Judicial Commission of New South Wales

SENTENCING BENCH BOOK

Update 56

November 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 56

Update 56, November 2023

Update 56 amends the Bench Book to update and revise various chapters, and incorporate recent case law and legislative developments. The following chapters have been revised:

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

- **[3-660] Pronouncement of ICO by court, terms and commencement** to add a cross-reference to **[3-620] Restrictions on power to make ICO**.

Suspended sentences

The chapter at **[5-700]**ff has been removed.

Setting terms of imprisonment

- **[7-508] Appellate review of an aggregate sentence** has been removed and added to **[70-000] Appeals**.
- **[7-516] Giving effect to finding of special circumstances** to add reference to *Sampson v R* [2023] NSWCCA 239 as an example of a case where the judge did not err by imposing a non-parole period that, when considered with existing sentences, exceeded the statutory ratio despite a finding of special circumstances.

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

- **[7-930] Exclusions and inclusions from Pt 4 Div 1A** to update a legislation reference.

Objective factors at common law

- **[10-000] Maximum penalty** to clarify the discussion relating to consideration of the maximum penalty when sentencing.
- **[10-000] Factors relevant to assessing objective seriousness** to update a cross-reference to **[10-440] Youth**.

Subjective matters at common law

- **[10-430]**ff **Advanced age** to separate the commentary regarding advanced age and youth into new paragraphs at **[10-430] Advanced age** and **[10-440] Youth**.
- **[10-440] Youth** to add a new paragraph with reference to *Miller v R* [2015] NSWCCA 86, *TM v R* [2023] NSWCCA 185, *MJ v R* [2010] NSWCCA 52, *R v Sharrouf* [2023] NSWCCA 137, *IM v R* [2019] NSWCCA 107, *Howard v R* [2019] NSWCCA 109, *JT v R* [2011] NSWCCA 128 regarding the specific principles to be applied when sentencing a young offender.
- **[10-460] Mental health or cognitive impairment** and **[10-470] Deprived background** to add reference to *Williams v R* [2022] NSWCCA 15 regarding considerations of childhood social deprivation and mental disorders in sentencing.
- **[10-490] Hardship to family/dependents** to clarify the principles relating to taking into account hardship to family and dependents.

Parity

- **[10-801] Introduction** to add reference to *Kiraz v R* [2023] NSWCCA 177, *Malouf v R* [2019] NSWCCA 307, *Baladjam v R* [2018] NSWCCA 304, *Why v R* [2017] NSWCCA 101, *Meager v R* [2009] NSWCCA 215 and *R v Araya* [2005] NSWCCA 283 regarding the parity principle and comparison of sentences imposed on persons who were not co-offenders.
- **[10-810] Co-offenders convicted of different charges** to add reference to *Kiraz v R* [2023] NSWCCA 177 and *Quinn v The Queen* (2011) 244 CLR 462 regarding the application of the parity principle where co-offenders are convicted of different charges.
- **[10-850] Crown appeals and parity** to add reference to *R v FF* [2023] NSWCCA 186 regarding the application of the parity principle in Crown appeals.

Children (Criminal Proceedings) Act 1987

- **[15-010] Guiding principles** to add reference to *TM v R* [2023] NSWCCA 185 regarding youth as a mitigating factor on sentence and the assessment of moral culpability.

Sentencing Commonwealth offenders

- The chapter at **[16-000]**ff has been updated and substantially revised, including references added to the following cases:
  - *Ilic v R* [2020] NSWCCA 300 and *Chan v R* [2023] NSWCCA 206, *Hildebrand v R* [2021] NSWCCA 9 regarding the relevant considerations in Part IB generally
  - *Woods v R* [2023] NSWCCA 37, *Sabbah v R (Cth)* [2020] NSWCCA 89, *Totaan v R* [2022] NSWCCA 75, *Marai v R* [2023] NSWCCA 224 regarding restrictions on sentences of imprisonment and commencement date
  - *Sigalla v R* [2021] NSWCCA 22 regarding s 16A(2) factors
  - *Lloyd v R* [2022] NSWCCA 18, *Pritchard v R* [2022] NSWCCA 130 and *Giles-Adams v R* [2023] NSWCCA 122 regarding the degree to which contrition is shown: s 16A(2)(f)
  - *Assi v R* [2021] NSWCCA 181 regarding failure to comply with legal obligations relating to pre-trial or ongoing disclosure: s 16A(2)(fa)
  - *Weber v R* [2020] NSWCCA 103 and *Mason (a pseudonym) v R* [2023] VSCA 75 regarding co-operation with law enforcement agencies: ss 16A(2)(h) and 16AC
  - *Lazarus v R* [2023] NSWCCA 214 regarding general deterrence: s 16A(2)(ja)
  - *Azari v R* [2021] NSWCCA 199 regarding need for adequate punishment: s 16A(2)(k)
  - *Eakin v R* [2020] NSWCCA 294, *TM v R* [2023] NSWCCA 185, *DS v R; DM v R* (2022) 109 NSWLR 82, *R v Eaton* [2023] NSWCCA 125, *Camilleri v R* [2023] NSWCCA 106, *Williams v R* [2022] NSWCCA 15, *CW v R* [2022] NSWCCA 50 regarding character, antecedents, age, means and physical or mental condition: s 16A(2)(m)
  - *Sigalla v R* [2021] NSWCCA 22 and *Darke v R* [2022] NSWCCA 52 regarding prospects of rehabilitation: s 16A(2)(n)
  - *Holt v R (Cth)* [2021] NSWCCA 14, *R v Hausman* [2022] NSWCCA 24 regarding cumulative, partly cumulative or concurrent sentences of imprisonment: s 19
  - *Stanley v Director of Public Prosecutions (NSW)* [2023] HCA 3 regarding additional sentencing alternatives: s 20AB
  - *Nweke v R (No 2)* [2020] NSWCCA 227 regarding revocation of parole or licence

Fraud offences in NSW

- The chapter at **[19-930]**ff has been updated and substantially revised, including references added to the following cases:
  - *Subramaniam v R* [2013] NSWCCA 159 regarding taking into account a mental condition as a mitigating factor in sentencing

- *Totaan v R* [2022] NSWCCA 75 and *Sabbah v R* (Cth) [2020] NSWCCA 89 regarding the importance of general deterrence, and full-time imprisonment
- *Singh v R* [2020] NSWCCA 353 regarding sentencing of youth for fraud offences
- *Abellanoza v R* [2021] NSWCCA 4, *Cordoba v R* [2021] NSWCCA 144, *Meis v R* [2022] NSWCCA 118 and *R v Edelbi* [2021] NSWCCA 122 regarding factors to be considered in assessing the objective seriousness of the offence
- *Arvinthan v R* [2022] NSWCCA 44 regarding s 21A *Crimes (Sentencing Procedure) Act* 1999 and fraud offences
- *Clinton v R* [2018] NSWCCA 66 and *Whyte v R* [2019] NSWCCA 218 and *Lee v R* [2019] NSWCCA 15 regarding consideration of aggravating factors
- *DPP (Cth) v De La Rosa* [2010] NSWCCA 194, *Upadhyaya v R* [2017] NSWCCA 162, *Miller v R* [2014] NSWCCA 34, *R v Zerafa* [2013] NSWCCA 222 and *Giourtalis v R* [2013] NSWCCA 216 regarding mitigating factors in sentencing for fraud cases
- *Bazouni v R* [2021] NSWCCA 256, *Selkirk v R* [2020] NSWSC 1590, *McLaren v R* [2021] NSWCCA 12 and *Kapua v R* [2023] NSWCCA 14 regarding fraud offences and ss 192E–192H *Crimes Act* 1900
- *Lee v R* [2019] NSWCCA 15, *Islam v R* [2020] NSWCCA 236 and *Lou v R* [2021] NSWCCA 120 regarding identity crime offences (ss 192J–192L *Crimes Act* 1900)
- *Aboud v R* [2021] NSWCCA 77, *R v Nakash* [2017] NSWCCA 196, *DPP (Cth) v Beattie* [2017] NSWCCA 301, *Elomar v R* [2018] NSWCCA 224, *Merhi v R* [2019] NSWCCA 322, *Noble v R* [2018] NSWCCA 253, *Tham v R* [2020] NSWCCA 338, *Sigalla v R* [2021] NSWCCA 22, *Nakhl v R (Cth)* [2020] NSWCCA 201, *Hayward v R (Cth)* [2021] NSWCCA 63 regarding Commonwealth fraud offences.

Robbery

- The chapter at **[20-000]**ff has been updated and substantially revised. A Table setting out the various offences and penalties for "robbery" in Part 4, Div 2 *Crimes Act* 1900 has been added at **[20-210] The statutory scheme**. References have been added to the following cases:
  - *Melaisis v R* [2018] NSWCCA 184 regarding the *De Simoni* principle and s 95 *Crimes Act*
  - *Harris v R* [2021] NSWCCA 322 and *Foaiaulima v R* [2020] NSWCCA 270 regarding significant changes to the statutory and common law since the *R v Henry* guideline judgment
  - *Barnes v R* [2022] NSWCCA 40 regarding the seriousness of the offending where the offender was armed with a dangerous weapon
  - *Antonio v R* [2008] NSWCCA 213 regarding s 21A(2)(b) offences where the offence involved the actual or threatened use of violence
  - *Calhoun (a pseudonym) v R* [2018] NSWCCA 150 regarding the involvement of a high level of violence affecting the objective seriousness of the offending and the offender's criminality
  - *Hiron v R* [2018] NSWCCA 10 regarding the parity principle where co-offenders are broadly involved in a joint criminal enterprise
  - *Cummins v R* [2019] NSWCCA 163 regarding Form 1 offences
  - *R v El Sayah* [2018] NSWCCA 64 regarding vulnerable victims
  - *Tammer-Spence v R* [2021] NSWCCA 90 regarding offending in a custodial setting.
  - *IS v R* [2017] NSWCCA 116 and *Edwards v R* [2021] NSWCCA 57 regarding an offender's deprived background and the application of the principles in *Bugmy v The Queen* (2013) 249 CLR 571
  - *Gardiner v R* [2018] NSWCCA 27 regarding rehabilitation
  - *Yildiz v R* [2020] NSWCCA 69 regarding an offender's youth and relative maturity

- *Dungay v R* [2020] NSWCCA 209 regarding Children's Court criminal histories of adult offenders.

