case the court may also administer a caution),

(ii) discharging the person on the condition they enter into a good behaviour bond for a period of time, not exceeding 2 years;

(b) directing the person enter into a good behaviour bond for a specified period, not exceeding 2 years;

(c) imposing a fine, not exceeding

(i) the maximum fine prescribed in respect of the offence or

(ii) 10 penalty units, whichever is the lesser;

(c1) releasing the person on condition they comply with an outcome plan determined at a conference held under the *Young Offenders Act* 1997;

(c2) adjourning the proceedings to a specified date (not later than 12 months after finding the person guilty) for any of the following purposes (but only if bail for the offence is or has been granted or dispensed with under the *Bail Act* 2013)

(i) assessing the person's capacity and prospects for rehabilitation, or

(ii) allowing them to demonstrate that rehabilitation has taken place, or

(iii) for any other purpose the Children's Court considers appropriate in the circumstances;

(d) to do both things referred to in (b) and (c) above;

(e) releasing the person on probation, on such conditions as it may determine, for such period of time, not exceeding 2 years, as it thinks fit;

(e1) do both things referred to in (c) and (e) above;

(f) subject to the provisions of the *Children (Community Service Orders) Act* 1987 (see in particular s 5), order the person to perform community service work;

(f1) do both things referred to in (e) and (f) above; or

(g) subject to the provisions of the *Crimes (Sentencing Procedure) Act* 1999, committing the person for a period of time (not exceeding 2 years)

(i) in the case of a person who is under 21 years of age, to the control of the Minister administering the *Children (Detention Centres) Act* 1987, or

(ii) in the case of a person at or above 21 years, to the control of the Minister administering the *Crimes (Administration of Sentences) Act* 1999.

The execution of an order under s 33(1)(g) may be suspended and the person released if they are not subject to any other order or to any sentence of imprisonment: s 33(1B).

Dismissal

A court may make an order dismissing a charge, with or without administering a caution. Compensation may be ordered under s 24.

The court may also administer a caution under s 31(1) *Young Offenders Act* 1997 if the offence is one for which a caution may be given and the child admits the offence. When administering a caution under s 31(1), the court must dismiss the proceedings for the offence in respect of which the caution is given: s 31(1A). A court that gives a caution under s 31(1) must notify, in writing, the Area Commander of the local police area in which the offence occurred of its decision to give the caution and must include the reasons why the caution was given: s 31(4). Section 31(5) provides that a court may not give a caution to a child in relation to an offence if the child has been dealt with by caution on three or more occasions:

(a) whether by or at the request of a police officer or specialist youth officer under s 29 or by a court under this section, and

(b) whether for offences of the same or of a different kind.

When administering a caution, the court may allow any victim to prepare a written statement describing the harm occasioned to the victim by the offence, and where appropriate, may permit all or part of the statement to be read to the child: s 31(1B).

Good behaviour bonds

Section 33(1A) provides that a good behaviour bond imposed under s 33:

(a) must contain a condition to the effect that the person to whom the bond relates (the "person under bond") will appear before the court if called on to do so at any time during the term of the bond, and

(b) must contain a condition to the effect that, during the term of the bond, the person under bond will be of good behaviour, and

(c) may contain such other conditions as are specified in the order by which the bond is imposed, other than conditions requiring the person under bond:

(i) to perform community service work, or

(ii) to make any payment, whether in the nature of a fine, compensation or otherwise.

In *Minister for Community Services v Children's Court of NSW* (2005) 62 NSWLR 419, Hoeben J considered a challenge to the power of the Children's Court to impose a bond condition. The magistrate included in a good behaviour bond a condition that the child in the proceedings "reside as directed by the Department of Community Services — not with the mother unless child and mother consent." It was held that s 33 of the Act and cl 7 (of the then *Children (Criminal Proceedings) Regulation* 2005) empowered

the magistrate to include such a condition. There was no requirement when imposing a good behaviour bond under s 33 for the consent of any person to be obtained before stipulating a condition of the kind envisaged by cl 7. The obligation on the child to comply with the condition would only crystallise if the Department gave a direction.

Clause 7 *Children (Criminal Proceedings) Regulation* 2016 sets out the following conditions that may be imposed in relation to an order made in respect of a child under s 33(1) of the Act:

(a) requiring the child to attend school regularly,

(b) relating to the child's employment,

(c) aimed at preventing the child from committing further offences,

(d) relating to the child's place of residence,

(e) requiring the child to undergo counselling or medical treatment,

(f) limiting or prohibiting the child from associating with specified persons,

(g) limiting or prohibiting the child from frequenting specified premises,

(h) requiring the child to comply with the directions of a specified person in relation to any matter referred to in paragraphs (a)–(g), and

(i) relating to such other matters as the court considers appropriate in relation to the child.

Variation of good behaviour bonds or probation and enforcement of conditions

Section 40(1) provides that a good behaviour bond or a probation order may be varied by the Children's Court on application made by or on behalf of the person to whom the order relates or by an authorised officer as follows:

(a) it may terminate the order,

(b) it may reduce the period of the order,

(c) it may vary any condition of the order in any respect, including (where the person has entered into the good behaviour bond, or been released on probation, on condition that the person will remain in the care of some other person named in the order) the substitution of the name of another person for that of the person named in the order.

Section 40(1A) provides that, if the order was made by a court exercising the functions of the Children's Court under s 18(2), the Children's Court may (but is not obliged to) refer the application to the court concerned to be dealt with by that court. Section 40(2) provides that the Children's Court may not extend the period of an order referred to in s 33(1)(b) or (e).

Section 41 provides that any person brought before a court who has failed to comply with the condition of a good behaviour bond or a probation order may be dealt with in any manner the person could have been dealt with in relation to the offence for which the good behaviour bond or probation order was imposed.

Fine

A court may, under s 33(1)(c), make an order imposing a fine not exceeding:

- the maximum fine prescribed by law in respect of the offence, or
- 10 penalty units,

whichever is the lesser.

Before making such an order, the Children's Court is to consider the age of the child, and, where information is available, the child's ability to pay and the potential impact of the fine on the rehabilitation of the child: s 33(1AA).

A fine may be imposed with a good behaviour bond or with a probationary order: ss 33(1)(d), (e1).

Adjournment

A court may make an order adjourning proceedings against the person to a specified date (not later than 12 months from the date of the finding of guilt) for the following purposes (but only if bail for the offence is or has been granted or dispensed with under the *Bail Act* 2013):

- for the purpose of assessing the person's capacity and prospects for rehabilitation,
- for the purpose of allowing the person to demonstrate that rehabilitation has taken place,
- for any other purpose the Children's Court considers appropriate in the circumstances: s 33(1)(c2).

Probation

A court may make an order releasing the person on probation, on such conditions as it may determine, for a period of time, not exceeding two years. Clause 7 *Children (Criminal Proceedings) Regulation* 2016 sets out the conditions that may be imposed in relation to such an order.

Community service orders

A community service order was conceived as an alternative to imprisonment that was by its nature rehabilitative, giving a young person the opportunity to make amends to the community for the offending conduct. The relevant sections of the *Children (Community Service Orders) Act* governing the making of community service orders are:

- s 5: Making of children's community service orders
- s 6: Explanation of nature and effect of proposed children's community service orders
- s 9: Children's community service orders not to be made by court unless work is available
- s 10: Children's community service orders may run concurrently
- s 11: Conditions that may be attached to children's community service order
- s 12: Preparation and service of copies of children's community service order
- s 13: Number of hours of community service work
- s 14: Place etc and time for presentation for work.

Control orders

Before imposing a control order under s 33(1), a background or juvenile justice report must be obtained: s 25. A failure to do so renders the sentence invalid: *CTM v R* [2007] NSWCCA 131 at [153]–[154].

The principle of parsimony is embodied in s 33(2), which provides that the Children's Court shall not impose a control order unless satisfied it would be wholly inappropriate to deal with the person by imposing any other available penalty under s 33(1)(a)–(f).

A control order made under s 33(1)(g) cannot be imposed unless the penalty provided by law in respect of the offence is imprisonment: s 34(1). Such an order cannot be imposed for a specified period unless the maximum penalty provided by law in respect of the offence is imprisonment for a period no less than that so specified: s 34(3).

In deciding whether to impose a control order the Children's Court shall not have regard to the question of whether the child is a child in need of care and protection under the *Children and Young Persons (Care and Protection) Act* 1998.

Where the Children's Court makes an order under s 33(1)(g) committing a person to the control of the Minister administering the *Crimes (Administration of Sentences) Act* 1999, the period of control is taken to be a sentence of imprisonment for the purposes of that Act: s 33(1C).

Limits on the imposition of control orders

Section 33A limits the imposition of control orders. Section 33A(4) precludes the Children's Court from imposing a new control order or from giving a direction if the order or direction would have the effect of requiring a person to be detained for a continuous period of more than three years, taking into account any other control order relating to the person.

Sections 33AA(2) and (3) provide the following limitations on the imposition of concurrent control orders:

- if a control order is made in relation to an offence involving an assault or an offence against the person, on a juvenile justice officer, committed by a person while the person was a person subject to control, and the person is subject to an existing control order at the time the new control order is made,
- the period for which the person is required to be detained under the new control order commences when the period for which the person is required to be detained under an existing control order, or if there is more than one, the last of them, expires, unless the Children's Court directs that the period is to commence sooner.

There must be special circumstances justifying such a direction: s 33AA(4).

The Children's Court must not make a new control order, or give such a direction, if the order or direction would have the effect of requiring a person to be detained for a continuous period of more than 3 years (taking into account any other control orders relating to them): s 33AA(5).

Other orders

The Children's Court has power under s 33(5) to:

(a) impose any disqualification under the road transport legislation on a person whom it has found guilty of an offence,

(b) order the forfeiture of any property that relates to the commission of an offence of which it has found a person guilty,

(c) make an order for restitution of property under s 43 *Criminal Procedure Act* 1986, or

(d) make a community clean up order in respect of a fine imposed for an offence under the *Graffiti Control Act* 2008.

For the purposes of any provision of the road transport legislation (see definition in s 6 *Road Transport Act* 2013) that confers on the court a power in respect of a person who has been convicted of an offence, a finding of guilt by the Children's Court is taken to be a conviction for that offence: s 33(6).

Guilty plea

When imposing a penalty under s 33 for which the person has pleaded guilty, the Children's Court must take into account the plea of guilty and may, accordingly, reduce any order that it would otherwise have made: s 33B(1).

Application of the Crimes (Sentencing Procedure) Act 1999

Subject to the Act and to s 27(4A) *Crimes (Sentencing Procedure) Act* 1999, Pts 3 and 4 *Crimes (Sentencing Procedure) Act* 1999 apply to the Children's Court in the same way as they apply to a Local Court: s 33C. They apply as if a reference in those provisions to the sentencing of an offender to imprisonment were a reference to the making of a control order: s 33C(1)(a). A reference in those provisions to:

- a conviction is a reference to a finding of guilt: s 33C(1)(b)
- an escape from lawful custody committed by the offender while an inmate of a correctional centre includes a reference to an escape from lawful custody committed by the offender while a detainee of a detention centre: s 33C(1)(c)
- a good behaviour bond, community correction order or conditional release order is a reference to a good behaviour bond imposed under s 33: s 33C(1)(d).

Part 3 Div 2 *Crimes (Sentencing Procedure) Act* 1999 (which relates to victim impact statements) applies to the Children's Court when the offence being dealt with is one of those identified in s 27(4A) of that Act. See **The statutory scheme for victim impact statements** at [12-820]ff.

Power to make non-association or place restriction order

Section 33D empowers a court to make either or both a non-association or a place restriction order not exceeding 12 months when it has made an order under s 33 (except s 33(1)(a)(i), (c1) and (c2)) and it is sentencing a person for an offence punishable by imprisonment for six months or more, whether or not the offence is also punishable by fine.

Restrictions on the imposition of control orders

Section 34 provides:

> (1) An order shall not be made under section 33(1)(f), (f1) or (g) in respect of an offence unless the penalty provided by law in respect of the offence is imprisonment.
>
> (2) (repealed)
>
> (3) An order shall not be made under section 33(1)(g) whereby a person is committed to the control of the Minister administering the *Children (Detention Centres) Act* 1987 for a specified period unless the maximum penalty provided by law in respect of the offence is imprisonment for a period no less than that so specified.

Reasons for decision to be given

Section 35 provides that when the Children's Court deals with a person under s 33(1)(g), it shall record:

(a) the reason for which it has dealt with the person under that paragraph, and

(b) the reason for which it considered that it would have been wholly inappropriate to deal with the person under s 33(1)(a)–(f1).

Compensation

If the Children's Court imposes a penalty under s 33(1) it may direct the payment of compensation by the person upon whom the penalty was imposed: s 36(1). In making this determination the Children's Court shall have regard to the person's means and income: s 36(2). The maximum amount of compensation that may be awarded is the amount equivalent to 10 penalty units (in the case of a person who is under the age of 16 years at the time of the order), or 20 penalty units (in any other case): s 36(3).

[15-120] Intervention orders

There are some intervention orders available under the Act: see Diversionary Programs on JIRS. Note that some programs listed are only available for adults and not young offenders.

Referrals for conferences by DPP and courts

The Director of Public Prosecutions or a court may refer a child alleged to have committed an offence for a conference under s 40(1) *Young Offenders Act* 1997 if:

(a) the offence is one for which a conference may be held,

(b) the child admits the offence,

(c) in the case of a referral by the Director of Public Prosecutions, the child consents to the holding of the conference, and

(d) the Director or court is of the opinion that a conference should be held under this part.

Section 40(3) *Young Offenders Act* gives the court power to refer a matter at any stage in proceedings, including after a finding that a child is guilty of an offence.

Section 40(5) *Young Offenders Act* provides that, in determining whether to refer a matter for a conference, the Director of Public Prosecutions or the court is to take into account the following matters:

(a) the seriousness of the offence,

(b) the degree of violence involved in the offence,

(c) the harm caused to any victim,

(d) the number and nature of any offences committed by the child and the number of times the child has been dealt with under the Act, and

(e) any other matter the Director or court thinks appropriate in the circumstances.

Youth conduct orders

The youth conduct orders scheme, set out in Pt 4A of the Act, operated between 1 July 2009 and 1 September 2014: s 48Y; *Children's (Criminal Procedure) Regulation* 2011, cl 30A (rep).

[15-130] The Criminal Records Act 1991 and the Children (Criminal Proceedings) Act 1987

The object of the *Criminal Records Act* 1991 (CRA), pursuant to s 3(1), is:

> to implement 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.

The CRA uses the word "conviction" as a term of art. It is not easy to discern how the Act applies to some of the orders made under s 33 *Children (Criminal Proceedings) Act 1987* (CCPA). In order to achieve the objectives of the CRA, Parliament has cast the net wide by characterising each order under s 33 as a "conviction" except for the express exception in s 5(c) CRA of a dismissal without caution under s 33(1)(a)(i) CCPA.

Section 4(1) CRA provides that conviction "means a conviction, whether summary or on indictment, for an offence and includes a finding or order which, under section 5, is treated as a conviction for the purposes of this Act". Section 5 provides:

> The following *findings or orders of a court are treated as convictions for the purposes of this Act*:
>
> …
>
> (c) … *an order under section 33* of the *Children (Criminal Proceedings) Act* 1987, other than an order dismissing a charge. [Emphasis added.]

Convictions which are not capable of being spent

Section 7(1) CRA provides that some convictions are not capable of becoming spent. They include convictions for sexual offences (see definition under s 7(4)) and certain convictions prescribed by the regulations (see cl 4 *Criminal Records Regulation* 2019). Offences for which a prison sentence of more than 6 months is imposed are not capable of becoming spent: s 7(1)(a). However, "prison sentence" does not include "the detaining of a person under a control order": s 7(4).

Interaction between ss 8 and 10 Criminal Records Act and s 14

It is important to note the relationship between ss 8 and 10 CRA. Section 8 has primacy over s 10 on the basis of s 8(1), which provides: "A conviction is spent on completion of the relevant crime-free period, *except as provided by this section*" [emphasis added].

The pertinent subsections of s 8 provide:

(1) A conviction is spent on completion of the relevant crime-free period, except as provided by this section.

(2) A finding that an offence has been proved, or that a person is guilty of an offence, without proceeding to a conviction is spent immediately after the finding is made, except as provided by this section.

(3) An order of the Children's Court dismissing a charge and administering a caution is spent immediately after the caution is administered.

(4) A finding that an offence has been proved, or that a person is guilty of an offence, and:

  (a) the discharging of, or the making of an order releasing, the offender conditionally on entering into a good behaviour bond for a specified period, on participating in an intervention program or on other conditions determined by the court, or

(b) the releasing of the offender on probation on such conditions as the court may determine, for such period of time as it thinks fit, or

(c) the making of a conditional release order, without conviction, under section 9 of the *Crimes (Sentencing Procedure) Act* 1999, for a specified term and with 1 or more additional or further conditions imposed under that Act,

is spent on satisfactory completion of the period or satisfactory compliance with the program (including any intervention plan arising out of the program) or conditions, as the case may require.

Section 10(1) provides:

The crime-free period in the case of an order of the Children's Court under section 33 of the *Children (Criminal Proceedings) Act* 1987 (other than a finding or order referred to in section 8 (2) or (3) of this Act) in respect of a person is any period of not less than 3 consecutive years after the date of the order during which:

(a) the person has not been subject to a control order, and

(b) the person has not been convicted of an offence punishable by imprisonment, and

(c) the person has not been in prison because of a conviction for any offence and has not been unlawfully at large.

Given the interaction between ss 8 and 10, the following question emerges: apart from a s 33(1) dismissal without caution (referred to in s 5(c)) which orders imposed under s 33 fall within the terms of s 8 and are not subject to a crime-free period of 3 years in s 10(1)?

Table: Children's Court orders and application of Criminal Records Act

The following table sets out the orders available to the Children's Court under s 33 and attempts to ascertain when that order is spent under the applicable provision of the *Criminal Records Act* (CRA). It is obvious the text of the CRA could be clearer.

Order under s 33 Children (Criminal Proceedings) Act 1987 (CCPA)	**Section of CCPA**	**When conviction is spent under Criminal Records Act 1991 (CRA)**
Dismissal without caution	33(1)(a)(i)	Section 5(c) CRA specifically excludes this order. It defines conviction as "an order under section 33 of the [CCPA], other than an order dismissing a charge".
Dismissal with caution	33(1)(a)(i)	An order of the Children's Court dismissing a charge and administering a caution is spent immediately after the caution is administered: s 8(3) CRA.
Discharge on condition of entering into good behaviour bond	33(1)(a)(ii)	Spent upon satisfactory completion of the bond period: s 8(4)(a) CRA. Although there is no reference to s 8(4) within the parenthesis in s 10(1) CRA, s 8(1) provides that a "conviction is spent on completion of the relevant crime-free period [as set out in s 10], except as provided by this section".
Good behaviour bond	33(1)(b)	This is ambiguous but is arguably caught by s 8(4) CRA on the basis s 33(1)(b) CCPA previously stated "it may make an order releasing the person on condition that the person enters into a good behaviour bond … as it thinks fit". This conforms with the text in s 8(4) which requires the words "or the making of an order releasing" to be read disjunctively. Therefore, the conviction is spent upon satisfactory completion of the bond period: s 8(4)(a).

Order under s 33 Children (Criminal Proceedings) Act 1987 (CCPA)	**Section of CCPA**	**When conviction is spent under Criminal Records Act 1991 (CRA)**
Fine	33(1)(c)	This is difficult to discern from the text of the CRA. It may be a long bow to argue that where the Children's Court imposes a fine without proceeding to conviction, the finding of guilt is "spent immediately after the finding is made": s 8(2) CRA. The argument rests on a proposition that s 8(2) can be utilised for orders in addition to s 10 *Crimes (Sentencing Procedure) Act* 1999. The parenthesis in s 10(1) CRA suggests s 8(2) applies to s 33 orders. Note, though s 8(2) may apply even if a fine is only part of the court's order under s 33(1)(d), (e1) CCPA. If the Children's Court proceeds to conviction, the order is not caught by s 8(2) or s 8(3) and the crime-free period of 3 years applies: ss 8(1), 10(1) CRA.
Release subject to compliance with outcome plan	33(1)(c1)	It is arguable that a conviction under s 33(1)(c1) CCPA is spent upon satisfactory completion of outcome plan: s 8(4)(a) CRA. The terms within s 8(4)(a) "the making of an order releasing, the offender … on other conditions" appears to include orders under s 33(1)(c1).
Adjournment	33(1)(c2)	Not a final sentencing order (akin to s 11 *Crimes (Sentencing Procedure) Act* 1999 with regard to the deferral of sentencing for rehabilitation, participation in an intervention program or other purposes).
Good behaviour bond and fine	33(1)(d)	As to the fine, see above. Otherwise, this is ambiguous. Arguably this order is caught by s 8(4) CRA on the basis that s 33(1)(b) CCPA previously stated "it may make an order releasing the person on condition that the person enters into a good behaviour bond … as it thinks fit". This conforms with the text in s 8(4). It requires the words "or the making of an order releasing" to be read disjunctively. Therefore, the conviction is spent upon satisfactory completion of the bond period: s 8(4)(a).
Probation	33(1)(e)	Spent upon satisfactory completion of the probation period: s 8(4)(b) CRA. Although there is no reference to s 8(4) within s 10(1) CRA, s 8(1) provides that a "conviction is spent on completion of the relevant crime-free period, except as provided by this section".
Probation and fine	33(1)(e1)	As for s 33(1)(e) above.
Community service order	33(1)(f)	The order is not caught by s 8(2), 8(3) or 8(4) CRA. Therefore, crime-free period of 3 years applies: ss 8(1), 10(1) CRA.
Probation and community service order	33(1)(f1)	Spent upon satisfactory completion of the probation period: s 8(4)(b) CRA. Although there is no reference to s 8(4) within s 10(1) CRA, s 8(1) provides that a "conviction is spent on completion of the relevant crime-free period, except as provided by this section".
Control order	33(1)(g)	The order is not caught by s 8(2), 8(3) or 8(4) CRA. Therefore, crime-free period of 3 years applies: ss 8(1), 10(1) CRA. Section 7(4) CRA provides that "prison sentence" for the purposes of the exceptions (where convictions cannot be spent) does not include "detaining of a person under a control order".
Suspended control order	33(1B)	The order is not caught by s 8(2), 8(3) CRA. Therefore, crime-free period of 3 years applies: ss 8(1), 10(1) CRA.

Applying ss 8(2) and 8(4) Criminal Records Act

It is to be noted that s 8(2) CRA uses the expression "without proceeding to conviction". When s 8(2) was enacted no consideration was given to s 14 CCPA, which limits the circumstances in which the Children's Court can record a conviction (Second Reading Speech, Criminal Records Bill, NSW, Legislative Assembly, *Debates*, 27 February 1991, p 392). The Second Reading Speech refers only to the difference in the crime-free periods — 3 years for children, 10 years for adults. It does not inform the current issue or remove ambiguity. The history of the amendments to s 8(2) appear to indicate that it was intended to only cover s 10 dismissals under the *Crimes (Sentencing) Procedure Act* 1999 (Explanatory note to Sch 2.13 of the Statute Law (Miscellaneous Provisions) Bill (No 2) 2000):

> The proposed amendment updates references to a charge being proved to reflect the language used in section 10 of the *Crimes (Sentencing Procedure) Act* 1999, which refers to a finding of guilt.

Apart from the terms of s 8(2), there is no other textual indication that cases where the Children's Court proceeds to conviction under s 14 are to be distinguished from cases where it does not.

Section 8(4) also applies to orders under s 33(1)(a)(ii), discharging the offender on condition of entering into a good behaviour bond. It would be incongruous that Parliament intended adult offenders to receive the benefit of s 8(4) but not children. This is so notwithstanding the absence of a reference to s 8(4) in the parenthesis in s 10(1) CRA. It must be an oversight because s 8(4)(b) provides a conviction is spent upon satisfactory completion of a probation period — an order only available in the Children's Court.

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Sexual offences against children

This chapter should be read in conjunction with **Sexual assault** at **[20-600]**ff.

[17-400] Change in community attitudes to child sexual assault

The abhorrence with which the community regards the sexual molestation of young children and the emphasis attached to general deterrence in sentencing offenders is reflected in the judgment in *R v BJW* [2000] NSWCCA 60 at [20], where Sheller JA stated:

> The maximum penalties the legislature has set for [child sexual assault] offences reflect community abhorrence of and concern about adult sexual abuse of children. General deterrence is of great importance in sentencing such offenders and especially so when the offender is in a position of trust to the victim. See the remarks of Kirby ACJ in *R v Skinner* (1994) 72 A Crim R 151 at 154.

The case of *R v Fisher* (unrep, 29/3/89, NSWCCA) at 6 is also frequently cited:

> This court has said time and time again that sexual assaults upon young children, especially by those who stand in a position of trust to them, must be severely punished, and that those who engage in this evil conduct must go to gaol for a long period of time, not only to punish them, but also in an endeavour to deter others who might have similar inclinations …
>
> This court must serve notice upon judges who impose weakly merciful sentences in some cases of sexual assault upon children, that heavy custodial sentences are essential if the courts are to play their proper role in protecting young people from sexual attacks by adults …

Tampering with children of tender years is a matter of grave concern to the community: *R v Evans* (unrep, 24/3/88, NSWCCA).

The courts have recognised a change in community attitudes to child sexual assault. In *R v MJR* (2002) 54 NSWLR 368 at [57], Mason P expressed the view that there has been a pattern of increasing sentences for child sexual assault and that this:

> … has come about in response to greater understanding about the long-term effects of child sexual abuse and incest; as well as by a considered judicial response to changing community attitudes to these crimes.

Increased penalties

See also **Sexual assault** at **[20-610]**.

In *R v ABS* [2005] NSWCCA 255 at [26], Buddin J, with whom Brownie AJA and Latham J agreed, said:

> Offences involving acts of significant sexual exploitation against children are almost without exception met with salutary penalties. Moreover, the legislature has in recent years provided for increased penalties in respect of many such offences. It is an area in which the need to protect children from exploitation and to deter others from acting in a similar fashion assume particular significance.

According to *R v PGM* [2008] NSWCCA 172 at [37], the seriousness with which sexual offences against young children must be viewed is reflected in the increase in the maximum penalty for s 66A *Crimes Act* 1900 offences from 20 to 25 years

(effective 1 February 2003) and the introduction of a standard non-parole period of 15 years: *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002.

[17-410] Sentencing for historical child sexual offences

Section 21B *Crimes (Sentencing Procedure) Act* 1999 provides that a court must sentence an offender in accordance with the sentencing patterns and practices *at the time of sentencing*: s 21B(1). The standard non-parole period for an offence is the standard non-parole period, if any, that applied at *the time the offence was committed,* not at the time of sentencing: s 21B(2). Further, when sentencing an offender for a child sexual offence, the court is to have regard to the trauma of sexual abuse on children as understood at the time of sentencing: s 25AA(3).

The exception to s 21B(1) — to sentence in accordance with sentencing practices and patterns *at the time of the offence* where exceptional circumstances exist — does not apply to child sexual offences: s 21B(3)(a). A "child sexual offence" is defined in s 25AA(5) to include specified offences committed against a person who, at the time of the offence, was under 16 years of age (also see s 21B(6)).

Section 21B applies to proceedings that commenced on or after 18 October 2022: *Crimes (Sentencing Procedure) Amendment Act* 2022, Sch 1[4]. Section 21B(1), (2) and (4) replaced s 25AA(1), (2) and (4) (which continues to apply to proceedings commenced before 18 October 2022), but expanded the requirement to sentence in accordance with current sentencing practices and patterns to all offences, rather than to child sexual offences only.

Section 21B(1) (formerly s 25AA(1)) overrides the common law principle expressed in *R v MJR* (2002) 54 NSWLR 368 that a court must apply the sentencing patterns and practices existing at the time of the offence: Second Reading Speech, Criminal Legislation Amendment (Child Sexual Abuse) Bill 2018, NSW, Legislative Assembly, *Debates*, 6 June 2018, p 7. As to the rationale for the enactment of s 25AA(1) and the previous common law see: *R v Cattell* [2019] NSWCCA 297 at [103]–[126]; *Corliss v R* [2020] NSWCCA 65 at [73]–[94] (Johnson J); [131]–[139] (Lonergan J).

In addition to sentencing in accordance with sentencing patterns and practices at the time of sentence, the court must also have regard to the trauma of sexual abuse on children as understood at the time of sentence, which may include recent psychological research or the common experience of courts: s 25AA(3). Justice Price, in *R v Cattell* at [121], said "current sentencing practices" understand the harmful effects of sexual offending against children and would also include the court setting a non-parole period in accordance with s 44 *Crimes (Sentencing Procedure) Act* 1999.

Sentencing practices and patterns are not defined. Given the relatively recent enactment of ss 21B and 25AA, parties will be unable to provide sufficient Judicial Commission statistical material to assist the court in determining "current sentencing patterns": *R v Cattell* at [122].

Section 19, which deals with the effect of alterations in penalties, is not affected by s 21B: s 21B(5), or the former s 25AA: s 25AA(4).

In *Corliss v R*, Johnson J described s 25AA(2) and (4) (now s 21B(2) and (5) respectively) as constituting "the express statutory qualifications to the otherwise

absolute operation of [s 25AA]": at [87]. The overall effect of s 21B(1), (2) (former s 25AA(1), (2)) is that, aside from the statutory guideposts of the maximum penalty and the applicable standard non-parole period, those matters previously identified as typically leading to a lesser sentence in historic cases cannot be taken into account. However, a court may consider the fact a historical offence encompassed a wider range of more serious conduct than would constitute the equivalent current offence: *O'Sullivan v R* [2019] NSWCCA 261 at [36], [46].

The Local Court must apply s 21B when sentencing for child sex offences: see for example *DPP v IJL* [2020] NSWLC 2 which considered the former s 25AA(1).

The approach to the former s 25AA

Note: Judicial consideration of the former s 25AA, which is discussed below, may guide the application of s 21B to historical child sexual offences for proceedings commenced on or after 18 October 2022.

In *R v Cattell* [2019] NSWCCA 297 at [123], Price J said a court sentencing an offender for an offence falling within s 25AA should:

- take into account the sentencing pattern existing at the time of sentence where such a pattern is able to be discerned
- determine the facts as now available to the court
- have regard to the maximum penalty and standard non-parole period (if any) applying at the time of the offence
- identify where the offence falls in the range of objective gravity
- take into account any relevant aggravating and mitigating factors in s 21A(2) and (3)
- set a non-parole period in accordance with s 44 as operative at the time of sentence
- fix the balance of the term.

The sentencing court should expressly state that the offender has been sentenced in accordance with s 25AA(1) and explain how the court has had regard to the trauma of sexual abuse on the child: *R v Cattell* at [125].

The breadth of conduct encompassed by a particular historical offence is likely to influence the identification of where a particular offence falls in the range of objective seriousness. This assumes some significance when s 25AA applies because certain historical offences incorporated conduct which is now the subject of separate offences with significantly higher maximum penalties. For example, the offence of indecent assault in s 81 *Crimes Act* 1900 (rep) which carried a maximum penalty of 5 years included conduct that would now constitute sexual intercourse. Part of the rationale for the increased, or changed, penalties is recognition of the harm caused by these offences: see, for example, *MC v R* [2017] NSWCCA 316 at [40]–[44]; *Woodward v R* [2017] NSWCCA 44 at [46]–[54].

Decision Restricted [2020] NSWCCA 275 and *WB v R* [2020] NSWCCA 159 include some general observations about how the requirements of s 25AA can be satisfied given what is now known about the long-term effects of child sexual abuse when the maximum penalties for historical offences were lower than for current

offences. In *WB v R*, Davies J (Bell P and N Adams J agreeing) acknowledged, in relation to the s 81 (rep) offences the subject of appeal in that case, that it had been superseded by offences with higher penalties, observing at [63]:

> Part of the reason for the heavier penalties is, obviously, that there is now much greater knowledge of the long-term effects of sexual abuse of a child or young person than was [previously] known... That may mean that it will be easier to find that damage or emotional harm is substantial where historical offences are dealt with under earlier legislation with much lower maximum penalties. Such an approach would not be inconsistent with the rationale behind s 25AA…

The operation of s 25AA was not otherwise considered in that case. Subsequently in *Decision Restricted* [2020] NSWCCA 275, N Adams J (Rothman J agreeing) after endorsing that aspect of *WB v R* said, at [164], that "it may well be easier to make a finding of substantial injury to a child for a sentence imposed on a historical child sexual assault offence after the enactment of s 25AA if the maximum penalty is so low as to enable a conclusion that the significant lifelong trauma such offending can inflict on a child is not already reflected in the maximum penalty." In that case one of the grounds of the Crown appeal against sentence, which was accepted by the court, was that the impact of the offending on the victims was not reflected in the aggregate sentence that had been imposed.