Commonwealth drug offences

- **[65-130] Objective factors relevant to all Commonwealth drug offences** to add reference to *Giles-Adams v R* [2023] NSWCCA 122 regarding the role of the offender and level of participation.

Appeals

- **[70-035] Appellate review of an aggregate sentence** to add commentary removed from **[7-508]** above and to add reference to *Lee v R* [2020] NSWCCA 244 and *Kresovic v R* [2018] NSWCCA 37 regarding the principles to have regard to in determining whether an aggregate sentence is manifestly excessive.
- **[70-090] Purpose and limitations of Crown appeals** to add reference to *Kaminic v R* [2014] NSWCCA 116 regarding the assessment of objective seriousness in Crown appeals, and *DPP (NSW) v TH* [2023] NSWCCA 81 regarding appeals of aggregate sentences on the grounds of manifest excess.

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SENTENCING BENCH BOOK

Update 56

November 2023

FILING INSTRUCTIONS OVERLEAF

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FILING INSTRUCTIONS

Update 56

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

[3-600] Introduction

Last reviewed: May 2023

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

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

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

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

The provisions in Pt 5 also:

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

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

Summary of significant ICO provisions

- The court must not make an ICO unless it has obtained an assessment report in relation to the offender, but the court is not bound by that report: ss 17D, 69(2). However, the court is not required to obtain a report if satisfied it has sufficient information available to justify making the ICO without one: s 17D(1A). See **[3-635]**.
- An ICO must not be made for a single offence if the term of imprisonment exceeds 2 years. If an ICO is made for multiple offences, or two or more ICOs are made, the term of the aggregate or effective sentence of imprisonment must not exceed 3 years: s 68. See **[3-610]**, **[3-620]**.

- ICOs are not available for certain offences, including manslaughter, murder, prescribed sexual offences, certain terrorism offences, breaches of serious crime prevention and public safety orders, and offences involving the discharge of a firearm: s 67. See **[3-620]**.
- An ICO must not be made for offenders under the age of 18 years: s 7(3). See **[3-620]**.
- An ICO can only be made for a domestic violence offence where the court is satisfied the victim of the offence and any person with whom the offender is likely to reside, will be adequately protected: s 4B. See **[3-620]**.
- In determining whether to make an ICO, community safety is the paramount consideration. When considering community safety, the court is to assess whether an ICO or full-time detention is more likely to address the offender's risk of reoffending: s 66. See **[3-632]** and the clear statement of the relevant principles from *Stanley v DPP* [2023] HCA 3 found in *Zheng v R* [2023] NSWCCA 64 below.
- An ICO must commence on the date it is made but may be reduced to take into account pre-sentence custody. See **[3-660]**.
- When making an ICO, the court is required to impose the standard conditions and at least one additional condition (unless there are exceptional circumstances) and may impose further conditions where necessary: ss 73, 73A, 73B. Home detention is available as an additional condition of an ICO: s 73A(2). See **[3-640]**.
- The court must not make an ICO or impose a home detention or community service work condition unless it has obtained a relevant assessment report in relation to the offender: ss 73A(3), 17D(2), (4). See **[3-635]**, **[3-640]**.
- A court cannot request an assessment report for a home detention condition until it has imposed a sentence of imprisonment: s 17D(3). See **[3-635]**.
- The Parole Authority may, in certain circumstances, impose, vary or revoke any conditions of an ICO, including those imposed by the court: *Crimes (Administration of Sentences) Act* 1999, s 81A. See **[3-635]**, **[3-640]**.

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

Last reviewed: May 2023

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

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

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

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

[3-620] Restrictions on power to make ICO

Last reviewed: May 2023

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

ICO not available for certain offences

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

(a) murder or manslaughter

(b) a prescribed sexual offence

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

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

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

(f) an offence involving the discharge of a firearm

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

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

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

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

ICOs and domestic violence offences

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

ICOs not available for juvenile offenders

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

ICOs not available where imprisonment exceeds limits

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

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

ICOs not available for offenders residing in other jurisdictions

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

[3-630] ICO is a form of imprisonment

Last reviewed: May 2023

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

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

Second, if a sentence of imprisonment is appropriate, the court determines the length of sentence without regard to how it is to be served: *Stanley v DPP* at [59]; *R v Douar* at [71]; *R v Zamagias* [2002] NSWCCA 17 at [26]; *Zreika v R* [2012] NSWCCA 44 at [56]. It is preferable for the court to articulate its conclusion as to the appropriate term: *R v Assaad* [2009] NSWCCA 182 at [33]. It is inappropriate to consider how the sentence will be served before determining its length: *R v Ryan* [2006] NSWCCA 394 at [1], [4].

The court must then consider whether any alternative to full-time imprisonment should be imposed: *Stanley v DPP* at [59]; *R v Zamagias* at [28]; *R v Foster* [2001] NSWCCA 215 at [30]; *Campbell v R* [2018] NSWCCA 87 at [47], [52]. The appropriateness of an alternative option depends on various factors, including whether such an alternative results in a sentence that reflects the objective seriousness of the offence and fulfils the purposes of punishment. Sight should not be lost of the fact that

the more lenient the alternative the less likely it will do so: *R v Zamagias* at [28]; *R v Hamieh* at [76]; *R v Douar* at [72]. It is preferable to make clear that such alternatives have been considered and, if necessary, explain why they are not appropriate, although a failure to do so is not erroneous: *Casella v R* [2019] NSWCCA 201 at [63]–[65]; see also *Campbell v R* [2018] NSWCCA 87 at [53].

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

Inherently lenient or a substantial punishment?

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

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

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

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

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

Last reviewed: May 2023

Community safety

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

1. [T]he power to make an ICO requires an evaluative exercise that treats community safety as the paramount consideration, with the benefit of the assessment mandated

by s 66(2). The issue is not merely the offender's risk of reoffending, but the narrower risk of reoffending in a manner that may affect community safety: *Stanley v DPP* at [72], [75].

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

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

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

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

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

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

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

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

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

Section 3A and other considerations subordinate to community safety

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

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

While aspects of community safety underpin some of the general purposes of sentencing in s 3A, such as specific and general deterrence and protection of the community from the offender, and will have been considered in deciding whether to impose a sentence of imprisonment, community safety is required to be considered *again* and in a different manner under s 66 when considering whether to make an ICO. Here, it is given its principal content by s 66(2), namely, the safety of the community from harms that might result if the offender reoffends, whether while serving the term of imprisonment that has been imposed or after serving it: *Stanley v DPP* at [77]. Also see *Mandranis v R* at [50]–[51]; *Zheng v R* at [282]–[283], [287]–[291].

Controversy concerning a restrictive interpretation of s 66(2)

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

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

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

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

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

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

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

An application for special leave to appeal against the "restrictive" interpretation of s 66 was refused by the High Court on the basis it had no prospect of success: *Fangaloka v The Queen* [2020] HCASL 12. The majority in the High Court decision of *Stanley v DPP* does not comment on the "restrictive" interpretation of s 66, however, they state at [75]–[76] that although the s 66(2) assessment is not determinative of whether an ICO should be made, community safety will usually have a decisive effect on the decision to make, or refuse to make, an ICO, unless the evidence is inconclusive. Also see *Zheng v R* at [286].

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

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

[3-635] ICO assessment reports

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

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

An assessment report may be requested:

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

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

A court must not:

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

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

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

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

[3-640] ICO conditions

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

An ICO is subject to:

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

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

Range of conditions

Standard conditions

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

Additional conditions

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

In *Zheng v R* [2023] NSWCCA 64, where the offender was sentenced for reckless wounding under s 35(4) *Crimes Act*, exceptional circumstances for the purposes of s 73A were also found as there had been no issues between the applicant and the victim regarding contact with their son, and in light of the Community Corrections' supervision plan, the applicant's compliance with onerous bail conditions for over four years, that the offending was not drug or alcohol-related, and the applicant's low intellectual functioning and major depressive disorder: at [290].

The additional conditions available include:

(a) home detention

(b) electronic monitoring

(c) a curfew

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

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

(f) abstention from alcohol or drugs or both

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

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

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

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

Maximum hours and minimum periods for community service work

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

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

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

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

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

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

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

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

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

Further conditions

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

Offenders' obligations under ICO conditions

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

Power of Parole Authority and Community Corrections to vary conditions

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

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

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

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

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

[3-650] Multiple orders

Last reviewed: May 2023

Only one "relevant order" can be in force for an offender at the same time for the same offence: s 17F(1). "Relevant order" is defined as an ICO, CCO or CRO: s 17E. If an offender is subject to multiple orders at the same time, an ICO (and its conditions) prevails over a CCO (and its conditions) and a CCO (and its conditions) prevails over a CRO (and its conditions): s 17F(3),(4). Despite this, a standard condition prevails over a condition that is not standard: s 17F(4)(c). For community service work and curfew conditions under multiple orders, see **Multiple orders** at **[3-520]**.

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

Last reviewed: November 2023

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

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

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

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

See **ICOs not available where imprisonment exceeds limits** at **[3-620] Restrictions on power to make ICO** regarding the duration of an ICO.

Explaining the order

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

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

[3-670] Breaches of ICOs

Last reviewed: May 2023

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

- record the breach and take no formal action
- give an informal warning to the offender
- give a formal warning that further breaches will result in referral to the Parole Authority
- give a direction about the non-compliant behaviour
- impose a curfew.

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

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

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

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

[3-680] Federal offences

Last reviewed: May 2023

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

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

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

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

[3-710] Additional references

Last reviewed: May 2023

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

[The next page is 3401]

(f) an offence under section 23(1)(b) or (2)(b) (Offences with respect to prohibited plants), 25 (Supply of prohibited drugs) or 25A (Offence of supplying prohibited drugs on an ongoing basis) of the *Drug Misuse and Trafficking Act* 1985,

(g) any other offence prescribed by the regulations for the purposes of this subsection.

[The next page is 4001]

Sentencing procedures for imprisonment

Appendix B: Legislative amendments relevant to the Pt 4 Div 1A Table — standard non-parole periods

Concurrent and consecutive sentences

Mandatory life sentences under s 61

[The next page is 4651]

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 **Indicative sentences: fixed term or term of sentence** at **[7-520]**.

[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**.

For appeals against aggregate sentences see: **[70-035] Appellate review of an aggregate sentence** and **Aggregate sentences** in **[70-090] Purpose and limitations of Crown appeals**.

[7-510] Special circumstances under s 44(2) or (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] Mitigating factors**.