However, the impact of offending on the victim is taken into account under s 3A(g) *Crimes (Sentencing Procedure) Act*. Recognition of the harm caused by child sexual assault is a necessary incident of sentencing in such cases in any event and, where there is evidence, substantial harm caused to a victim falling within s 21A(2)(g) is taken into account: see further **[12-830] Evidentiary status and use of victim impact statements on sentence** and **[12-832] Victim impact statements and harm caused by sexual assault**.

Where there are numerous sexual offences and some occur when the victim is 16 or 17 years old, the sentencing court must expressly state when s 25AA applies and when it does not: *R v Cattell* at [115]–[116]. In *Franklin v R* [2019] NSWCCA 325 the applicant's offending extended over a period when the victim was between five and 17 years old. The court dismissed the appeal but said if it had been necessary to resentence, s 25AA could only apply to the offences committed when the victim was under 16 years old and general law principles with respect to sentencing for historical sexual offences would apply to the balance: at [145]. As to the difficulties of applying the principle of totality in this situation, see *R v Cattell* at [152]. There is a degree of artificiality in attempting to do so. See also *Cunningham v R* [2020] NSWCCA 287 at [32]–[33].

Juvenile offenders

Section 21B applies if a juvenile offender commits a child sexual offence but is sentenced as an adult. In *JA v R* [2021] NSWCCA 10 at [62] the court (considering the former s 25AA) commented on the difficulties in sentencing in such circumstances.

Resentencing following successful appeal

When varying or substituting a sentence, a court must vary or substitute the sentence in accordance with the sentencing patterns and practices *at the time of the original sentencing*: s 21B(4). The former s 25AA did not make specific provision for the variation or substitution of a sentence.

Additional resources

H Donnelly "Sentencing according to current and past practices", paper presented at *Sentencing: New Challenges* conference, National Judicial College of Australia on 29 February 2020 at https://www.njca.com.au/wp-content/uploads/2023/03/1.pdf, accessed 22 July 2021.

[17-420] Statutory scheme in the Crimes Act 1900 (NSW)

Table 1 lists the provisions in the *Crimes Act* 1900 which create sexual offences against children, or those that may be committed against children.

Sections 61L and 61M(1) are sexual offences of general application that, in their standard form, apply both to adults and children (see s 77, discussed below). Sections 61N(1), 61O, 66A–66EB, 73, and 91G–91H *Crimes Act* 1900 specifically and exclusively pertain to sexual offences against children. Sections 61J, 61M(1), (2), 80A(2A)(b), 80D(2) and 91J–91L pertain to sexual offences against children by way of aggravation.

Before the commencement of the *Crimes Amendment (Child Pornography and Abuse Material) Act* 2010 on 17 September 2010, the *Crimes Act* 1900 defined "child pornography" as material that depicts or describes (or appears to depict or describe), in a manner that would in all the circumstances cause offence to a reasonable person, a person who is (or appears to be) a child:

(a) engaged in sexual activity

(b) in a sexual context, or

(c) as the victim of torture, cruelty or physical abuse (whether or not in a sexual context).

For offences committed from 17 September 2010, such material, which is now more broadly defined, is referred to as "child abuse material" and is defined in s 91FB(1).

Table 1: Sexual offences against children under the Crimes Act 1900

Section^	Offence	Max (yrs)*	Commentary
s 61J(1)	Aggravated sexual assault	20 *[SNPP 10]*	[17-505]
s 61M(1)^	Aggravated indecent assault	7 *[SNPP 5]*	[17-510]
s 61M(2)^	Aggravated indecent assault — child under 16 years	10 *[SNPP 8]*	[17-510]
s 61N(1)^	Act of indecency — child under 16 years	2	[17-520]
s 61N(2)^	Act of indecency — person 16 years or above	1.5	[17-520]
s 61O(1)^	Aggravated act of indecency — child under 16 years	5	[17-520]
s 61O(1A)^	Aggravated act of indecency — person 16 years or above	3	[17-520]
s 61O(2)^	Aggravated act of indecency — child under 10 years	7	[17-520]
s 61O(2A)^	Aggravated act of indecency — child under 16 years (knowing it to be filmed for producing child abuse (previously "child pornography") material)	10	[17-520]

^ Repealed by the *Criminal Legislation Amendment (Child Sexual Abuse) Act* 2018 on 1 December 2018.

* SNPP: Standard non-parole period

Section^	Offence	Max (yrs)*	Commentary
s 66A	Sexual intercourse — child under 10 years	life *[SNPP 15]*	[17-480]
s 66B	Attempting or assaulting with intent to have sexual intercourse with child under 10 years	25 *[SNPP 10]*	[17-480]
s 66C(1)	Sexual intercourse — child between 10 and 14 years	16 *[SNPP 7]*	[17-490]
s 66C(2)	Aggravated sexual intercourse — child between 10 and 14 years	20 *[SNPP 9]*	[17-490]
s 66C(3)	Sexual intercourse — child between 14 and 16 years	10	[17-490]
s 66C(4)	Aggravated sexual intercourse — child between 14 and 16 years	12 *[SNPP 5]*	[17-490]
s 66D	Assaulting with intent to have sexual intercourse with child between 10 and 16 years	as per s 66C(1)–(4)	—
s 66DA	Sexual touching — child under 10	16 *[SNPP 8]*	
s 66DB	Sexual touching — child between 10 and 16	10	
s 66DC	Sexual act — child under 10	7	
s 66DD	Sexual act — child between 10 and 16	2	
s 66DE	Aggravated sexual act — child between 10 and 16	5	
s 66DF	Sexual act for production of child abuse material — child under 16	10	
s 66EA	Persistent sexual abuse of a child	Life [25 if committed before 1.12.2018]	[17-500]
s 66EB(2)(a)	Procuring child for unlawful sexual activity — child under 14 years	15 *[SNPP 6]*	[17-535]
s 66EB(2)(b)	Procuring a child for unlawful sexual activity — child under 16 years	12 *[SNPP 5]*	[17-535]
s 66EB(2A)	Meeting a child following grooming for unlawful sexual activity — child under 14 years	15 *[SNPP 6]*	[17-535]
s 66EB(2A)	Meeting a child following grooming for unlawful sexual activity — child under 16 years	12 *[SNPP 5]*	[17-535]
s 66EB(3)(a)	Grooming a child for unlawful sexual activity — child under 14 years	12 [*SNPP 5*]	[17-535]
s 66EB(3)(b)	Grooming a child for unlawful sexual activity — child under 16 years	10 [*SNPP 4*]	[17-535]
s 73(1)	Sexual intercourse with young person above 16 years and under 17 years who is under special care	8	[17-530]
s 73(2)	Sexual intercourse with young person above 17 years and under 18 years who is under special care	4	[17-530]
s 73A(1)	Sexual touching — young person of or above 16 years and under 17 years under special care	4	
s 73A(1)	Sexual touching — young person of or above 17 years and under 18 years under special care	2	
s 80A(2A)(b)	Aggravated sexual assault by forced self-manipulation	20	[20-720]
s 80D(2)	Aggravated causing sexual servitude	20	[17-540]

^ Repealed by the *Criminal Legislation Amendment (Child Sexual Abuse) Act* 2018 on 1 December 2018.

* SNPP: Standard non-parole period

Section^	Offence	Max (yrs)*	Commentary
s 80G	Incitement to commit a sexual offence	Same as penalty for substantive offence	[17-545]
s 91D(1)	Promoting or engaging in acts of child prostitution — child 14 years or above	10	[17-540]
s 91D(1)	Promoting or engaging in acts of child prostitution — child under 14 years	14 [*SNPP 6*]	[17-540]
s 91E(1)	Obtaining benefit from child prostitution — child 14 years or over	10	[17-540]
s 91E(1)	Obtaining benefit from child prostitution — child under 14 years	14 [*SNPP 6*]	[17-540]
s 91F(1)	Premises not to be used for child prostitution	7	[17-540]
s 91G(1)	Children not to be used for production of child abuse (previously "child pornography") material — child under 14 years	14 [*SNPP 6*]	[17-541]
s 91G(2)	Children not to be used for production of child abuse (previously "child pornography") material — child 14 years or above	10	—
s 91H(2)	Possession, production or dissemination of child abuse (previously "child pornography") material	10	[17-541]
s 91J(1)	Voyeurism	100 penalty units or 2 years or both	[17-543]
s 91J(3)	Aggravated voyeurism	5	[17-543]
s 91K(1)	Filming a person engaged in a private act	100 penalty units or 2 years or both	[17-543]
s 91K(3)	Aggravated filming a person engaged in a private act	5	[17-543]
s 91L(1)	Filming a person's private parts	100 penalty units or 2 years or both	[17-543]
s 91L(3)	Aggravated filming a person's private parts	5	[17-543]

Section 80AE explicitly states that consent is not a defence to a charge under ss 61E(1A), 61E(2), 61E(2A), 61M(2), 61N(1), 61O(1), 61O(2), 61O(2A), 66A, 66B, 66C, 66D, 66DA, 66DB, 66DC, 66DD, 66DE, 66DF, 66EA, 66EB, 66EC, 67 (rep), 68 (rep), 71 (rep), 72 (rep), 72A (rep), 73, 73A, 74 (rep) or 76A (rep), or to a charge under ss 61E(1) (rep), 61L (rep), 61M(1), or 76 (rep) if the victim is a child under 16 years. Consent is also not a defence to a charge under s 91D: s 91D(3).

On conviction of a person for a sexual offence against a child, the court may refer the matter to an appropriate child protection agency if the child is under the authority of the offender: s 80AA.

^ Repealed by the *Criminal Legislation Amendment (Child Sexual Abuse) Act* 2018 on 1 December 2018.

* SNPP: Standard non-parole period

[17-430] Standard non-parole periods

The *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002 introduced standard non-parole periods, as detailed in Table 1 at **[17-420]**.

The effect of the introduction of standard non-parole periods will generally be an upward movement in the length of sentences for offences to which they apply: *Muldrock v The Queen* (2011) 244 CLR 120 at [31]; *R v AJP* [2004] NSWCCA 434 at [37].

See further **Move upwards in the length of non-parole periods?** at **[7-990]**.

[17-440] Section 21A Crimes (Sentencing Procedure) Act 1999

Section 21A was inserted into the *Crimes (Sentencing Procedure) Act* in 2002 and provides a non-exhaustive list of aggravating and mitigating factors to be taken into account in determining the appropriate sentence for an offence. The weight of authority indicates that Parliament intended the section to replicate the common law, rather than alter it: *R v Wickham* [2004] NSWCCA 193 at [23].

Some of the aggravating factors relevant to child sexual assault in s 21A(2) are:

- the offender has a record of previous convictions: s 21A(2)(d)
- the offence involved gratuitous cruelty: s 21A(2)(f)
- the injury, emotional harm, loss or damage caused by the offence is substantial: s 21A(2)(g)
- the offender abuses a position of trust or authority in relation to the victim: s 21A(2)(k)
- the victim is vulnerable, for example, because the victim is very young or has a disability: s 21A(2)(l)
- the offence involves multiple victims or a series of criminal acts: s 21A(2)(m)
- the offence was part of a planned or organised criminal activity: s 21A(2)(n).

Application of these subsections are discussed in **Section 21A factors "in addition to" any Act or Rule of Law** at **[11-060]**ff.

The aggravating factor in s 21A(2)(n) — the offence was part of a planned or organised criminal activity — was considered by the court in *Saddler v R* [2009] NSWCCA 83. The applicant who had downloaded more than 45,000 images and 700 movies from the internet, and stored them on external hard drives, CDs and a laptop, was sentenced for possessing child pornography contrary to s 91H(3) *Crimes Act* 1900 (repealed). These circumstances, however, could not be properly regarded as constituting "planned or organised" criminal activity for the purpose of aggravating the offence under s 21A(2)(n): at [32]. In particular, there was no evidence of planning, or none that went beyond that which is inherent in the offence: at [36].

The court in *Saddler v R* also considered the aggravating factor in s 21A(2)(f) — the offence involved gratuitous cruelty. At that time, child pornography was defined by s 91H(1) *Crimes Act* 1900 to include the element, "torture, cruelty or physical abuse" (the definition, which still includes that phrase, is now contained in s 91FB(1)(a) and child pornography material is now referred to as "child abuse material"). The

sentencing judge found that this aspect of the definition of child pornography was present and had taken it into account in determining the objective gravity of the offence. Taking it into account again under s 21A(2)(f) would be impermissible double counting: at [41]. Further, although there is no direct authority on the question of whether the possession of images after they had been created "involved" gratuitous cruelty, it was likely that it would not. Some involvement of the applicant in the creation of the images is required: at [43].

[17-450] De Simoni principle

The court must disregard a matter of aggravation if taking it into account leads to punishing an offender for a more serious offence: *The Queen v De Simoni* (1981) 147 CLR 383. This consideration is most likely to arise when a basic form of the offence is charged and the court has regard to factors which are often found as aggravating features of offences in the *Crimes Act* 1900; such as, the offence was committed in company (*R v Newham* [2005] NSWCCA 325), the offender used a weapon, or the offender was in a position of trust: *R v Wickham* at [26]. See also **Fact finding at sentence** at **[1-500]**.

[17-460] Victim impact statements

For the use of victim impact statements, see **Victims and victim impact statements** at **[12-800]**.

[17-480] Sexual intercourse — child under ten: s 66A

For a detailed discussion of the offence and applicable principles, see P Poletti, P Mizzi and H Donnelly, "Sentencing for the offence of sexual intercourse with a child under 10", *Sentencing Trends & Issues*, No 44, Judicial Commission of NSW, 2015.

The current form of the offence under s 66A *Crimes Act* 1900, as implemented by the *Crimes Legislation Amendment (Child Sex Offences) Act* 2015 (commenced upon assent on 29 June 2015) provides that any "person who has sexual intercourse with a child who is under the age of 10 years is guilty of an offence". The amendments represent a reversion to a single form of the offence which existed prior to the *Crimes Amendment (Sexual Offences) Act* 2008. A maximum penalty of life imprisonment (previously applicable only to the aggravated form of the offence) applies to the new offence. The standard non-parole period of 15 years continues to apply.

For offences committed between 1 January 2009 and 29 June 2015, the following maximums apply:

- s 66A(1): sexual intercourse with a child under 10 (maximum penalty of 25 years)
- s 66A(2): sexual intercourse with a child under 10 in circumstances of aggravation (maximum penalty of life imprisonment).

A standard non-parole period of 15 years applied to either form of the offence. Subsections 66A(3)(a)–(h) provided that the circumstances of aggravation included when an offender:

- intentionally or recklessly inflicted actual bodily harm on the child
- threatened to inflict actual bodily harm on the child or a person who is present or nearby

- committed the offence in company
- committed the offence on a child under his or her authority
- committed the offence on a child with a serious physical disability
- committed the offence on a child with a cognitive impairment
- took advantage of a child who was under the influence of alcohol or drugs
- deprived the child of his or her liberty, either before or after the commission of the offence, or
- committed the offence of break and enter into any dwelling-house or other building with the intention of committing the offence or any other serious indictable offence.

Specific guidance on the factors relevant to assessing the objective seriousness for an offence under s 66A *Crimes Act* 1900 has been provided by the Court of Criminal Appeal: *R v AJP* [2004] NSWCCA 434 at [25], *MLP v R* [2006] NSWCCA 271 at [22], *R v PGM* [2008] NSWCCA 172. These factors include how the offences took place, over what period, with what degree of coercion, the use of threats or pressure, and any immediate effect on the victim. However, caution should be exercised where these cases discuss assessing these factors by reference to being below or above a midpoint: *Muldrock v The Queen* (2011) 244 CLR 120. See **Consideration of standard non-parole period in sentencing** at **[7-920]**.

See also **Sexual assault** at **[20-630]** ff.

Attempting or assaulting with intent to have sexual intercourse with child under 10: s 66B

In *R v McQueeney* [2005] NSWCCA 168, the offender committed two counts of attempted sexual intercourse with a child under 10 years and was sentenced to a non-parole period of 7 years and a balance of term of 3 years. The court found that the sentencing judge did not offend the principles for an attempted offence. Justice Latham, Howie and Grove JJ agreeing, stated at [25]–[26]:

> [H]is Honour was dealing with the applicant for an attempt rather than the substantive offence. The approach to sentencing for an attempted substantive offence was expressed by this court in *Taouk* (1992) A Crim R 387 as follows:
>
> > "There is clearly an interrelationship between the seriousness of the intended consequences and the real prospects of having achieved them and that relationship has to be weighed in each case in the light of all the circumstances."
>
> In those circumstances his Honour's evaluation of the objective gravity of the offence required his Honour to consider that the substantive offence was not completed and the prospect that the attempt, if not interrupted, would have succeeded. On the facts before him his Honour was entitled to conclude that the substantive offence may well have succeeded but for the fact that the complainant awoke. The applicant had progressed a considerable way towards actual penetration. The boy's underwear had been removed and the applicant was holding the boy by the shoulders. The applicant was actively engaged in the attempt. Given these features of the offence and the gravity of the offence which was attempted, I am not persuaded that his Honour imposed a sentence in respect of this offence which was outside the range of his sentencing discretion. It may well be regarded as a sentence towards the top of the range, but that is insufficient to attract the intervention of this court.

Where committed on or after 29 June 2015, the offence is subject to a standard non-parole period of 10 years.

[17-490] Sexual intercourse — child between 10 and 16: s 66C

The *Crimes Amendment (Sexual Offences) Act* 2008 inserted a new circumstance of aggravation for the aggravated form of this offence — where an offender deprives a child of his or her liberty for a period before or after the commission of the offence: s 66C(5)(h).

The courts have repeatedly emphasised the extremely serious view that has to be taken towards matters of this kind: *R v JVP* (unrep, 6/11/95, NSWCCA). In the early 1990s it was held that the ages of victims and the range of criminality of the offenders may vary greatly, rendering a wide range of sentences appropriate, including periodic detention (then available as a sentencing option, but now replaced by intensive correction orders): *R v Agnew* (unrep, 6/12/90, NSWCCA) per Loveday J; *R v McClymont* (unrep, 17/12/92, NSWCCA) per Gleeson CJ.

The most significant matter which determines where a particular offence is to be placed in the spectrum of offences of this kind is the degree to which the offender is seen to have exploited the youth of the victim: *R v Sea* (unrep, 13/8/90, NSWCCA) per Badgery-Parker J at 4.

In *R v KNL* [2005] NSWCCA 260 at [42]–[43], Latham J, Brownie AJA and Buddin J agreeing, stated:

> It is trite to observe that sexual intercourse with a child of 12, knowing the child's age, is objectively more serious than sexual intercourse with a child of 12, in ignorance of the child's true age. However, it is also the case that, in terms of the position occupied by a given offence on the spectrum of offences of this kind, the younger the child, the more serious the offence; *R v T* (1990) 47 A Crim R 29.
>
> The complainant was just over 12 years of age. She was closer to ten than she was to 16, yet that feature of the offence was largely disregarded, in favour of the mitigation constituted by the respondent's mistaken belief as to her age.

Whether a complainant is a willing participant, notwithstanding his or her age, is relevant to the level of objective seriousness of a s 66C offence: *Wakeling v R* [2016] NSWCCA 33 at [47], [49]; *Hogan v R* [2008] NSWCCA 150 at [77].

The *Crimes Legislation Amendment (Child Sex Offences) Act* 2015 introduced standard non-parole periods for offences, inter alia, contrary to ss 66C(1), 66C(2) and 66C(4), committed on or after 29 June 2015. See **Table 1: Sexual offences against children under the *Crimes Act* 1900** at **[17-420]**.

[17-500] Maintain unlawful sexual relationship with child: s 66EA

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

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

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

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

Fact finding following a guilty verdict

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

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

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

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

Assessing the seriousness of an offence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Worst cases

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

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

Section 61M(2)

It is of considerable significance when assessing the objective seriousness of indecent assaults against children to consider the actual character of the assault, including the degree of physical contact involved: *R v PGM* [2008] NSWCCA 172 at [31], applying *G A T v R* [2007] NSWCCA 208 at [22]; *Corby v R* [2010] NSWCCA 146 at [71].

In *R v PGM*, the degree of genital connection in two of the s 61M(2) counts, and the gross indecency involved in the other, meant that the judge's characterisation of the

offending as at the lower end of mid-range was indicative of error: at [31], [40]. By way of contrast, where an indecent assault involved the kissing and cuddling of a child the offender believed, unreasonably, was over 16, the court said that in the particular circumstances this "was not deeply intrusive" and that the offence fell "towards the bottom of the range of objective seriousness": *Corby v R* [2010] NSWCCA 146 at [72], [78], [81]. The age difference (39 to 14 years in *Corby*) can also aggravate the offence: *Corby v R* at [77]. Other factors relevant to the assessment of objective seriousness include the specific age of the child within the range of 10–16 years, the duration of the conduct and any use of coercion: *BT v R* [2010] NSWCCA 267 at [22]–[24]; *R v KNL* [2005] NSWCCA 260 at [42]–[43]; *R v AJP* [2004] NSWCCA 434 at [25]. An absence of any threats "may have much less, and perhaps little, weight" in the context of offences by persons in positions of authority over their victims than in the case of offenders not in such a position: *BT v R* [2010] NSWCCA 267 at [24] per RS Hulme J referring to *R v Woods* [2009] NSWCCA 55 at [52]-[53].

See discussion of good character and s 21A(5A) *Crimes (Sentencing Procedure) Act 1999* at **[17-570]**.

Further appeal cases are accessible in the SNPP Appeals component of JIRS.

[17-520] Act of indecency: s 61N

Table 1 at **[17-420]** sets out the maximum penalties applicable to acts of indecency committed against persons under 16 years: s 61N(1) *Crimes Act* 1900, and against persons 16 years and above: s 61N(2).

While, ordinarily, a custodial sentence would be appropriate for indecent assaults, such a sentence is neither necessarily required nor inevitable in every case: *R v O'Sullivan* (unrep, 20/10/89, NSWCCA) at 4–5. However, the legislature does expect the courts to punish severely those who commit sexual assaults on young children: *R v Muldoon* (unrep, 13/12/90, NSWCCA) at 6. For example, periodic detention, when it was available as a sentencing option (prior to 1 October 2010), was said not to be appropriate where the offences occurred over a long period of time on young children: *R v Burchell* (unrep, 9/4/87, NSWCCA).

The Court of Criminal Appeal has declined to lay down a requirement that a custodial sentence should ordinarily be imposed in relation to the charge of act of indecency: *R v Baxter* (unrep, 26/5/94, NSWCCA) per Hunt CJ at CL at 11. In *R v Baxter*, the Court of Criminal Appeal emphasised the importance of looking to such considerations as the nature of the assault, the existence and extent of any penetration, the age of the victim and other features relevant to the case: *R v Barrett* (unrep, 26/7/95, NSWCCA) per Kirby ACJ at 6. In *Corby v R* [2010] NSWCCA 146 at [84], the Court of Criminal Appeal stated that if the act of indecency occurred in the physical presence of the victim this will bear on the determination of the seriousness of the offence. The seriousness of the offence escalates if the offence continues over a period of days: at [86].

Aggravated act of indecency: s 61O

Table 1 at [17-420] sets out the maximum penalties for aggravated acts of indecency offences committed against a person under 16 years: s 61O(1) *Crimes Act* 1900, 16 years or above: s 61O(1A); or under 10 years: s 61O(2). Table 1 also sets out the

maximum penalty for the offence of committing an act of indecency with or towards a person under the age of 16 years (or inciting a person under the age of 16 years to an act of indecency) knowing that the act of indecency is being filmed for the purpose of producing child abuse material (previously child pornography): s 61O(2A), inserted by the *Crimes Amendment (Sexual Offences) Act* 2008 (effective 1 January 2009).

In *R v ARC* (unrep, 28/8/96, NSWCCA), Hunt CJ at CL stated the following in relation to s 61O offences:

> … the size of the scale in relation to the acts of indecency referred to in [the] NSW *Crimes Act* is necessarily small. Section 61O provides for circumstances of aggravation … That further reduces the size of the relevant scale. Moreover, it does not take much for an act of indecency to become an indecent assault, with a correspondingly higher maximum sentence.

[17-530] Sexual intercourse with child between 16 and 18 under special care: s 73

Any person who has sexual intercourse with someone under their special care who is of or above 16 but under 17 years of age, is liable to imprisonment for 8 years. Where the victim is of or above the age of 17 years and under the age of 18 years, the offender is liable to imprisonment for 4 years: s 73(2) *Crimes Act* 1900. "Under the special care of another person", for the purposes of s 73, is defined in s 73(3).

[17-535] Procuring or grooming: s 66EB

Under s 66EB(2) *Crimes Act* 1900, an adult who intentionally procures a child for unlawful sexual activity with that or any other person is guilty of an offence. The offence carries a maximum penalty of 15 years imprisonment where the child involved is under 14 years of age, and 12 years imprisonment in any other case.

In *Tector v R* [2008] NSWCCA 151, the offender was charged with using a telecommunications service to procure a 12-year-old boy to engage in sexual activity: s 474.26(1) Criminal Code (Cth). Section 474.26(1) is the Commonwealth equivalent of s 66EB(2). Like s 66EB(2)(a), it carries a maximum penalty of 15 years. The court (Hall J, Giles JA and Barr J agreeing) sentenced the offender to a head sentence of 8 years imprisonment, with a non-parole period of 5 years. The gravamen of the offence is conduct by an adult directed at a child under 16 years, undertaken with the intent of encouraging, enticing, recruiting or inducing (whether by threats, promises or otherwise) that child to engage in sexual activity. "Sexual activity" is defined in s 474.28(11) (now repealed) to include "any" activity of a sexual or indecent nature and "need not involve physical contact between people": at [90]. In addition to the nature of the sexual activity proposed, the following factors were relevant to the determination of sentence at [94]:

- the offender invited the child to engage in sexual activity with him
- money was offered as an inducement to sexual activity
- the offender persistently pursued the child (over a course of approximately six weeks)
- the child, at 12 years of age, was significantly below the age of 16 years

- the extent of the age difference between the 41-year-old applicant and the 12-year-old child
- the offender took steps to remain anonymous (false name, public telephones and internet cafes).

A new offence of "meeting child following grooming" was inserted into the *Crimes Act* 1900 by the *Crimes Amendment (Sexual Offences) Act* 2008: ss 66EB(2A) and (2B). It carries a maximum penalty of 15 years imprisonment where the child involved is under 14 years of age, and 12 years imprisonment in any other case: s 66EB(2A). The offence involves an adult intentionally meeting a child, or travelling to meet a child, whom he or she has groomed for sexual purposes, with the intention of procuring the child for unlawful sexual activity: s 66EB(2A).

The *Crimes Legislation Amendment (Child Sex Offences) Act* 2015 introduced standard non-parole periods for all offences under s 66EB, committed on or after 29 June 2015. See **Table 1: Sexual offences against children under the *Crimes Act* 1900** at **[17-420]**.

[17-540] Child sexual servitude and prostitution

Part 3 Div 10A (ss 80B–80F) *Crimes Act* 1900 deals with offences relating to sexual servitude. The aggravated form of the offence of causing sexual servitude applies to persons under the age of 18 years: ss 80C(a), 80D(2). The *Crimes Amendment (Sexual Offences) Act* 2008 increased the maximum penalty for the aggravated form of the offence from 19 to 20 years imprisonment (effective 1 January 2009): s 80D(2).

Part 3 Divs 15 and 15A (ss 91C–91H) of the *Crimes Act* 1900 deal with offences relating to child prostitution and child abuse/pornography material. The *Crimes Amendment (Child Pornography) Act* 2004 amended ss 91C and 91G and introduced s 91H. Significantly, the maximum penalty for offences in s 91G was doubled, increasing from 7 to 14 years where the child is under the age of 14 years, and from 5 to 10 years where the child is of or above the age of 14. The *Crimes Amendment (Sexual Offences) Act* 2008 increased the maximum penalty for offences under s 91E (obtaining benefit from child prostitution): see below.

Child prostitution

Promoting or engaging in acts of child prostitution: s 91D

In *R v Romano* [2004] NSWCCA 380, the applicant had been sentenced to a fixed term of 6 years on each of three counts of causing a child to participate in act of child prostitution and on each of three counts of causing a child under 14 years to participate in an act of child prostitution. The court found that, although the sentencing judge, in setting a sentence close to the maximum, erred in characterising s 91D prostitution offences as "in many ways … analogous to a violent aggravated sexual assault in terms of its effect on the community and particularly on the girl", when the offences on the Form 1 were taken into account, the sentence imposed was within the sentencing range.

For offences under s 91D(1) (see **Table 1: Sexual offences against children under the *Crimes Act* 1900** at **[17-420]**), committed on or after 29 June 2015, a standard non-parole period of 6 years applies.

Obtaining benefit from child prostitution: s 91E

On each of seven counts of obtaining benefit from child prostitution under s 91E in *R v Romano* [2004] NSWCCA 380, the applicant was sentenced to a fixed term of 3 years. The *Crimes Amendment (Sexual Offences) Act* 2008 increased the maximum penalty for receiving money or any other material benefit knowing that it is derived from an act of prostitution involving a child under the age of 14 years from 10 to 14 years imprisonment (effective 1 January 2009): s 91E(1). The higher maximum penalty only applies where the age of the child is set out in the charge for the offence: s 91E(3).

For offences under s 91E(1) (see **Table 1: Sexual offences against children under the *Crimes Act* 1900** at **[17-420]**), committed on or after 29 June 2015, a standard non-parole period of 6 years applies where the offence is one involving a child under 14, attracting the 14 year maximum penalty.

Premises not to be used for child prostitution: s 91F

In *R v Hilton* [2005] NSWCCA 317, the applicant was charged with 11 counts of obtaining money from child prostitution under s 91E(1) and eight counts of premises not to be used for child prostitution under s 91F(1). His defence — that he did not know the two girls were under 18 years of age — was rejected by the sentencing judge. On appeal, the submission that he was double punished for his conduct was made good: *Pearce v The Queen* (1998) 194 CLR 610 applied. There was no need to charge the applicant with offences under s 91F(1) as well as under s 91E(1); the offences under s 91F, in point of criminality, being almost entirely subsumed in the offences committed under s 91E: at [8]. Therefore, the sentence for offences under s 91E(1) was reduced for each count to a fixed term of 2 months, whereas the sentence for offences under s 91F(1) was confirmed as a 3-year-term of imprisonment with a non-parole period of 12 months. Justice Adams (with Bell and Hall JJ agreeing), stated that despite the powerful subjective circumstances of this case the objective criminality of the offences was substantial and necessitated a term of full-time custody.

[17-541] Child abuse/pornography offences

The following text sets out both Commonwealth and State offences. Increases to maximum penalties reflect the view of the State and Federal Parliament of the serious criminality involved in child pornography offences: *R v Porte* [2015] NSWCCA 174 at [57], [58]. In 2008, the maximum penalty for an offence against s 91H(2) *Crimes Act* 1900 (see below) was increased from 5 to 10 years imprisonment. In 2010, the maximum penalty for the Criminal Code (Cth), s 474.19 (see below) (and other similar offences) was increased from 10 to 15 years imprisonment.

State offences

Part 3 Div 15A *Crimes Act* 1900 contains the following State child abuse material (previously child pornography) offences:

- using a child to produce child abuse material: s 91G(1)
- producing child abuse material: s 91H(2)
- disseminating child abuse material: s 91H(2)
- possessing child abuse material: s 91H(2).

"Child abuse material" is defined in s 91FB as material which:

> … depicts or describes in a way that reasonable persons would regard as being, in all the circumstances, offensive:
>
> (a) a person who is, appears to be or is implied to be, a child as a victim of torture, cruelty or physical abuse, or
>
> (b) a person who is, appears to be or is implied to be, a child engaged in or apparently engaged in a sexual pose or sexual activity (whether or not in the presence of other persons), or
>
> (c) a person who is, appears to be or is implied to be, a child in the presence of another person who is engaged or apparently engaged in a sexual pose or sexual activity, or
>
> (d) the private parts of a person who is, appears to be or is implied to be, a child.

Commonwealth offences

Chapter 10 Pts 10.5 and 10.6 Criminal Code (Cth) contain the following Commonwealth child pornography and child abuse material offences:

- using a postal service for child pornography or child abuse material: ss 471.16, 471.19 (maximum penalty of 15 years)
- possessing, controlling, producing, supplying or obtaining child pornography or child abuse material for use through a postal or similar service: ss 471.17, 471.20 (maximum penalty of 15 years)
- using a carriage service to access, transmit (or cause to be transmitted to himself or herself), make available, publish, distribute, advertise, promote or solicit child pornography or child abuse material: ss 474.19, 474.22 (maximum penalty of 15 years). See **Special Bulletin 11 — DPP (Cth) and DPP (Vic) v Garside [2016] VSCA 74**, which reviewed the leading authorities in NSW and Victoria.
- possessing, controlling, producing, supplying or obtaining child pornography or child abuse material for use by the offender or another person to commit an offence against ss 474.19 and 474.22: ss 474.20, 474.23 (maximum penalty of 15 years).