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 historical child sexual offences** at **[17-410]**.

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

Last reviewed: November 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]; see also *Sampson v R* [2023] NSWCCA 239 at [6]–[13]. 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]**ff.

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 **Mixture of Commonwealth and State offences** at **[16-040] Sentencing for multiple 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]**ff;
- **Factors relevant to assessing objective seriousness** at **[10-012]**; and
- **Subjective matters at common law** at **[10-400]**ff.

[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: November 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].

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: s 21B(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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Sentencing procedures generally

Guilty pleas

Power to reduce penalties for pre-trial disclosure

Power to reduce penalties for assistance to authorities

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

Victims and victim impact statements

Taking further offences into account (Form 1 offences)

Sentencing guidelines

Correction and adjustment of sentences

[The next page is 5451]

Objective factors at common law

[10-000] Maximum penalty

Last reviewed: November 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. Other appeal decisions discussing reference to, or a statement of, the wrong maximum penalty and its impact on the sentence include: *Des Rosiers v R* [2006] NSWCCA 16 at [20], *R v O'Neill* [2005] NSWCCA 353, *R v Tadrosse* (2005) 65 NSWLR 740, *Smith v R* [2007] NSWCCA 138 at [34] and *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]**ff.

[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]**ff.

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]**, above).

[10-012] Factors relevant to assessing objective seriousness

Last reviewed: November 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]**ff, **Standard non-parole period offences — Pt 4 Div 1A** at **[7-890]**ff 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]** in **Parity**.

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]**ff; **Subjective matters at common law** at **[10-400]**ff.

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 **[10-440] Youth**; **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]**.

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]**ff.

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]**ff.

[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 also **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 **Achieving consistency in sentencing** at **[16-035] Relevance of decisions of other State and Territory courts**.

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 from **[17-000]** and following.

[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] [see *Chan v R* [2010] NSWCCA 153] 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

Last reviewed: August 2023

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

Last reviewed: August 2023

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 **[20-840] Use of evidence of uncharged criminal acts at sentence** in **Sexual assault**.

[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** 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** 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* [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* [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** sentencing Commonwealth offenders at **[16-010]**.

[10-430] Advanced age

Last reviewed: November 2023

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

Section 16A(2)(m) *Crimes Act* 1914 (Cth) requires the court to take into account age for Commonwealth offenders. However, as in the case of other subjective considerations, the court must nevertheless impose a sentence which reflects the objective seriousness of the offence: *R v Gallagher* (unrep, 29/9/95, NSWCCA); *R v McLean* [2001] NSWCCA 58 at [44]; *R v Knight* [2004] NSWCCA 145 at [33]; *Des Rosiers v R* [2006] NSWCCA 16 at [32].

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

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

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

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

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

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

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

A sentence should not be "crushing" in the sense that it "connotes the destruction of any reasonable expectation of useful life after release": *R v Yates* (1984) 13

A Crim R 319 at 326; [1985] VR 41 at 48; *R v MAK* [2006] NSWCCA 381; also see **Imposition of a crushing sentence** at **[8-220] Totality and sentences of imprisonment**. Notwithstanding, age is but one consideration and cannot justify the imposition of an erroneously lenient sentence: *Geraghty v R* [2023] NSWCCA 47 at [116].

[10-440] Youth

Last reviewed: November 2023

Specific provisions apply when sentencing a young offender (defined as a person under the age of 18): see **[15-000]**ff **Children (Criminal Proceedings) Act 1987** including **[15-010] Guiding Principles** and **[15-090] Sentencing principles applicable to children dealt with at law**.

An offender's youth is a recognised mitigating factor and, generally, the younger the offender, the greater the weight it should be given: *R v Hearne* [2001] NSWCCA 37 at [27]; *KT v R* [2008] NSWCCA 51 at [22]. However, the relevance of youth does not solely depend upon the offender's biological age: *MW v R* [2010] NSWCCA 324 at [51]; *R v Hearne*, above, at [28]. It may also concern a young adult offender's cognitive, emotional and/or psychological immaturity: *Miller v R* [2015] NSWCCA 86 at [97]–[98]. However, a 27-year-old offender is less likely to be regarded as a young person in the sense contemplated by the authorities: *R v Mastronardi* [2000] NSWCCA 12 at [20]. 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]** and **Section 21A(3)(h) — the offender has good prospects of rehabilitation, whether by reason of the offender's age or otherwise** at **[11-280]**.

An offender's youth does not generally impact upon the assessment of the offence's objective seriousness but may impact upon the assessment of the offender's moral culpability: *IE v R* [2008] NSWCCA 70 at [19]–[21]; *TM v R* [2023] NSWCCA 185 at [66]; see also **Factors relevant to assessing objective seriousness** at **[10-012]**.

Sentencing principles for young offenders emphasise that rehabilitation is generally to take precedence over other sentencing factors: s 6 *Children (Criminal Proceedings) Act* 1987; *Miller v R*, above, at [96]; *Campbell v R* [2018] NSWCCA 87 at [23]. In *KT v R*, above, at [22]ff, McClellan CJ at CL 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] NSWCCA 349 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] NSWCCA 37 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] NSWCCA 397 at [61]).
>
> …
>
> 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]).

As noted above, the emphasis given to rehabilitation rather than general deterrence may be moderated where the offender has engaged in "adult behaviour" and the offending was serious: *IS v R* [2017] NSWCCA 116 at [89]; *MJ v R* [2010] NSWCCA 52 at [37]–[39]; *KT v R* [2008] NSWCCA 51 at [25]. Further, in *IE v R* [2008] NSWCCA 70, the Court held 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: at [16]. The comments in *IE v R* have been cited with approval in *R v Sharrouf* [2023] NSWCCA 137 at [270] (Wilson J) and *IM v R* [2019] NSWCCA 107 at [55] (Meagher JA, RA Hulme and Button JJ agreeing).

In *TM v R* [2023] NSWCCA 185 at [49], Yehia J stated at [49]:

> The qualification to the principles concerning young persons where they conduct themselves in an "adult like manner" should be applied with some caution. While in some cases, significant planning, or other indicia of mature decision-making, may result in a diminution of the relevant principles, the gravity of an offence does not, by itself, demonstrate "adult like" behaviour. The assessment must be one of maturity and conduct, not only the degree of violence.

See also *YS v R* [2010] NSWCCA 98 at [22]; *MW v R* [2010] NSWCCA 324 at [51].

In *TM v R*, above, the offender, a 15-year-old child, with a group of 10 young men, punched and stomped on a 17-year-old victim, while stealing his hat and jacket, resulting in significant injuries to the victim. The Court found, while the conduct was serious, it had all the hallmarks of youth: immaturity, poor self-regulation, and

a tendency to go along with a group: at [47]. In *Howard v R* [2019] NSWCCA 109, the offender, who had just turned 18, threw a Molotov cocktail during a street brawl and Fullerton J (with Macfarlan JA agreeing) found the decision to do so, "although extremely serious, was nonetheless eloquent of his limited emotional maturity and a less than fully developed capacity to control impulsive behaviour": at [11].

By contrast, in *JT v R* [2011] NSWCCA 128, where the child offender and another bashed a 14-year-old into insensibility during a prolonged attack, the Court found this did not reflect "impulsivity and immaturity on the part of the applicant … [and] … this is the very sort of offence that McClellan CJ at CL had in mind when qualifying his initial statement of principle in paras [24] and [25] of *KT v Regina*": at [34]. Similarly, youth was not a significant mitigatory factor for the 20-year-old offender in *R v Sharrouf* [2023] NSWCCA 137 because the Court considered that 24 serious domestic violence offences committed over a protracted period was adult-like behaviour: at [213] (Price J with Wilson J agreeing).

For a discussion of youth in respect of particular offences, see **Mitigating factors** at **[18-380] Dangerous driving and navigation**; **Subjective factors commonly relevant to robbery** at **[20-300] Robbery** and **Mitigating circumstances** at **[20-770] Sexual assault**. For a discussion of the application of the parity principle where co-offenders are different ages, see **Juvenile and adult co-offenders** at **[10-820] Parity**.

When imposing a term of imprisonment, youth may be factor in finding special circumstances to depart from the statutory non-parole period ratio: *Crimes (Sentencing Procedure) Act* 1999, s 44(2B); see also **What constitutes special circumstances?** at **[7-514] Setting terms of imprisonment**.

[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** below.

[10-460] Mental health or cognitive impairment

Last reviewed: November 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 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* [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.

See also *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].

It is often the case that childhood social deprivation causes mental disorders but not always and usually not wholly, so it is important not to double count for the same factor: *Williams v R* [2022] NSWCCA 15 at [130]–[131]. In *Williams v R*, the combination of the offender's psychiatric disorders and his childhood exposure to trauma and violence caused him to normalise the violence used in the commission of the offence (robbery), such that each factor deserved consideration in the sentencing process: at [132]–[133]. See also **[10-470] Deprived background**, below.

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 **[6-550] 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

Last reviewed: November 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].

When childhood social deprivation causes mental disorders, it may not do so wholly, so it is important not to double count for the same factor: *Williams v R* [2022] NSWCCA 15 at [130]–[131]. In *Williams v R*, the combination of the offender's psychiatric disorders and his childhood exposure to trauma and violence caused him to normalise the violence used in the commission of the offence (robbery), such that each factor deserved consideration in the sentencing process: at [132]–[133]. See also **[10-460] Mental health or cognitive impairment**.

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 line of authority from the Court of Criminal Appeal has 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.

For a full discussion of the issue, see Beckett J, "The Bugmy Bar Book: Presenting evidence of disadvantage and evidence concerning the significance of culture on sentence" at pp 11–15 at www.publicdefenders.nsw.gov.au/Documents/JudgeBeckett-TheBarBookPaper2021.pdf, accessed 31 October 2023.

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] 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: November 2023

Although the general principle is that hardship to family and dependants needs to be exceptional before it justifies a discrete and substantial component of leniency, if it is not exceptional it may still be taken into account as part of the offender's subjective case: *Matthews v R* [2018] NSWCCA 186 at [33] and the authorities cited there. Simpson J (with Macfarlan and Gleeson JJA agreeing) at [33] said great caution is required in applying this qualification lest it undermine the principle.