An aggravated form of each offence is contained in ss 471.22 and 474.24A Criminal Code (Cth) (maximum penalty of 25 years). It is also an offence for an internet service provider or internet content host who is aware that a service they provide can be used to access material they believe, on reasonable grounds, is either child pornography or child abuse material to not refer details of that material to the Australian Federal Police within a reasonable time after becoming aware of the existence of the material: s 474.25 (maximum penalty of 100 penalty units, that is, $18,000).

There is also an offence of importing or exporting child pornography or child abuse material: s 233BAB *Customs Act* 1901 (Cth) (maximum penalty of 10 years).

Mixture of State and Commonwealth offences

It is apparent that there is a degree of overlap between some of the Commonwealth and State offences. In *R v Cheung* [2010] NSWCCA 244 at [131], the court said that it was open to a sentencing court to seek guidance from the sentences in respect of much longer established identical state offences. Although these comments were made in the context of drug offences, the statement of principle should apply regardless of the offence. See further discussion in **Sentencing Commonwealth offenders** at **[16-002]**.

A combination of Commonwealth and State offences is not uncommon in a child pornography matter: *R v Porte* at [55]. Although the offences overlap, they are not identical. Commonwealth offences focus on the internet and the role it plays as the heart of the child pornography industry, whereas State offences are not concerned with the means by which the offender gains possession of the material: *R v Porte* at [56]; *R v Fulop* [2009] VSCA 296 at [11]–[12].

For a detailed discussion of the sentencing principles which apply in relation to sentencing for such offences see P Mizzi, T Gotsis and P Poletti, *Sentencing offenders convicted of child pornography and child abuse material offences*, Research Monograph 34, Judicial Commission of NSW, 2010. As a general rule, the same sentencing principles apply regardless of whether the court is dealing with a State or Commonwealth offence.

Sentencing principles

General deterrence

General deterrence is a paramount consideration for offences involving child abuse/child pornography material. In *R v Booth* [2009] NSWCCA 89 at [40]–[44], Simpson J said:

> possession of child pornography is an offence which is particularly one to which notions of general deterrence apply. Possession of child pornography is a callous and predatory crime.
>
> In sentencing for such a crime, it is well to bear firmly in mind that the material in question cannot come into existence without exploitation and abuse of children somewhere in the world. Often this is in underdeveloped or disadvantaged countries that lack the resources to provide adequate child protection mechanisms. The damage done to the children may be, and undoubtedly often is, profound. Those who make use of the product feed upon that exploitation and abuse, and upon the poverty of the children the subject of the material.
>
> What makes the crime callous is not just that it exploits and abuses children; it is callous because, each time the material is viewed, the offender is reminded of and confronted with obvious pictorial evidence of that exploitation and abuse, and the degradation it causes.
>
> And every occasion on which an internet child pornography site is accessed (or when such material is accessed by any means at all) provides further encouragement to expand their activities to those who create and purvey the material.
>
> It is for that reason that this is a crime in respect of which general deterrence is of particular significance. In my opinion the sentencing judge too readily dismissed from consideration the need to convey the very serious manner in which courts view possession of child pornography.

In *R v Gent* [2005] NSWCCA 370 at [43], where the applicant was charged with importing child pornography under s 233BAB(5) *Customs Act* and sentenced to 18 months imprisonment with a non-parole period of 12 months, the Crown relied upon the statement of Morden ACJO in the Ontario Court of Appeal in *R v Stroempl* (1995) 105 CCC (3d) 187 at 191 to the following effect:

> The possession of child pornography is a very important contributing element in the general problem of child pornography. In a very real sense, possessors such as the appellant instigate the production and distribution of child pornography — and the

> production of child pornography, in turn, frequently involves direct child abuse in one form or another. The trial judge was right in his observation that if the courts, through the imposition of appropriate sanctions, stifle the activities of the prospective purchasers and collectors of child pornography, this may go some distance to smother the market for child pornography altogether. In turn, this would substantially reduce the motivation to produce child pornography in the first place.

This passage has been applied in Australia in *R v Jones* (1999) 108 A Crim R 50 at 51, a decision referred to by Malcolm CJ in *Assheton v R* (2002) 132 A Crim R 237 and Williams JA and MacKenzie J in *R v Cook* [2004] QCA 469.

Prior good character

In dismissing the severity appeal, the court in *R v Gent* (McClellan CJ at CL, Adams and Johnson JJ) found that the sentencing judge did not err in giving limited weight to the applicant's prior good character. General deterrence remains the "paramount consideration": at [64], [100].

In *Mouscas v R* [2008] NSWCCA 181 at [37], the court held that as the offence of possessing child pornography is frequently committed by persons of prior good character and since general deterrence is necessarily important, it is legitimate for a court to give less weight to good character as a mitigating factor. This aspect of Price J's judgment was endorsed in *DPP (Cth) v D'Alessandro* [2010] VSCA 60 in relation to Commonwealth offences. See the discussion of good character and s 21A(5A) *Crimes (Sentencing Procedure) Act* at [17-570]. See also *R v Elliot* [2008] NSWDC 238 at [57]; *Police v Power* [2007] NSWLC 1.

Assessing the objective seriousness generally

Assessing the objective seriousness of a particular offence involving child abuse or child pornography material offence is the most significant aspect of the sentencing exercise. In *Minehan v R* [2010] NSWCCA 140 at [94], the Court of Criminal Appeal identified the following factors as being relevant to an assessment of the objective seriousness of a range of offences including, possessing, disseminating and transmitting child pornography:

1. Whether actual children were used in the creation of the material.
2. The nature and content of the material, including the age of the children and the gravity of the sexual activity portrayed.
3. The extent of any cruelty or physical harm occasioned to the children that may be discernible from the material.
4. The number of images or items of material — in a case of possession, the significance lying more in the number of different children depicted.
5. In a case of possession, the offender's purpose, whether for his/her own use or for sale or dissemination. In this regard, care is needed to avoid any infringement of the principle in *The Queen v De Simoni* (1981) 147 CLR 383.
6. In a case of dissemination/transmission, the number of persons to whom the material was disseminated/transmitted.
7. Whether any payment or other material benefit (including the exchange of child pornographic material) was made, provided or received for the acquisition or dissemination/transmission.
8. The proximity of the offender's activities to those responsible for bringing the material into existence.

9. The degree of planning, organisation or sophistication employed by the offender in acquiring, storing, disseminating or transmitting the material.
10. Whether the offender acted alone or in a collaborative network of like-minded persons.
11. Any risk of the material being seen or acquired by vulnerable persons, particularly children.
12. Any risk of the material being seen or acquired by persons susceptible to act in the manner described or depicted.
13. Any other matter in s 21A(2) or (3) *Crimes (Sentencing Procedure) Act* (for State offences) or s 16A *Crimes Act* 1914 (for Commonwealth offences) bearing upon the objective seriousness of the offence.

In *R v Porte* [2015] NSWCCA 174 at [63]–[64], the court said the sentencing principles set out in *Minehan v R* remain relevant and have been applied in numerous decisions including: *R v Linardon* [2014] NSWCCA 247; *R v Martin* [2014] NSWCCA 283; *James v R* [2015] NSWCCA 97. The court added to these principles the following considerations:

- The absence of an intention to sell or distribute child abuse material does not mitigate penalty for a possession offence: *R v Porte* at [66]; *Saddler v R* [2009] NSWCCA 83 at [49]–[50]; *R v Booth* [2009] NSWCCA 89 at [46].
- The possession of child abuse material is not a victimless crime. Those who possess such material help to create a market for the continued exploitation and abuse of children. It is for that reason that general deterrence is of particular significance: *R v Porte* at [68]–[70]; *R v Booth* at [41]–[42].
- Evidence of rehabilitation, while an important sentencing consideration under s 16A(2)(n) *Crimes Act* 1914 (Cth) and s 21A(3)(h) *Crimes (Sentencing Procedure) Act* 1999, may have reduced significance given the predominance of general deterrence and denunciation in the sentencing process for these offences: *R v Porte* at [71]–[72]; *R v Booth* at [47].

R v Porte was applied in *R v De Leeuw* [2015] NSWCCA 183 at [70]. See also *Lyons v R* [2017] NSWCCA 204 at [76].

The use of scales, such as the CETS (Child Exploitation Tracking System) scale, to categorise the material is a helpful way to assist a sentencing court in assessing the objective seriousness of the offence: *R v Porte* at [75]. It is of further assistance to provide random sample evidence of the material to the court so that it has before it something more than a formulaic classification which may not communicate the true nature of the material: *R v Porte* at [77], [114]. Such evidence is permitted under s 289B *Criminal Procedure Act* 1986.

Other factors of universal application which must be considered when sentencing for these offences include: the offender's motivation; the way in which the material is organised; whether the charges are representative; evidence concerning the surrounding circumstances and the proper application of the *De Simoni* principle; and issues related to totality: see further P Mizzi, T Gotsis and P Poletti, *Sentencing offenders convicted of child pornography and child abuse material offences*, Research Monograph 34, Judicial Commission of NSW, Sydney, 2010. The court in *R v Porte* at [62] described the monograph as a helpful publication.

Specific offences

Children not to be used for production of child abuse material: s 91G(1) Crimes Act 1900

A person commits an offence under s 91G if they use a child for the production of child abuse material, cause or procure a child to be so used, or consents to a child in their care being so used. The wording of this section was amended by the *Crimes Amendment (Child Pornography and Abuse Material) Act* 2010, effective 17 September 2010. The phrase, "for pornographic purposes" was replaced by "for the production of child abuse material". Offences contrary to s 91G(1) committed on or after 29 June 2015 attract a standard non-parole period of 6 years.

In *R v Pearson* [2005] NSWCCA 116, on the charge of using a child under 14 years for pornographic purposes, the applicant was sentenced to a fixed term of 18 months. Although the court found that in sentencing the applicant for that offence the sentencing judge contravened s 21A(2) *Crimes (Sentencing Procedure) Act* by taking into account, as a circumstance of aggravation, that the complainant was under the age of 14, notwithstanding the error, the sentences imposed on the applicant were not found to be manifestly excessive.

In *Hitchen v R* [2010] NSWCCA 77, the applicant was charged with a number of child pornography offences including one against s 91G(1)(a) which was accepted as a "worst category" case (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256; see [10-005] **Cases that attract the maximum**): *Hitchen v R* at [11], [24]. That offence involved the applicant using his 7-year-old step-daughter on nine separate occasions for the purpose of photographing and videoing her in erotic postures which the sentencing judge described as "disgusting and degrading": *Hitchen v R* at [15]. The applicant was sentenced to a non-parole period of 2 years with a balance of term of 4 years for this offence (the total effective sentence was 18 years with a non-parole period of 14 years).

Production, dissemination or possession of child abuse material: s 91H Crimes Act 1900

A new form of s 91H was inserted into the *Crimes Act* 1900 by the *Crimes Amendment (Child Pornography and Abuse Material) Act* 2010, effective 17 September 2010. The new section uses the phrase "child abuse material" rather than "child pornography".

The maximum penalty for the possession offence under the previous form of s 91H was increased from 5 to 10 years imprisonment, and the previous production, dissemination and possession offences were merged into s 91H(2): *Crimes Amendment (Sexual Offences) Act* 2008 (effective 1 January 2009).

"Child abuse material" includes material that "appears to be or is implied to be" a child: as a victim of torture, cruelty or physical abuse; engaged in a sexual pose or sexual activity; or in the presence of a person who is engaged in a sexual pose or sexual activity or: s 91FB(1).

The fact that no actual children are used in the production of offending material is a relevant matter in the assessment of objective seriousness: *Minehan v R* [2010] NSWCCA 140 at [90]. In *Whiley v R* [2010] NSWCCA 53, the images the subject of the charge were drawn by the applicant and did not involve the actual abuse of children. This, together with the small number of images produced and the fact that the

offender produced them for his own gratification, justified a finding that the offence fell within the low range: at [55]–[71]. In *R v Jarrold* [2010] NSWCCA 69, the production offences involved internet conversations with others concerning sexual activity between the respondent and children. An argument that the offences should be treated as less serious because they were a result of fantasy was strongly rejected: at [53]. The court did accept that, although the offences were separate and distinct, and two related to ongoing criminal activity, they otherwise fell towards the bottom of the range: at [55].

Accessing, transmitting and making available child pornography or child abuse material: ss 474.19 and 474.22 Criminal Code (Cth)

In *James v R* [2009] NSWCCA 62 at [16], the court separately determined the seriousness of an offence of accessing child pornography and an offence of possession of such material, noting that the access offence continued over a shorter period of time than the possession offence which had continued for a period of over 3 years.

In offences involving the transmission and making available of child pornography or child abuse material, the degree of sophistication and technical skill in the use of the internet is relevant to a determination of the objective seriousness of the offence. In *R v Mara* (2009) [2009] QCA 208 at [10], [37], the court concluded that such sophistication and skill was an aggravating factor. In *R v Talbot* [2009] TASSC 107 at [9], the fact material was made available using two file sharing programs and was encrypted, thus making detection more difficult, justified a finding that the offences fell within the worst category (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256; see **[10-005] Cases that attract the maximum**).

See the discussion of factors which might bear on an assessment of the objective seriousness of these types of offences referred to in *Minehan v R* [2010] NSWCCA 140 at [94] discussed above.

[17-543] Voyeurism and related offences

New voyeurism and related offences were inserted into the *Crimes Act* 1900 by the *Crimes Amendment (Sexual Offences) Act* 2008: Pt 3 Div 15B (ss 91I–91M) (effective 1 January 2009). The maximum penalties for these offences are detailed in Table 1 at **[17-420]**.

Voyeurism: s 91J

Voyeurism is the seeking of sexual arousal or gratification by observing another person engaged in a private act without the consent of the person and knowing that the other person has not consented to be observed for that purpose: s 91J(1). "Engaged in a private act" is defined in s 91I(2). An offence against s 91J(1) is a summary offence: s 91J(2).

An aggravated form of the offence is committed when the person observed was under 16 years of age or the offender constructed or adapted the fabric of any building for the purpose facilitating the commission of the offence: s 91J(3), (4).

Filming a person engaged in a private act: s 91K

It is an offence for a person to seek sexual arousal or gratification (or enable another person to do so) by filming another person engaged in a private act without the consent

of the person and knowing that the person being filmed has not consented to being filmed for that purpose: s 91K(1). An aggravated form of the offence is committed if the person being filmed was under 16 years of age or the offender constructed or adapted the fabric of any building for the purpose of facilitating the commission of the offence: s 91K(3), (4).

Filming a person's private parts: s 91L

It is an offence for a person to seek sexual arousal or gratification (or seek to enable another person to do so) by filming another person's private parts without the consent of the person and knowing that the person being filmed does not consent to being filmed for that purpose: s 91L(1). An offence against s 91L(1) is a summary offence. An aggravated form of the offence is committed if the person filmed was under 16 years of age or the offender constructed or adapted the fabric of a building for the purpose of facilitating the commission of the offence: s 91L(3), (4).

[17-545] Incitement to commit a sexual offence

An offence of inciting a person to commit a sexual offence was inserted into the *Crimes Act* 1900 by the *Crimes Amendment (Sexual Offences) Act* 2008 (effective 1 January 2009): s 80G. Inciting a person to commit a sexual offence carries the penalty provided for the commission of the sexual offence: s 80G(1).

[17-550] Intensive correction order not available for a "prescribed sexual offence"

Section 66 *Crimes (Sentencing Procedure) Act* provides that an intensive correction order may not be made in respect of a sentence of imprisonment for an offence under Div 10 or 10A of Pt 3 *Crimes Act* 1900.

For a further discussion of restrictions on the power to make intensive correction orders see **Intensive correction orders (ICOs)** at **[3-630]**.

[17-560] Other aggravating circumstances

Breach of trust

It is an obvious aggravating feature if the offender was in a position of trust and violated that trust by sexually assaulting the child: *R v Muldoon* (unrep, 13/12/90, NSWCCA). There is a variety of situations where breach of trust has been recognised.

Family members

The abuse of trust is considered more serious where the offender is the father (or family member) of the victim. Sentences must be of a severe nature and little leniency can be given, even though the parent has been otherwise of good character: *R v Evans* (unrep, 24/3/88, NSWCCA); *R v Welcher* (unrep, 9/11/90, NSWCCA) per Lee CJ at CL at [15]; *R v Bamford* (unrep, 23/7/91, NSWCCA). In *R v Hudson* (unrep, 30/7/98, NSWCCA) at 2, Sully and Ireland JJ, Spigelman CJ agreeing, stated:

> children in a family situation are virtually helpless against sexual attack by the male parent and … children have a right to be protected from sexual molestation within the family and … this can only be achieved by the courts imposing sentences of a salutary nature.

The Court of Criminal Appeal has expressed particular concern that in family situations children are required to obey their parents. The offender exploits that authority and their power to discipline the child: *R v JVP* (unrep, 6/11/95, NSWCCA); *R v RKB* (unrep, 30/6/92, NSWCCA). In *R v BJW* [2000] NSWCCA 60 at [20]–[21], Sheller JA stated:

> [A] child aged 13 or younger is virtually helpless in the family unit when sexually abused by a step-parent. All too often the child is afraid to inform upon the step-parent; see generally *R v Bamford* (unreported) CCA, 23 July 1991 per Lee CJ at CL at 5. The younger the victim the more serious is the criminality; see *R v PWH* (unreported) CCA, 20 February 1992.

Teachers, coaches and group leaders

In *R v King* (unrep, 20/8/91, NSWCCA), the respondent was a leader in a junior athletics organisation. In allowing the Crown appeal the court increased his sentence from a 2-year periodic detention order to a fixed term of 2 years.

In *R v MacDonnell* (unrep, 8/12/95, NSWCCA), the respondent was the head teacher at the victim's school. On the charge of carnal knowledge under s 73 he was sentenced to a minimum term of 6 months with an additional term of 2 years.

In *R v Lumsden* (unrep, 31/7/96, NSWCCA), the applicant was the victim's swimming coach. The court found that the sentencing judge did not err in finding that the breach of trust arising from a coach and pupil relationship aggravated the circumstances of the child sexual assault offences.

Carers

In *R v Eagles* (unrep, 16/12/93, NSWCCA), the applicant was a baby sitter. On multiple charges of homosexual child abuse he was sentenced to a minimum term of 7 years with an additional term of 3 years.

Priests

In *Ryan v The Queen* (2001) 206 CLR 267, the applicant was a priest who abused his position of trust by sexually assaulting young boys over an extended period of time.

Homeless children

In *R v Fisk* (unrep, 21/7/98, NSWCCA), the applicant was charged with 24 separate counts of serious sexual misconduct against three victims. In confirming the aggregate sentence of a minimum term of 9 years with an additional term of 3 years, the court found that the applicant's behaviour in manipulating, exploiting and taking advantage of the boys' dysfunctional family backgrounds and homeless state, was a further aggravating factor.

Multiple assaults

Merely that the offences occurred in the course of a single extended episode does not justify the conclusion that the sentences are to be wholly concurrent: *R v Dunn* [2004] NSWCCA 41 at [50]. In *Carlton v The Queen* [2008] NSWCCA 244 at [122], the court held that there should have been at least partial accumulation of the sentences notwithstanding that they occurred as part of one episode. The imposition of totally concurrent sentences failed to acknowledge the separate harm done to the victim by

the different acts of the appellant: at [122]. This was an occasion where consideration of an offender's behaviour being closely related in time should not have obscured the fact that different offences were committed: at [122].

In child sexual assault cases where there are multiple assaults occurring as part of a background of continuous abuse, the fact that these offences are not isolated events is a material consideration in sentencing: *R v Bamford* (unrep, 23/7/91, NSWCCA). In *Dousha v R* [2008] NSWCCA 263 at [27]:

> I am satisfied that her Honour's finding that the counts were representative of a course of conduct was in order to emphasise the distinction between the leniency that might be extended for an isolated instance of misconduct as distinct from repeated and discrete misconduct.

Offences involving a number of victims or a large number of instances which occurred over a long period of time have been regarded as demonstrative of cases involving a very high degree of criminality: see *R v Hill* (unrep, 7/7/92, NSWCCA). Condign punishment is called for where grave and repeated sexual assaults are perpetrated upon young children, particularly by a person in a position of trust and authority: *R v JCW* [2000] NSWCCA 209 per Spigelman J at [121]. However, each case must be necessarily understood upon its own facts and by reference to the particular objective circumstances. Such consideration would necessarily include the number of victims involved, the duration of the offence(s) and the extent of sexual invasion seen: *R v Davis* [1999] NSWCCA 15 at [65].

Caution must be exercised when a criminal escapade involves consequences for more than one victim. In these circumstances, there is a special need to ensure that by imposing concurrent sentences, insufficient recognition is not given to the fact that more than one victim has been impacted by the criminal activity: *R v AB* [2005] NSWCCA 360.

In *R v Wicks* [2005] NSWCCA 409 at [49], McClellan CJ at CL stated:

> Persons who set about committing crimes of a sexual nature upon a number of different victims, even if the offence occurs in a short space of time can expect a penalty which imposes a prison term which will be served separately for at least some of the offences (… see the discussion about multiple victims in *R v Dunn* [2004] NSWCCA 41 at [50], *R v AB & Clifford* [2005] NSWCCA 360 at [90]–[84], *R v Weldon* (2002) 136 A Crim R 55 at 62 per Ipp J).

In *R v Katon* [2008] NSWCCA 228 at [41], the court, applying *R v Knight* [2005] NSWCCA 253 per Johnson J at [112], held that:

> The facts relating to the various offences disclose a course of serious criminal conduct over a number of years. That conduct involved the sexual abuse of 3 individual victims. In the ordinary course there should be a recognition of that separate offending by at least partial accumulation of the sentences …

In *Dousha v R* [2008] NSWCCA 263 at [57], a case involving discrete offending against two young children over a period of years, the court held that there was no error manifested in the fact that the sentences were partially accumulated.

[17-570] Mitigating factors

Last reviewed: August 2023

The issue of consent

Consent is *not* a mitigating factor or defence. Children are to be protected from sexual conduct, even if they are willing participants: *R v McClymont* (unrep, 17/12/92, NSWCCA); *R v Brady* (unrep, 3/3/94, NSWCCA).

Sections 77(1) and 91D(3) *Crimes Act* 1900 provide that consent is no defence to the offences specified in those sections, as noted above at [17-420]. The judge erred in *R v Nelson* [2016] NSWCCA 130 by describing, as a factor in the respondent's favour, the offences as "consensual". "Consensual" is not a proper description; the offending may be better described as not being the subject of opposition. Lack of consent is not an element of the offences because the law deems persons of that age unable to give informed consent. While the use of threats or force would have aggravated the offending, mere lack of opposition is irrelevant and not a mitigating factor: *R v Nelson* at [23]. The age difference between the victims and the respondent was significant: *R v Nelson* at [25], [64].

Good character

The *Crimes Amendment (Sexual Offences) Act* 2008 inserted special rules for child sexual offences: s 21A(5A), (5B) *Crimes (Sentencing Procedure) Act* (effective 1 January 2009). Section 21A(5A) provides that, in determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence. Section 21A(5A) has effect despite any Act or rule of law to the contrary: s 21A(5B). See further **[10-410]**.

A new definition of "child sexual offence" was also inserted: s 21A(6). The good character amendment applies to the determination of a sentence for an offence whenever committed unless, before the commencement of the amendments, a court has convicted the person being sentenced of the offence or accepted a plea of guilty (which has not been withdrawn): Sch 2 Pt 19 cl 59.

Prior to the commencement of the *Crimes Amendment (Sexual Offences) Act* 2008, an offender's prior good character was held to be of less significance in child sex cases than other types of offences: *R v Rhule* (unrep, 25/7/95, NSWCCA); *R v Muldoon* (unrep, 13/12/90, NSWCCA); *R v DCM* (unrep, 26/10/93, NSWCCA); *R v Balenaivalu* (unrep, 19/2/96, NSWCCA); *R v Levi* (unrep, 15/5/97, NSWCCA); *R v C* (unrep, 24/4/97, NSWCCA) ; *R v Elliot* [2008] NSWDC 238 at [42]; *Mouscas v R* [2008] NSWCCA 181 at [37]; *R v PGM* [2008] NSWCCA 172 at [43]–[44] and *Dousha v R* [2008] NSWCCA 263 at [49].

In *R v PGM* [2008] NSWCCA 172 at [44], the court observed that, while the judge was entitled to take the respondent's previous good character into account, to afford it "very significant weight" failed to recognise that the pattern of repeat offending extended over a period of seven months and that the relationship with the victim was deliberately fostered by the respondent for his own sexual gratification. Further, a determined and conscious course of offending diminishes the mitigating impact of a finding of good character: *R v Kennedy* [2000] NSWCCA 527 at [21]; *R v ABS* [2005]

NSWCCA 255 at [25]. The fact that the respondent used child pornography when perpetrating one of the s 61M(2) offences further indicated that his offending was "neither opportunistic nor in any meaningful contrast to his outward or public good character": *R v PGM* at [44].

Offender abused as a child

If it is established that a child sexual assault offender was sexually abused as a child, and that the history of abuse has *contributed* to the offender's own criminality, that is a matter which can be taken into account by a sentencing judge as a factor in mitigation of penalty: *R v AGR* (unrep, 24/7/98, NSWCCA) at 13. However, while it is appropriate to take such a circumstance into account, it cannot be regarded as an excuse, notwithstanding the fact that such a link may aid in explaining the reason why the offender committed the offence: *R v Lett* (unrep, 27/3/95, NSWCCA) per Hunt CJ at CL at [5]; *R v Reynolds* (unrep, 7/12/98, NSWCCA) per Hulme J. Courts have to do what they can to see that the cycle of sexual abuse is broken: *R v Reynolds*.

The weight to be given to this circumstance will depend very much on the facts of the individual case and will be subject to a wide discretion in the sentencing judge: *R v AGR* (unrep, 24/7/98, NSWCCA) at [5]. Such a consideration will usually only go to reducing the offender's moral culpability for the acts, notwithstanding that it may also be relevant to the offender's prospects of rehabilitation: *R v AGR*.

In *R v Cunningham* [2006] NSWCCA 176 at [67], the court held that the applicant's history of sexual abuse did not entitle him to mitigation because the psychiatric evidence did not go so far as to suggest that the abuse contributed to his paedophilia or the offences. Furthermore, the offences were committed in breach of a bond for similar prior offences with regard to which the applicant had already received the benefit of the history at sentence.

In *Dousha v R* [2008] NSWCCA 263 at [47], the applicant conceded that there was no direct evidence that the single instance of sexual abuse he suffered as a child had in any way contributed to his offending. Indeed, there was evidence to the contrary, as a psychologist who assessed the applicant opined that the incident did not contribute to the applicant's offending. The court held at [47] that, "[i]n the absence of any causal connection of that kind (or the issue having any bearing upon the applicant's prospects of rehabilitation)", the incident was not relevant to the sentencing discretion.

Delay

Substantial delay in bringing a matter before the court in some cases may operate to the offender's advantage, for example by providing the offender with the opportunity to establish a new life and demonstrate rehabilitation. In other cases, the period of delay may lead to some constraint upon the offender's lifestyle or other detriment which may also justify a degree of leniency: *R v V* (unrep, 24/2/98, NSWCCA) per Wood J. In *R v Todd* [1982] 2 NSWLR 517 at 519, a case concerned with factors arising from consideration of offences committed interstate and resulting delays, Street CJ set down the following principle:

> where there has been a lengthy postponement, whether due to an interstate sentence or otherwise, fairness to the prisoner requires weight to be given to the progress of his rehabilitation during the term of his earlier sentence, to the circumstance that he has been left in a state of uncertain suspense and to what will happen to him when in due course

> he comes up for sentence on subsequent occasion, and to the fact that sentencing for a stale crime, long after the committing of the offences, calls for a considerable measure of understanding and flexibility of approach — passage of time between offence and sentence, when lengthy, will often lead to considerations of fairness to the prisoner in his present situation playing a dominant role in the determination of what should be done in the matter of sentence; at times this can require what might otherwise be a quite undue degree of leniency being extended to the prisoner.

In the case of child sexual assault, however, an offender should not benefit from the fact offences are not revealed until many years after they were committed. In *R v Moon* [2000] NSWCCA 534 at [35], the court held the 30-year delay in complaint should not be taken into account as a mitigating factor, noting it was the very nature of the relationship between offender and child that leads to repression, inhibition and delayed complaint. Similarly, in *Richards v R* [2023] NSWCCA 107, the court held a 34-year delay in complaint did not operate as a mitigating factor, noting child sexual assault victims are loath to report matters because of fear, trauma and shame: at [94]. Where an offender remains silent, hoping the offences will not be discovered, a reduced sentence is inappropriate: *Richards v R* at [89]–[91], [95]–[96]; see also Beech-Jones CJ at CL at [3]–[4]; distinguishing *R v Todd* [1982] 2 NSWLR 517 at 519–520.

In *R v Dennis* (unrep, 14/12/92, NSWCCA), an authority cited in *Richards v R*, the applicant had been charged with five counts of indecent assault and two counts of buggery after the victim came forward in 1990 following a public appeal about child abuse, and complained of offences that had occurred over the period 1974–1980. James J, Hunt CJ at CL and Carruthers J agreeing, said:

> It is not infrequently the case that sexual offences committed against a child of which only the offender and the child have knowledge, are first revealed by the child to a third person only years afterwards when the child has attained a certain level of maturity. In such cases the mere passage of time between the committing of the offences and the disclosure of the offences and the apprehension of the offender is of little weight as a factor in mitigation of penalty.

Lapse of time between the commission of the offence and notification to police should be a mitigating factor only where the delay would cause unfairness to the offender: *R v Johnson* (unrep, 16/5/97, NSWCCA) per Priestley JA. However, it is impossible to lay down any general principle as to the operation of leniency arising from delay: *R v Thomson* (unrep, 18/6/96, NSWCCA) per Levine J.

In *R v Holyoak* (1995) 82 A Crim R 502, a case involving sexual offences in which the appellant had not been charged until more than 20 years had passed and in which there had been a further six years delay before conviction; "extra curial" punishment via the media; and "hate" communications, Allen J stated:

> Whether, in any particular case, so long a delay is a detriment depends upon the circumstances of that case. There is no rule of law that it always is a detriment — although often it will be. It could be, to take a case at one extreme, that the offender has spent years in emotional hell, appalled at what he has done, terrified that the day may come when he is found out, disgraced and convicted, fearing that at any time there will be that knock on the door and never feeling free to remain so long in any community that he comes to be known and his background be of interest to others. At the other extreme the offender may have gone through the years untroubled by his offences, lacking any remorse in respect of them and feeling confident that they will never come to light

> because the victim never would be prepared to talk about them, his confidence increasing as the years went by with his victim remaining silent — the offender enjoying over the many years unwarranted acceptance by his associates in his respectable and stable lifestyle.

In finding that the sentencing judge made no error in principle in relation to delay, Levine J in *R v Thomson*, Priestley JA and Abadee J agreeing, applied *R v Holyoak*. The sentencing judge had found this was not a case where there had been any dilatory conduct by the police or prosecuting authorities, nor was it a matter in which there had been charges 'hanging over' the prisoners head. As far as the applicant was concerned the matter was not going to proceed after the victim's mother refused to co-operate with the authorities in 1987. There was no evidence to the effect that the prisoner's life was in any way affected by the delay between the detection by his wife in 1987 and the eventual furnishing of evidence enabling prosecution.

The issue of delay was considered in *R v Humphries* [2004] NSWCCA 370, where Barr J, Buddin and Campbell JJ agreeing, stated that the sentencing judge was entitled to ignore the fact that there was an 11-year delay between the victim's complaint to her mother and her complaint to police and the subsequent charging of the applicant. In that case, the complainant had been discouraged from making a report by her family. Justice Barr stated at [19]–[20]:

> Although a lengthy delay between finding and charging can be taken into account in favour of an offender, there is no rule that that must happen. Each case depends on its own facts. There is no rule of law that delay is always a detriment to the offender, though it often will be: *R v Holyoak* (1995) 82 A Crim R 502 at 508.
>
> One of the incidents of a lengthy delay can be that the offender is left in an agony of mind, not knowing whether or not he will be charged. The applicant was not put into any such frame of mind. He was able confidently to rely, until the police were finally told, upon the complainant's not telling the police, in accordance with the understanding he believed had been reached [among the family].

In *R v EGC* [2005] NSWCCA 392, in referring to the distinction drawn in *R v Holyoak*, the applicant submitted that, while the rehabilitation of an offender is not necessarily a mitigating factor in cases where there is a time lapse between the commission of the offences and conviction for them, it is a powerful mitigating factor where delay was a consequence of the prosecuting authorities failing to expeditiously bring the offender to trial. Justice Latham, Sully and Hulme JJ agreeing, doubted whether such a neat distinction can be drawn. Justice Latham stated at [32]:

> nothing in the judgment [in *R v Holyoak*] suggests that the weight to be afforded to the rehabilitation of an offender varies according to whether delay has been occasioned by tardiness on the part of the prosecution.