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*. This was accepted in *O'Brien v R* [2022] NSWCCA 234 and *R v Hall* [2017] NSWCCA 313 at [65], although consideration should be given to the qualification in *Matthews v R* discussed above. Further, in *R v Girard* [2004] NSWCCA 170, Hodgson JA at [21] said the imprisonment of a child's parents, although not exceptional (in this case), can be taken into account as one subjective circumstance, but not as a matter resulting in a substantial reduction or elimination of a term of imprisonment. This was applied in *Doyle v R* [2022] NSWCCA 81 at [35], [40]. In *R v Cornell* [2015] NSWCCA 258, Beech-Jones J at [139]–[141] discusses some of the other authorities impacting upon the principle.

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].

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: s 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] kA 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) 43 NTLR 7 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) 138 SASR 37 at [227]–[229]; *R v Calica*, above, 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* [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 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: November 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) *Crimes (Sentencing Procedure) Act* 1999: *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].

Lastly, the parity principle is not concerned with the comparison of sentences imposed on persons who were not co-offenders: *Kiraz v R* [2023] NSWCCA 177 at [43]; *Malouf v R* [2019] NSWCCA 307; *Baladjam v R* [2018] NSWCCA 304 at [148]–[149]; *Why v R* [2017] NSWCCA 101; *Meager v R* [2009] NSWCCA 215; *R v Araya* [2005] NSWCCA 283 at [66].

[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: November 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: *Quinn v The Queen* (2011) 244 CLR 462 at [30]; *Elias v The Queen* (2013) 248 CLR 483 at [30]; *Kiraz v R* [2023] NSWCCA 177, at [42]; *Green v The Queen* at [30]; *Jimmy v R* (2010) 77 NSWLR 540 at [136]–[137], [202], [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

Last reviewed: November 2023

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]; *R v FF* [2023] NSWCCA 186 at [63]–[65]. Although the Crown may argue a sentence imposed on a co-offender indicates the marked inadequacy of the sentence imposed on a respondent to the appeal, if approached in that way the Crown must persuade the court of the similarity of the facts on which the respondent and other co-offenders were sentenced, their comparable roles in the offences, and why the sentence imposed is, by reference to those features, inadequate: *R v Lembke* at [60]–[61].

[The next page is 5711]

Children (Criminal Proceedings) Act 1987

para

Children (Criminal Proceedings) Act 1987

[The next page is 7051]

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. See also *Local Court Bench Book* **[38-000] Children's Court — Criminal Jurisdiction**, and the *Children's Court of NSW Resource Handbook*. Unless otherwise specified, references to sections below are references to sections of the *Children (Criminal Proceedings) Act*. It is a fundamental principle that children who commit offences should be dealt with differently and separately to adult offenders: *Campbell v R* [2018] NSWCCA 87 at [20]. The common law also provides for the modification of sentencing factors in relation to both young offenders and young adult offenders: *KT v R* [2008] NSWCCA 51 at [22]ff; see also **[10-440] Youth**.

[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] Guiding principles

Last reviewed: November 2023

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.

Part of the rationale behind s 6 reflects common law authorities which recognise youth as a mitigating factor on sentence. For example, the emotional immaturity and a less developed capacity to control impulsive behaviour of a young offender (and a young adult offender) may reduce their moral culpability and the relevance of retribution: *TM v R* [2023] NSWCCA 185; *Campbell v R* [2018] NSWCCA 87 at [30]–[31]; *KT v R* [2008] NSWCCA 51 at [22]ff; see **[10-440] Youth**.

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].

Further, applying s 6 may not address all matters relevant to an offender's youth. For example, in *TM v R* [2023] NSWCCA 185, it was held the sentencing judge erred in assessing the offender's moral culpability for aggravated robbery causing grievous bodily harm as high, when the remarks on sentence did not reveal whether the offender's youth was considered. While the judge referred to the offender's age (15 years 3 months) and s 6, none of the s 6 principles "directly address the concept of moral culpability": at [57].

[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.

[The next page is 8001]

Crimes Act 1914 (Cth)

para

Sentencing Commonwealth offenders

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Sentencing Commonwealth offenders

[16-000] Summary of relevant considerations

Last reviewed: November 2023

- Part IB of the *Crimes Act* 1914 (Cth) is not a code and NSW sentencing provisions may be picked up and applied. See **[16-005]**.
- In determining a sentence or order in respect of a federal offence, it must be of a severity appropriate in all the circumstances of the offence: s 16A(1). See **[16-010]**.
- Section 16A(2) provides a non-exhaustive list of factors the court must take into account in determining a sentence. The aggravating and mitigating factors contained in s 21A of the *Crimes (Sentencing Procedure) Act* 1999 do not apply. See **[16-025]**.
- Penalties that may be imposed on federal offenders include:
  - Discharge without conviction (s 19B)
  - Fine (as provided)
  - Conditional release without conviction (s 20(1)(a))
  - Imprisonment, with immediate release, or release after a specified time, on recognizance with or without conditions (s 20(1)(b))
  - Sentencing options available under NSW law may include intensive correction order (s 7 *Crimes (Sentencing Procedure) Act*) and community correction order (s 8 *Crimes (Sentencing Procedure) Act*).

  See **[16-030]**. Sample orders for various Commonwealth penalties are included in the *Local Court Bench Book* at **[18-100]**.
- The court must have regard to the sentences imposed in all States and Territories: *The Queen v Pham* (2015) 256 CLR 550 at [23], [41]. See **[16-035]**.
- When imposing aggregate sentences for a mix of State and Commonwealth offences, separate aggregate sentences must be imposed in relation to the State and Commonwealth offences. See **[16-040]**.
- The totality principle applies when sentencing for Commonwealth offences. See **[16-030]** and **[16-040]**.
- The function of directing release on parole or licence resides with the Attorney-General (Cth), as do decision-making powers such as revoking parole and amending conditions attached to it. See **[16-050]** and **[16-055]**.

See also *Sentencing of Federal Offenders in Australia — A Guide for Practitioners*, Commonwealth Director of Public Prosecutions, 6th edn, April 2023.

All references to provisions in this chapter are to the *Crimes Act* 1914 (Cth) unless otherwise stated.

[16-005] Introduction

Last reviewed: November 2023

Part IB *Crimes Act* 1914 deals with the sentencing, imprisonment and release of federal offenders. It sets out the sentencing factors, procedural requirements and penalty options when sentencing a person for a "federal offence" (defined as an "offence against the law of the Commonwealth": s 16 *Crimes Act* 1914 (Cth)). However, Pt IB is not a code. The High Court rejected the "proposition that Pt IB 'covered a field' as an exhaustive statement of the will of the Parliament with respect to sentencing for federal offences": *Putland v The Queen* (2004) 218 CLR 174, at [53] (Gummow and Heydon JJ; see also Gleeson CJ at [12]).

As Part IB is not a code, State or Territory sentencing provisions can be picked up and applied to the sentencing of federal offenders; so long as that law is not inconsistent with a law of the Commonwealth (see s 109 of the *Commonwealth of Australia Constitution Act*; and ss 68(1) and 79(2) of the *Judiciary Act* 1903 (Cth)) (endorsed in *Putland v R* at [4] (Gleeson CJ); see also [34] (Gummow and Heydon JJ); *Williams v The King [No 2]* (1934) 50 CLR 551 at 560 per Dixon J; *Ilic v R* [2020] NSWCCA 300 at [24] (McCallum J) and *Chan v R* [2023] NSWCCA 206 at [4] (Kirk JA). For example, a federal offender sentenced in NSW can receive an intensive correction order (ICO) and where an ICO is considered, NSW sentencing procedures and provisions apply (see **Additional sentencing alternatives: s 20AB** at **[16-030] Penalties that may be imposed** and **[3-600] Intensive Correction Orders**.

The purpose of applying state laws to federal offenders is to ensure that offenders charged with federal offences are dealt with consistently with offenders in the state where they are prosecuted: *Hildebrand v R* [2021] NSWCCA 9 at [10]. Some key instances in which Part IB applies, to the exclusion of NSW sentencing laws, are:

- Consideration of the factors in s 16A(2) when determining what is a sentence commensurate with the criminality. The aggravating and mitigating factors in s 21A of the *Crimes (Sentencing Procedure) Act* 1999 do not apply to the sentencing of federal offenders
- Div 4 Pt IB is exhaustive regarding the fixing of a non-parole period and the making of a recognizance release order: *Hili v The Queen* (2010) 242 CLR 520 at [22]
- There is no statutory ratio for the setting of a minimum period of full-time imprisonment or non-parole period (s 44 *Crimes (Sentencing Procedure) Act* does not apply and accordingly there is no need for a finding of "special circumstances" to warrant a ratio outside of that prescribed): *Hili v The Queen* (2010) 242 CLR 520; *Power v The Queen* (1974) 131 CLR 623 and *Deakin v The Queen* [1984] HCA 31
- Div 8 Pt IB *Crimes Act* 1914, containing ss 20BQ, 20BR is exhaustive of the summary disposition for dealing with federal offenders suffering from mental illness or intellectual disability: *Kelly v Saadat-Taleb* (2008) 72 NSWLR 305
- Section 16BA is exhaustive of the procedure for the Court to take into account additional offences when sentencing for an offence. A federal offence cannot be taken into account or included on a Form 1 list of additional charges filed pursuant to s 32 of the *Crimes (Sentencing Procedure) Act*): *Hildebrand v R* [2021] NSWCCA 9; *Ilic v R* [2020] NSWCCA 300. See also **Taking other offences into account: s 16A(2)(b) and s 16BA** at **[16-025] Section 16A(2) factors**.

[16-010] General sentencing principles applicable

Last reviewed: November 2023

Section 16A provides the approach to be taken when sentencing federal offenders:

> In determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.

Section 16A(2) provides the factors that must be taken into account on sentence: see **[16-025] Section 16A(2) factors**.

[16-015] Restrictions on sentences of imprisonment and commencement date

Last reviewed: November 2023

Section 17A(1) of the *Crimes Act* 1914 (Cth) provides the court can only sentence a federal offender to imprisonment if it is satisfied that "no other sentence is appropriate in all the circumstances of the case". It requires consideration of all other available sentences and all the circumstances of the case rather than focusing exclusively on a comparison between imprisonment and one or more types of sentences not involving imprisonment: *Atanackovic v The Queen* (2015) 45 VR 179; *Woods v R* [2023] NSWCCA 37.

The High Court and other appellate courts have discouraged principles that seek to dictate that a sentence of imprisonment is required for certain classes of cases: *Sabbah v R (Cth)* [2020] NSWCCA 89; *Kovacevic v Mills* [2000] SASC 106 at [43]; *Totaan v R* [2022] NSWCCA 75 at [90]–[100]; *Hili v The Queen* (2010) 242 CLR 520 at [36]–[38], [41]. In *Sabbah v R*, McCallum J commented that such principles do not give proper regard to the requirement of proportionality in s 16A(1), subvert the instinctive synthesis exercise of sentencing and are inconsistent with the principle in s 17A that a sentence of imprisonment should not be imposed unless no other sentence is appropriate in all the circumstance of the case: [4]–[10].

However, since 23 June 2020, for a Commonwealth child sex offence (as defined in s 3), s 20(1)(b)(iii), inserted by the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act* 2020 (Cth), provides that immediate release on recognizance is not available unless there are "exceptional circumstances". This suggests a minimum term of imprisonment is required, noting that, pursuant to s 67(1), (2) *Crimes (Sentencing Procedure) Act* 1999, an intensive correction order is also not available when sentencing offenders for certain child sexual offences in the Criminal Code. See also ss 16AAA, 16AAB, 16AAC in relation to mandatory minimum penalties, and exclusions and reductions to those penalties.

If a federal offender is sentenced to imprisonment, the laws of the State or Territory relating to its commencement date, including consideration of (and backdating for) any pre-sentence custody, apply: s 16E. In *Marai v R* [2023] NSWCCA 224, the Court of Criminal Appeal found no error in backdating the commencement of a sentence of imprisonment to account for the federal offender's immigration detention while on bail, noting that the Commonwealth Director of Public Prosecution's (CDPP's) request was a factor in that detention: [95] (Sweeney J, with Kirk JA agreeing); s 16E *Crimes Act* 1914 (Cth); s 47(2) *Crimes (Sentencing Procedure) Act* . For further discussion of

NSW law, see **Court to take other matters into account (including pre-sentence custody)** at **[12-500]**. A court is restricted from imposing imprisonment for certain minor offences unless satisfied there are exceptional circumstances that warrant it: s 17B(1), (3).

[16-020] Maximum penalties

Last reviewed: November 2023

The maximum penalty must be considered when determining an "appropriate" sentence: *Markarian v The Queen* (2005) 228 CLR 357 at [30]–[31]; *Elias v The Queen* (2013) 248 CLR 483 at [27]. It is Parliament's expression to sentencing judges (and the community) of the seriousness of the offence: *Muldrock v The Queen* (2011) 244 CLR 120 at [31]; see also *R v Taylor* [2022] NSWCCA 256 at [60]. It also enables the sentencing judge to compare the case under consideration with the worst possible case (the latter attracting the maximum penalty): *Markarian v The Queen* at [39].

[16-025] Section 16A(2) factors

Last reviewed: November 2023

Section 16A(2) provides:

> (2) In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court:
>
> (a) the nature and circumstances of the offence;
>
> (b) other offences (if any) that are required or permitted to be taken into account;
>
> (c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character — that course of conduct;
>
> (d) the personal circumstances of any victim of the offence;
>
> (e) any injury, loss or damage resulting from the offence;
>
> (ea) if an individual who is a victim of the offence has suffered harm as a result of the offence — any victim impact statement for the victim;
>
> (f) the degree to which the person has shown contrition for the offence:
>
> (i) by taking action to make reparation for any injury, loss or damage resulting from the offence; or
>
> (ii) in any other manner;
>
> (fa) the extent to which the person has failed to comply with:
>
> (i) any order under subsection 23CD(1) of the *Federal Court of Australia Act* 1976; or
>
> (ii) any obligation under a law of the Commonwealth; or
>
> (iii) any obligation under a law of the State or Territory applying under subsection 68(1) of the *Judiciary Act* 1903;
>
> about pre-trial disclosure, or ongoing disclosure, in proceedings relating to the offence;
>
> (g) if the person has pleaded guilty to the charge in respect of the offence:
>
> (i) that fact; and

(ii) the timing of the plea; and

(iii) the degree to which that fact and the timing of the plea resulted in any benefit to the community, or any victim of, or witness to, the offence;

(h) the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or of other offences;

(j) the deterrent effect that any sentence or order under consideration may have on the person;

(ja) the deterrent effect that any sentence or order under consideration may have on other persons;

(k) the need to ensure that the person is adequately punished for the offence;

(m) the character, antecedents, age, means and physical or mental condition of the person;

(ma) if the person's standing in the community was used by the person to aid in the commission of the offence — that fact as a reason for aggravating the seriousness of the criminal behaviour to which the offence relates;

(n) the prospect of rehabilitation of the person;

(p) the probable effect that any sentence or order under consideration would have on any of the person's family or dependants.

In determining the appropriate sentence, the Court "must" have regard to the factors in s 16A(2) so far as they are "relevant and known". Section 16A(2) is not an exhaustive list as the factors are "[i]n addition to any other matters".

There is nothing in s 16A(2) which "as a whole suggests any hierarchy of considerations or that varying degrees of importance should be placed upon each of the matters set out in subsection (2)": *Totaan v R* (2022) 108 NSWLR 17 at [83] (Bell CJ).

The plurality (Gaudron, Gummow and Hayne JJ) in *Wong v The Queen* (2001) 207 CLR 584 when considering the s 16A(2) factors stated at [75]:

> Attributing a particular weight to some factors, while leaving the significance of all other factors substantially unaltered, may be quite wrong. We say "may be" quite wrong because the task of the sentencer is to take account of all of the relevant factors and to arrive at a single result which takes due account of them all. That is what is meant by saying that the task is to arrive at an "instinctive synthesis". This expression is used, not as might be supposed, 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 … balances many different and conflicting features.

This does not deny the application of statute and principles governing the exercise of the sentencing discretion that have been developed by the High Court and appellate courts for particular offences. See for example, *Kovacevic v Mills* [2000] 76 SASC 106 where the court stated that, for the more serious cases of sustained and deliberate fraud, deterrence is very important: [43]. This description of the role of deterrence was approved in *Totaan v R* at [99]. However, the Court stated, s 16A does not fetter the sentencing discretion by creating any hierarchy of matters so as to result in one or more factors being described as "pre-eminent": [99]; see also [81]–[83], [90]–[91].

There is no requirement for a sentencing judge to refer to every factor under s 16A(2). The Court of Criminal Appeal in *R v Ferrer-Esis* (1991) 55 A Crim R 231 at 237–238 stated s 16A:

> only requires the sentencing judge to take those matters into account; it does not require judges always to refer to each of them when explaining the sentence imposed. Indeed, the act of sentencing is to a large extent incapable of being fitted into such a straightjacket, and in most cases it is unnecessary for the judge to expose the precise reasoning by which the ultimate sentence has been reached: *R v Gallagher* (1991) 23 NSWLR 220. It is only where the judge has formed a particular view in relation to one or more of these items which would not otherwise be apparent in the circumstances of the case that reference should be made to the particular items in the judge's remarks on sentence, so that no erroneous conclusion would otherwise be drawn in relation to those matters.

As the list of factors in s 16A(2) is not exhaustive, common law principles apply to sentencing federal offenders irrespective of whether such principles are referred to, or located in, Pt IB of the *Crimes Act* 1914: *Johnson v The Queen* [2004] HCA 15 per Gummow, Callinan and Heydon JJ at [15]; *Xiao v R* [2018] NSWCCA 4 at [94]; *Aboud v R* [2021] NSWCCA 77 at [87]. For example, delay and proportionality are not factors listed in s 16A(2) but may be relevant when sentencing a federal offender: *Aboud v R* at [91]; *Sabra v R* [2015] NSWCCA 38 at [41]–[45]; *Bui v Director of Public Prosecutions (Cth)* (2012) 244 CLR 638 at [18]; cf *Director of Public Prosecutions (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194 at [100] (For a detailed discussion of delay, see also **Delay** at **[10-530]** and for the application of delay in federal fraud sentences see **Delay** at **[20-000] Mitigating factors**).

Likewise, the "totality" of the offending in fixing sentences for separate offences is relevant to federal offences, with the question of totality arising only after the individual sentences are determined: *Sigalla v R* [2021] NSWCCA 22 at [118]; *Pearce v The Queen* (1998) 194 CLR 610; *Mill v The Queen* (1988) 166 CLR 59. See also **[16-030]** and **[16-040]**.

Nature and circumstances of the offence: s 16A(2)(a)

This factor relates to consideration of matters relevant to assessing the objective seriousness of the offending. There are a wide variety of matters that can be considered. Broadly, it can involve considering the conduct, the degree of intention, knowledge or recklessness, motive and other factors that may impinge on the intentional aspects of the conduct.

The fact-finding exercise at sentencing is relevant to this factor. That is, where an offender disputes the facts and seeks to reduce the objective seriousness of the offence, they bear the burden of establishing such matters on the balance of probabilities, with the Crown bearing the burden of establishing facts adverse to offender beyond reasonable doubt: *The Queen v Olbrich* (1999) 199 CLR 270 at [27]–[28]; see also **Onus of proof** at **[1-405]**. A court will not resolve all disputed issues by determining the facts are either aggravating or mitigating. See **The aggravating/mitigating binary fallacy** at **[9-720]**. Where there is a lack of evidence about a factor see discussion in **Role of offender and level of participation** at **[19-870] Other factors relevant to objective seriousness**.

The case law assists as to what factors may be relevant to assessing the nature and circumstance of particular classes of offences. For example:

- In relation to possession and transmission of child abuse material offences, see *R v De Leeuw* [2015] NSWCCA 183 at [72]; *R v Aniezue* [2016] ACTSC 82; *R v Asplund* [2010] NSWCCA 316; *Minehan v R* [2010] NSWCCA 140 at [94]; *R v Hutchinson* [2018] NSWCCA 152 at [45]; see also **Commonwealth offences** and **Sentencing principles** at **[17-541]**;
- In relation to importation or possession of unlawfully imported border controlled drugs: *R v Nguyen; R v Pham* [2010] NSWCCA 238 at [72]; *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [210]–[211], [224] (McClellan CJ at CL) and the authorities cited; see also **[65-100] Commonwealth drug offences**; and
- In relation to proceeds of crime offences (Div 400 Criminal Code), see *R v Li* [2010] NSWCCA 125 at [41]; *Majeed v The Queen* [2013] VSCA 40 at [35]; see also **Money laundering** at **[65-200]**.