In *R v EGC*, although police were notified in 1991, both the victim and her mother rejected police involvement. The victim's mother had in fact married the applicant six months after being told by the victim of the sexual assaults. Stating at [35] that "mere knowledge of such allegations cannot found a justifiable inference of deliberate inaction by prosecuting authorities", Latham J continued at [36]:

> A number of decisions of this court are consistent with the Judge's approach to this issue, in circumstances where the complainant and members of her family decline to make a statement or contact the police, despite some early intervention by welfare authorities. *V*, *Thompson* and *Humphries* all fall into that category and resulted in the

> dismissal of sentence appeals premised upon non-adherence to the principles established in *R v Todd* [1982] 2 NSWLR 517. In *V*, Wood CJ at CL cites *Thompson* and *Holyoak* amongst others, as illustrative of the proposition that leniency is not necessarily extended wherever there is a stale offence or substantial delay (at 300).

Although the court in *R v EGC* held that the sentencing judge did not fail to give sufficient weight to the applicant's rehabilitation in the context of the delay between notification of the assaults to police and charge, it found that the passage of time between the commission of the offences and sentence was capable of, and ought to have, constituted special circumstances. The Court of Criminal Appeal has recognised prosecution for a stale offence as a special circumstance warranting alteration of the statutory ratio: *R v Virgona* [2004] NSWCCA 415; *R v Fidow* [2004] NSWCCA 172.

In *Dousha v R* [2008] NSWCCA 263 at [30], where there was a delay of about 20 years, the court held that it was open to her Honour to conclude that rehabilitation was not established. Although the fact that a lengthy period has elapsed without further offences being committed may allow for a finding that an offender has either rehabilitated or has good prospects for doing so, such a finding is not mandated. Her Honour gave greater weight to the psychologist's opinion that the applicant possessed persisting features of paedophilic orientation: at [18], [29].

Pre-Trial Diversion of Offenders Program

The *Pre-Trial Diversion of Offenders Act* 1985 applied to "a person who is charged with a child sexual assault offence committed with or upon the person's child or the child of the person's spouse or de facto partner": s 3A. It established a procedure whereby certain offenders are to be diverted from the ordinary curial path and made subject to a program of treatment intended to modify their criminal behaviour; the ultimate aim of the treatment being the reduction of the prospects of re-offending: *R v DWD* (unrep, 2/3/98, NSWCCA). As the legislation was explained when it was introduced into Parliament, the Act was based upon the theory that there are certain cases in which punishment is not an effective or appropriate deterrent. It has as its principal objective the protection and alleviation of the stress of victims of child sexual assault.

Following the repeal of the *Pre-Trial Diversion of Offenders Regulation* 2005 on 1 September 2012, the program closed. See *Attorney General for NSW v CMB* [2015] NSWCCA 166 at [5]–[12] for a legislative history.

Possibility of summary disposal

See discussion under **Sexual assault** at **[20-770]**.

Health

Ill-health may be a mitigating factor where the evidence establishes that imprisonment will be more burdensome because of the offender's state of health or that imprisonment will have a "gravely adverse effect on the offender's health": *R v Smith* (1987) 44 SASR 587 at 589. See also *R v Bailey* (unrep, 3/6/88, NSWCCA); *R v Zappala* (unrep, 4/11/91, NSWCCA) at 5–6; *R v Varner* (unrep, 24/3/92, NSWCCA); *R v Cole* (unrep, 29/3/94, NSWCCA) at 10. For a lengthy discussion on the principles relating to ill-health see *R v L* (unrep, 17/6/96, NSWCCA) at 6–9.

Ultimately, the fact that a person may suffer hardship in gaol by reason of some illness or disability is a matter for the prison authorities. It is their responsibility to ensure that the prisoner is not subjected to undue hardship: *R v Zappala* and *R v L*.

There may be exceptional cases where the offender's condition is so severe that imprisonment would be inhumane: *R v Vento* (unrep, 6/7/93, NSWCCA); *R v Dowe* (unrep, 1/9/95, NSWCCA) referred to in *R v L*.

Age

The age of the offender is relevant on sentence primarily on the basis that imprisonment may be more onerous for an older individual. There is no automatic reduction because of age. It is a matter to be considered together with the other circumstances of the case: *R v Varner* (unrep, 24/3/92, NSWCCA); *R v Holyoak* (1995) 82 A Crim R 502. In *R v DCM* (unrep, 26/10/93, NSWCCA) at 3, Badgery-Parker J said, Kirby ACJ and Loveday AJ agreeing:

> Age is not a licence to commit sexual offences nor should it be thought that a person who commits such offences can then expect to be allowed to go free merely because of advanced years.

There is no principle that the offender should not be sentenced to a term that would result in him or her spending the rest of his or her life in gaol: *R v Varner*; *R v Holyoak*; *R v Gallagher* (unrep, 29/11/95, NSWCCA).

The youth of an offender may also be a relevant consideration. In *R v JJS* [2005] NSWCCA 225 the applicant, a 14-year-old boy who assaulted his three-year-old cousin contrary to s 61M(2), was sentenced to a 5-year good behaviour bond. The bond was reduced on appeal to a term of 3 years, the court finding that the sentence was unduly burdensome and inappropriate in the circumstances of the case.

Intellectual handicap/mental disorder

General deterrence should be given less weight in cases where the offender is suffering from a severe intellectual disability or mental disorder because such an offender is not an appropriate medium for making an example to others. The court moderates the consideration of general deterrence to the circumstances of the particular case. See the discussion about an offender's mental condition and *Muldrock v The Queen* (2011) 244 CLR 120 at [10-460].

In *R v Morrow* [1999] NSWCCA 64, where the intellectually disabled applicant was charged with one count of sexual intercourse with child under 10 years contrary to s 66A, the court dismissed the Crown appeal against a 5-year s 558 recognizance order. The applicant was suffering from serious depression and his ability to function in the general community was 99.9% lower than the rest of the population.

Where the offender knows what he or she is doing and understands the gravity of his or her actions, the moderation will not be great: *R v Champion* (1992) 64 A Crim R 244 at 254. See also *R v DCM* at 6–7; *R v Engert* (unrep, 20/11/95, NSWCCA); and *R v Monk* (unrep, 2/3/98, NSWCCA) at 3–5.

As to the relevance of an offender's mental condition for standard non-parole period offences see *Mental condition* in **What is the standard non-parole period?** at **[7-890]**.

Offender undertakes treatment

It has been said that it is "an important matter in his favour" that the offender is prepared to undertake treatment for his sexual attraction to children. This is particularly so in cases involving Depo Provera treatment ("chemical castration"), where there are

significant side effects. In *R v DCM* (unrep, 26/10/93, NSWCCA), the respondent was charged with 16 counts of child sexual assault offences involving five children over a period of 4 years and 5 months. In dismissing the Crown appeal and confirming the 300 hours community service and recognizance orders, Badgery-Parker J, Kirby ACJ and Loveday AJ agreeing, had regard to "the quite exceptional circumstances of this case", including that the respondent underwent a course of treatment of Depo Provera and Androcur.

Extra-curial punishment

The sentencing court is entitled to take into account punishment meted out by others, such as abuse, harassment and threats of injury to person and property: *R v Allpass* (unrep, 5/5/93, NSWCCA). In *R v Holyoak* (unrep, 1/9/95, NSWCCA), the fact that the applicant had suffered substantially from personal harassment by media representatives as well as received a large volume of "hate" communications from members of the public, meant that the punishment commenced, in a real sense, before his sentence.

Section 24A(1) provides that, in sentencing an offender, the court must not take into account, as a mitigating factor, the fact that the offender has or may become:

(a) a registrable person under the *Child Protection (Offenders Registration) Act* 2000 as a consequence of the offence, or

(b) the subject of an order under the *Child Protection (Offenders Prohibition Orders) Act* 2004, or

(c) as a consequence of being convicted of the offence, has become a disqualified person under the *Child Protection (Working with Children) Act* 2012, or

(d) the subject of an order under the *Crimes (High Risk Offenders) Act* 2006 (whether as a high risk sex offender or as a high risk violent offender).

Section 24A(1)(a)–(b) has effect despite any Act or rule of law to the contrary: s 24A(2). It applies to the determination of a sentence for an offence whenever committed unless, before the commencement of the amendments, a court has convicted the person being sentenced of the offence or accepted a plea of guilty (which has not been withdrawn): Sch 2 Pt 19 cl 59. Section 24A(1)(c) applies to offences whenever committed unless, before 3 March 2011, a court has convicted the person being sentenced of the offence, or a plea of guilty has been accepted and the plea has not been withdrawn: *Crimes (Sentencing Procedure) Act* 1999, Sch 2, Pt 21, cl 62.

For the position before the enactment of s 24A see *R v KNL* [2005] NSWCCA 260 at [49]–[50].

Hardship of custody for child sex offender

Protective custody is not automatically to be regarded as a circumstance mitigating the sentence: *Clinton v R* [2009] NSWCCA 276 at [24]; *R v Way* (2004) 60 NSWLR 168 at [176]–[177]; *R v Durocher-Yvon* (2003) 58 NSWLR 581. The Court of Criminal Appeal has repeatedly applied the principle that where an offender seeks to receive a reduction of sentence on the ground that conditions of imprisonment will be more onerous, it is for the offender to lead evidence of what those conditions entail: *Clarkson v R* [2007] NSWCCA 70 per Howie J, Sully J agreeing, at [273]. It will be an

error to take into account in mitigation the fact that an offender will serve a sentence in protective custody — either in the determination of the sentences or in the finding of special circumstances under s 44(2) *Crimes (Sentencing Procedure) Act* — without evidence that the conditions of imprisonment will be more onerous: *RWB v R* [2010] NSWCCA 147 at [192]–[195]; *R v LP* [2010] NSWCCA 154 at [21].

The Sentencing Council of NSW said in a report, *"Penalties Relating to Sexual Assault Offences in New South Wales"*, 2008, Vol 1, at [6.49]:

> In the case of sexual offenders, it is difficult to imagine that those prisoners who are assumed likely to serve their sentences in special management areas or in limited association areas, who have access to programs or services or a reasonable degree of association with other inmates, would qualify for special consideration. Each case would, however, need to depend on its own facts.

The Council expressed the view at [6.51] that "the conditions of protective custody should more actively be promoted to judicial officers".

A paper on protective custody by Domenic Pezzano, Superintendent Operations Branch, Corrective Services NSW, "*Information for ODPP/Courts on options for offenders who request protective custody — limited association and non-association*" (revised December 2010) describes the programs and employment opportunities.

[The next page is 9241]

Dangerous driving and navigation

[18-300] Statutory history

Last reviewed: August 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]. Additionally, since *R v Whyte*, there have been changes to sentencing practice including an acknowledgement that references to "moral culpability" in the guideline are now to be understood as references to the objective criminality of the offence: *R v Eaton* [2023] NSWCCA 125 at [56].

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: August 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: *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 sentencing practice since guideline

Changes in sentencing practice since *R v Whyte* (2002) 55 NSWLR 252 was decided should be taken into account when applying the guideline. In particular, the references to "moral culpability" in *R v Whyte* are now to be understood as references to the objective criminality of the offending: *R v Eaton* [2023] NSWCCA 125 at [56]. The assessments of objective criminality and moral culpability are considered to be different but related assessments as part of the instinctive synthesis process: *R v Eaton* [2023] NSWCCA 125 at [56]; see also *Stanton v R* [2021] NSWCCA 123 at [29]; see **Objective and subjective factors at common law** at **[9-700]**.

Also, 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**.

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

Last reviewed: August 2023

Note: References to "moral culpability" in the guideline of *R v Whyte* (2002) 55 NSWLR 252 (as indicated in the commentary below) are to be understood as references to the objective criminality of the offence: *R v Eaton* [2023] NSWCCA 125 at [56].

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 **[10-405]**.

[18-336] Length of the journey

Last reviewed: August 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 longer journey was relevant to assessing 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: August 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].

In *Hoskins v R* [2020] NSWCCA 18 the offender struck a woman crossing the street then fled, aware she was likely dead. He was sentenced for failure to stop and assist and two summary traffic offences. The Court (Basten JA; RA Hulme and N Adams JJ agreeing) found that the maximum penalties for failure to stop offences, being the same as for dangerous driving offences, made the sentencing exercise "more than usually difficult" and that "too heavy a focus on [the maximum penalty]… is apt to lead to anomalous results": at [14]–[15]. The Court held the sentencing 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 and gave excessive weight to the maximum penalty: at [43]. 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.

[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: August 2023

The guideline for dangerous driving occasioning death in *R v Whyte* (2002) 55 NSWLR 252 affords guidance in dangerous navigation cases: *Buckley v R* [2012] NSWCCA 85 at [41]. However, although it may be an appropriate "check" for sentencing in such

cases, the analogy between the offences is not perfect: *R v Eaton* [2023] NSWCCA 125 at [71] For example, dangerous driving offences are far more prevalent than s 52B offences which is relevant to the significance of general deterrence: *R v Eaton* at [71].

In *Buckley v R*, the sentencing judge had appropriate regard to relevant factors when assessing the circumstances of the dangerous navigation which resulted in the death of two people. These factors included a consideration of the defendant's level of experience, his degree of intoxication, whether persons on the vessel were wearing life jackets and could swim, together with the offender's efforts immediately after the incident to assist or obtain assistance: at [43]–[48].

In *R v Eaton*, the heavily intoxicated offender capsized a single-person kayak, drowning a four-year-old child on board. The type of vessel involved meant many aggravating features identified in *R v Whyte* were not relevant such as the number of people put at risk and the degree of speed: at [71]. The court also observed the guideline is not designed to place a straight-jacket on sentencing judges because, in this case, the offender's subjective circumstances resulted in a substantial reduction in her "moral culpability", whereas the guideline "focussed attention on the objective circumstances of the offence": [72]–[73].

[The next page is 9301]

Detain for advantage/kidnapping

[18-700] Section 86 Crimes Act 1900

The offence of kidnapping is governed by s 86 *Crimes Act* 1900. Section 86(1)–(3) creates a basic, aggravated and specially aggravated form of the offence:

> **86 Kidnapping**
>
> (1) **Basic offence**
>
> A person who takes or detains a person, without the person's consent:
>
> (a) with the intention of holding the person to ransom, or
>
> (a1) with the intention of committing a serious indictable offence, or
>
> (b) with the intention of obtaining any other advantage,
>
> is liable to imprisonment for 14 years.
>
> (2) **Aggravated offence**
>
> A person is guilty of an offence under this subsection if:
>
> (a) the person commits an offence under subsection (1) in the company of another person or persons, or
>
> (b) the person commits an offence under subsection (1) and at the time of, or immediately before or after, the commission of the offence, actual bodily harm is occasioned to the alleged victim.
>
> A person convicted of an offence under this subsection is liable to imprisonment for 20 years.
>
> (3) **Specially aggravated offence**
>
> A person is guilty of an offence under this subsection if the person commits an offence under subsection (1):
>
> (a) in the company of another person or persons, and
>
> (b) at the time of, or immediately before or after, the commission of the offence, actual bodily harm is occasioned to the alleged victim.
>
> A person convicted of an offence under this subsection is liable to imprisonment for 25 years.

Section 86 extends beyond the traditional notion of kidnapping (holding a person for ransom). The gravamen of the offence is directed to interference with a person's liberty (*Davis v R* [2006] NSWCCA 392 at [56]) or the unlawful detaining of a person (*R v Newell* [2004] NSWCCA 183 at [32]; *R v Falls* [2004] NSWCCA 335 at [42]; *R v Burton* [2008] NSWCCA 128 at [95]; *Jeffries v R* (2008) 185 A Crim R 500 at [79]).

The concept of "any other advantage" under s 86(1)(c) includes psychological gratification or satisfaction: *R v Rose* [2003] NSWCCA 411; *R v Speechley* (2012) 221 A Crim R 175 at [50]–[51].

The basic form of the offence "has been marked out by the legislature as a serious offence, a maximum penalty of fourteen years imprisonment being provided. When such an offence is committed the punishment must be sufficient to punish and deter the offender from repeating the offence": *Chaplin v R* (2006) 160 A Crim R 85, McClellan CJ at CL at [31] (a case dealing with an attempt to commit the basic offence).

[18-705] Attempts to commit the offence

The fact an offender is charged with attempt does not mean the offence is necessarily less serious: *R v Newell* [2004] NSWCCA 183 at [33]. Although the seriousness of an offence may be reduced by the fact the person was not in fact detained, an attempt can nevertheless involve a serious threat which may cause the victim to be terrified: *Newell* at [33]. The seriousness of the offence is not reduced where the offender has not determined what specific advantage he/she wishes to gain from the victim's captivity: at [33]. A court need not make findings about the issue. For example, in *R v Newell*, the judge was not required to determine what the offender might have done to obtain his sexual gratification had he succeeded in detaining the child: at [33]. But where the offender has not decided at the time the victim escapes this is not to be regarded as a matter in mitigation: at [33].

[18-715] Factors relevant to the seriousness of an offence

The terms of s 86, and the cases which have applied it, inform the assessment of factors bearing upon the objective gravity of a given offence: *R v Speechley* (2012) A Crim R 175 at [105]; *Jeffries v R* [2008] NSWCCA 144 at [79]. Many factors are relevant to the assessment of the seriousness of the crime: *R v Falls* [2004] NSWCCA 335 at [42]; *Jeffries v R* at [81].

The court in *R v Newell* [2004] NSWCCA 183 at [32] identified factors relevant to the seriousness of a given offence under s 86 which include:

- the period of the detention
- the circumstances of the detention
- the person being detained, and
- the purpose of the detention.

The last factor, the nature of the advantage that the offender seeks to obtain, is not conclusive as to the seriousness of the offence: *R v Newell* at [32]; *R v Speechley* at [55]. A detention with no rational purpose is not necessarily less serious: *Diaz v R* [2018] NSWCCA 33 at [44]. Nor is the offence less serious if the relevant "advantage" is to secure the offender's self-protection: *R v Hamid* (2006) 164 A Crim R 179 at [131].

An offence which does *not* involve ransom (as referred to in s 86(1)(a)) may still be so grave as to warrant the imposition of the maximum penalty. See *R v Newell* at [32] applied in *Jeffries v R*, above, at [80]. These worst cases need not involve holding the person to ransom.

Circumstances which increase the seriousness of the offence are not confined to the period of detention or the actual use of violence. Rather, a threat of violence and the presence of a weapon are factors of aggravation even though actual injury may not be occasioned to the victim: *R v Kerr* [2008] NSWCCA 201 at [51]. In *Kerr* a very real threat of violence to the victim existed during the whole of her detention for around 36 hours. The offender's threats included sexual assault by his friends, detention in a cellar, and that the victim would be kept as a hostage for a month: at [49]. In *R v Burton* [2008] NSWCCA 128 the offence was aggravated as it extended over some hours, involved threats of violence with a weapon (including a knife and a hair comb with a metal end), and was committed in the context of the offender's violent and controlling

domestic relationship with the victim: at [95]. In *Hurst v R* [2017] NSWCCA 114, the fact the offender's motivation for the detention was that he derived pleasure from inflicting pain, humiliation and fear on the victim, causing her to genuinely fear for her life, and that the offence was committed against a background of domestic violence, resulted in the detention being categorised as very serious: *Hurst v R* at [112]–[113].

The relative brevity of the detention is of limited assistance in determining objective gravity where the victim escaped and fled his or her captor(s) rather than being released: *R v Speechley* at [106]. Although the duration of a detention may not objectively be long, the victim's perspective, his or her position relative to the offender and the purpose of the detention must be taken into account: *Hurst v R* at [114]. In *Bott v R* [2012] NSWCCA 191 at [48] the court noted the sentencing judge "correctly rhetorically asked" how long the victim might have been detained if he had not escaped by activating a car alarm. However, in *Allen v R* [2010] NSWCCA 47 at [22], the court considered it would be speculative to infer, against the applicant's interests, that he would have prolonged the detention.

The statutory scheme recognises that a kidnapping offence committed in company is more serious because of the force of numbers deployed against the victim: *R v Speechley* at [60].

An absence of injury to the victim for the basic offence does not reduce the objective gravity of an offence under s 86(2)(a). If actual bodily harm is occasioned to the victim a more serious form of the charge under s 86(2) or 86(3) would apply: *R v Speechley* at [107]. It would be wrong to have regard to the absence of an ingredient which, if it were present, would constitute a different and more serious offence under s 86(3): *R v Speechley* at [108].

A court can take into account "anguish", violence and harm inflicted, including "severe discomfiture simply by reason of the manner in which [the victim is] tied up": *R v Flentjar* [2008] NSWSC 771 at [38].

Detaining for advantage in a domestic context

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

"The circumstance that the offence occurred in a domestic context, as distinct from the detention of a stranger, does not lessen its gravity": *Heine v R* [2008] NSWCCA 61 at [40]; *Raczkowski v R* [2008] NSWCCA 152 at [46]; *Hussain v R* [2010] NSWCCA 184 at [68]. In *R v Hamid* at [131], Johnson J said assessing the objective seriousness of the offence in that case involved examining the immediate acts of the offender in the context of his violent control of the victim (who was his partner); see also *R v Burton* at [95].

It is an error not to have express regard to the need for general and specific deterrence and denunciation of domestic violence offences: *R v Burton* at [95], following *R v Hamid* at [86] and *Hiron v R* [2007] NSWCCA 336 at [32].

Delay in complaint, which is a distinctive feature of domestic violence, should not be held against the victim of a detain for advantage offence because it is a direct product of the offending itself: *Hurst v R* at [132]. See generally **[10-530] Delay**.

In *Jeffries v R*, a significant aggravating factor was that the s 86 offence was committed in breach of an apprehended domestic violence order (at [91]), and that

the offender's "recidivist conduct demonstrated a propensity to act violently towards his partners": at [92]. Such recidivism increases the weight to be given to retribution, personal deterrence and protection of the community: at [93]; *R v McNaughton* (2006) 66 NSWLR 566 at [26].

The court in *Burton* noted that, given victims of domestic violence often — and contrary to their interests — forgive their attackers (at [104]), a court should cautiously approach a victim's expressions of forgiveness and requests for a lenient sentence: at [102], [105].

In *Boney v R* [2008] NSWCCA 165 at [112], the court held that the judge imposed "unjustifiably high" sentences for three detain for advantage offences committed in a domestic violence context. The court held that although the detentions were "far from short" they were "far less" than the circumstances envisaged by s 86. Hulme J added at [112]:

> … it is to be borne in mind that …[the] provision covers also detention for the purposes of ransom, detention that might well extend for much longer than occurred in this case and in circumstances where a victim might be blindfolded, in an unknown location and completely out of contact with anyone not an offender.

When committed against a person with whom the offender has a domestic relationship, an offence under s 86 is a "domestic violence offence" for the purposes of recording such offences as part of an offender's prior record under the *Crimes (Domestic and Personal Violence) Act* 2007: ss 11–12.

Motivation and vigilante action

Offences under s 86 are regularly motivated by a desire to retaliate for conduct allegedly committed in the past by the victim upon the offender or a third party. It is necessary for courts to condemn such "vigilante action" and to reflect general deterrence in the sentence: *R v Speechley* (2012) A Crim R 175 at [110], [122]. However, motive may be relevant to explain why the offence was committed and to indicate a lack of need for personal deterrence where the act of retaliation is unlikely to be repeated: *Barlow v R* [2008] NSWCCA 96 at [67]–[68] and *Rayment v R* (2010) 200 A Crim R 48 at [108], both citing principles from *R v Swan* [2006] NSWCCA 47 at [33] and *R v Mitchell* (2007) 177 A Crim R 94 at [30]–[32] which are not kidnapping cases. As punishment and humiliation are necessary elements of an offence of specially aggravated kidnapping under s 86(3), it is an error to take quasi-vigilantism into account as an additional aggravating factor: *Sorensen v R* [2016] NSWCCA 54 at [128]–[129]; *Hall v R* [2017] NSWCCA 260 at [33]–[35].

Sentences other than full-time imprisonment generally not appropriate

Non-custodial sentences will generally not be appropriate for an offence under s 86, particularly for the aggravated form of the offence: *R v Anforth* [2003] NSWCCA 222 at [48]; *R v Speechley* (2012) A Crim R 175 at [116]. In *Anforth*, the court held that suspended sentences were a manifestly inadequate punishment for two counts of aggravated kidnapping and failed "to demonstrate the community's abhorrence of offences of [such a] violent and sadistic nature": at [48]. Suspending a sentence of imprisonment may deprive the punishment of much of its effectiveness and fail to reflect the objective gravity of the offence: *R v Speechley* at [124]. Similarly, for an offence of aggravated kidnapping under s 86(2), where actual bodily harm

and psychological trauma is inflicted, an intensive correction order (ICO) is not an appropriate form of punishment as it fails to sufficiently address the issue of general deterrence: *R v Ball* [2013] NSWCCA 126 at [117].

Reliance on statistics

Offences under s 86 are very fact specific and not sufficiently homogenous so as to make reference to statistics of much assistance: *R v Newell* [2004] NSWCCA 183 at [43]; *Jeffries v R* [2008] NSWCCA 144 at [82], [85]; *Homsi v R* [2011] NSWCCA 164 at [116], [124]; *Hurst v R* at [120]; *Diaz v R* at [49]–[51]. Similarly, in *Heine v R* [2008] NSWCCA 61, it was observed that "the offence is one that is committed in a wide range of circumstances, which makes the statistics of less assistance than is the case with some [other] offences": at [34]. In *Jeffries* the court noted that, while the sentence imposed was comparatively lengthy "in mathematical terms", courts should not sentence offenders by reference to the statistical median range of sentences handed down over a period of time: at [86]; *R v AEM* [2002] NSWCCA 58 at [116].

[18-720] Elements of offence and s 21A factors not to be double counted

Where an offender is to be sentenced for an aggravated offence (s 86(2)) or a specially aggravated offence (s 86(3)), the aggravating elements of the offence — the infliction of actual bodily harm and/or being in company — are not to be further considered as aggravating features under s 21A of the *Crimes (Sentencing Procedure) Act* 1999 (s 21A(2)): *R v Davis* [2004] NSWCCA 310 at [19]; *R v VL* [2005] NSWCCA 301 at [30]. On the other hand, actual or threatened violence is not an element of the offence under s 86 and therefore may be taken into account as an aggravating factor: *R v VL*, above, at [32]–[34].

[18-730] Joint criminal enterprise and role

Last reviewed: August 2023

Where the basis of an offender's liability for kidnapping is joint criminal enterprise and the participants assault the victim, the criminality of the person who did not strike the majority of the blows should not necessarily be assessed as significantly less: *R v Turner* [2004] NSWCCA 340 at [24]–[26]; see also *Rahman v R* [2023] NSWCCA 148 at [77]–[80].

However, the lesser role of an offender when compared with co-offenders may warrant a degree of amelioration of the sentence: *Bajouri v R* [2009] NSWCCA 125 at [47], [50]; cf *Charlesworth v R* (2009) 193 A Crim R 300 at [80]. In *Bajouri*, although the offender actively participated in detaining the victim (at [9]), he was not involved "until the last minute and had no part in the planning or preparation". This reduced the seriousness of the offence.

See also **Co-offenders with joint criminal liability** at **[10-807]**.

[The next page is 9481]

Sexual assault

[20-600] Statutory scheme in Crimes Act 1900

Part 3 Div 10 *Crimes Act* 1900 is titled "Offences in the nature of rape, offences relating to other acts of sexual assault etc". Division 10A contains offences relating to sexual servitude. Unless otherwise specified, references to sections below are references to sections of the *Crimes Act*.

For commentary on the following offences relating to children see **Sexual offences against children** at [17-400]ff: ss 61M(2), 66A–66EB, 73, 77 and 80AA (child sexual assault), ss 91C–91H (child prostitution and pornography) and ss 91I–91M (grooming and voyeurism).

A brief legislative history describing the significant reforms to the laws relating to sexual assault in the past 30 years can be found at [1-025] in the *Sexual Assault Trials Handbook*.

[20-604] Change in community attitudes to sexual assault and harm

In *R v MJR* (2002) 54 NSWLR 368 at [11], Spigelman CJ said that sexual assault has generally "come to be regarded as requiring increased sentences … by reason of a change of community attitudes". Mason P at [57] explained the increased pattern of sentencing for child sexual abuse by reference to the greater understanding of the long-term psychological consequences for the victims and the considered judicial response to changing community attitudes to these crimes.

In *DBW v R* [2007] NSWCCA 236, the court held that the decision of *R v Muldoon* (unrep, 13/12/90, NSWCCA) — where it was held that to prove harm, the Crown must adduce evidence in the form of studies of the lasting effects of sexual abuse and, if necessary, a psychiatric assessment — is no longer of assistance today. Chief Justice Spigelman said at [39] that the effect of sexual abuse was not a matter for expert evidence and "the public and the courts have become much more aware of, and knowledgeable about, the effects of child sexual abuse".

The court again considered the issue of harm in *R v King* [2009] NSWCCA 117 at [41]:

> It should not be assumed, without evidence to the contrary, that there is no significant damage by way of long-term psychological and emotional injury resulting from a sexual assault of a child who is old enough, as was the complainant, to appreciate the significance of the act committed by the offender. It should be assumed that there is a real risk of some harm of more than a transitory nature occurring. That should be a factor taken into account when sentencing for a child sexual assault offence. It is an inherent part of what makes the offence so serious.

The High Court remarked in *The Queen v Kilic* (2016) 259 CLR 256 at [21]:

> current sentencing practices with respect to sexual offences may be seen to depart from past practices by reason, inter alia, of changes in understanding of the long-term harm done to the victim.

[20-610] Effect of increase in maximum penalties

This issue is dealt with comprehensively in **Objective factors at common law** at **[10-000]**ff. It is well settled that the legislature may be taken to indicate that sentences for an offence must increase following an increase in the maximum penalty: *Baumer v The Queen* (1988) 166 CLR 51 at 56; *R v Slattery* (1996) 90 A Crim R 519 at 524. In the context of sexual assault, the 1989 amendments substantially increased the maximum penalties for sexual assault offences. The maximum penalty for sexual intercourse without consent was increased from 8 years (under s 61D (rep)) to 14 years (under s 61I). Similarly, the maximum penalty for aggravated sexual assault increased from between 12–14 years (under s 61C (rep)) to 20 years (under s 61J).

In the 1990s, the Court of Criminal Appeal repeatedly declared that the *Crimes Amendment Act* 1989 was designed to reflect community standards and the seriousness with which the community regards sexual assault offences: *R v Hartikainen* (unrep, 8/6/93, NSWCCA); *R v Gilbert* (unrep, 24/2/94, NSWCCA); and *R v May* [1999] NSWCCA 40 at [7]. The amendments make it incumbent upon the courts to give effect to the concerns of Parliament in almost doubling the penalties, at least for s 61J: *R v Truong* (unrep, 8/12/97, NSWCCA).

The court in both *Upton v R* [2006] NSWCCA 256 at [47] and *R v MAK* [2005] NSWCCA 369 at [130] observed that the introduction of a maximum penalty of life imprisonment for offences under s 61JA manifests an intention on the part of Parliament to substantially increase penalties for aggravated sexual assault committed in company.

Importance of maximum penalty

In *Markarian v The Queen* (2005) 228 CLR 357 at [30]–[31], Gleeson CJ, Gummow, Hayne and Callinan JJ said:

> Legislatures do not enact maximum available sentences as mere formalities. Judges need sentencing yardsticks. It is well accepted that the maximum sentence available may in some cases be a matter of great relevance …
>
> It follows that careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick.

[20-620] Standard non-parole period sexual assault offences

The statutory regime for standard non-parole period offences is dealt with in detail in **Standard non-parole period offences** at [7-890]ff. Offences committed on or after 1 February 2003 are subject to the standard non-parole period provisions. Standard non-parole periods have been prescribed for the following sexual offences:

- sexual assault (s 61I) — 7 years
- aggravated sexual assault (s 61J) — 10 years
- aggravated sexual assault in company (s 61JA) — 15 years
- aggravated indecent assault (s 61M(1)) — 5 years, increased to 7 years for offences committed on or after 1 January 2009.

In the area of child sexual assault standard non-parole periods were introduced for offences under ss 61M(2) (8 years), 66A (15 years), 66B (10 years), 66C(1) (7 years), 66C(2) (9 years) and 66C(4) (5 years) (discussed separately in **Sexual offences against children** at [17-400]).

It is an error to decline to set a non-parole period for a sexual offence with a standard non-parole period: *Leddin v R* [2008] NSWCCA 242 at [13].

The Table of standard non-parole periods does not include attempt offences, except for the various manifestations of the offence of attempt murder: *R v DAC* [2006] NSWCCA 265 at [10]. In *R v DAC*, the judge erred in applying the Table to an aggravated attempt to have sexual intercourse without consent under ss 61J and 61P.