Purposes of sentencing in s 16A(2): deterrence, punishment, rehabilitation

There is no distinct statement of the purposes of sentencing in the *Crimes Act* 1914, unlike, for example, s 3A *Crimes (Sentencing Procedure) Act* 1999. However, s 16A of the Commonwealth Act includes deterrence, punishment and rehabilitation in the list of matters to which the court is to have regard in passing sentence: ss 16A(2)(j), (ja), (k) and (n).

The *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act* 2015 (Cth) inserted s 16A(2)(ja) into the Act in November 2015 to explicitly provide that "the deterrent effect that any sentence or order under consideration may have on other persons" was a matter required to be taken into account when sentencing a federal offender. The introduction of s 16A(2)(ja) was not an indication that before its commencement the principle of general deterrence was not a relevant factor but to clarify that it *is* a factor: *Aitchison v* R [2015] VSCA 348 at [66], [69]. General deterrence has been a feature of sentencing practice throughout all jurisdictions, not just Australia, and express words would have been necessary to warrant its exclusion: *Aitchison v R* at [66], applying *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370 at 378, where the NSWCCA (shortly after Pt IB commenced) had concluded that the duty imposed on a court by s 16A(1) to ensure the sentence or order "is of a severity appropriate in all the circumstances of the offence" imported general principles of sentencing law including general deterrence.

Taking other offences into account: ss 16A(2)(b) and 16BA

Section 16A(2)(b) allows any other offences (as required or permitted) to be taken into account at sentencing. The offence is listed in a schedule, pursuant to s 16BA which allows the court, when a person is convicted of federal offences, to take into account other federal offences (including indictable offences where the court has jurisdiction) in respect of which the offender admits guilt. The federal offender does not have to be "convicted" of the additional federal offences for them to be taken into account. This provision, and the process, is similar to s 33(2) *Crimes (Sentencing Procedure) Act* 1999 (NSW): see **[13-200] The statutory requirements**. However, federal offences

cannot be taken into account on a State Form 1 and may only be taken into account in relation to another federal offence using the s 16BA procedure. Similarly, State offences cannot be listed in a s 16BA schedule: see discussion in *Ilic v R* [2020] NSWCCA 300 and *Hildebrand v R* [2021] NSWCCA 9.

A document, found at Form 1, Sch 3 *Crimes Regulations* 1990 (Cth), listing the additional federal offences the person "is believed to have committed" is filed in court: s 16BA(1)(a)–(b). The Form 1 must be signed by the prosecutor and the offender: s 16BA(1)(c).

Before passing sentence, the court may, if in all the circumstances it is proper to do so, ask the federal offender whether they admit guilt in respect of the additional offences and wish them to be taken into account in passing sentence for the offences of which they have been convicted. If the federal offender admits guilt and wishes to have the additional offences taken into account, the court may do so when passing sentence: s 16BA(2).

The sentencing judge must make the various statutory inquiries and obtain the necessary admissions and indication from the federal offender that they wish to have the additional offences taken into account: *Purves v R* [2019] NSWCCA 227 at [5]. However, where the offender is legally represented, their consent to the use of this procedure can be based on their legal representative's words or conduct: *Kabir v R* [2020] NSWCCA 139 at [49]–[50]. A failure to obtain the necessary consent cannot be remedied on appeal because s 16BA(1) requires that this procedure be undertaken by the court which convicts the offender: *Purves v R* at [6].

An offence taken into account pursuant to s 16BA does not aggravate the objective seriousness of the principle offence but increases what would have otherwise been the penalty because of relevant purposes of sentencing, such as specific deterrence, responsibility and accountability for the offence: *Le v R* [2022] NSWCCA 243 at [36] (R A Hulme J); *Nguyen v R* [2019] NSWCCA 209 at [58]–[64] (Johnson J).

Offence consists of a series of criminal acts of the same or a similar character: s 16A(2)(c)

An offence forming part of a course of conduct consisting of a series of criminal acts of the same or a similar characteristic can be taken into account when determining a sentence that is appropriate in all the circumstances: *R v Donald* [2013] NSWCCA 238 at [79]. It will apply in different ways depending on the facts and circumstances of the case.

Section 16A(2)(c) will be relevant in cases involving "rolled up" charges. This approach is common for federal offences relating to child abuse material and fraud offences: *R v De Leeuw* [2015] NSWCCA 183 at [116]; *R v Donald* [2013] NSWCCA 238. Numerous offences are rolled into one offence on a plea of guilty which advantages an offender by restricting the maximum penalty available to a single offence, rather than the total theoretically available maximum sentence from multiple charges: *R v Jones* [2004] VSCA 68 at [13]; *R v Donald* at [84], [85]. A course of conduct may constitute an aggravating factor for "rolled up" charges because more than one episode of criminal conduct may magnify the objective seriousness of the offence: *R v De Leeuw* at [116]; *R v Glynatsis* [2013] NSWCCA 131 at [67]–[68]; *Xiao v R* [2018] NSWCCA 4 at [164]. *Fitzgerald v R* at [37].

In sentencing for a rolled-up charge, the court is required to assess the criminality of an offender's conduct as particularised. The more contraventions or episodes of criminality that form part of the rolled-up charge, the more objectively serious the offence is likely to be: *Commonwealth Director of Public Prosecutions v Kawasaki Kisen Kaisha Ltd* [2019] FCA 1170.

Victim of the offence — personal circumstances and victim impacts statements: ss 16A(2)(d), (ea), 16AAAA and 16AB

When sentencing a federal offender the court must take into account:

- the personal circumstances of any victim of an offence: s 16A(2)(d) and
- if an individual who is "a victim of the offence" has suffered "harm" as a result of the offence, the court must consider any victim impact statement: s 16A(2)(ea).

"Victim" is not defined in Part IB. A "victim" has included an unwitting friend who has been manipulated or recruited to enable the offence: *Kabir v R* [2020] NSWCCA 139 at [62]. It has also included witnesses to a terrorist attack on another who suffered psychological and emotional harm as a result: *R v Khan (No 11)* [2019] NSWSC 594. In *R v Zhu* [2013] NSWSC 127 at [203], it was considered the classes of victims for insider trading offences were the market, the offender's employers, and those who traded with the offenders not privy to the inside information. In *R v Nahlous* [2013] NSWCCA 90, the Court considered that, in relation to a child grooming offence, the child who was groomed was a victim, but their mother was not.

Section 16AAAA legislates the procedural requirements for victim impact statements. It provides a victim impact statement can be an oral or written statement made by a victim of the offence, or by a member of the victim's family (with the court's leave), or a person appointed by the Court: s 16AAAA(1). "Family" includes a de facto partner, a child of the victim, or anyone else who would be a member of the person's family if the de facto partner or child is taken to be a member of the person's family: s 16A(4).

Section 16AB sets out other procedural requirements or guidelines for victim impact statements and includes:

- Only one victim impact statement can be made unless the court gives leave (s 16AB(2));
- No implication is to be drawn from the absence of a victim impact statement (s 16AB(3));
- A victim impact statement may be read to the court by or on behalf of the victim (s 16AB(4)); and
- A victim impact statement cannot be read out or taken into account to the extent it expresses an opinion about an appropriate sentence, or is offensive, threatening or harassing, or admitting it would not be in the interests of justice.

The victim impact statement is intended to provide the sentencing judge with an understanding of the harm suffered from the offence. "Harm" is defined broadly in s 16 to include physical, psychological and emotional suffering, economic and other loss, and damage.

Any injury, loss or damage resulting from the offence: s 16A(2)(e)

This provision is not dependent on matters contained within a victim impact statement or particular victims being identified, and the court can take judicial notice of the injury, loss, or damage resulting from particular offences. Examples include:

- Harm arising from transmission of child pornography offences: *R v Jones* (1999) 108 A Crim 50; *DPP v D'Alessandro* (2010) 26 VR 477; *R v Clarkson* (2011) 32 VR 361;
- Damage to the reputation of Australian business persons conducting business in foreign countries and distortion to the market for bribery of foreign official offences: *Elomar v R* [2018] NSWCCA 224;
- Damage to the Australian economy arising from cartel activities: *DPP (Cth) v Nippon Yusen Kabushiki Kaisha* (2017) 254 FCR 235, [250]–[252], [298], [300]; and
- Harm to the community for the importation and possession of border controlled drugs: for example, *Ngo v The Queen* [2017] WASCA 3.

The degree to which contrition is shown: s 16A(2)(f)

Contrition must be "shown" (that is, established on the evidence) by an offender, either by words or conduct. The discount for contrition, like other subjective considerations, is generally not quantified but forms part of the process of instinctive synthesis: *Betka v R* [2020] NSWCCA 191 at [62]. An offender may express contrition in the form of remorse in their oral testimony in court, in a letter, or to family, friends or psychologists/psychiatrists. Ultimately, the weight and cogency to be given to utterances found in third party statements or untested material is a matter for the individual assessment of the judge: *Lloyd v R* [2022] NSWCCA 18 at [45]. A sentencing judge may be cautious of untested statements of contrition and remorse and attribute less weight to them than contrition that is first hand and tested: *Imbornone v R* [2017] NSWCCA 144 at [57], *Singh v R* [2018] NSWCCA 60 at [31]; *Diaz v R* [2019] NSWCCA 216 at [48]; *Weber v R* [2020] NSWCCA 103 at [62]–[63]; *Pritchard v R* [2022] NSWCCA 130 at [101].

Section 16A(2)(f) provides that the degree to which a court can take into account contrition expressed by a federal offender can include instances in which they made reparation for any injury, loss or damage arising from the offence. This includes the repayment of money obtained as a consequence of an offence before pecuniary penalty proceedings under the *Proceeds of Crime Act* 2002 have been commenced: *R v Host* [2015] WASCA 23 at [25]; [198]. The effect of s 320 *Proceeds of Crime Act* is that the fact of making a pecuniary penalty order and payments made pursuant to it are irrelevant considerations which cannot be taken into account under s 16A(2)(f): *R v Host* at [25]; [115]; [198]; s 320(d). To the extent s 320 is inconsistent with s 16A(2)(f), s 16A(2)(f) must be read down to give effect to s 320: *R v Host* at [22]–[23]; [115]; [196]–[197].

Contrition within s 16A(2)(f) may also refer to the subjective willingness of an offender to facilitate the course of justice. This is conceptually different from the utilitarian value of a guilty plea in s 16A(2)(g): *Bae v R* [2020] NSWCCA 35 at [55]; *Giles-Adams v R* [2023] NSWCCA 122 at [76].