It was predicted that the effect of the standard non-parole period would generally be to increase the level of sentencing for offences to which it applies: *R v AJP* (2004) 150 A Crim R 575. See the statement of the High Court in *Muldrock v The Queen* (2011) 244 CLR 120 at [31] and an earlier study by the Judicial Commission of NSW that found the introduction of standard non-parole periods in fact resulted in significant increases in sentences: P Poletti and H Donnelly, *The impact of the standard non-parole period sentencing scheme on sentencing patterns in New South Wales*, Research Monograph 33, Judicial Commission of NSW, Sydney, 2010. See **Move upwards in the length of non-parole periods?** at [7-990].

[20-630] Assessing objective gravity of sexual assault

An important step in determining the appropriate sentence is to assess where the particular sexual assault offence lies on the spectrum or scale of seriousness: *Ibbs v The Queen* (1987) 163 CLR 447. In *R v Gebrail* (unrep, 18/11/94, NSWCCA), Mahoney JA emphasised the importance of making clear findings about the objective seriousness of the crime in sexual assault cases:

> it is important to understand why assessments of the seriousness of the instant offence [s 61J] are made and the significance of such assessments. As I have indicated, every offence of this kind is a serious offence. But those whose duty it is to deal with crimes of this kind and to sentence those who commit them know that though each case is inherently serious, some are more serious than others. In some cases, the degree of violence, the physical hurt inflicted, the form of forced intercourse and the circumstances, of humiliation and otherwise, are much greater than are involved in this case. It is to be understood that in sentencing it is appropriate — indeed, in most cases it is necessary — that the sentencing judge form and record his assessment of where, on the relevant scale of seriousness, the particular offence lies.

Part of the assessment of the objective seriousness of the sexual assault involves taking into account the nature of the sexual act. In *Ibbs v The Queen* at 452, Mason CJ and Wilson, Brennan, Toohey and Gaudron JJ stated:

> The inclusion of several categories of sexual penetration within the offence described as sexual assault carries no implication that each category of sexual penetration is as heinous as another if done without consent. When an offence is defined to include any of several categories of conduct, the heinousness of the conduct in a particular case depends not on the statute defining the offence but on the facts of the case. In a case of sexual assault, a sentencing judge has to consider where the facts of the particular case lie in a spectrum, at one end of which lies the worst type of sexual assault perpetrated by any act which constitutes sexual penetration as defined …

Ibbs v The Queen requires the sentencer to assess and take into account where the sexual act fits in the continuum of seriousness for a given offence. In *R v PGM* (2008) 187 A Crim R 152 at [26], Fullerton J summarised the position as follows:

> While there is no hierarchy of sexual acts that constitute sexual intercourse for the purposes of the criminal law, it is generally accepted that some forms of sexual activity may be regarded as more serious than others (see *Ibbs v The Queen* (1987) 163 CLR 447). This is of course necessarily modified by the context in which the offence occurred, and other circumstances of the particular offending to which Simpson J referred in *AJP* at [24]–[26].

Forms of sexual intercourse and objective seriousness

Section 61H(1) *Crimes Act* 1900 provides, inter alia:

> "*sexual intercourse*" means:
>
> (a) sexual connection occasioned by the penetration to any extent of the genitalia (including a surgically constructed vagina) of a female person or the anus of any person by:
>
> (i) any part of the body of another person, or
>
> (ii) any object manipulated by another person,
>
> except where the penetration is carried out for proper medical purposes, or
>
> (b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person, or
>
> (c) cunnilingus, …

The Court of Criminal Appeal has at various times drawn distinctions between the relative seriousness of the acts referred to in s 61H. The cases are discussed below. The discussion demonstrates that drawing distinctions between specific sexual acts for the purpose of assessing the objective seriousness of an offence cannot be pressed too far. It is only one part of the task. The objective seriousness of an offence depends on *all* the circumstances of the case and is not confined to the nature of the act committed by the offender. While the form of intercourse "is an important factor, it is not to be regarded as the sole consideration": *R v Hibberd* (2009) 194 A Crim R 1 at [56]. Other relevant matters in deciding where on the continuum of seriousness an offence lies include: "the degree of violence, the physical hurt inflicted, the form of the forced intercourse, the circumstances of humiliation … the duration of the offence": *R v Hibberd* at [56], cited with approval in *R v Daley* [2010] NSWCCA 223 at [48]. In *R v Daley* at [48], Price J (Hodgson JA and Fullerton J agreeing) clarified what was said in *R v Hibberd* about the duration of an assault:

> the short duration of a sexual assault would not ordinarily be considered as a factor which reduces the objective seriousness of the offence. Most sexual assaults will not be prolonged as the offender will seek to avoid apprehension. On the other hand, a sexual assault of an extended duration will necessarily add to the seriousness of the offending as the suffering and the humiliation of the victim will be increased.

The context in which the offending occurs is an important part of determining the objective seriousness of a particular offence. In *R v Hall* [2017] NSWCCA 313, two forcible acts of penetration occurred over a period of about 20 to 30 minutes while the victim was threatened with being killed with a knife and dragged around a motel room

while blindfolded. In those circumstances, the court described the victim's ordeal as "utterly terrifying" and concluded the fact the victim did not sustain any significant physical harm did not lessen the objective seriousness of two offences against s 61D(1) (an earlier form of s 61J(1)): *R v Hall* at [118]. The offences were not of "short duration": *R v Hall* at [53], [118]. Further, the sentencing judge's description of the violence as "limited" and involving "a degree of rough handling" was a significant understatement: *R v Hall* at [55].

Fellatio, cunnilingus and penile-penetration

In *R v O'Donnell* (unrep, 1/7/94, NSWCCA), Hunt CJ at CL said that "[f]ellatio, in my opinion, is clearly less criminal than, say, anal or vaginal penetration". Justice Grove said in *R v Andrews* [2001] NSWCCA 428 at [6] that Hunt CJ at CL's statement "clearly did not intend … to reveal some matter of law" and he could only have expressed it as a matter of opinion. Further:

> the penetration of a victim by a sexual organ derives its seriousness from a consideration of the particular circumstances of the case rather than from the nature of the sexual act itself.

Although *R v Andrews* was a two-judge bench decision it was cited with approval and applied in *R v Hajeid* [2005] NSWCCA 262 at [52]; *R v MS* [2005] NSWCCA 322 at [16]; and *R v Sanoussi* [2005] NSWCCA 323 at [32].

In *R v AJP* (2004) 150 A Crim R 575 at [23]–[25], Simpson J reviewed the authorities on the question of whether some acts, such as penile-vaginal penetration, are more serious than others, and what factors should be considered in assessing the objective seriousness in the context of the standard non-parole period provisions. Those provisions require the judge to determine whether an offence falls in the middle of the range of objective seriousness. Her Honour said:

> In *R v Davis* [1999] NSWCCA 15 Wood CJ at CL wrote:
>
> > "[66] In *Ibbs v The Queen* … the High Court rejected the proposition that each kind of sexual penetration as defined in the section, there under consideration, was to be regarded as neither more nor less heinous than another. The Court said that such a proposition cannot be accepted. It appears to me that any other view would beggar common sense, and that penile-vaginal penetration of a child is significantly more serious than many of the other forms of conduct encompassed within s 66A [sexual intercourse — child under 10 years] …"
>
> It might be true, as senior counsel suggested, that penile-vaginal intercourse would, in the circumstances, have amounted to a more serious offence. But does that avail the respondent? Let it be supposed that his Honour had not excluded as irrelevant the nature of the sexual activity in question. It is difficult to think that that of itself would have led him to the conclusion that the offence was of something less than mid-range gravity. It is not possible to create some kind of hierarchy of the seriousness of the various kinds of sexual intercourse contemplated by s 66A (and defined in s 61H). It is the facts and circumstances of each case, including the nature of the intercourse, that enables the proper evaluation of objective seriousness. While penile-vaginal penetration might be taken to be more serious than enforced fellatio, that does not mean that enforced fellatio necessarily falls somewhere below the mid-point of objective seriousness. There are many instances of conduct that come within the definition of sexual intercourse that would be significantly less serious than enforced fellatio. Had his Honour considered

> the nature of the sexual intercourse as relevant, he must, in my view, have come to the view that enforced fellatio falls somewhere in the middle, or towards the upper end, of that scale.
>
> Other appropriate areas of inquiry in the consideration of the objective seriousness of a s 66A offence are, for example, how the offences took place, over what period of time, with what degree of force or coercion, the use of threats or pressure before or after the offence to ensure the victim's compliance with the demands made, and subsequent silence, and any immediately apparent effect on the victim. Although the sentencing judge was fully conversant with the facts of the offences, he has not explicitly considered these matters in the specific context of the evaluation of objective seriousness.

In *R v PGM* (2008) 187 A Crim R 152, the court held that it was open for the trial judge to find that the acts of cunnilingus were in general terms less serious than the penile penetration: However, at [28] Fullerton J said:

> to reason to the conclusion that the act of penile penetration … was of the same order of seriousness as cunnilingus simply by reason of the fact that the respondent's penis penetrated the child's genitalia only to a small extent, is to fail to give account to the fact that penile penetration of a young child involves conduct of a quite different order and criminality of a more serious kind than other forms of sexual intercourse contemplated by the statutory definition in s 61H of the *Crimes Act*. In that connection I note the observation of the Chief Justice in *RJA v R* [2008] NSWCCA 137 at [33] that a limited degree of penetration is not necessarily indicative of a lower level of objective criminality.

The court held in *R v MS* [2005] NSWCCA 322 at [16], that in some cases little may differentiate the objective seriousness of an act of fellatio from an act of penile-vaginal intercourse:

> The circumstances of an act of fellatio may place it in a position on that spectrum consistent with an act of penile-vaginal intercourse. For example, where the complainant's head is forced and held onto the offender's penis to the point of ejaculation into the complainant's mouth, while threats and insults are uttered, in the company of a number of other offenders who are waiting their turn, little may objectively differentiate such an offence from an act of penile-vaginal intercourse, absent overt threats where the offender wears a condom.

R v Oloitoa [2007] NSWCCA 177 is clearly an example of a very serious assault involving fellatio. The act of enforced fellatio was the basis of an aggravated sexual assault charge under s 61J. It was committed during a home invasion in the early hours of the morning. The respondent was armed and in company with another offender. The act was accompanied by threats of violence and completed by the respondent ejaculating in the victim's mouth in front of her children. McClellan CJ at CL said at [42]: "the offence was marked by the personal degradation of the victim", and later at [43]:

> these features should have led the sentencing judge to conclude that the crime was above the mid range of objective seriousness. It called for a non-parole period greater than 10 years.

R v Oloitoa was cited in *Cole v R* [2010] NSWCCA 227 at [87] to justify a high sentence for an offence involving fellatio.

Any physical injury inflicted by penile penetration is also relevant. In *R v Shannon* [2006] NSWCCA 39 at [37], Howie J said:

> with young children it seems to me that penile penetration is the most serious form of sexual assault for the obvious reason that it is the most likely to result in physical injury to the child.

Digital and penile penetration

Non-consensual sexual intercourse by digital penetration is generally less serious than an offence of penile penetration, but each case depends on its own facts: *R v Hibberd* (2009) 194 A Crim R 1 at [56]; *R v Da Silva* (unrep, 30/11/95, NSWCCA), per Grove J at 3. However, there is no canon of law which mandates a finding that digital penetration must be considered less serious than other non-consensual acts of sexual intercourse: *R v Hibberd* at [56]. In *R v Hibberd* at [21], Tobias JA said that the law should change:

> the time has come for this Court to depart from any prima facie assumption, let alone general proposition, that digital sexual intercourse is to be regarded as generally less serious than penile sexual intercourse …
>
> [T]he objective seriousness of the offence is wholly dependent on the facts and circumstances of the particular case …

Justice James agreed with Price J — who had applied *R v Da Silva* — and his Honour reserved his position on whether the court should depart from previous statements that digital penetration is generally less serious than penile penetration at [27]. The court held nevertheless that the judge erred by focusing too heavily on the form of the forced intercourse (digital penetration) and had failed to give sufficient weight to the extent of the violence used in the offence: *R v Hibberd* at [66].

In *R v King* [2009] NSWCCA 117 at [36], the court said in response to a submission that it was open for the trial judge to find that digital penetration was less serious than penile penetration and that this was a very significant fact in the assessment of the degree of criminality:

> What is to be considered is the type of penetration in all the circumstances surrounding the offending. The type of penetration is simply one factor and by itself does not indicate how serious the particular offence is. The simple fact is that had the intercourse in this case been penile penetration it would have been an offence of very great seriousness if for no other reason than because of the age of the child. In such a case the seriousness of the offence may have been above mid range. But the fact that it was not penile penetration does not mean that the offence is reduced to low range.

Anal penetration

The s 61J offence in *R v Russell* (unrep, 21/6/96, NSWCCA) involved anal intercourse. Justice Dunford said:

> The nature of the offences is further aggravated, in my view, by the degrading nature of the anal intercourse, even though this offence in any circumstance is of its nature always degrading.

Age gap between offender and victim

In *R v Shortland* [2018] NSWCCA 34, the court found the lack of a significant age gap between the 25-year-old offender and 31-year-old victim was immaterial

when determining the objective seriousness of the offence. In cases of non-consensual intercourse between adults, age difference is rarely likely to be relevant: *R v Shortland* at [15], [87].

[20-640] Sexual intercourse without consent: s 61I

Sexual intercourse without consent carries a maximum sentence of 14 years imprisonment. Where it is committed on or after 1 February 2003 it is also subject to a standard non-parole period of 7 years. The courts have always regarded sexual intercourse without consent as a serious offence: *R v Russell* (unrep, 21/6/96, NSWCCA). In *R v Hartikainen* (unrep, 8/6/93, NSWCCA), Gleeson CJ said that non-consensual intercourse is an extreme form of violence and one which the community expects the courts to take very seriously. This remains so even in cases where there is no additional violence perpetrated against the victim: *R v May* [1999] NSWCCA 40 at [7]. Even before the introduction of the standard non-parole period for the offence of sexual intercourse without consent the Court of Criminal Appeal held that it would be unusual if a conviction under s 61I did not ordinarily result in a sentence of full-time imprisonment: *R v Crisologo* (1997) 99 A Crim R 178 at 179; *R v May* at [10].

Counsel for the appellant in *Sabapathy v R* [2008] NSWCCA 82 at [71] submitted that the appellant's mental state of recklessness and his subjective circumstances warranted a sentence other than full-time custody. The court held:

> that [a] conviction for the offence of sexual intercourse without consent will ordinarily bring a custodial sentence. There may be unusual or exceptional circumstances in which a sentence other than a custodial sentence will be appropriate, but there is no litmus test for when that might be so. It is part of the exercise of the broadly based sentencing discretion in the light of all the facts in the particular case.

In *R v Shortland* [2018] NSWCCA 34, Basten JA (R A Hulme J agreeing at [37]) observed that, although it was unhelpful to talk of the principle in *Sabapathy v R* as a general rule or presumption, it was apparent it had been followed: *R v Shortland* at [6]. However, his Honour concluded it would be unusual or extraordinary to impose a non-custodial sentence in a case where there was no guilty plea or an accompanying finding that the offender was remorseful: *R v Shortland* at [7].

The 7-year standard non-parole period will most likely increase sentences for offences committed under s 61I since that is generally the effect of the standard non-parole period: *R v AJP* (2004) 150 A Crim R 575. This statement should be read in light of later statements by the High Court in *Muldrock v The Queen* (2011) 244 CLR 120 at [31].

Summaries of the Crown and severity appeals for offences committed under s 61I since the introduction of the standard non-parole period can be accessed via the SNPP appeals component of JIRS.

Attempted intercourse: s 61P

A sexual assault offence is not to be regarded as at the lower end of the scale merely because intercourse did not actually occur. An attempted sexual intercourse without consent may be a serious offence, in particular where there are aggravating features: *R v Grech* [1999] NSWCCA 268. Section 61P provides that an attempt to commit

sexual intercourse without consent carries the same penalty as if the completed offence was committed: *R v Gulliford* (2004) 148 A Crim R 558. It applies to ss 61I–61O inclusive.

The standard non-parole period provisions in Pt 4 Div 1A *Crimes (Sentencing Procedure) Act* do not apply, except for the various manifestations of the offence of attempt murder, to attempt offences: *R v DAC* [2006] NSWCCA 265 at [10]. The judge erred in *R v DAC* by applying the standard non-parole period to the offence of aggravated attempt to have sexual intercourse without consent contrary to ss 61J and 61P.

[20-645] Consent must be addressed when in issue

Where consent is an issue on sentence, it is erroneous not to address the offender's arguments or explain the basis upon which the issue was resolved: *R v Alcazar* [2017] NSWCCA 51 at [44]. In *R v Alcazar* at [45], the court held that this error contributed to a manifestly inadequate sentence because the seriousness of the offending was not properly identified.

See **Suggested direction — sexual intercourse without consent (s 61I) where the offence was allegedly committed on and after 1 January 2008** at [5-1566] and **Notes** at [5-1568] of the *Criminal Trial Courts Bench Book*.

[20-650] De Simoni principle and s 61I

The court must disregard a matter of aggravation if to take it into account would be to punish the offender for an offence which was more serious than that for which the offender stands for sentence: *The Queen v De Simoni* (1981) 147 CLR 383. This consideration is most likely to arise when the court has regard to factors which are often found as aggravating features of offences in the *Crimes Act*, such as: the offence was committed in company; the offender used a weapon; or the offender was in a position of trust: *R v Wickham* [2004] NSWCCA 193 at [26]. None of the aggravating matters in s 61J (listed below) can be taken into account in aggravation for an offence under s 61I.

The sentencing judge erred in *R v Bakewell* (unrep, 27/6/96, NSWCCA) by taking into account the psychological impact of the crime on the victim and the applicant's forcefulness during sexual intercourse. This was held to be impermissible since these matters, described in a victim impact statement, effectively constituted an aggravated form of the offence found under s 61J.

In *R v Johnson* [2005] NSWCCA 186 at [26], the sentencing judge erred by taking into account as a matter of aggravation that the offences involved violence of a sexual character. According to Hunt AJA at [23], violence can be taken into account provided that it does not involve the infliction of actual bodily harm:

> When defining the offence of sexual intercourse without consent, s 61I of the *Crimes Act* 1900 makes no reference to violence, and its title "Sexual Assault" does not go beyond the common assault which is inherent in the "sexual connection" to which the definition of "sexual intercourse" in s 61H refers. It does not include any suggestion of either violence or (as violence is usually defined) the exercise of physical force. Many sexual assaults do involve violence, and that violence is appropriately taken into account by way of aggravation in a sexual assault charge under s 61I — provided that it does not involve the infliction of actual bodily harm, when the offender becomes exposed

> to a greater maximum sentence, one of imprisonment for 20 years (s 61J "Aggravated Sexual Assault"), in lieu of imprisonment for 14 years (s 61I "Sexual Assault"). The principle laid down in *The Queen v De Simoni* (at 388–392), that a matter may be taken into account in aggravation of sentence only where it does not render the accused liable to a greater punishment, would otherwise be infringed.

[20-660] Aggravated sexual assault: s 61J

Sexual intercourse without consent committed in circumstances of aggravation carries a maximum sentence of 20 years. Where it is committed on or after 1 February 2003 it is also subject to a standard non-parole period of 10 years. "Circumstances of aggravation" are defined in s 61J(2):

(a) intentional or reckless infliction of actual bodily harm

(b) threat of actual bodily harm by means of an offensive weapon/instrument

(c) in company

(d) victim under the age of 16 years

(e) victim under the authority of the offender

(f) victim has a serious physical disability

(g) victim has a cognitive impairment

(h) break and entry into dwelling-house or other building with the intention of committing the offence or any other serious indictable offence

(i) deprivation of victim's liberty for a period before or after the commission of the offence.

For offences committed prior to 15 February 2008, the previous form of s 61J(2)(a) applies, that is "malicious" infliction of actual bodily harm.

Section 61J(2)(h) and (i) were inserted by the *Crimes Amendment (Sexual Offences) Act* 2008, which commenced on 1 January 2009.

The aggravating factors under s 61J(2) are not all of equal seriousness: *Thorne v R* [2007] NSWCCA 10 at [82]. For example, a threat to inflict actual bodily harm may be less serious than actually inflicting harm. There can also be other aggravating factors applicable to this offence not mentioned in s 61J(2), such as acts degrading the complainant: *Thorne v R* at [82].

Range for s 61J

In *R v AEM* [2002] NSWCCA 58 at [103]–[143], the court reviewed the pattern of sentencing for offences under s 61J at that time and concluded that the cases cited by counsel did not establish a relevant pattern of sentencing. The court also cautioned against the use of Judicial Commission of NSW statistics for sexual assault offences: at [110]–[117].

Whatever view may be taken on the question of whether there is an established range, the introduction of a standard non-parole period of 10 years will have the effect of generally increasing sentences for this offence. In *R v AD* [2005] NSWCCA 208 at [43], Howie J said in the course of dealing with a severity appeal for a s 61J offence:

> the judge in the present matter was obliged to have regard to the standard non-parole period of 10 years even though it was not applicable to the applicant's case. In [*R v AJP*

> (2004) 150 A Crim R 575] it was made clear that the effect of the standard non-parole period will generally be to increase the level of sentencing for offences to which it applies. If the provisions prescribe a standard non-parole period of 10 years, as against a maximum penalty of 20 years, as is the case with an offence under s 61J, it follows that the head sentence must exceed half the maximum penalty for the offence notwithstanding that the offence is one of only mid-range seriousness.

Summaries of the Crown and severity appeals for offences committed under s 61J since the introduction of the standard non-parole period can be accessed via the SNPP appeals component of JIRS.

Section 61J cases that attract the maximum

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

R v Anderson [2002] NSWCCA 304 is an example of near worst case category of a s 61J offence. *Anderson* was said to be worse than *R v AEM* [2002] NSWCCA 58 because it involved infliction of actual bodily harm. The offender had a long history of criminal conduct and committed numerous violent offences after escaping from a prison.

In *R v Boatswain* (unrep, 15/12/93, NSWCCA) the offender committed seven counts of aggravated sexual intercourse without consent against two different victims on different occasions. The court imposed an effective sentence of 23 years with a non-parole period of 15 years. *R v Presta* [2000] NSWCCA 40 was also a serious case. The applicant received a minimum term of 14 years and 3 months and additional term of 4 years and 9 months.

[20-670] Aggravated sexual assault in company: s 61JA

Section 61JA(1) provides that:

> A person:
>
> (a) who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse, and
>
> (b) who is in the company of another person or persons, and
>
> (c) who:
>
> (i) at the time of, or immediately before or after, the commission of the offence, intentionally or recklessly inflicts actual bodily harm on the alleged victim or any other person who is present or nearby, or
>
> (ii) at the time of, or immediately before or after, the commission of the offence, threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument, or
>
> (iii) deprives the alleged victim of his or her liberty for a period before or after the commission of the offence,
>
> is liable to imprisonment for life.

In *R v MRK* [2005] NSWCCA 271 at [3], Spigelman CJ stated :

> As indicated by the maximum penalty of life imprisonment, the offence under s 61JA is in the highest level of sexual assault offences under the *Crimes Act*, above the offences

> for which s 61J provides being sexual assault in circumstances of aggravation. This represents a recognition by the legislature of the particular heinousness which often accompanies gang rapes.

R v Hoang [2003] NSWCCA 380 involved the applicant having sexual intercourse with the victim without her consent, in company, having deprived her of her liberty for a period prior to the commission of the offence. According to Wood CJ at CL at [40]–[42], the sexual assault offence:

> fell within the upper range of seriousness for such an offence, the seriousness of which is, itself, underlined by the fact that the maximum available penalty for it is imprisonment for life … This community will not, and it cannot, tolerate the activities of marauding young gangs of the kind to which this appellant attached himself, and it is time that he and his ilk understood that to be the case, at the penalty otherwise of facing lengthy terms of imprisonment.

In *R v Upton* [2006] NSWCCA 256 at [50], the applicant played a lesser role than his co-offender and the Crown relied on the doctrine of extended joint criminal enterprise. The court agreed that the crime was one of the worst of its type and held that a sentence of imprisonment of 7 years with a non-parole period of 4 years "might be considered lenient": *R v Upton* at [50].

In *R v MAK* [2005] NSWCCA 369, the crime was characterised as falling into the worst category of offence (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256) under s 61JA. MRK's brothers were sentenced respectively to terms of imprisonment of 16 years, with a non-parole period of 12 years; 22 years, with a non-parole period of 16 years; and 22 years, with a non-parole period of 13 years. Justice Grove said that, having regard to the maximum penalty, the applicants were treated leniently: *R v MAK* at [97], [130].

Summaries of the Crown and severity appeals for offences committed under s 61JA since the introduction of the standard non-parole period legislation can be accessed via the SNPP Appeals component of JIRS.

[20-680] Assault with intent to have sexual intercourse: s 61K

Section 61K provides that any person who "intentionally or recklessly" (prior to 15 February 2008, "maliciously") inflicts actual bodily harm, or threatens to inflict actual bodily harm by means of an offensive weapon or instrument, with intent to have sexual intercourse with another person, is liable to imprisonment for 20 years. Appeals against sentences for s 61K offences include *R v Jones* (1993) 70 A Crim R 449; *R v Armand-Iskak* [1999] NSWCCA 414; *R v Smith* (1993) 69 A Crim R 47; *R v Leys* [2000] NSWCCA 358 and *R v Sanderson* [2000] NSWCCA 512.

[20-690] Indecent assault

Section 61L provides:

> Any person who assaults another person and, at the time of, or immediately before or after, the assault, commits an act of indecency on or in the presence of the other person, is liable to imprisonment for 5 years.

In *R v O'Sullivan* (unrep, 20/10/89, NSWCCA), Priestley JA said that the sentencing judge had taken an "over-strict approach" in saying that a custodial sentence had to be imposed in every case of indecent assault, as it was then defined.

Section 61M — "in circumstances of aggravation"

Section 61M is dealt with under **Sexual offences against children** at [17-510].

Under s 61M(1) any person who assaults another person in circumstances of aggravation is liable to imprisonment for 7 years. "Circumstances of aggravation" are defined in s 61M(3). Under s 61M(2):

> any person who assaults another person, and, at the time of, or immediately before or after, the assault, commits an act of indecency on or in the presence of the other person, is liable to imprisonment for 10 years, if the other person is under the age of 16 years.

Parliament has set a standard non-parole period of 5 years for an offence under s 61M(1) and 8 years for an offence under s 61M(2): items 9A, 9B, Table of Standard non-parole periods, see [8-000].

[20-700] Sexual assault procured by intimidation, coercion and other non-violent threats

Section 65A was repealed by the *Crimes Amendment (Consent—Sexual Assault Offences) Act* 2007, which commenced 1 January 2008. It provided:

(1) In this section: "non-violent threat" means intimidatory or coercive conduct, or other threat, which does not involve a threat of physical force.

(2) Any person who has sexual intercourse with another person shall, if the other person submits to the sexual intercourse as a result of a non-violent threat and could not in the circumstances be reasonably expected to resist the threat, be liable to imprisonment for 6 years.

(3) A person does not commit an offence under this section unless the person knows that the person concerned submits to the sexual intercourse as a result of the non-violent threat.

In *R v Aiken* (2005) 63 NSWLR 719 the court held that s 65A was inserted in 1987 for the purpose of criminalising non-violent threats. The elements of intimidation, coercion and non-violent threats are now incorporated in s 61HA(6)(b) as grounds for establishing that a person does not consent to sexual intercourse.

[20-710] Victim with a cognitive impairment: s 66F

The *Crimes Amendment (Cognitive Impairment — Sexual Offences) Act* 2008 clarified and extended the nature of sexual offences committed against persons who have a cognitive impairment. The amending Act replaced the term "intellectual disability" with "cognitive impairment", which includes not only intellectual disability, but extends to developmental or neurological disorders, dementia, severe mental illness or brain injury, which results in the person requiring supervision or social habilitation in connection with daily life activities.

Section 66F(2) provides that a person who has sexual intercourse with a person who has a cognitive impairment, and who is responsible for the care of that person (whether generally or at the time of the sexual intercourse only), is liable to a maximum

penalty of 10 years imprisonment. A person is responsible for the care of a person with a cognitive impairment if the person provides care to that person at a facility or at the home of that person in a program under which care is provided to persons with a cognitive impairment.

Section 66F(3) provides that any person who has sexual intercourse with a person who has a cognitive impairment, with the intention of taking advantage of that cognitive impairment, is liable to a maximum penalty of 8 years imprisonment.

In *R v Grech* [1999] NSWCCA 268 at [37], Carruthers J said deterrence looms large for offences under s 66F(2). His Honour explained the gravamen of the offence at [33]–[34]:

> strong emotional relationships are quite capable of developing between carer and intellectually disabled person, whether they are of the same gender or not. It is essential, therefore, that persons in authority exercise the utmost care to avoid such situations developing, and immediately there are indications of such a situation arising, the obligation is on the person in authority to remove himself or herself from the relationship or, at the very least, immediately to seek expert counselling.
>
> Neither of these courses was adopted in the subject case and, intolerably, the relationship developed into one of a continuing and prolonged violation of the provisions of s 66F(2) … The fact that the relationship may have developed, as the applicant contends, into a mutual loving relationship could fairly be described as an aggravating feature of the case rather than a mitigating factor.

[20-720] Sexual assault by forced self-manipulation: s 80A

Section 80A(2) provides that any person who compels another person to engage in self-manipulation, by means of a threat that the other person could not reasonably be expected to resist, is liable to imprisonment for 14 years. If there are circumstances of aggravation (outlined in s 80A(1)), the person is liable to imprisonment for 20 years under s 80A(2A). Section 80A(3) provides that a person does not commit an offence under this section unless the person knows that the other person engages in the self-manipulation as a result of the threat.

[20-730] Incest

Section 78A(1) states that "any person who has sexual intercourse with a close family member who is of or above the age of 16 years is liable to imprisonment for 8 years". Under s 78B any person who attempts to commit an offence under s 78A is liable to imprisonment for 2 years. In *R v GS* [2002] NSWCCA 4, the applicant had engaged in a sexual relationship with his natural daughter over a 14-year period. On the three counts of incest, the court sentenced him to 4 years and 6 months, with a non-parole period of 3 years.

[20-740] Bestiality

Last reviewed: August 2023

Section 79 provides that "any person who commits an act of bestiality with any animal" shall be liable to imprisonment for 14 years. Any person who attempts to commit an act of bestiality with any animal shall be liable to imprisonment for 5 years: s 80.

Bestiality is not defined in the *Crimes Act*, but at common law it has been held to consist of any form of sexual intercourse with an animal: *R v Brown* (1889) 24 QBD 357. No particular mode of penetration is required: *R v Bourne* (1952) 36 Cr App R 125; applied by the High Court in *Bounds v The Queen* [2006] HCA 39. A woman may commit bestiality: *R v Packer* [1932] VLR 225. In *Chesworth v R* [2023] NSWCCA 115 at [19], the court noted the objective seriousness of bestiality offences should be assessed having regard to the animal's inability to consent to any form of activity with a human.

[20-750] Intensive correction order not available for a "prescribed sexual offence"

Section 67(1)(b) *Crimes (Sentencing Procedure) Act* 1999 states that an intensive correction order (ICO) must not be made in respect of a sentence of imprisonment for a "prescribed sexual offence". A "prescribed sexual offence" is defined in s 67(2) as:

(a) an offence under Pt 3, Divs 10 or 10A *Crimes Act* 1900, being:

  (i) an offence where the victim is under 16 years of age, or

  (ii) an offence where the victim is any age and the elements of which includes sexual intercourse (as defined by s 61H)

(b) an offence against ss 91D, 91E, 91F, 91G or 91H *Crimes Act*

(c) an offence against ss 91J, 91K or 91L *Crimes Act*, where the victim is under 16 years, or

(d) an offence that, at the time it was committed, was a prescribed sexual offence within the meaning of this definition.

Subsections 67(2)(d)–(f) also list a number of Commonwealth offences which are purported to fall within the definition of a "prescribed sexual offence" in respect of which an ICO must not be made.

[20-760] Other aggravating circumstances

Breach of trust

In *R v Qin* [2008] NSWCCA 189, offences under ss 61I and 61L that were committed in the context of a relationship between a masseuse and his customer were aggravated by a breach of the trust inherent in that relationship: at [36], [49].

See "Breach of trust" in **Sexual offences against children** at [17-560].

Risk of pregnancy

The risk of pregnancy is an aggravating factor that can be taken into account in sentence: *KAB v R* [2015] NSWCCA 55. The court (Wilson J and Ward JA agreeing, Simpson J in dissent) in *KAB v R* held that there was no denial of procedural fairness for the judge to take into account that there was a "high risk of pregnancy" when the agreed facts included that the offender had penile/vaginal intercourse with his step-daughter and ejaculated into her vagina where neither party had raised the issue at the sentencing hearing. On appeal, the offender argued that had he known the judge was going to take this factor into account he would have submitted evidence that he had undergone a vasectomy.