As to s 16A(2)(f) and (g), the Court in *Betka v R*, Fullerton J said at [62] (Wilson and Ierace JJ agreeing):

> While I accept that in practical terms the factors which inform the sentencing considerations in ss 16A(2)(f) and (g) of the Crimes Act (Cth) might overlap, what must be borne in mind is that it is only in respect of the objective or utilitarian value of a plea of guilty that the Court will apply an arithmetical discount when sentencing for a Commonwealth offence, a discount which is largely, although not exclusively, informed by the timing of the plea. Where a sentencing court is persuaded that the timing of the plea itself reflects a willingness on the part of the offender to facilitate the course of justice, that finding should find expression in the reasons for sentence as one of the factors which informs the value of the plea without it attracting any additional or arithmetical sentencing discount. Importantly, however, where the Court does not make that finding, or where the Court is not otherwise satisfied that the evidence relied upon by an offender allows for a finding of a subjective willingness to facilitate the course of justice as a mitigating factor on the balance of probabilities, the objective or utilitarian value of the plea should not be diminished.

The strength of the prosecution case can be taken into account in assessing contrition which facilitates the course of justice or is indicative of remorse. A guilty plea actuated by an overwhelming Crown case would suggest less weight is given to contrition involving facilitation of the course of justice: *Bae v R* [2020] NSWCCA 35; *Tyler v R* [2007] NSWCCA 247 at [114].

While contrition and remorse are required to be taken into account separately under s 16A(2)(f) in addition to the guilty plea under s 16A(2)(g), those factors can overlap: *Singh v R* at [26]–[28]; *Xiao v R* [2018] NSWCCA 4 at [134]. Care should be taken to avoid double counting the objective and subjective aspects of guilty pleas and contrition: *Bae v R* [2020] NSWCCA 35 at [55], [57]; *Chuang v R* [2020] NSWCCA 60 at [19]. When an offender pleads guilty and expresses contrition and a willingness to cooperate with authorities, those factors form a complex mix of inter-related considerations, and attempts to separate them to attribute specific numerical or proportionate value would be artificial, contrived and illogical: *Singh v R* at [28]–[29]; *R v Gallagher* (1991) 23 NSWLR 220; *Wong v The Queen* (2001) 207 CLR 584. Such an approach is also contrary to the process of instinctive synthesis: *Singh v R* at [30].

Failure to comply with legal obligations relating to pre-trial or ongoing disclosure: s 16A(2)(fa)

There is little appellate case law considering this provision. The provision suggests the court is required to consider the extent to which a federal offender failed to comply with pre-trial and ongoing disclosure obligations, where those laws are provided for by s 23CD(1) of the *Federal Court of Australia Act* 1976 (which relates to pre-trial and ongoing disclosure for offences prosecuted in the Federal Court of Australia), or by any obligation under a law of the Commonwealth or a law of the State or Territory. In *Assi v R* [2021] NSWCCA 181, a licensed customs officer was involved in a scheme to avoid the payment of excise duty on imported tobacco. While the judge was correct to take into account the offender's breach of duties as a customs broker when considering the objective seriousness of the offence, the judge erred in finding the breach fell under s 16A(2)(fa)(ii): *Assi v R* at [46]. The section only applies to breaches of Commonwealth orders or obligations concerning a "pre-trial disclosure, or ongoing disclosure, in proceedings relating to the offence": *Assi v R* at [45].

Plea of guilty: s 16A(2)(g)

Section 16A(2)(g) provides the sentencing court must take into account the plea of guilty, its timing, and the degree to which both resulted in any benefit to the community or any victim of, or witness to, the offence. The section gives effect to aspects of the objective utilitarian value of a guilty plea, as described in *Xiao v R* (2018) 96 NSWLR 1; *Bae v R* [2020] NSWCCA 35 and *Small v R* [2020] NSWCCA 216 at [73].

Identifying the utilitarian value of a guilty plea within s 16A(2)(g) involves an objective assessment of the way in which the guilty plea facilitated the course of justice: *Bae v R* [2020] NSWCCA 35 at [55], [57]; *Xiao v R* (2018) 96 NSWLR 1 at [280]. Giles-Adams; Preca v The Queen [2023] NSWCCA 122 at [70]. A subjective acknowledgement of willingness to facilitate justice is not relevant to the utilitarian value of the plea in s 16A(2)(f): *Bae v R* [2020] NSWCCA 35 at [57]-[58]; see also *R v Borkowski* [2009] NSWCCA 102 at [32] (point 4) (Howie J).

It is desirable to specify the discount given for a guilty plea in the interests of transparency: *Huang aka Liu v R* [2018] NSWCCA 70 at [9]; *Xiao v R* at [279]–[280]; *Markarian v The Queen* (2005) 228 CLR 357 at [24]; *Cahyadi v R* [2007] NSWCCA 1 at [34]. However, a failure to do so would not of itself constitute error: *Huang aka Liu v R* at [9]. It is an error to specify a range of percentage discounts as distinct from a specific percentage: *Huang aka Liu v R* at [9].

The guideline judgment of *R v Thomson and Houlton* (2000) 49 NSWLR 383, and specified discounts stipulated in ss 25D and 25E of the *Crimes (Sentencing Procedure Act)* 1999, do not apply to the sentencing of federal offenders. However, in *Bae v R*, Johnson J (Bell P and Walton J agreeing) concluded that the principles set out in *R v Borkowski* at [32]–[33] in respect of the utilitarian discount for State offences could practically assist for Commonwealth offences: at [52]–[54].

Co-operation with law enforcement agencies: ss 16A(2)(h) and 16AC

For the procedure to adopt when considering an offender's assistance to authorities see **[12-210] Procedure**.

The court must take into account any past co-operation the federal offender has provided to law enforcement agencies under s 16A(2)(h), and any undertaking to cooperate in the future under s 16AC. The rationale for recognising assistance provided to the authorities is set out in *R v Cartwright* (1989) 17 NSWLR 243 at 252–253: see **[12-205] Rationale** for rationale for assistance to authorities.

Discounts for past and future assistance are distinct and should not be confused: *R v Vo* [2006] NSWCCA 165 at [37], citing *R v Gladkowski* (2000) 115 A Crim R 446). It is erroneous to give a combined reduction for past and future co-operation rather than separately addressing future co-operation: *R v Vo* at [33]; *R v Tae* [2005] NSWCCA 29 at [19]. In such a case, the appellate court should itself fix a reduction for future co-operation: *R v Vo* at [43]; *R v Tae* at [20], [32].

Where co-operation also demonstrates contrition, the contrition attracts an unquantified discount as part of instinctive synthesis under s 16A(2)(f) (see above discussion).

Past co-operation

Past co-operation includes co-operation in the investigation of the offence for which the offender is being sentenced as well as any other state, territory or federal offence.

There is no requirement, statutory or otherwise, for a sentencing judge to provide a discrete quantified discount for past assistance, but generally the practice is to do so especially in respect of the utilitarian benefit of the assistance: *Weber v R* [2020] NSWCCA 103 at [34], [68].

A discount will be extended for past assistance that is accepted and used by authorities: *Alchikh v R* [2007] NSWCCA 345 at [25]. The extent of the discount involves a consideration of the effectiveness of the assistance and its value to the authorities: *R v El Hani* [2004] NSWCCA 162 at [73]. However, the absence of evidence does not necessarily mean there should be no discount: *Weber v R* at [67]. For example, where authorities have rejected and not used the assistance, a judge may still give some discount provided they are satisfied the proffered assistance was truthful and to give effect to the rationale for encouraging assistance: *Alchikh v R* [2007] NSWCCA 345 at [25].

In the past, sentencing cases adopted an arithmetic approach to discount for past assistance and a plea of guilty. In *McKinley v R* [2022] NSWCCA 14 (MacFarlan J) the Court of Criminal Appeal criticised the arithmetic approach to assistance stating at [49]:

> The … arithmetic view probably does not withstand later authority criticising an arithmetic approach to sentencing. Consistency in this area, like others, must be determined by the consistent application of sentencing principles. The principles applicable to determining assistance, which it is unnecessary to repeat or summarise, were discussed more fully by this Court in *R v XX*.

Macfarlan J also said in *McKinley* at [56]:

> ultimately the test that must be utilised depends upon the fulfilment of the purpose of the administration of justice. The reduction needs to be sufficiently significant that it will encourage those persons who have committed crimes to come forward and confess the crime, notwithstanding that the police are unaware of either the crime or the perpetrators of the crime.

Where an offender pleads guilty and also co-operates with authorities, a combined discount can be given, or alternatively quantities for the utilitarian value of the plea quantified and quantities for the past cooperation with authorities identified: *Weber v R* [2020] NSWCCA 103 at [68]; cf *R v Sukkar* [2006] NSWCCA 92.

Future assistance

Section 16AC(1)–(2) provides, where a court reduces the sentence imposed because a federal offender has undertaken to provide future assistance, the court must state that the sentence or order is being reduced for that reason, and the sentence or order that would have applied otherwise. This requirement assists an appellate court in resentencing an offender who has failed to comply with the undertaking. Section 21E was the predecessor to s 16AC and the case law in relation to the former provision remains relevant. application of the former provision was discussed in *DPP (Cth) v Couper* [2013] VSCA 72 at [141]–[146].

In *Mason (a pseudonym) v R* [2023] VSCA 75, the Court at [44]–[60] considered the approach to discounting a sentence for future cooperation pursuant to s 16AC, stating:

> Where a person has cooperated with law enforcement authorities and given an undertaking of the kind contemplated by s 16AC, that matter must, by force of s 16A, be taken into account by the judge when imposing the sentence. In most cases the effect of

> doing so will be to reduce the sentence that, hypothetically, would have been imposed had there not been cooperation of that kind. Almost inevitably, where this occurs the non-parole period will be lower than would have been imposed had there not been cooperation. In other words, the cooperation will produce a consequence for both the head sentence and the non-parole period.
>
> There may be cases, although if they exist they surely must be rare, where the cooperation has an effect on the sentence but not the non-parole period. It follows that usually the impact will be on both aspects of the sentence. On the other hand, there may be cases, again we think rare, where the judge reduces the non-parole period but the cooperation has no discernible impact on the head sentence.
>
> Where a sentence has 'been reduced' by reason of cooperation, s 16AC requires the judge to specify what would have been the sentence or non-parole period in the event that there had been no cooperation.
>
> In our view the better construction of s 16AC … is that if there has been an impact on both the head sentence and the non-parole period (which will be the usual case) the judge must specify how each element had been effected. That is the judge should specify what the head sentence would have been and what the non-parole period would have been.
>
> This construction is fortified by s 16AC(4). Where there is a failure to honour the undertaking in whole or in part, an appeal may be brought and the appellate court may have to resentence. In doing so s 16AC(4) contemplates that the appellate court will or may reinstate the sentence that would have been imposed. At the least, these matters would inform the appellate court's task should a ground of appeal succeed and resentencing be required"

In *Dagher v R* [2017] NSWCCA 258, Adamson J (with Leeming JA and Johnson J agreeing) stated that failing to comply with the requirement in s 16AC(2) to identify the sentence that would have been imposed but for the undertaking to co-operate in the future is an error: [8].