Use of weapon

The use of a knife in sexual offences, where it can be taken into account as a matter of aggravation, is regarded by the court as abhorrent to the community, and will lead to a significant increase in the sentence: *R v Rothapfel* (unrep, 4/8/92, NSWCCA) per Studdert J at [12]. Offenders who use knives in sexual attacks must expect stern punishment: *R v H* (unrep, 23/8/96, NSWCCA) per Studdert J.

Home invasion

It is an aggravating circumstance where a victim is assaulted in his or her own home both at common law and under s 21A(2)(eb) *Crimes (Sentencing Procedure) Act*. Break and entry into a dwelling-house is also a specified circumstance of aggravation under ss 61J(2)(h) and 66C. In *R v Preston* (unrep, 9/4/97, NSWCCA) at 25, Dunford J said:

> sexual assault is a serious offence at any time, but its criminality is aggravated when it is committed against a defenceless woman in the sanctity of her own home.

Examples where sexual assault offences were committed in the context of break and enter offences include: *R v Johnston* [2002] NSWCCA 201; *R v Anderson* [2002] NSWCCA 304; *R v Hoang* [2003] NSWCCA 380; *R v Allan* [2004] NSWCCA 107; *R v DAC* [2006] NSWCCA 265 and *R v Oloitoa* [2007] NSWCCA 177.

Offences committed by medical practitioner

The gravity of sexual offences is magnified by the circumstance that it involved a breach of trust which the patient reposed in a medical practitioner: *R v Arvind* (unrep, 8/3/96, NSWCCA) per Grove J at [16]. Criminal interference with the bodies of persons seeking health care by medical practitioners will be met with stern retribution. Patients are extremely vulnerable and taking advantage of that situation for self-gratification means that general and personal deterrence will be part of an appropriate sentence: *R v Arvind*.

Drink spiking

Sexual offences which are preceded by spiking the victim's drink are ordinarily dealt with under ss 38 and 38A. See discussion in **Assault, wounding and related offences** at [50-110].

Intoxication

Intoxication as a factor in sentencing is discussed in **Subjective matters at common law** at **[10-480]**.

[20-770] Mitigating circumstances

Youth of offender

The general principle is that in cases involving young offenders, general deterrence is given less weight and more emphasis is placed on rehabilitation. However, where a youth behaves like an adult and commits a sexual assault of considerable gravity, the function of the courts and the primary objective of sentencing is the protection of the community: *R v Nichols* (1991) 57 A Crim R 391; *R v Gordon* (1994) 71 A Crim R 459 at 469; *R v BUS* (unrep, 3/11/95, NSWCCA); *R v DAR* (unrep, 2/10/97, NSWCCA); *R v AEM* [2002] NSWCCA 58; *R v Alcazar* [2017] NSWCCA 51 at [122]–[124]. It is not the youth of an offender per se that justifies the amelioration of a sentence, but

the circumstances of a particular juvenile offender and a particular offence that may indicate that general deterrence and retribution should play a lesser role: *IE v R* (2008) 183 A Crim R 150 at [16]. Special considerations must be applied under Pt 2 Div 4 *Children (Criminal Proceedings) Act* 1987 where the offender is under 18 years of age at the time of the offence and under 21 years when charged.

See the further discussion of this factor in **Subjective matters at common law** at **[10-430]**.

Mental condition

See discussion of this factor in **Subjective matters at common law** at **[10-460]**.

Delay

The suspense or uncertainty suffered by an offender who remains silent in the hope that his or her offences will not be discovered must not be taken into account on sentence: *R v Spiers* [2008] NSWCCA 107 at [37]–[38] and cases cited therein. The delay enabled the sentencing judge to conclude that this offender was unlikely to re-offend, but the court noted at [39] that this was "perhaps not properly regarded as rehabilitation".

In *R v Hall* [2017] NSWCCA 313, the court observed that there are cases where the descriptor "delay" is inapt and suggests "something that might have occurred earlier was deferred, postponed or put off until later": *R v Hall* at [98]. In that case, the 23-year delay between the offences (in respect of which the victim had immediately complained) and his arrest was solely attributable to the respondent evading detection. The court found that the concepts of delay and "stale crime" do not automatically lead to certain consequences in sentencing, such as leniency. The underlying circumstances and their impact on the assessment of sentence must be considered: *R v Hall* at [98]–[99].

Rehabilitation and established good character in the time since offending is a relevant consideration: *R v Hall* at [100]. However, general deterrence still has a role to play. It is important it is known that the criminal justice system will punish, denounce and make an offender accountable for serious criminal offending, no matter how long it takes for them to be brought to account (where the time required to do so is not the fault of anyone else): *R v Hall* at [122].

See also discussion of delay in **Sexual offences against children** at **[17-570]** and **Subjective matters at common law** at **[10-530]**.

Extra-curial punishment

The court is entitled to take into account punishment meted out by others, such as abuse and harassment and threats of injury to person and property: *R v Allpass* (1993) 72 A Crim R 561 at 566. In *R v Holyoak* (1995) 82 A Crim R 502 at 506, the court took account of the fact that the applicant had suffered substantially from personal harassment by media representatives and received a large volume of "hate" communications from members of the public. The punishment commenced, in a real sense, before his sentence.

In *Sharwood v R* [2006] NSWCCA 157, the judge erred by excluding evidence that the applicant was beaten in his home in the presence of his wife and daughter by

two men in relation to his offences under s 61M(1). The attack resulted in physical injury and damage to the applicant's house. The court held at [67] that the incident was a matter which should have been taken into account as a subjective circumstance justifying some degree of leniency.

See further discussion of this factor in **Subjective matters at common law** at **[10-520]**.

Possibility of summary disposal

The *Criminal Procedure Act* 1986 makes provisions in Ch 5 of the Act for some indictable offences to be dealt with summarily in certain circumstances. Section 260 provides:

> (1) An indictable offence listed in Table 1 to Schedule 1 is to be dealt with summarily by the Local Court unless the prosecutor or the person charged with the offence elects in accordance with this Chapter to have the offence dealt with on indictment.
>
> (2) An indictable offence listed in Table 2 to Schedule 1 is to be dealt with summarily by the Local Court unless the prosecutor elects in accordance with this Chapter to have the offence dealt with on indictment.

Section 260 applies to the following sexual assault offences:

- indecent assault — s 61L [Table 2 offence]
- aggravated indecent assault — s 61M [Table 1 offence]
- act of indecency — s 61N [Table 2 offence]
- aggravated act of indecency — s 61O(1), (1A) [Table 2 offence] and s 61O(2), (2A) [Table 1 offence]
- sexual intercourse — child between 14 and 16 — s 66C(3) [Table 1 offence]
- attempting, or assaulting with intent, to have sexual intercourse with child between 10 and 16 — s 66D [Table 1 offence, where victim 14 years of age or over]
- procuring or grooming child under 16 for unlawful sexual activity — s 66EB [Table 1 offence]
- attempt to commit bestiality — s 80 [Table 1 offence]
- procuring person for prostitution — s 91A [Table 1 offence]
- procuring person for prostitution by drugs, etc — s 91B [Table 1 offence]
- production, dissemination or possession of child abuse (previously child pornography) material — s 91H [Table 1 offence]
- aggravated voyeurism — s 91J(3) [Table 1 offence]
- aggravated offence of filming a person engaged in private act — s 91K(3) [Table 1 offence]
- aggravated offence of filming a person's private parts — s 91L(3) [Table 1 offence].

Where an offence that could have been dealt with summarily is prosecuted on indictment, the court may have regard to that fact but only in the exceptional circumstances outlined in *Zreika v R* (2012) 223 A Crim R 460 at [107]–[109].

See further discussion of this factor in **Objective factors at common law** at **[10-080]**.

Hardship of custody

Sentencers should no longer assume that persons convicted of sexual assault, who serve their sentences in protection, will spend their time in more onerous custodial conditions than the general prison population: *R v Mostyn* (2004) 145 A Crim R 304 at [179]; *R v Way* (2004) 60 NSWLR 168 at [177] and *R v Gu* [2006] NSWCCA 104 at [33]. The court must base such a conclusion on evidence: *R v Durocher-Yvon* (2003) 58 NSWLR 581 at [22].

This factor is discussed further in **Subjective matters at common law** at **[10-500]**.

[20-775] Factors which are *not* mitigating at sentence

The relevance of a prior relationship

The mere fact that there was a pre-existing relationship between an offender and a victim does not mitigate the criminality of the sexual assault: *R v Cortese* [2013] NSWCCA 148 at [55] and cases discussed therein. The fact that an offence occurred in a domestic context does not lessen its gravity: *R v Hamid* (2006) 164 A Crim R 179; *Heine v R* [2008] NSWCCA 61 at [40]; *R v Harvey* (unrep, 23/8/96, NSWCCA); *R v Grech* [1999] NSWCCA 268 at [34]–[35]. The assessment of the seriousness of the crime will ultimately depend on the facts of the case. One common circumstance in which a pre-existing relationship has been found to diminish the seriousness of a sexual offence is where it suggests some prevarication or at least initial consent on the part of the victim: *Bellchambers v R* [2011] NSWCCA 131 at [47]; *NM v R* [2012] NSWCCA 215 at [59]; *R v Cortese* at [55].

This circumstance has been contrasted to an assault committed by a stranger where there is no such potential prevarication: *R v Cortese* at [50]. See also *Boney v R* (2008) 187 A Crim R 167 at [106] and *NM v R* at [59]. Where the offender is a stranger, a further element of fear and terror would be expected: *ZZ v R* [2013] NSWCCA 83 at [103]. The fact that victim knew the offender and trusted him or her will "provide little comfort": *ZZ v R* at [103]. An offence which is committed where two people are engaged in intimate contact by consent and one of them fleetingly goes too far, is to be distinguished from one where the victim made her lack of consent clear and struggled: *Stewart v R* [2012] NSWCCA 183 at [69]. Offences committed in a domestic context as distinct from an attack from a stranger does not lessen their seriousness: *ZZ v R* at [104]. Sully J said in *R v O'Grady* (unrep, 13/5/97, NSWCCA) that where a relationship breaks down:

> the woman who is involved in the relationship is entitled to feel that, whatever other consequences ensue, her personal safety will not be threatened at all, let alone threatened by the commission of criminal offences of the gravity of those with which we are now called upon to deal.

Grove J said, in *Raczkowski v R* [2008] NSWCCA 152 at [46]:

> a violent and pre planned attack … in … a domestic setting is not a matter of mitigation. This Court has repeatedly stressed that it is a circumstance of significant seriousness: *R v Edigarov* [2001] 125 A Crim R 551; *R v Dunn* [2004] 144 A Crim R 180; *R v Burton* [2008] NSWCCA 128.

Manner of dress and sexual history of victim

It is entirely inappropriate to focus on the prior sexual conduct of the victim or to characterise the victim's manner of dress or behaviour as provocative and as somehow contributing to the commission of the offence: *R v Radenkovic* (unrep, 6/3/90, NSWCCA); *R v King* (unrep, 18/7/91, NSWCCA). The mere fact that the victim permitted the offender to sleep in her bed with her is not a mitigating factor: *R v O'Grady* (unrep, 13/5/97, NSWCCA).

Sex workers are as entitled to the protection of the law against sexual assault as other citizens. In such cases it is wrong to sentence on the basis that the psychological effect on the victim or the gravity of the offence will be less than that experienced by others: *R v Leary* (unrep, 8/10/93, NSWCCA) per Kirby ACJ at 6, disapproving *R v Hakopian* (unrep, 11/12/91, VicCCA).

"Cultural" conditioning

In *R v MAK* [2005] NSWCCA 369 counsel for MSK submitted that the court should favourably consider his appeal because, having come from Pakistan, he was culturally conditioned by its "very traditional views about women". This submission was emphatically rejected by McClellan CJ at CL at [4]:

> Whatever be its intended meaning the submission must be rejected. It is a fundamental right of every person in a civilised society to live without fear of being assaulted, whether it be physical assault or assaults of a sexual nature. For this reason the legislature has made all forms of assault upon the person a crime imposing heavy penalties on those who do not respect that right. When, as happened in the matters under appeal, the conduct of an offender demonstrates a complete disregard for that right our community expects the courts to impose penalties which punish the offender and mark out the seriousness of the offence so that others will be deterred from acting in a similar manner.

Counsel for MSK raised the issue of the relevance of cultural conditioning again at first instance in *R v MSK* [2006] NSWSC 237. Justice Hidden at [45] rejected the submission because it had no factual basis:

> he must have had sufficient exposure to the Australian way of life to be aware that the place occupied by women in the traditional culture of his area of origin is far removed from our social norms. He can have been in no doubt that to treat those two young women in the manner he did was utterly unacceptable.

[20-780] Sentencing for offences committed many years earlier

The court in *R v Hall* [2017] NSWCCA 313, confirmed that, in sentencing for sexual assault offences committed many years prior, judges should adopt the approach outlined by Howie J in *R v Moon* (2000) 117 A Crim R 497 at [70]–[71]. That is, where there is an absence of reliable statistical data for sentencing patterns at the time of the offence, the nature of the criminal conduct involved and the maximum penalty will be important factors in determining the appropriate sentence: *R v Hall* at [74]–[75].

This topic is further dealt with in **Sexual offences against children** at **[17-410]**.

[20-790] Utility of sentencing statistics

In *R v Shannon* [2006] NSWCCA 39 the applicant was charged with three counts of sexual intercourse with a 12-year-old victim under s 66C *Crimes Act* 1900. His counsel

relied on available statistics and an examination of comparable cases dealt by the Court of Criminal Appeal to argue that the sentences imposed were at the "upper higher level" of punishment imposed for offences against this section. Justice Howie stated at [36]:

> The decisions referred to, the schedule relied upon by the applicant and the statistics maintained by the Judicial Commission indicate that there is a wide variation in the sentences that are imposed for offences of this type. That no doubt reflects the range of activity included within the concept of sexual intercourse and in the varying circumstances surrounding the offending. They are of little assistance in my view except as indicating the sentence imposed by the judge is at the upper end of the range.

In *R v Shortland* [2018] NSWCCA 34, the respondent to the Crown appeal was sentenced, after a trial, to a suspended sentence of 2 years imprisonment on each of three counts of sexual intercourse without consent contrary to s 61I. The sentencing judge was provided with Judicial Commission statistics which showed that 237 cases, where a s 61I offence was the principal offence, were dealt with between 2010 and 2016. In 47 of those cases, there was a conviction after trial and a custodial sentence was imposed in all but one. In 26 cases, offenders received suspended sentences but pleas of not guilty were entered in only three of those cases. Basten JA (RA Hulme J agreeing at [37]) concluded that the judge erroneously used sentencing precedent partly by focusing on the 26 cases where suspended sentences were imposed, observing that three out of 237 cases did not constitute a relevant sentencing pattern: *R v Shortland* at [6].

[20-800] Victim impact statements

See **Victims and victim impact statements** at **[12-820]**.

[20-810] Section 21A Crimes (Sentencing Procedure) Act 1999

The application of s 21A generally is discussed in detail at **[11-000]**.

Substantial injury, emotional harm, loss or damage: ss 21A(2)(g), (3)(a)

There must be evidence before the court to warrant a finding that the injury and emotional harm caused by the offence was substantial within the terms of s 21A(2)(g). Additional evidence of harm ordinarily found in a victim impact statement is required. In *R v Cunningham* [2006] NSWCCA 176, a child sexual assault case, the judge erred by taking into account as an aggravating factor that the impact of the offence on the victims was substantial. No evidence was led regarding the emotional or psychological harm suffered by any of the complainants.

R v Cunningham should be read with *DBW v R* [2007] NSWCCA 236, where the court held that it was not necessary for expert evidence to be led on matters that have become common knowledge and which could be inferred by common sense. In this case, it was open for the judge to infer, from reports tendered at sentence, a link between the applicant's sexual abuse of his son and his son's inappropriate sexual conduct at school: at [29]. The judge "would have been entitled to act on the basis that there was a substantial harm": at [38]. It was said in *R v King* [2009] NSWCCA 117 at [41] that it should not be assumed, without evidence to the contrary, that there is no significant damage by way of long-term psychological and emotional injury resulting from a sexual assault of a child: see extract from the judgment at [20-604].

Victim was vulnerable: s 21A(2)(l)

The age of the victim is relevant to determining the objective seriousness of an offence. The younger the victim the more serious the crime: *RJA v R* (2008) 185 A Crim R 178 at [13]. Offences arising out of the home invasion of a 78-year-old woman were aggravated by her age: *R v DAC* [2006] NSWCCA 265 at [19]. On the other hand, an 18-year-old victim was not vulnerable for the purposes of s 21A(2)(l) on account of her age since 18 is the age of adulthood and cannot be regarded as "very young" under s 21A(2)(l): *Perrin v R* [2006] NSWCCA 64 at [35]. However, the victim was vulnerable on the basis that she was affected by alcohol which markedly lowered what she could appreciate and do at the time.

[20-820] Totality and sexual assault offences

Given that it is common for offenders to commit multiple offences, the totality principle has a central role in the sentencing exercise for sexual assault.

The totality principle is a well-established principle of sentencing to be applied by the court when sentencing an offender for more than one offence. It requires a judge or magistrate to determine an appropriate sentence for each offence, consider questions of cumulation or concurrence and then, when reviewing the aggregate sentence consider whether it is "just and appropriate": *Pearce v The Queen* (1998) 194 CLR 610.

The principle of totality requires that the effective sentence imposed on an offender represent a proper period of incarceration for the total criminality involved: *R v AEM* [2002] NSWCCA 58 at [69] per Beazley JA, Wood CJ at CL and Sully J.

The issue is discussed in detail with particular reference to sexual assault offences at **Concurrent and consecutive sentences** at **[8-230]**.

[20-830] Circumstances of certain sexual offences to be considered in passing sentence: s 61U

Section 61U states that where a person is convicted of:

(a) both an offence under s 61I and an offence under s 61K, or

(b) both an offence under s 61J and an offence under s 61K, or

(c) both an offence under s 61JA and an offence under s 61K,

whether at the same time or at different times, the judge passing sentence on the person in respect of the two convictions or the later of the two convictions is required, if it appears that the two offences arose substantially out of the one set of circumstances, to take that fact into account in passing sentence. *R v Ridgeway* (unrep, 16/7/98, NSWCCA) contains a short discussion of s 61U.

[20-840] Use of evidence of uncharged criminal acts at sentence

The court may take into account uncharged acts of a similar nature for the limited purpose of placing the offences charged into context and to rebut an assertion that the offence is an isolated act or was out of character. The offender is denied leniency to which he or she might have been entitled if the offence(s) was an isolated incident:

R v H (1980) 3 A Crim R 53; *R v Burchell* (1987) 34 A Crim R 148; *R v Kozakiewicz* (unrep, 11/6/91, NSWCCA); *R v Hartikainen* (unrep, 8/6/93, NSWCCA); *R v JCW* (2000) 112 A Crim R 466, *MJL v R* [2007] NSWCCA 261 at [15].

While uncharged acts may be taken into account to rebut a suggestion that the charged misconduct was an isolated incident, the evidence of uncharged acts should not be used to aggravate the sentence for charged offences: *R v Mailes* (2003) 142 A Crim R 353 at [51]; *Fisher v R* [2008] NSWCCA 129 at [19].

In *R v EMC* (unrep, 21/11/96, NSWCCA), the applicant was sentenced on the basis that several of the charges were representative of a wider series of offences. Chief Justice Gleeson said:

> This did not, of course, mean that his Honour was punishing the applicant for those other offences or treating them as part of the criminality in respect of which he was imposing the sentence … it meant that the applicant was not being dealt with on the basis that these were isolated instances.

This use of uncharged acts for this limited purpose does not infringe the principle that a person should not be punished for crimes for which he or she has not been convicted. There is a distinction between not increasing a penalty based on the presence of an aggravating fact and refusing to extend leniency on account of the fact that the events as charged were not isolated incidents: *R v JCW* (2000) 112 A Crim R 466 per Spigelman CJ at [68]; *MJL v R* [2007] NSWCCA 261 at [15].

For a detailed discussion see **Objective factors at common law** at **[10-030]**.

[The next page is 15001]

Domestic violence offences

[63-500] Introduction

Domestic violence is accepted to be a blight on civil society. A court sentencing an offender for an offence committed in what is loosely described as a "domestic context" must apply specifically developed sentencing principles.

The High Court in *The Queen v Kilic* (2016) 259 CLR 256 at [21] recognised a societal shift in relation to domestic violence:

> … current sentencing practices for offences involving domestic violence depart from past sentencing practices for this category of offence because of changes in societal attitudes to domestic relations.

The community's concern at the level of domestic violence, generally inflicted by men against women, is given effect in sentencing by recognising the importance of general and specific deterrence. In that context, in *Yaman v R* [2020] NSWCCA 239 at [135] Wilson J (Fullerton and Ierace JJ agreeing) said:

> The right of all women to determine their own path in life must be protected and upheld by the courts. Where a woman's right is ignored or disregarded by an offender, that right must be vindicated, including by punitive and strongly deterrent sentences where necessary.

[63-505] Statutory framework

Definitions of "personal violence offence" and "domestic violence offence" are found in ss 4, 5, 5A, 11 *Crimes (Domestic and Personal Violence) Act* 2007. These definitions are used as a basis for applying provisions in the *Crimes (Sentencing Procedure) Act* 1999 such as those discussed below.

A "domestic violence offence" is defined in s 11 *Crimes (Domestic and Personal Violence) Act* as an offence committed against a person with whom the offender has (or has had) a domestic relationship, being:

(a) a personal violence offence or

(b) an offence (other than a personal violence offence) that arises from substantially the same circumstances as those from which a personal violence offence has arisen, or

(c) an offence (other than a personal violence offence) the commission of which is intended to coerce or control the person against whom it is committed or to cause that person to be intimidated or fearful (or both).

"Domestic relationship" is broadly defined in s 5. The definition of "personal violence offence" in s 4 includes most of the assault and wounding offences referred to in the list in **Assault, wounding and related offences** at **[50-000]**. Section 12(2) provides that if a person pleads guilty to, or is found guilty of, an offence and the court is satisfied the offence was a domestic violence offence, the court must direct that the offence be recorded on the person's criminal record as a domestic violence offence.

Section 5A provides that a personal violence offence by a paid carer against a dependant is a domestic violence offence and an ADVO may be made for

the dependant's protection. However, a personal violence offence committed by a dependant against a paid carer is not a domestic violence offence, although the paid carer may still apply for an APVO against the dependant.

The *Crimes (Sentencing Procedure) Act* 1999 imposes several requirements on a court sentencing an offender for a domestic violence offence.

When a court finds a person guilty of a domestic violence offence, it must impose, under s 4A(1), either:

- a sentence of full-time detention, or
- a supervised order (being an intensive correction order (ICO), community correction order (CCO) or conditional release order (CRO) that includes a supervision condition).

However, the court may impose a different sentence if satisfied that it is more appropriate in the circumstances, and gives reasons for reaching that view: s 4A(2).

Additional requirements designed for the protection and safety of victims are set out in s 4B:

- an ICO cannot be imposed unless the court is satisfied the victim of the domestic violence offence, and any other person with whom the offender is likely to reside, will be adequately protected (whether by ICO conditions or otherwise): s 4B(1)
- a home detention condition cannot be imposed if the court reasonably believes the offender will reside with the victim of the domestic violence offence: s 4B(2)
- the court must consider the victim's safety before making either a CCO or CRO for a domestic violence offence: s 4B(3).

See also **Intensive Correction Orders (ICOs) (alternative to full-time imprisonment)** at **[3-600]**ff, **Community Correction Orders (CCOs)** at **[4-400]**ff and **Conditional Release Orders (CROs)** at **[4-700]**ff.

In addition, ss 39(1) and 39(1A) *Crimes (Domestic and Personal Violence) Act* 2007 relevantly provide that following a guilty plea being entered by, or a finding of guilt being made in respect of, an offender who has committed a serious offence (defined in s 40(5)), a court must make a final apprehended violence order (AVO) for the victim's protection, regardless of whether an interim AVO has been made or whether an application for an AVO has been made, unless satisfied that an order is "not required". For adult offenders sentenced to full-time imprisonment the ADVO must be for the period of imprisonment and an additional two years, unless there is good reason to impose a different period: ss 39(2A)–(2C). In terms of when an ADVO comes into force, s 39(2D) states:

> The date on which the apprehended domestic violence order comes into force may be a day before the day the person starts serving [their] term of imprisonment.

Domestic violence orders made in one State or Territory are now recognised in all other Australian jurisdictions as a consequence of the national recognition scheme given statutory effect in Pt 13B *Crimes (Domestic and Personal Violence) Act* 2007 which enables the enforcement of the prohibitions and restrictions contained in interstate and foreign domestic violence orders.

[63-510] Sentencing approach to domestic violence

Last reviewed: August 2023

A comprehensive examination of the cases and legislation can be found in A Gombru, G Brignell and H Donnelly, "Sentencing for domestic violence*", Sentencing Trends & Issues*, No 45, Judicial Commission of NSW, June 2016. See also M Zaki, B Baylock, P Poletti, "Sentencing for domestic violence in the Local Court", *Sentencing Trends & issues*, No 48, Judicial Commission of NSW, July 2022.

The High Court in *Munda v Western Australia* (2013) 249 CLR 600 at [54]–[55] referred to the role of the criminal law in the context of domestic violence as including:

> the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence.
> …
>
> … A just sentence must accord due recognition to the human dignity of the victim of domestic violence and the legitimate interest of the general community in the denunciation and punishment of a brutal, alcohol-fuelled destruction of a woman by her partner. A failure on the part of the state to mete out a just punishment of violent offending may be seen as a failure by the state to vindicate the human dignity of the victim; and to impose a lesser punishment by reason of the identity of the victim is to create a group of second-class citizens, a state of affairs entirely at odds with the fundamental idea of equality before the law.

In assessing the crime before it, the court in *The Queen v Kilic* (2016) 259 CLR 256 treated the fact the respondent's offence involved domestic violence as a distinguishing aggravating circumstance of significance and, at [28], referred to: "… the abuse of a relationship of trust which such an offence necessarily entails and which ... must be deterred".

In *Cherry v R* [2017] NSWCCA 150, Johnson J at [78] (Macfarlane JA and Harrison J agreeing) said:

> It is undoubtedly the case that the criminal law, in the area of domestic violence, requires rigorous and demanding consequences for perpetrators for the purpose of protecting partners, family members and the wider community.

The importance of general deterrence in condemning such conduct was clearly explained by Wilson J (Fullerton and Ierace JJ agreeing) in *Yaman v R* [2020] NSWCCA 239 at [131] as follows:

> Offences committed by (mostly) men who … refuse to accept that a partner or former partner is entitled to a life of her own choosing, must be dealt with sternly by the courts, to mark society's strong disapprobation of such conduct, and to reinforce the right of women to live unmolested by a former partner. Offences involving domestic violence are frequently committed, and the criminal justice system must play a part in protecting those who have been or may be victims of it.

The denunciation of, and punishment for, "brutal" and "alcohol-fuelled" conduct in the context of a domestic relationship was considered to be particularly apt in *Ngatamariki v R* [2016] NSWCCA 155 at [73]. Serious domestic violence offences, such as the sustained offending over 6 years in *R v JD* [2018] NSWCCA 233, should attract appropriate sentences to maintain public confidence in the administration of justice:

at [102]. Indeed, in sentencing a domestic violence offender, particularly a repeat domestic violence offender, specific and general deterrence are important factors, together with the requirement of powerful denunciation and the need for protection of the community: *R v Hamid* (2006) 164 A Crim R 179 at [86]. See also *Turnbull v R* [2019] NSWCCA 97 at [153].

While a background of childhood deprivation may reduce moral culpability making an offender unsuitable for general deterrence (see **[10-470] Deprived background of an offender**), in dealing with domestic violence offenders, victims are not to be treated as less worthy of protection, nor that the crimes against them found warranting less denunciation, because of factors personal to the offender: *Kennedy v R* [2022] NSWCCA 215 at [43].

See also *DPP v Darcy-Shillingsworth* [2017] NSWCCA 224 at [84]–[85], [107]–[108] where the court held that the sentences imposed for offences committed in a domestic violence context did not reflect the community interest in general deterrence.

The courts have recognised the special dynamics of domestic violence. A victim of a domestic violence offence is personally targeted by the offender and the offence is usually part of a larger picture of physical and mental violence in which the offender exercises power and control over the victim: *R v Burton* [2008] NSWCCA 128 at [97]; see also *R v JD* [2018] NSWCCA 233 at [92]. In most instances, the conduct typically involves aggression by men who are physically stronger than their victims, and there is no real prospect of spontaneous physical retaliation because of the disparity between their respective strengths: *Patsan v R* [2018] NSWCCA 129 at [39]–[40]; *Diaz v R* [2018] NSWCCA 33 at [5]; *R v Edigarov* [2001] NSWCCA 436 at [41].

Another common feature is that there may be a considerable delay between the offences and the victim making a complaint. However, such delay should not be held against a victim as it is a direct product of the nature of the offending. It would be incongruous for the offender to benefit from such delay: *Hurst v R* [2017] NSWCCA 114 at [132], see also [138].

The offender often has a genuine, albeit irrational, belief of being wronged by the victim and also believes the violence is justified: *Xue v R* [2017] NSWCCA 137 at [53]; *Ahmu v R* [2014] NSWCCA 312 at [83]. But a resort to violence is not justified even if the belief turns out to be correct: *Xue v R* at [53]; see also *Efthimiadis v R (No 2)* [2016] NSWCCA 9 at [86].

There is a continuing threat to the victim's safety even where the victim becomes estranged from the offender: *R v Dunn* [2004] NSWCCA 41 at [47]. The victim may forgive the offender against their own interests: *R v Glen* (unrep, 19/12/94, NSWCCA); *R v Rowe* (1996) 89 A Crim R 467; *R v Burton* at [105]. Sentencing courts must treat such forgiveness with caution and attribute weight to general and specific deterrence, denunciation and protection of the community: *R v Hamid* at [86]; *Simpson v R* [2014] NSWCCA 23 at [35]; *R v Eckermann* [2013] NSWCCA 188 at [55]; *Ahmu v R* at [83]. The attitude of the victim cannot interfere with the exercise of the sentencing discretion: *R v Palu* [2002] NSWCCA 381 at [37].

Particular care is required on the part of a court when it makes findings of fact concerning the aggravating factor that the victim was vulnerable. The judge erred in

Drew v R [2016] 264 NSWCCA 310 by observing that the victim was vulnerable using generalisations about a culture of silence and ostracism within Aboriginal communities in relation to domestic violence: *Drew v R* per Fagan J at [8], Gleeson JA agreeing at [1], N Adams J at [84]. Such a finding was not open on the evidence in the case: *Drew v R* at [3]–[4]. Further, the aggravating factor of vulnerability under s 21A(2)(l) *Crimes (Sentencing Procedure) Act* 1999 is only engaged where the victim is one of a class that is vulnerable by reason of some common characteristic: *Drew v R* at [8]. See N Adams J's discussion of the cases in *Drew v R* at [75]–[78].

However, a finding that the victim was vulnerable in the more general sense of being under an impaired ability to avoid physical conflict with the offender or defend herself in the event of such conflict was well open on the evidence: *Drew v R* at [5], [8]. It was a circumstance of the offence, relevant to determining the appropriate sentence, that because of the victim's emotional and intimate attachment to the offender she was less likely than any other potential victim to avoid him or put herself out of harm's way: *Drew v R* at [7]. That individual vulnerability had, in practical terms, the same consequence for assessment of the objective seriousness of the offence: *Drew v R* at [8].

Domestic violence is addressed elsewhere in the publication as follows:

- **Purposes of sentencing** at **[2-240]** To prevent crime by deterring the offender and other persons from committing similar offences: s 3A(b)
- **Victims and victim impact statements** at **[12-850]** The relevance of the attitude of the victim — vengeance or forgiveness (Domestic violence)
- **Section 21A factors "in addition to" any Act or rule of law** at **[11-090]** Section 21A(2)(d) — the offender has a record of previous convictions (particularly if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences)
- **Particular offences**
  - **Break and enter offences** at **[17-050]** The standard non-parole period provisions (Domestic violence)
  - **Detain for advantage/kidnapping** at **[18-715]** Factors relevant to the seriousness of an offence (Detaining for advantage and domestic violence)
  - **Sexual assault** at **[20-775]** Factors which are *not* mitigating at sentence (The relevance of a prior relationship)
  - **Murder** at **[30-047]** Murders committed in the context of domestic violence
  - **Assault, wounding and related offences** at **[50-130]** Particular types of personal violence (Domestic violence)

[63-515] Apprehended violence orders

In *Browning v R* [2015] NSWCCA 147 at [5], the court affirmed Spigelman CJ's observations in *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512 at [20] concerning the objectives of the statutory scheme at the time which made provision for apprehended violence orders:

> The legislative scheme is directed to the protection of the community in a direct and immediate sense, rather than through mechanisms such as deterrence. Individuals can obtain protection against actual or threatened acts of personal violence, stalking

> intimidation and harassment. Apprehended Violence Orders constitute the primary means in this State of asserting the fundamental right to freedom from fear. The objects served by such orders are quite distinct from those that are served by civil adversarial proceedings or proceedings in which an arm of the State seeks to enforce the criminal law.

See the *Local Court Bench Book* for procedures with regard to apprehended violence orders from **[22-000]**ff.

[63-518] Impact of AVO breaches on sentencing

Section 14(1) *Crimes (Domestic and Personal Violence) Act* 2007 provides for the offence of contravening an apprehended violence order (AVO). Section 14(4) provides:

> Unless the court otherwise orders, a person who is convicted of an offence against subsection (1) must be sentenced to a term of imprisonment if the act constituting the offence was an act of violence against a person.

An offence committed in breach of an AVO is a significant source of aggravation: *Kennedy v R* [2008] NSWCCA 21 at [8]; *R v Macadam-Kellie* [2001] NSWCCA 170 at [37]–[38]. Such offences are not offences committed in breach of conditional liberty simpliciter; they breach a form of conditional liberty designed to protect the same victim from further attacks by the offender: *Cherry v R* [2017] NSWCCA 150 at [80]. There is a particular need to show there will be a heavy price to pay for indulging in domestic violence particularly when court orders have been issued to prohibit such violence, lest such orders are seen to be, and become, wholly futile: *Turnbull v R* [2019] NSWCCA 97 at [153].

It is also a significant aggravating factor under s 21A(2)(j) *Crimes (Sentencing Procedure) Act* 1999 if an offender commits offences whilst on conditional liberty for offences arising from breaches of an AVO order: *Jeffries v R* [2008] 185 NSWCCA 144 at [91]; *Browning v R* [2015] NSWCCA 147 at [8].

Offences committed in breach of an AVO and the offence of breaching an AVO, involve separate and distinct criminality. There is no duplicity in imposing distinct sentences for each offence: *Suksa-Ngacharoen v R* [2018] NSWCCA 142 at [131]. Breaches of an AVO should ordinarily be separately punished from an offence occurring at the same time. In *Suksa-Ngacharoen v R* at [132], when discussing the criminality inherent in a breach of an ADVO, Wilson J (Leeming JA and Bellew J agreeing) said:

> The criminality of breaching an ADVO rests in the complete disregard for an order of a court, conduct which has the practical effect of undermining the authority of the courts, and preventing the courts from extending effective protection to persons at risk of harm from another. The legislative intent of the scheme for apprehended domestic violence orders is to permit a court to restrain the conduct of an individual who poses a risk to a person with whom he or she is or was in a domestic relationship. If the authority of the courts in making these orders is simply ignored … the law and the courts are diminished, and the capacity for the courts to protect vulnerable individuals is impeded. Conduct which involves deliberate disobedience of a court order must be treated as serious, and should ordinarily be separately punished from any offence that occurs at the same time, always having regard to the requirements of the totality principle as set out in *Pearce v The Queen* (1989) 194 CLR 610.

[63-520] Stalking and intimidation

Section 13(1) *Crimes (Domestic and Personal Violence) Act* 2007 contains an offence of stalking or intimidating another person with the intention of causing the other person to fear physical or mental harm. Section 13(3) provides that a person intends to cause fear of physical or mental harm if he or she knows that the conduct is likely to cause fear in the other person. A person who attempts to commit such an offence is liable to the same penalty as if the person had committed the offence itself: s 13(5). The offence of intimidation is one of "specific intent" under s 428B *Crimes Act* 1900 and, therefore, an offender's intoxication can be considered for the purposes of determining criminal liability: *McIlwraith v R* [2017] NSWCCA 13 at [39]–[42]. However, an offender's intoxication at the time of the offence cannot be relied upon as a matter of mitigation at sentence: s 21A(5AA) *Crimes (Sentencing Procedure) Act*; see also *Cherry v R* at [81] in the context of self-induced intoxication because of drug use.

See **[11-335] Special rule for intoxication**.

[The next page is 32201]

Appeals

[70-000] Introduction

This chapter first discusses sentence appeals for matters dealt with on indictment and then appeals from the Local Court. A creature of statute, the precise nature of a sentence appeal depends on the language and context of the statutory provision(s): *Dinsdale v The Queen* (2000) 202 CLR 321 at [57]; *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573 at [8].

[70-020] Section 5(1)(c) severity appeals

Section 5(1)(c) *Criminal Appeal Act* 1912 provides that a person convicted on indictment may appeal against sentence to the Court of Criminal Appeal with leave.

Time limits and applications out of time

The provisions of the *Criminal Appeal Act* and the Criminal Appeal Rules (repealed but now see Supreme Court (Criminal Appeal) Rules 2021, with similar provisions) relating to time limits and applications out of time are explained in *Kentwell v The Queen* (2014) 252 CLR 601 at [11]–[13]. Section 10(1)(a) *Criminal Appeal Act* requires notice of intention to apply for leave to appeal to be given within 28 days from the date of sentence. If notice is not given by the defendant, the applicable period for a notice of appeal is three months after the sentence: r 3.5(2)(b) Supreme Court (Criminal Appeal) Rules 2021. A notice of appeal against a sentence under s 5D *Criminal Appeal Act* must be filed 28 days after the sentence: r 3.5(3). If a notice of appeal is filed after the time for filing has expired, the application for leave may only be made with the leave of the Court: r 3.5(5). The Court has a discretion to dispense with the rules in particular cases: r 1.4.

Section 10(2)(b) provides the court may, at any time, extend the time within which the notice under s 10(1)(a) is required to be given to the court or, if the rules of court so permit, dispense with the requirement for such a notice.

An application should not be approached by requiring the applicant to demonstrate that substantial injustice would be occasioned by the sentence: *Kentwell v The Queen* at [4], [30], [44]; *O'Grady v The Queen* (2014) 252 CLR 621 at [13]. In considering whether to grant an extension of time a court must consider what the interests of justice require in the particular case. The principle of finality does not provide a discrete reason for refusing to exercise the power to extend the time limit where the sentence is being served: *Kentwell v The Queen* at [32].

The prospect of success of the appeal is relevant. This involves considering the merits of an appeal. That issue is addressed by reference to s 6(3) *Criminal Appeal Act*: *Kentwell v The Queen* at [33]–[34]. As to the approach the court must take to s 6(3), see further below at **[70-040]**.

The courts have drawn a distinction between an order refusing leave to appeal and an order dismissing a severity appeal. In the former case, an applicant may return to the court and make subsequent applications. Where a subsequent application for leave raises issues determined by the court in a previous application, there may be a discretionary bar, but no jurisdictional bar to the application: *Lowe v R* [2015] NSWCCA 46 at [14].

[70-030] The ordinary precondition of establishing error

Severity appeals under s 5(1)(c) *Criminal Appeal Act* 1912 are not rehearings. It is not enough that the appeal court considers that had it been in the position of the judge, it would have taken a different course: *Lowndes v The Queen* (1999) 195 CLR 665 at [15]. Nor is an appeal the occasion for revising and reformulating the case presented below: *Zreika v R* [2012] NSWCCA 44 per Johnson J at [81]. The applicant must establish the sentencing judge made an error in the exercise of their discretion: *House v The King* (1936) 55 CLR 499 at 505. In *Markarian v The Queen* (2005) 228 CLR 357 at [25], Gleeson CJ, Gummow and Callinan JJ said:

> As with other discretionary judgments, the inquiry on an appeal against sentence is identified in the well-known passage in the joint reasons of Dixon, Evatt and McTiernan JJ in *House v The King* … itself an appeal against sentence. Thus is specific error shown? (Has there been some error of principle? Has the sentencer allowed extraneous or irrelevant matters to guide or affect the decision? Have the facts been mistaken? Has the sentencer not taken some material consideration into account?) Or if specific error is not shown, is the result embodied in the order unreasonable or plainly unjust? It is this last kind of error that is usually described, in an offender's appeal, as "manifest excess", or in a prosecution appeal, as "manifest inadequacy".

See also the explanation of specific error in *Kentwell v The Queen* (2014) 252 CLR 601 at [42].

Manifest inadequacy of sentence, like manifest excess, is a conclusion and intervention on either ground is not warranted simply because the result arrived at below is markedly different to other sentences imposed for other cases: *Hili v The Queen* (2010) 242 CLR 520 at [59], referring to *Dinsdale v The Queen* (2000) 202 CLR 321 at [6] and *Wong v The Queen* (2001) 207 CLR 584 at [58]. Intervention is only justified where the difference is such that the court concludes there must have been some misapplication of principle, even though where and how cannot be discerned from the reasons: *Hili v The Queen* at [59].

Failure to attribute sufficient weight to an issue

The failure of a judge to attribute sufficient weight to an issue at sentence is not a ground of appeal that falls within the types of error in *House v The King* (1936) 55 CLR 499: *Bugmy v The Queen* (2013) 249 CLR 571 at [22], [53]; *CMB v Attorney General for NSW* (2015) 256 CLR 346 at [48].

Such a ground of appeal has the inherent problem of implicitly acknowledging that some weight has been placed on the issue: *DF v R* [2012] NSWCCA 171at [77]; *Hanania v R* [2012] NSWCCA 220 at [33]. The only means to test an assertion of that kind is to examine the sentence: *Hanania v R* at [33].

Failure of defence to refer to matters at first instance later relied upon

It will be rare for an applicant to succeed in a severity appeal where appellate counsel relies upon a subjective matter open on the evidence but barely raised before the sentencing judge: *Stewart v R* [2012] NSWCCA 183 at [56]. This is because appeals are not an opportunity to reformulate the case below: *Stewart v R* at [56], citing *Zreika v R* [2012] NSWCCA 44.

Errors of fact and fact finding on appeal

Factual findings are binding on the appellate court unless they come within the established principles of intervention: *AB v R* [2014] NSWCCA 339 at [44], [50],

[59]; *R v Kyriakou* (unrep, 6/8/87, NSWCCA); *Skinner v The King* (1913) 16 CLR 336 at 339–340; *Lay v R* [2014] NSWCCA 310 at [52]. These principles require that error be shown before the CCA will interfere with a sentence: *AB v R* at [52], [59]; *R v O'Donoghue* (unrep, 22/7/88, NSWCCA); *Kentwell v The Queen* (2014) 252 CLR 601 at [35]; *Hopley v R* [2008] NSWCCA 105 at [28]. It is necessary to identify specific error within the terms of *House v The King* (1936) 55 CLR 499 as a ground of appeal: *Carroll v The Queen* (2009) 83 ALJR 579 at [8], [24]; *Camm v R* [2009] NSWCCA 141 at [68]; *Cao v R* [2010] NSWCCA 109 at [48].

It is incumbent on the applicant to show that the factual finding was not open: *Turnbull v Chief Executive of the Office of Environment and Heritage* [2015] NSWCCA 278 at [26], [32]. A factual error may be demonstrated if there is no evidence to support a particular factual finding, or if the evidence is all one way, or if the judge has misdirected himself or herself. Error can be identified, either in the approach to the fact finding exercise, or in the principles applied: *AB v R* at [59]. The court cannot review the finding of fact made and substitute its own findings: *R v O'Donoghue* at 401.

In *Clarke v R* [2015] NSWCCA 232 at [32]–[36] and *Hordern v R* [2019] NSWCCA 138 at [6]–[20], Basten JA (Hamill J agreeing in each case) disapproved of *R v O'Donoghue* and opined that it was enough if the judge had made a mistake with respect to a factual finding that was material to the sentence. However that view has failed to receive support in subsequent judgments of the court: see *Yin v R* [2019] NSWCCA 217 at [27]; *Gibson v R* [2019] NSWCCA 221 at [2]–[6]; *TH v R* [2019] NSWCCA 184 at [1]; [22]–[23].

If the factual findings of the sentencing judge are not challenged on appeal, the appeal court must consider the appeal having regard only to those factual findings by the judge: *R v MD* [2005] NSWCCA 342 at [62]; *R v Merritt* (2004) 59 NSWLR 557 at [61]; *Carroll v The Queen* (2009) 83 ALJR 579 at [8], [24].

There is a distinction between a sentencing judge's assessment of facts and what they are capable of proving, and factual findings which the CCA might make were it to come to its own view of agreed facts: *Lay v R* at [51]; *Aoun v R* [2011] NSWCCA 284. Where a factual error has been made in the *House v The King* sense, the CCA does not assess whether, and to what extent, the error influenced the outcome. The sentencing discretion having miscarried, it is the duty of the CCA to exercise the sentencing discretion afresh: *Lay v R* at [53] applying *Kentwell v The Queen* at [40]–[43].

[70-040] Section 6(3) — some other sentence warranted in law

Section 6(3) *Criminal Appeal Act* 1912 provides:

> On an appeal under section 5(1) against a sentence, the court, if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.

It is only open to the CCA to quash the sentences if it is of the opinion stipulated in s 6(3) as one "that some other sentence ... is warranted in law and should have been passed": *Elliott v The Queen* (2007) 234 CLR 38 at [34].

The phrase "is warranted in law" assumes no change in the relevant law between the imposition of the sentence and the determination of the appeal against it: *Elliott*

v The Queen at [36]. For proceedings commenced on or after 18 October 2022, s 21B(4) of the *Crimes (Sentencing Procedure) Act* 1999 provides that, when varying or substituting a sentence, a court must do so in accordance with the sentencing patterns and practices at the time of the original sentencing.

Once a specific error of the kind identified in *House v The King* (1936) 55 CLR 499 has been established, it is the duty of the CCA to exercise the discretion afresh taking into account the purposes of sentencing and any other Act or rule of law: *Kentwell v The Queen* (2014) 252 CLR 601 at [42] citing Spigelman CJ in *Baxter v R* [2007] NSWCCA 237 at [19] with approval. The task does not involve assessing the impact of the error on the sentence or merely adjusting the sentence to allow for the error identified: *Baxter v R*. It is not necessary to determine whether the error had an actual effect on the sentence, only that it had the capacity to do so: *Newman (a pseudonym) v R* [2019] NSWCCA 157 at [11]–[13]; *Tomlinson v R* [2022] NSWCCA 16 at [200]. In this context use of the term "material" to distinguish between errors impacting on the sentencing discretion and those that do not should be avoided: *Newman (a pseudonym) v R* at [11]; *Ibrahim v R* [2022] NSWCCA 134 at [24].

The court must exercise its independent discretion and determine whether the sentence is appropriate for the offender and the offence: *Kentwell v The Queen* at [42]; *Thammavongsa v R* [2015] NSWCCA 107 at [4], [44]. Any comparison of the proposed re-sentence with the original sentence is only made at the end of the process required under s 6(3) to check that the sentence arrived at by the appellate court does not exceed the original sentence: *Thammavongsa v R* at [5]–[6].

Not all errors vitiate the exercise of the sentencing discretion, for example, setting the term of the sentence first where the law requires the non-parole period to be set first: *Kentwell v The Queen* at [42].

In *Lehn v R* (2016) 93 NSWLR 205, the court convened a five-judge bench to consider whether, if there is an error affecting only a discrete component of the sentencing exercise, the court is required under s 6(3) to re-exercise the sentencing discretion generally, or, only in respect of the discrete component affected by the error. The court held that if the sentencing judge's discretion miscarries for a discrete component of the sentencing process it is necessary for the CCA to re-exercise the sentencing discretion afresh under s 6(3): per Bathurst CJ at [60] with other members of the court agreeing at [118], [125], [128], [141]. Section 6(3) requires the court to form an opinion as to whether some other sentence is warranted in law. As a matter of language, s 6(3) does not provide that, if a discrete error is found, the sentence can be adjusted to take account of that error: *Lehn v R* at [68]. The High Court in *Kentwell v The Queen* at [42] held that the CCA's task on finding error causing a miscarriage of the discretion was not to assess whether, and to what degree, the error influenced the outcome, but to re-exercise the sentencing discretion afresh and form its own view of the appropriate sentence but not necessarily re-sentence: *Lehn v R* at [77] quoting *Kentwell v The Queen*. Those remarks are equally appropriate where the discretion miscarried in respect of a discrete component of the sentencing process: *Lehn v R* at [78].

Where error may not require re-exercise of sentencing discretion

There will be occasions when, notwithstanding error, it is not necessary to re-exercise the sentencing discretion: *Lehn v R* (2016) 93 NSWLR 205 at [72]. For example, where

an arithmetical error occurs in calculating commencement and end dates of a sentence, which was arrived at in the proper exercise of discretion, or where there is error in the calculation of the effect of a discount for a plea or assistance to the authorities, where the extent of the discount was reached in accordance with proper principles: *Lehn v R* at [72]. In *Greenyer v R* [2016] NSWCCA 272, the court held that the judge's error (a mathematical slip in calculating the backdate) did not require a full reconsideration of the sentence: at [34], [44]. In that case, both parties agreed to the confined approach adopted by the court. A similar arithmetical error was found to affect the non-parole period in *Li v R (Cth)* [2021] NSWCCA 100 and was corrected without the court proceeding to re-sentence: at [58]; [66]; [71].

The sentencing error in *Lehn v R* of allowing a utilitarian discount of 20% for a guilty plea entered in the Local Court (instead of 25% and without indicating an intention to grant a lesser discount) was not related to only a discrete component of the sentencing discretion: at [64]–[65], [118], [120], [129], [141]. The approach taken by the judge directly related to the sentencing purpose of ensuring the penalty reflected the objective gravity of the offence: at [64]. The Crown conceded the judge's approach denied the applicant procedural fairness; such an error entitles the aggrieved party to a rehearing: at [65], [118], [128], [140].

Is a lesser sentence warranted

The CCA may conclude, taking into account all relevant matters, including evidence of events that have occurred since the sentence hearing, that a lesser sentence is the appropriate sentence for the offender and the offence; this is a conclusion that a lesser sentence is warranted in law: *Kentwell v The Queen* at [43]. If the court concludes either that the same, or a greater, sentence should be imposed, it is not required to re-sentence: *Kentwell v The Queen* at [43]. Only in rare cases could the court substitute a harsher sentence. Convention requires the court to inform the applicant of its proposed course to provide an opportunity for the applicant to abandon the appeal: *Kentwell v The Queen* at [43] citing *Neal v The Queen* (1982) 149 CLR 305 at 308.

The practice of the Crown relying in an appeal on the bare submission that "no other sentence is warranted in law" should cease as it lacks clarity, suggesting that the original sentence is "within range" and the appeal should be dismissed for that reason: *Thammavongsa v R* at [3], [16].

Reception of evidence following finding of error

As a general rule, the appellate court's assessment of whether some other sentence is warranted in law under s 6(3) is made on the material before the sentencing court and any relevant evidence of the offender's progress towards rehabilitation in the period since the sentencing hearing: *Betts v The Queen* (2016) 258 CLR 420 at [2], [11]; *Kentwell v The Queen* (2014) 252 CLR 601 at [43]. The court takes account of new evidence of events that have occurred since the sentence hearing: *Kentwell v The Queen* at [43] citing *Douar v R* [2005] NSWCCA 455 at [124] and *Baxter v R* at [19] with approval. In *Douar v R* at [126], the court took into account the applicant's provision of assistance to authorities after sentence in holding that a lesser sentence was warranted. In the ordinary case, the court will not receive evidence that could have been placed before the sentencing court: *R v Deng* [2007] NSWCCA 216 at [43]; *R v Fordham* (unrep, 2/12/97, NSWCCA).

The appellant cannot run a "new and different case": *Betts v The Queen* at [2]. It is not the case that once error is demonstrated, the appellate court may receive *any* evidence capable of bearing on its determination of the appropriate sentence: *Betts v The Queen* at [8], [12]–[13] approving *R v Deng* [2007] NSWCCA 216 at [28]. The conduct of an offender's case at the sentence hearing involves forensic choices, such as whether facts are to be contested. That a sentencing judge's discretion is vitiated by *House v The King* (1936) 55 CLR 499 error does not, without more, provide a reason for not holding the offender to those forensic choices: *Betts v The Queen* at [14]. Refusing to allow an appellant to run a new and different case on the question of re-sentence does not cause justice to miscarry: *Betts v The Queen* at [14].

In *Betts v The Queen*, there was no error in refusing to take new psychiatric evidence as to the cause of the offences into account when considering whether a lesser sentence was warranted in law under s 6(3). The appellant had made a forensic choice to accept responsibility for the offences and the psychiatric opinion was based on a history which departed from agreed facts: at [57]–[59].

The power to remit under ss 12(2) and 6(3)

Section 12(2) *Criminal Appeal Act* 1912 provides: "The Court of Criminal Appeal may remit a matter or issue to a court of trial for determination and may, in doing so, give any directions subject to which the determination is to be made".

The question of whether the appellate court is empowered to remit the determination of a sentence appeal under the supplemental powers conferred by s 12(1) is controversial: *Betts v The Queen* at [17]. The issue was unnecessary to determine in *Betts v The Queen* at [7]. However, the extrinsic material for the amending Act which inserted s 12(2) does not provide support for the conclusion that s 12(2) qualifies the re-sentencing obligation imposed by s 6(3): *Betts v The Queen* at [17].

The utility of the remittal power is evident where the sentence hearing has been tainted by procedural irregularity as in *O'Neil-Shaw v R* [2010] NSWCCA 42: *Betts v The Queen* at [19].

It was held in *O'Neil-Shaw v R* at [56] that s 6(3) should not be utilised to determine an appeal where it emerges that the resolution of a factual dispute at first instance was tainted by a procedural irregularity and a denial of procedural fairness. In such a case, the appellate court is not in a position to determine the matter itself: *O'Neil-Shaw v R* at [32]. Remittal under s 12(2) *Criminal Appeal Act* is the more appropriate course since this permits a judge to determine the question of sentence upon the evidence adduced in the second hearing: *O'Neil-Shaw v R* at [57].

The meaning of "sentence" in s 6(3)

An aggregate sentence imposed under s 53A *Crimes (Sentencing Procedure) Act* 1999 is a "sentence" within s 6(3): *JM v R* [2014] NSWCCA 297 at [40]; see also **[7-508] Appellate review of an aggregate sentence**. The appeal is against the aggregate sentence, not the individual indicative sentences: see, for example, *R v Kennedy* [2019] NSWCCA 242 at [78]; *DS v R* [2017] NSWCCA 37 at [63]–[64]. However, in determining whether an aggregate sentence is manifestly excessive, regard may be had to the indicative sentences: *JM v R* at [40]; *Gibson v R* [2019] NSWCCA 221 at [88].

In the past there was an issue about whether the word "sentence" in s 6(3) refers only to a specific sentence for a particular offence and did not include a reference to an

overall effective sentence: see *R v Bottin* [2005] NSWCCA 254 (as to the latter) and *Arnaout v R* [2008] NSWCCA 278 at [21] (as to the former). That debate was noted in *Nahlous v R* (2010) 77 NSWLR 463 at [12] and by Hodgson JA in *McMahon v R* [2011] NSWCCA 147 at [2]–[4].

[70-060] Additional, fresh and new evidence received to avoid miscarriage of justice

The Court of Criminal Appeal has flexibility to receive new evidence where it is necessary to do so in order to avoid a miscarriage of justice: *Betts v The Queen* (2016) 258 CLR 420 at [2], [10]. More than one approach has been adopted (as explained below). *Barnes v R* [2022] NSWCCA 140 contains a summary of the relevant principles at [24]–[34].

The conventional approach is for the court to ask whether the additional evidence is "fresh", that is, evidence which the applicant was unaware of and could not have obtained with reasonable diligence: *R v Goodwin* (unrep, 3/12/90, NSWCCA); *R v Abou-Chabake* [2004] NSWCCA 356 at [63]. Fresh evidence is to be contrasted with new evidence which is not received. It is evidence that was available at the time, but not used and could have been obtained with reasonable diligence: *Khoury v R* [2011] NSWCCA 118 at [107]; *R v Many* (unrep, 11/12/90, NSWCCA); *Barnes v R* at [28]. Even if evidence is fresh, it will not be received by the court unless it affects the outcome of the case: *R v Fordham* (unrep, 2/12/97, NSWCCA) at 378. For example, the evidence in *Bajouri v R* [2016] NSWCCA 20 of images on Facebook showing the victim doing activities such as jet skiing 10 months after the assault offence and 18 months before his victim impact statement could not qualify as fresh evidence. It did not contradict or cast doubt on the contents of the victim impact statement: at [44], [46], [51]. "New" evidence is evidence that was available but not used, or was discoverable with the exercise of reasonable diligence at the time of sentence: *Khoury v R* at [107]; *Barnes v R* at [28].

Evidence of factual circumstances which existed at sentence

The Court of Criminal Appeal has received additional evidence of facts or circumstances which existed at the time of sentencing, even if not known, or imperfectly understood, at that time: *Khoury v R* [2011] NSWCCA 118 at [113]. That is, circumstances existed which were known at sentence but their significance was not appreciated: *Khoury v R* at [114]–[115]. See the examples referred to in *Springer v R* [2007] NSWCCA 289 at [3]. The rationale for the receipt of the additional evidence is that the sentencing court proceeded on an erroneous view of the facts before it: *Khoury v R* at [113].

The decision to admit additional evidence is discretionary and caution must be exercised: *Khoury v R* at [117]; *Wright v R* [2016] NSWCCA 122 at [19], [71]. The applicant must establish a proper basis for the admission of the evidence: *Khoury v R* at [117]. Relevant factors to be taken into account according to Simpson J in *Khoury v R* at [121] include:

> … the circumstances of, and any explanation for, the non-production of the evidence — a deliberate decision on the part either of the applicant, or his or her legal representatives, ignorance in the applicant of the significance of the evidence,

> resulting in its not being communicated to the legal representatives, incompetent legal representation [and] … the potential significance of the evidence to have affected the outcome at first instance …

Two categories of case have emerged:

- medical evidence cases: *Khoury v R* at [115]
- assistance to authorities cases: *R v Many* (unrep, 11/12/90, NSWCCA); *ZZ v R* [2019] NSWCCA 286.

Medical evidence cases

The general principle that parties will not normally be able to produce fresh or new evidence on appeal reflects the importance of finality: *Cornwell v R* [2015] NSWCCA 269 at [39]. However, evidence as to a medical condition may form the basis for an exception to this principle where it is in the interests of justice: *Cornwell v R* at [39], [57], [59]; *Turkmani v R* [2014] NSWCCA 186; *Khoury v R* [2011] NSWCCA 118 at [115]; *Dudgeon v R* [2014] NSWCCA 301.

In *Turkmani v R*, the court at [66] identified three categories of case where fresh evidence is sought to be adduced in relation to the health of an offender. First, where the offender was only diagnosed as suffering from a condition after sentence but was affected at the time of sentence; secondly where, although the symptoms of a condition may have been present, their significance was not appreciated and; thirdly where a person was sentenced on the expectation that they would receive a particular level of medical care in custody but did not. See the discussion of *Turkmani v R* in *Wright v R* [2014] NSWCCA 186 at [73].

The discretion to admit fresh evidence of an offender's medical condition was permitted in *Cornwell v R* on the basis that he was clearly suffering Huntington's disease at the time of sentencing which was likely to make custody more burdensome for him: at [59], [64]. The evidence established that the pre-sentence instructions given by the applicant to his legal representatives — that he did not wish to undergo testing for the disease — were justified by psychological factors including the fear of a positive diagnosis following his experience of family members with the same disease: at [58].

In *Wright v R*, the applicant was sentenced on the basis he was in poor health and of advanced age. Following sentence, he was diagnosed with Alzheimer's disease. Although the evidence qualified as fresh evidence, the court exercised its discretion not to admit it because the evidence would not have made a significant difference to the sentence imposed by the judge: at [1], [20], [84], [98], [100]. The sentence already represented a lenient outcome: at [86].

Evidence the applicant had developed terminal liver cancer was admitted as fresh evidence in *Lissock v R* [2019] NSWCCA 282. The Crown accepted the condition was present to some degree at sentence and its significance not fully appreciated until much later. The applicant was re-sentenced on the basis his time in custody would be more difficult physically and psychologically than if he were completely well: at [92]–[94], [113]–[114].

As to psychological conditions, there is an unresolved issue as to whether the additional evidence is the psychological condition existing at the time or the later diagnosis by the expert in a report prepared after sentence proceedings: *Khoury v R*

at [118], quoting Basten JA in *Einfeld v R* [2010] NSWCCA 87 at [45], [50]. A psychological report prepared after sentence is not necessarily fresh or new evidence because it was prepared after sentence: *Khoury v R* at [120], but see *R v Fordham* at 377–378.

Assistance to authorities

In the particular circumstances of *ZZ v R* [2019] NSWCCA 286, the court concluded that information provided by the applicant in an interview with police upon her arrest which, after the sentence proceedings, resulted in arrests overseas, qualified as fresh evidence and resulted in a reduction of her sentence on appeal: at [29]–[30], [33]–[34]. See also *Agnew (a pseudonym) v R* [2018] NSWCCA 128 at [38]–[42].

Evidence of facts that have arisen entirely after sentence

The past tense used in s 6(3) "some other sentence, whether more or less severe is warranted in law and should have been passed" has the effect according to Simpson J in *Khoury v R* [2011] NSWCCA 118 at [110] that:

> … evidence of events or circumstances or facts that have arisen *entirely* since sentencing cannot be taken into account, no matter how compelling they may be. If the facts did not exist at the time of sentencing, it cannot have been an error for the sentencing judge not to have taken them into account [emphasis added].

See also *Agnew (a pseudonym) v R* [2018] NSWCCA 128 at [38]. While there is some flexibility with respect to the application of this principle (see *Agnew v R* at [39]–[40] and the discussion below) the view, for example, that a post-sentence reduction in a custodial sentence for assistance to authorities can be achieved by means of an appeal where no error or miscarriage has been found should not be encouraged: *Agnew v R* at [40]–[42].

Evidence that an applicant assisted authorities post sentence: *JM v R* [2008] NSWCCA 254, or had a medical condition that did not exist at sentence, has not been received by the court: *Khoury v R* at [111]–[112].

[70-065] Miscarriage of justice arising from legal representation

The general rule as set out in *R v Birks* (1990) 19 NSWLR 677 at 683 and 685 that "a party is bound by the conduct of his or her counsel, and counsel have a wide discretion as to the manner in which proceedings are conducted" applies to sentencing proceedings: *Khoury v R* [2011] NSWCCA 118 at [104]; *Tran v R* [2014] NSWCCA 32 at [12]; *CL v R* [2014] NSWCCA 196. However, fresh evidence has been admitted by the Court of Criminal Appeal without error being established where a miscarriage of justice occurred because the applicant was incompetently or carelessly represented at sentence: *R v Fordham* at 377–378, citing *R v Abbott* (unrep, 12/12/85, NSWCCA); *Munro v R* [2006] NSWCCA 350 at [23]–[24].

Where evidence was available to the defence at the time of sentencing, a miscarriage of justice will rarely result simply from the fact that the evidence was not put before the sentencing judge, even if the evidence may have had an impact upon the sentence passed: *R v Fordham* at 377.

Where deliberate tactical decisions are made on the part of the accused as to the evidence that should or should not be called, and the issues that should or should not be

pursued, there is nothing unfair, and there will be no miscarriage, in holding an accused to such decisions, even though it is conceivable that other decisions or something else may have worked better: *Ratten v R* (1974) 131 CLR 510 at 517; *R v Diab* [2005] NSWCCA 64 at [19].

In *Khoury v R*, counsel said it did not occur to him to call psychiatric evidence concerning the applicant's low intellectual functioning. Evidence was received on appeal because of its significance in the case: see the explanation of *Khoury v R* in *Grant v R* [2014] NSWCCA 67 at [57]. Conversely, in *Grant v R*, the court refused to admit two psychological reports prepared many years after sentence proceedings: *Grant v R* at [58].

A miscarriage of justice was found in *Grant v R* where the applicant pleaded guilty to manslaughter on the basis of excessive self-defence because the legal representative: failed to explain to the client the various states of mind within the offence of manslaughter; failed to obtain clear instructions from the client on that issue; and, informed the court what he thought was his client's intention without having obtained clear instructions on the issue: at [71], [77].

[70-070] Crown appeals for matters dealt with on indictment

Section 5D(1) *Criminal Appeal Act* 1912 provides:

> The Attorney-General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any sentence pronounced by the court of trial in any proceedings to which the Crown was a party and the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as to the said court may seem proper.

Although the Attorney General (NSW) has a statutory right to appeal against sentence, it has only been exercised once since the establishment of the office of an independent Director of Public Prosecutions (DPP) by the *Director of Public Prosecutions Act* 1986 (NSW). See *CMB v Attorney General for NSW* (2015) 256 CLR 346. The decision to institute a Crown appeal is made by the DPP, although the Executive government sometimes requests that the DPP consider an appeal on behalf of the Crown to correct a sentence perceived to be inadequate.

Time limits to appeal and specifying grounds

Section 10(1) *Criminal Appeal Act* (which provides that a notice of intention to appeal must be filed 28 days from the date of sentence), does not apply to Crown appeals: *R v Ohar* (2004) 59 NSWLR 596. However, under the rules, the period for filing a Crown appeal against sentence under s 5D *Criminal Appeal Act* is 28 days after the sentence: r 3.5(4), Supreme Court (Criminal Appeal) Rules 2021. If a notice of appeal is filed after this period, the court must grant leave: r 3.5(5). Delay in bringing an appeal is relevant to the court's exercise of its discretion to intervene: *Green v The Queen* (2011) 244 CLR 462 at [43].

A notice of a Crown appeal (as filed) must be served on the respondent, the Legal Aid Commission and the last known Australian legal practitioner representing the respondent (r 3.7(1)) and must be personally served on the respondent if they are not represented (r 3.7(2)).

While not specifically addressed in the rules, it appears clear from the approved Notice of Appeal and accompanying Annexure A (available on the Supreme Court website) that documents setting out all grounds relied on in the appeal and written submissions addressing each ground are to be attached to the relevant notice of appeal: cf *R v JW* (2010) 77 NSWLR 7 at [33] .

At some stage a formal document identifying the grounds should be brought into existence in a Crown appeal: *R v JW* (2010) 77 NSWLR 7 at [33], [35]. The court acknowledged in *R v JW* at [33] that it is a desirable "rule of practice", within the meaning of r 76, that a Crown appeal should identify grounds of appeal in the notice of appeal, but that practice does not require grounds to be identified when the notice is first filed and failure to do so does not render the appeal incompetent: *R v JW* at [33]. The High Court decision of *Carroll v The Queen* (2009) 83 ALJR 579 does not imply a contrary position: *R v JW* at [35].

[70-080] Matters influencing decision of the DPP to appeal

The NSW Prosecution Guideline Chapter 10: DPP appeals, at [10.2], states in part that the DPP will only lodge an appeal if satisfied that:

1. all applicable statutory criteria are established
2. there is a reasonable prospect that the appeal will succeed
3. it is in the public interest.

The Guideline states, at [10.4] Appeals against sentence, that the primary purpose of DPP sentence appeals to the Court of Criminal Appeal is to allow the court to provide governance and guidance to sentencing courts. The Guideline recognises that such appeals are, and ought to be, rare. The Guideline states they should be brought in appropriate cases:

1. to enable the courts to establish and maintain adequate standards of punishment for crime
2. to enable idiosyncratic approaches to be corrected
3. to correct sentences that are so disproportionate to the seriousness of the crime as to lead to a loss of confidence in the administration of criminal justice.

The *Prosecution policy of the Commonwealth: guidelines for the making of decisions in the prosecution process* (issued by the CDPP in July 2021) sets out the Director's policy in relation to Commonwealth prosecution appeals against sentence. It can be accessed from "Prosecution Process" on the CDPP website.

Guideline 6.35 of the Commonwealth prosecution policy states that the prosecution right to appeal against sentence "should be exercised with appropriate restraint" and "consideration is to be given as to whether there is a reasonable prospect that the appeal will be successful". Guideline 6.36 further states that an appeal against sentence should be instituted promptly, even where no time limit is imposed by the relevant legislation.

[70-090] Purpose and limitations of Crown appeals

The primary purpose of a Crown appeal is to lay down principles for the governance and guidance of courts with the duty of sentencing convicted persons: *Green v The Queen* (2011) 244 CLR 462 per French CJ, Crennan and Kiefel JJ at [1], [36], quoting

Barwick CJ in *Griffith v The Queen* (1977) 137 CLR 293 at 310. See also *R v DH* [2014] NSWCCA 326 at [19]; *R v Tuala* [2015] NSWCCA 8 at [98]. Their Honours in *Green v The Queen* continued at [36]:

> That is a limiting purpose. It does not extend to the general correction of errors made by sentencing judges. It provides a framework within which to assess the significance of factors relevant to the exercise of the discretion.

The High Court affirmed the above passage in *CMB v Attorney General for NSW* (2015) 256 CLR 346 at [55].

The purpose of Crown appeals extends to doing what is necessary to avoid manifest inadequacy or inconsistency in sentencing: *Lacey v Attorney General of Queensland* (2011) 242 CLR 573 at [16]; *Everett v The Queen* (1994) 181 CLR 295 at 300; *Dinsdale v The Queen* (2000) 202 CLR 321 at [61]–[62].

The two hurdles in Crown appeals

In a Crown appeal against sentence, the Crown is required to surmount two hurdles: firstly, it must identify a *House v The King* [(1936) 55 CLR 499 at 505] error in the sentencing judge's discretionary decision; and secondly, it must negate any reason why the residual discretion of the CCA not to interfere should be exercised: *CMB v Attorney General for NSW* at [54] citing *Everett v The Queen* (1994) 181 CLR 295 at 299–300 and *R v Hernando* [2002] NSWCCA 489 per Heydon JA at [12] with approval. The discretion is residual only in that its exercise does not fall to be considered unless *House v The King* error is established: *CMB v Attorney General for NSW* at [33], [54]. Once the discretion is enlivened, it remains incumbent on the Crown as the appellant under s 5D to demonstrate that the discretion should be exercised: *CMB v Attorney General for NSW* at [33], [54].

Error and manifest inadequacy

The court may only interfere where error, either latent or patent, is established: *Dinsdale v The Queen* at [61]; *Wong and Leung v The Queen* (2001) 207 CLR 584 at [58], [109]. The bases of intervention in *House v The King* (1936) 55 CLR 499 at 505 are not engaged by grounds of appeal which assert that the judge erred by (a) failing to properly determine the objective seriousness of the offence, or (b) failing to properly acknowledge the victim was in the lawful performance of his duties, or (c) by giving excessive weight to an offender's subjective case to reduce the sentence: *Bugmy v The Queen* (2013) 249 CLR 571 at [22], [53]; *R v Tuala* [2015] NSWCCA 8 at [44]. These are just "particulars of the ground that the sentence was manifestly inadequate": *Bugmy v The Queen* at [22], [53].

Manifest inadequacy of a sentence is shown by a consideration of all matters relevant to fixing a sentence and, by its nature, does not allow lengthy exposition. Reference to the circumstances of the offending and the personal circumstances of an offender, may sufficiently reveal the bases for concluding that a sentence is manifestly inadequate: *Hili v The Queen* (2010) 242 CLR 520 at [59]–[61].

As to the application of the parity principle in Crown appeals see [10-850].

Assessment of objective seriousness

It is open to an appeal court in a Crown appeal to form a different view from the sentencing judge as to the objective seriousness of an offence where the (only)

House v The King error asserted is that the sentence is "plainly unjust": *Carroll v The Queen* (2009) 83 ALJR 579 at [24]. However, in reaching its conclusion, the appeal court cannot discard the sentencing judge's factual findings where the findings are not challenged: *Carroll v The Queen* at [24]. In *Decision Restricted* [2014] NSWCCA 116 at [79]–[89], Simpson J expressed reservations about the authority of *Mulato v R* [2006] NSWCCA 282 in light of the approach in *Carroll v The Queen* at [24] described above: *Sabongi v R* [2015] NSWCCA 25 at [70]. Spigelman CJ had said in *Mulato v R*:

> Characterisation of the degree of objective seriousness of an offence is classically within the role of the sentencing judge in performing the task of finding facts and drawing inferences from those facts. This Court is very slow to determine such matters for itself …

Mulato v R was applied in *Stoeski v R* [2014] NSWCCA 161 at [46]. A subsequent application for special leave to appeal to the High Court, on the basis her Honour's statement at [46] was wrong in principle, was refused: *Stoeski v The Queen* [2015] HCA Trans 19. The court in *Sabongi v R* at [72] held, after reference to *Stoeski v R* [2014] NSWCCA 161 at [46] that: "… the observations of Spigelman CJ and Simpson J in *Mulato* should be applied in New South Wales".

The court in *Ramos v R* [2015] NSWCCA 313 held that notwithstanding what the High Court said in *Carroll v The Queen* at [24] — that "it was open to the Court of Criminal Appeal to form a view different from the primary judge about where, on an objective scale of offending, the appellant's conduct stood" — neither *Carroll v The Queen* nor *Mulato v R* represent any departure from the principles laid down in *House v The King* (1936) 55 CLR 499: per Basten JA at [41]; Campbell J agreeing at [72]. The relevant question is whether the assessment of the objective seriousness of the offending was outside the range properly available to the sentencing judge: *Ramos v R* at [41].

See earlier discussion under **Errors of fact and fact finding on appeal** in [70-030].

Specific error alone is not enough to justify interference in a Crown appeal; the Crown must also demonstrate that the sentence is manifestly inadequate: *R v Janceski* [2005] NSWCCA 288 at [25]. The court must make an express finding that the sentence imposed at first instance is manifestly inadequate and the power to substitute the sentence is not enlivened by a finding that the court would have attributed less weight to some factors and more to others: *Bugmy v The Queen* at [24]; *R v Tuala* at [44]. The court must be satisfied that the discretion miscarried, resulting in the judge imposing a sentence which was "below the range of sentences that could be justly imposed for the offence consistently with sentencing standards": *Bugmy v The Queen* at [24], [55]. If that is the case, the court has to then consider whether the Crown appeal "should nonetheless be dismissed in the exercise of the residual discretion": at [24].

As to the residual discretion see further below at [70-100].

Aggregate sentences

Section 5D *Criminal Appeal Act* permits the Crown to appeal "against any sentence pronounced". The Crown cannot appeal an indicative sentence (the sentence that would have been imposed for an individual offence under s 53A(2)(b) *Crimes (Sentencing Procedure) Act*) because it is neither pronounced nor imposed: *R v Rae* [2013] NSWCCA 9 at [32]. Where an aggregate sentence is imposed only one sentence is

pronounced, but the appellate court can consider submissions as to the inadequacy or otherwise of an indicative sentence in determining whether an aggregate sentence is inadequate: *R v Rae* at [32]–[33].

Double jeopardy principle

The *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act* 2009 abolished the principle of double jeopardy in Crown appeals on sentence. A new s 68A entitled "Double jeopardy not to be taken into account in prosecution" was inserted into the *Crimes (Appeal and Review) Act* 2001. It provides:

> (1) An appeal court must not:
>
> (a) dismiss a prosecution appeal against sentence, or
>
> (b) impose a less severe sentence on any such appeal than the court would otherwise consider appropriate,
>
> because of any element of double jeopardy involved in the respondent being sentenced again.
>
> (2) This section extends to an appeal under the *Criminal Appeal Act* 1912 and accordingly a reference in this section to an appeal court includes a reference to the Court of Criminal Appeal.

The terms of s 68A(1), "[an] appeal court", and s 68A(2), "extends to an appeal under the *Criminal Appeal Act* 1912", on their face appear also to apply to Crown appeals from the Local Court to the District Court.

The expression "double jeopardy" in s 68A is limited to "the element of distress and anxiety which a respondent suffers from being exposed to the possibility of a more severe sentence": *R v JW* (2010) 77 NSWLR 7 at [54]. Chief Justice Spigelman said at [141] (with support of other members of the Bench at [205] and [209]):

> (i) The words "double jeopardy" in s 68A refer to the circumstance that an offender is, subject to the identification of error on the part of the sentencing judge, liable to be sentenced twice.
>
> (ii) Section 68A removes from consideration on the part of the Court of Criminal Appeal the element of distress and anxiety to which all respondents to a Crown appeal are presumed to be subject.
>
> (iii) Section 68A prevents the appellate court exercising its discretion not to intervene on the basis of such distress and anxiety.
>
> (iv) Section 68A also prevents the appellate court from reducing the sentence which it otherwise believes to be appropriate on the basis of such distress and anxiety.
>
> (v) Section 68A prevents the Court from having regard to the frequency of Crown appeals as a sentencing principle applicable to an individual case by taking either step referred to in (iii) or (iv), or otherwise.

Application of s 68A to Commonwealth Crown appeals

The High Court held in *Bui v DPP (Cth)* (2012) 244 CLR 638 that ss 289–290 *Criminal Procedure Act* 2009 (Vic) (which are materially similar double jeopardy provisions to s 68A) do not apply to Crown appeals against sentence for a Commonwealth offence. The court made explicit reference to the NSW decision of *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 in deciding the issue. See also *DPP (Cth) v Afiouny* [2014] NSWCCA 176 at [75]. Section 80 *Judiciary Act* 1903 (Cth), which enables State courts

to exercise federal jurisdiction, allows the common law to apply where it has not been modified by State legislation and so far as the laws of the Commonwealth are not applicable or their provisions insufficient: *Bui* at [27]. The High Court held that no question of picking up the Victorian provisions arose because the issue can be resolved by reference to s 16A *Crimes Act* 1914 (Cth) itself. In short, there is "no gap" in the Commonwealth laws: *Bui* at [29]. Section 16A does not accommodate the common law principle of "presumed anxiety": *Bui* at [19]. The same reasoning applies to s 68A.

Although presumed anxiety cannot be read into the text of s 16A(1), actual mental distress can be taken into account under s 16A(2)(m) both when the court is determining whether to intervene and in resentencing: *Bui* at [21]–[24], approving *DPP (Cth) v De La Rosa*. Simpson J's view in that case of s 16A(2)(m) at [279]–[280] — that it is limited to a condition of distress and anxiety which is the subject of proof — is to be preferred to the views expressed by Allsop P and Basten JA: *Bui* at [23]. Section 16A(2)(m) refers to the actual mental condition of a person, not his or her presumed condition. A condition of distress or anxiety must be demonstrated before s 16A(2)(m) applies: *Bui* at [23].

Counsel for the respondent in *R v Nguyen* [2010] NSWCCA 238 at [125]–[127] unsuccessfully relied upon the offender's anxiety and distress suffered as a consequence of the Crown appeal. However, in *R v Primmer* [2020] NSWCCA 50 the respondent's affidavit, setting out his personal anxiety and distress when advised of the appeal and the prospect of his sentence being increased, was one matter taken into account by the court in exercising its discretion to decline to intervene: at [40]–[43].

Rarity

It was long established at common law that appeals by the Crown should be rare: *Malvaso v The Queen* (1989) 168 CLR 227. The application of that factor has been abolished, see *R v JW* at [141] in (v) (see above). In *R v JW* at [124], [129], Spigelman CJ said that insofar as "rarity" was intended to apply as a sentencing principle by way of guidance to courts of criminal appeal, it should be understood as reflecting the double jeopardy principle, now abolished. Other reasons for the frequency or otherwise of such appeals are not matters that are generally of concern to a court of criminal appeal. They are directed to the prosecuting authorities.

[70-100] The residual discretion to intervene

Once error is identified in a Crown appeal, the court is not obliged to embark on the resentencing exercise: *R v JW* (2010) 77 NSWLR 7 at [146]. The court has a discretion to refuse or decline to intervene even if error is established: *R v JW* at [146]; *Green v The Queen* (2011) 244 CLR 462 at [1], [26]; *R v Reeves* [2014] NSWCCA 154 at [12].

It is an error for the court to fail to consider the exercise of its residual discretion to dismiss the Crown appeal despite finding error: *Bugmy v The Queen* (2013) 249 CLR 571 at [24]; *Reeves v The Queen* (2013) 88 ALJR 215 at [60]–[61].

Two questions are relevant to the exercise of the residual discretion: first, whether the court should decline to allow the appeal even though the sentence is erroneously lenient; and second, if the appeal is allowed, to what extent the sentence should be varied: *R v Reeves* at [13]; *Green v The Queen* at [35]. The purpose of Crown appeals is not simply to increase an erroneous sentence. The purpose is a "limiting purpose"

to establish sentencing principles and achieve consistency in sentencing: *R v Reeves* at [14]–[15]; *Griffiths v The Queen* (1977) 137 CLR 293 at [53]; *R v Borkowski* [2009] NSWCCA 102 at [70]. Where the guidance provided to sentencing judges is limited, for example, because the proceedings are subject to non-publication orders, it may be appropriate to dismiss the appeal in the exercise of the residual discretion: *HT v The Queen* (2019) 93 ALJR 1307 at [51]; [55]; [90].

In determining whether to exercise the residual discretion, it is open for the appellate court to look at the facts available as at the time of the hearing of the appeal, including events that have occurred after the original sentencing: *R v Reeves* at [19]; *R v Deng* [2007] NSWCCA 216 at [28]; *R v Allpass* (unrep, 5/5/93, NSWCCA).

The onus is on the Crown to negate any reason why the residual discretion should be exercised: *R v Hernando* [2002] NSWCCA 489 at [12], cited with approval in *CMB v Attorney General for NSW* (2015) 256 CLR 346 at [34], [66].

Section 68A(1) expressly removes double jeopardy as a discretionary consideration for refusing to intervene: *R v JW* at [95] but it "leaves other aspects untouched" and "there remains a residual discretion to reject a Crown appeal" for reasons other than double jeopardy: *R v JW* per Spigelman CJ at [92], [95] (other members of the court agreeing at [141], [205], [209]).

The residual discretion, where it is exercised, necessitates an immediate and highly subjective assessment of the circumstances of the case at hand: *R v Holder and Johnston* [1983] 3 NSWLR 245 at 256.

Factors that bear upon the residual discretion

The category of factors that bear upon the residual discretion are not closed. Rarity and the frequency of Crown appeals is no longer a relevant consideration: *R v JW* (2010) 77 NSWLR 7 at [129].

Conduct of the Crown

The conduct of the Crown at first instance is an important consideration. A Crown concession before the sentencing judge that a non-custodial sentence is appropriate, bearing in mind the Crown's duty to assist a sentencing court to avoid appellable error, is a consideration weighing strongly against interference: *CMB v Attorney General for NSW* at [38], [64]; see also *R v Allpass* (unrep, 5/5/93, NSWCCA); *R v Chad* (unrep, 13/5/97, NSWCCA); *R v JW* (2010) 77 NSWLR 7 at [92]. The failure of the Crown to indicate that a proposed sentence is manifestly inadequate is a material consideration in the exercise of the CCA's residual discretion: *CMB v Attorney General for NSW* at [64]. When the Crown asks the CCA to set aside a sentence on a ground, conceded in the court below, the CCA in the exercise of its discretion should be slow to interfere: *CMB v Attorney General for NSW* at [38], [64], [68]; citing *R v Jermyn* (1985) 2 NSWLR 194 at 204 with approval.

Other factors

Some of the other factors that may favour the exercise of the discretion are:

- delay by the Crown in lodging the appeal: *R v Hernando* at [30]; *R v JW* at [92]; *R v Bugmy (No 2)* [2014] NSWCCA 322 at [19], [101]
- conducting a case on appeal on a different basis from that pursued at first instance: *R v JW* at [92]

- delay in the resolution of the appeal: *R v Price* [2004] NSWCCA 186 at [60]; *R v Cheung* [2010] NSWCCA 244 at [151]; *R v Hersi* [2010] NSWCCA 57 at [55]
- the fact a non-custodial sentence was imposed on the offender at first instance: *R v Y* [2002] NSWCCA 191 at [34]; *R v Tortell* [2007] NSWCCA 313 at [63]
- the fact the non-parole period imposed at first instance has already expired: *R v Hernando* at [30]; or the fact the respondent's release on parole is imminent: *Green v The Queen* at [43]
- the fact the offender has made substantial progress towards rehabilitation: *CMB v Attorney General for NSW* at [69]
- "the effect of re-sentencing on progress towards the respondent's rehabilitation": *Green v The Queen* at [43]
- where resentencing would create disparity with a co-offender: *R v Bavin* [2001] NSWCCA 167 at [69]; *R v McIvor* [2002] NSWCCA 490 at [11]; *R v Cotter* [2003] NSWCCA 273 at [98]; *R v Borkowski* at [67]; *Green v The Queen* at [37]. See **Crown appeals and parity** at **[10-850]**
- the deteriorating health of the respondent since sentence: *R v Yang* [2002] NSWCCA 464 at [46]; *R v Hansel* [2004] NSWCCA 436 at [44]
- the fact that, were the court to impose a substituted sentence, the increase would be so slight as to constitute 'tinkering': *Dinsdale v The Queen* (2000) 202 CLR 321 at [62]; *R v Woodland* [2007] NSWCCA 29 at [53]
- the guidance provided to sentencing judges will be limited and the decision will result in injustice: *Green v The Queen* at [2]; *CMB v Attorney General for NSW* at [69]
- the case is unlikely to ever arise again: *CMB v Attorney General for NSW* at [69].

[70-110] Resentencing following a successful Crown appeal

If a Crown appeal against sentence is successful and the appellate court resentences the respondent, it does so in the light of all the facts and circumstances as at the time of resentencing: *R v Warfield* (1994) 34 NSWLR 200 at 209, following *R v Allpass* (unrep, 5/5/93, NSWCCA). The court will admit evidence of matters occurring after the date of the original sentencing to be taken into account on this basis: *R v Deng* [2007] NSWCCA 216 at [28]. For proceedings commenced on or after 18 October 2022, s 21B(4) of the *Crimes (Sentencing Procedure) Act*1999 provides that, when varying or substituting a sentence, a court must do so in accordance with the sentencing patterns and practices at the time of the original sentencing.

Section 68A(1)(b) prohibits an appeal court from imposing a less severe sentence "than the court would otherwise consider appropriate because of any element of double jeopardy involved in the respondent being sentenced again". Section 68A prevents the appellate court from reducing the sentence which it otherwise believes to be appropriate on the basis of distress and anxiety suffered by the respondent: *R v JW* (2010) 77 NSWLR 7 at [98], [141], [205], [209]; affirmed in *R v Parkinson* [2010] NSWCCA 89 at [49]–[51].

For appeals by the Crown against a person who fails to fulfil an undertaking to assist authorities, see **Power to reduce penalties for assistance to authorities** at **[12-240]**.

[70-115] Judge may furnish report on appeal

Section 11 *Criminal Appeal Act* 1912 provides that judges may furnish the registrar with their notes of the trial and a report, giving their opinion of the case or any point arising in the case.

A s 11 report should only be provided in exceptional circumstances: *R v Sloane* [2001] NSWCCA 421 at [13]. The report's function is not to provide a reconsideration of sentence or to justify or explain why a judge dealt with a matter in a particular way: *Vos v R* [2006] NSWCCA 234 at [26]; *R v Sloane* at [9]. The relevant and permissible functions of a report are set out in *R v Sloane* at [10]–[12]; see also *Zhang v R* [2018] NSWCCA 82 at [37]–[39].

[70-120] Severity appeals to the District Court

Any person who has been sentenced by the Local Court may appeal to the District Court against the sentence: s 11(1) *Crimes (Appeal and Review) Act* 2001. The appeal is by way of a rehearing of the evidence given in the original Local Court proceedings, although fresh evidence may be given in the appeal proceedings: s 17.

The nature of an appeal "by way of rehearing" was discussed in *Fox v Percy* (2003) 214 CLR 118. Referring to the "requirements and limitations of such an appeal" the court said at [23]:

> On the one hand, the appellate court is obliged to "give the judgment which in its opinion ought to have been given in the first instance". On the other, it must, of necessity, observe the "natural limitations" that exist in the case of any appellate court proceeding wholly or substantially on the record. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the "feeling" of a case which an appellate court, reading the transcript, cannot always fully share. [Citations omitted.]

Section 20(2) *Crimes (Appeal and Review) Act* empowers the District Court on a sentence appeal to set aside or vary the sentence or dismiss the appeal. "Sentence" is exhaustively defined in s 3. "Varying a sentence" is defined in s 3(3) to include: (a) a reference to varying the severity of the sentence, (b) a reference to setting aside the sentence and imposing some other sentence of a more or less severe nature, and (c) a reference to varying or revoking a condition of, or imposing a new condition on, an intensive correction order, community correction order or conditional release order. The power conferred to vary a sentence includes the power to make an order under s 10 of the *Crimes (Sentencing Procedure) Act* 1999 and, for that purpose, to set aside a conviction made by the original Local Court (without setting aside the finding of guilt on which the conviction is based) to enable the order to be made: s 3(3A).

The exercise of a power to set aside or vary a sentence under s 20 operates prospectively and extends to cases where the variation includes the imposition of a s 10 order and the setting aside the conviction: *Roads and Maritime Services v Porret* (2014) 86 NSWLR 467 at [33]. The exercise of the power to impose a s 10 order does not render the effect of the sentence up to the time of the appeal a nullity: *Roads and Maritime Services v Porret* at [33].

Where the judge is contemplating an increased sentence, the principles in *Parker v DPP* (1992) 28 NSWLR 282 require the judge to indicate this fact so the appellant can

consider whether or not to apply for leave to withdraw the appeal: at 295. See further discussion in **Procedural fairness** at **[1-060]**. The court is prevented from ordering a new sentence, or varying an existing sentence, to one that could not have been made or imposed by the Local Court: s 71. Any sentence varied or imposed and any order made has the same effect and may be enforced in the same manner as if it were made by the Local Court: s 71(3).

[70-125] Appeals to the Supreme Court from the Local Court

A person who has been sentenced by the Local Court, otherwise than with respect to an environmental offence, may appeal to the Supreme Court against the sentence, but only on a ground that involves a question of law alone: s 52 *Crimes (Appeal and Review) Act*. However, such a person may appeal to the Supreme Court on a ground that involves a question of fact, or a question of mixed law and fact, if the court grants leave: s 53.

A person sentenced by the Local Court with respect to an environmental offence may appeal to the Supreme Court against the sentence, but only on a ground that involves a question of law alone, and only by leave of the Supreme Court: s 53(2).

A question of law alone does not include a mixed question of fact and law: *R v PL* [2009] NSWCCA 256 at [25]. A question concerning the application of correct legal principle to the facts of a particular case is a question of mixed fact and law; while a question concerning the application of incorrect legal principle to the facts of a particular case can give rise to a question of law alone: *Brough v DPP* [2014] NSWSC 1396 at [49]. In that case, an appeal founded upon a critique of the way in which a sentencing magistrate applied well-established principles of totality to the evidence was not a question of law alone: *Brough v DPP* at [50]–[51].

To identify an error by the Local Court in the exercise of its sentencing discretion in terms that amount to an error of the kind identified in *House v King* (1936) 55 CLR 499 at 504, does not of itself answer the question posed by s 56(1), that is, whether the court answered a question of law alone incorrectly, or otherwise made an assumption as to the existence of a legal principle which was wrong: *Bimson, Roads and Maritime Services v Damorange Pty Ltd* [2014] NSWSC 734 at [46].

If it is apparent that the court had acted on a "wrong principle", then the question of law would be whether that principle was wrong or correct and, if wrong, whether the trial judge acted on that principle and whether that materially affected the outcome: *Bimson* at [48].

A conclusion that the exercise of judicial discretion was unreasonable or plainly unjust may enable the appellate court to infer there was error but it does not necessarily enable the appellate court to infer that the error was one that involved the lower court applying or adopting a wrong legal principle. It will often be a distraction to attempt to label a sentence appealed from as manifestly inadequate or excessive. Instead, the appellant should isolate the question of law or legal principle that the lower court adopted or assumed and then demonstrate that it was wrong and material to the outcome: *Bimson* at [53]. Therefore an assertion that a sentence is manifestly inadequate does not identify a question of law alone as required by s 56(1)(a): *Bimson* at [57]. It is not the court's function under s 56(1)(a) to embark on an inquiry into the adequacy or even manifest inadequacy of a Local Court sentence: *Bimson* at [93].

A ground of appeal alleging that the magistrate had incorrectly characterised the seriousness of the offences did not raise a question of law alone; however a ground alleging that the magistrate had applied an incorrect maximum penalty and jurisdictional limit did raise a question of law alone: *Bimson* at [66], [77].

In determining a severity appeal from the Local Court, the Supreme Court has the power to set aside or vary the sentence, dismiss the appeal, or to set aside the sentence and remit the matter to the Local Court for redetermination: s 55(2).

The Supreme Court does not have jurisdiction to hear an appeal against a sentence imposed in the Local Court if an application for leave to appeal in the District Court has been dismissed and the magistrate's order has been confirmed: *Devitt v Ross* [2018] NSWSC 1675 at [60]–[62].

[70-130] Crown appeals on sentence to the District Court

Section 23 *Crimes (Appeal and Review) Act* 2001 provides that the DPP may appeal to the District Court against a sentence imposed on a person by a Local Court in proceedings for:

(a) any indictable offence that has been dealt with summarily: s 23(1)(a)

(b) any prescribed summary offence (within the meaning of the *Director of Public Prosecutions Act* 1986): s 23(1)(b), or

(c) any summary offence that has been prosecuted by or on behalf of the DPP: s 23(1)(c).

An appeal pursuant to s 23 is of a different nature to a Crown appeal to the Court of Criminal Appeal under the *Criminal Appeal Act*. Section 26 *Crimes (Appeal and Review) Act* provides that a s 23 Crown appeal against sentence is to be by way of a rehearing of the evidence given in the original Local Court proceedings. The court may also grant the DPP leave to lead fresh evidence, but only in exceptional circumstances: s 26(2). For the appeal to be upheld, error must be found: *DK v Director of Public Prosecutions* [2021] NSWCA 134 at [32].

The District Court is empowered on an appeal to dismiss the appeal, set aside or vary the sentence: s 27(1); but is prevented from ordering a new sentence, or varying an existing sentence, to one that could not have been made or imposed by the Local Court: s 71.

The court has a residual discretion to decline to intervene, on a similar basis to the Court of Criminal Appeal: *DK v Director of Public Prosecutions* at [43]–[44] (see further **[70-100]**–**[70-110]** above). The discretion may not be exercised on the basis of double jeopardy.

[70-135] Crown appeals to the Supreme Court

The Crown may appeal to the Supreme Court against a sentence imposed by a Local Court in any summary proceedings, but only on a ground that involves a question of law alone: s 56(1)(a) *Crimes (Appeal and Review) Act*. Sentences imposed with respect to environmental offences may be appealed by the Crown but only with the leave of the court and on a question of law alone: s 57(1)(a).

See [70-125], above, for discussion of what constitutes a question of law alone. A Crown appeal alleging manifest inadequacy of sentence does not itself raise an error of law: *Morse (Office of the State Revenue) v Chan* [2010] NSWSC 1290 at [5], [39]; *Bimson, Roads and Maritime Services v Damorange Pty Ltd* [2014] NSWSC 734 at [51]. The function of the Supreme Court on appeals under s 56(1) is to identify and correct legal error, not to ensure consistency in sentencing for similar offences by magistrates across New South Wales: *Bimson* at [54].

In determining a Crown appeal on a question of law alone, the Supreme Court has the power to set aside or vary the sentence, or to dismiss the appeal: s 59(1). The court is prevented from imposing or varying a sentence to one which could not have been imposed in the Local Court: s 71.

In addition, the court retains a discretion to decline to intervene where an error of law has been established. In *Bimson*, an appeal under s 56, the court declined to intervene although error was established on the basis that the error was caused solely by a statement made to the court by counsel for the prosecution: see [94].

[70-140] Judicial review

Judicial review is another type of appeal available against a District Court judgment following an appeal from the Local Court. There is no right of appeal from the judgment of the District Court given in its criminal jurisdiction, on an appeal to it from the Local Court: *Hollingsworth v Bushby* [2015] NSWCA 251; *Toth v DPP (NSW)* [2014] NSWCA 133 at [6].

Section 69C *Supreme Court Act* 1970 applies to proceedings for judicial review of a determination made by the District Court in appeal proceedings relating to a conviction or order made by the Local Court or sentence imposed by the Local Court. The proceedings are instituted in the supervisory jurisdiction of the Court of Appeal with respect to a judgment of the District Court: *Tay v DPP (NSW)* [2014] NSWCA 53 at [1]. The execution of a sentence imposed as a consequence of a conviction, or of any other order, is stayed when proceedings seeking judicial review are commenced: at s 69C(2); *Tay v DPP (NSW)* at [5].

Part 59 Uniform Civil Procedure Rules 2005 (NSW), dealing with judicial review proceedings, requires that proceedings must be commenced within three months of the date of the decision sought to be reviewed: r 59.10(1); *Toth v DPP (NSW)* at [6]. Section 176 *District Court Act* 1973 relevantly provides: "No adjudication on appeal of the District Court is to be removed by any order into the Supreme Court". Section 176 prevents the Court of Appeal exercising its supervisory jurisdiction for error of law on the face of the record: *Hollingsworth v Bushby* at [5], [84], [92]; *Toth v DPP (NSW)* at [6]. The provision does not preclude relief under s 69 *Supreme Court Act* on the ground of jurisdictional error: *Hollingsworth v Bushby* at [5], [84], [92]; *Garde v Dowd* (2011) 80 NSWLR 620.

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