Discounts for assistance are intended to foster the interests of law enforcement and recognise the contrition involved as well as the potential risks to an offender. When allowing a discount, it is important the offender is clearly apprised of the fact a benefit is being conferred: *R v A* [2004] NSWCCA 292 at [25].

Failure to comply with undertaking

Section 16AC(3) entitles the CDPP to appeal, at any time, against the sentence when the offender fails, without reasonable excuse, to comply with the undertaking. The CDPP bears the onus of proving, beyond reasonable doubt, that the failure was without reasonable excuse: *R v MI* [2018] NSWCCA 151 at [39].

Under s 16AC(4)(a), where an offender fails entirely to co-operate after receiving a reduced sentence on the basis of promised co-operation, the court on appeal must substitute the sentence or non-parole period that would have been imposed but for the promised co-operation. Section 16AC(4)(b) provides that, where there is a partial failure to co-operate, the court may substitute such a sentence or non-parole period not exceeding that which could be imposed under s 16AC(4)(a).

Specific deterrence: s 16A(2)(j)

The court is required to consider the deterrent effect the sentence may have on the federal offender: s 16A(2)(j). There can be many reasons why specific deterrence assumes greater relevance in the sentencing exercise or is otherwise of less relevance. It may have greater relevance if the federal offender has committed the offence

before: *Veen v The Queen (No 2)* (1988) 164 CLR 465, 477. It may have less relevance because an offender's evidence suggests the process of charging, conviction and/or pre-sentence custody, has deterred them from repeat behaviour. Mental health conditions may also moderate or elevate the weight to be given to specific deterrence: *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [177]. For further discussion of specific deterrence under NSW law, see **[2-240] To prevent crime by deterring the offender and other persons from committing similar offences: s 3A(b)**. For further discussion of the impact of a mental health or cognitive impairment on specific deterrence under NSW law, see **Protection of society and dangerousness** at **[10-460] Mental health or cognitive impairment**.

General deterrence: s 16A(2)(ja)

Section 16A(2)(ja) legislatively endorses the need to consider general deterrence.

General deterrence may be an important consideration in respect of particular classes of offences, for example, in the more serious cases of sustained and deliberate fraud (*Kovacevic v Mills* [2000] SASC 106 at [43] approved in *Totaan v R* [2022] NSWCCA 75 at [99]), or child sex exploitation offending such as child abuse material offences (*Lazarus v R* [2023] NSWCCA 214 at [76], [78] (Cavanagh J, with Ierace J agreeing)).

General deterrence may assume less weight in a sentencing exercise where a federal offender adduces evidence of a mental condition which was causally related to the offending in a material way, the rationale being that the particular offender is not an appropriate offender of which to make an example, as compared to a highly morally culpable offender: *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [177].

Need for adequate punishment: s 16A(2)(k)

This factor requires the court to ensure the person is adequately punished for the offence. The word "punishment" in this context has been held to be synonymous with retribution, which is a purpose of sentencing: *Azari v R* [2021] NSWCCA 199 at [57]. Particular regard may be paid to the objective seriousness of the offending and general deterrence when determining whether a person is "adequately punished" for the offence (see for example, *R v Manuel* [2020] WASCA 189; 285 A Crim R 563 at [92]).

Character, antecedents, age, means and physical or mental condition: s 16A(2)(m)

This factor involves consideration of prior convictions, but also character and antecedents generally. "Antecedents" is not solely a reference to convictions but can include all aspects of an offender's background, both favourable and unfavourable. For example, in *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332 at [34]–[35], [60]–[61] bankruptcy was considered an antecedent (and a factor of hardship).

The weight to be attached to good character or the lack of a criminal record may vary depending on the type of offence. For example, the lack of a criminal record may have less significance for a drug trafficking offence than for other types of offences: *R v Leroy* [1984] 2 NSWLR 441. In *R v Leroy*, the offender was convicted of being knowingly concerned in the importation of cocaine contrary to s 233B (rep) *Customs Act* 1901 (Cth). Chief Justice Street stated at 446–447:

> Very frequently, those selected to play some part in the chain of drug trafficking, as the appellant plainly enough was, are selected because their records, their past and their

> lifestyles are not such as to attract suspicion. It is this in particular which has led the courts to take in the case of drug trafficking a view which does not involve the same degree of leniency being extended to first offenders.

In white collar offences, such as those against the *Corporations Act* 2001 (Cth), "limited weight" is attached to prior good character because it is normally the factor that places the offender in the position that enables them to commit the offence: *R v Gent* [2005] NSWCCA 370 at [47], [52]–[59]; *R v Rivkin* (2004) 59 NSWLR 284 at [410]; *R v Boughen* [2012] NSWCCA 17 at [73]; *Eakin v R* [2020] NSWCCA 294 at [38]. See **Character, antecedents, age, means and physical or mental condition of the person — s 16A(2)(m)** at **[20-065] Types of Commonwealth fraud**.

In *Nguyen v R* [2016] NSWCCA 5 at [29], the Court of Criminal Appeal held the sentencing judge did not err in finding that the offender was not a person of good character because he had deliberately given false evidence, despite his lack of prior convictions.

A federal offender's subjective material provided to address s 16A(2)(m) may overlap with, or inform, the weight to be given to other factors in s 16A(2) such as specific deterrence and general deterrence. For example, a mental condition may make an offender more dangerous to the community suggesting specific deterrence needs to be given greater weight: see *DPP (Cth) v De La Rosa* at [77] and *R v Israil* [2002] NSWCCA 255 at [24].

Sentencing assessment reports or psychological/psychiatric reports may be tendered as evidence of a federal offender's physical or mental condition. A mental condition may be relevant to the moral culpability of the offender and/or the objective seriousness of the offence. The two concepts are separate but related (depending on the condition and factual circumstances): *TM v R* [2023] NSWCCA 185 at [55]; *DS v R* (2022) 109 NSWLR 82 at [77]; *R v Eaton* [2023] NSWCCA 125 at [45]; *Camilleri v R* [2023] NSWCCA 106 at [135]. Care must be taken not to double count for the same factor: *Williams v R* [2022] NSWCCA 15 at [131].

Where a mental condition is relied upon to reduce an offender's moral culpability, it may impact on the weight attached to other sentencing factors (such as specific deterrence, denunciation or adequate punishment for the offending), although it does not of itself necessarily warrant reduction in the sentence: *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [177] (and the cases cited therein). See further discussion of the case law at **[10-460] Mental health or cognitive impairment**.

Care must be taken not to double count breach of trust as an aggravating factor and to give good character little weight. In *Merhi v R* [2019] NSWCCA 322, the judge found the offending was aggravated because of the abuse of trust formed from his previous employment as a Customs Officer which helped facilitate the offence. It was an error for the judge to also find the offender's employment limited the weight to be given to prior good character, in effect, by dismissing good character as a relevant mitigating factor: *Merhi v R* at [6], [51], [55], [57].

Youth will ordinarily be a factor of significance in the sentencing exercise, but the circumstances of the case may reduce the weight to be given to it. The relevance of youth to the sentencing exercise was set out in *KT v R* [2008] NSWCCA 51 at [22]–[26]; see also *CW v R* [2022] NSWCCA 50. For further discussion see **[10-440] Youth**.

Customary law or cultural practice: s 16A(2A)

Section 16A(2A) provides that customary law and cultural practice are not to be taken into account in mitigating or aggravating the seriousness of criminal behaviour, except as relevant to s 16A(2)(ma) (see below).

Standing in community used to aid commission of offence: s 16A(2)(ma)

Section 16A(2)(ma) applies to federal offenders charged with, or convicted of, an offence from 20 July 2020: *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act* 2020 (Cth), s 2; Sch 8[6]. The section requires consideration of whether the person's standing in the community was used to aid the commission of the offence and, if so, is taken to aggravate the offence's seriousness.

The prohibition in s 16A(2A) against taking into account any form of customary law or cultural practice as a reason to aggravate the seriousness of the criminal behaviour does not apply if a person's standing in the community aided the commission of the offence.

Prospects of rehabilitation: s 16A(2)(n)

The prospects of rehabilitation are a mandatory consideration for the court: *Sigalla v R* [2021] NSWCCA 22 at [143]. An acknowledgement of wrongdoing may be a significant element in rehabilitation: *Sigalla v R* at [143]. However, while the absence of true remorse may reduce the weight that can be given to prospects of rehabilitation, it does not necessarily nullify them: *Sigalla v R* at [143], [147]–[148]. Remorse is not a prerequisite to an assessment that an offender has some prospect of rehabilitation: *Sigalla v R* at [143], [147]–[148].

Additionally, where an offence is reflective of an offender's character or the offender has an untreated mental condition relating to the offending, or which is causally connected in some way to the offending, the court is not likely to find the offender has good prospects of rehabilitation in the absence of treatment: *Young v R* [2021] SASCA 51 at [31]–[34].

When sentencing for a "Commonwealth child sex offence" (defined in s 3), s 16A(2AAA) provides the court must have regard to the objective of rehabilitating the offender, by considering treatment options. This may impact on the length of a sentence of imprisonment or non-parole period to include sufficient time for the offender to undertake a rehabilitation program.

The Explanatory Memorandum to the amending legislation, the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 at [255] to [258] states:

> [255] This item inserts subsection 16A(2AAA) which introduces a specific sentencing factor relating to rehabilitation that the court must have regard to when sentencing Commonwealth child sex offenders. This factor must be considered in addition to the general sentencing factors in subsection 16A(2), as part of the overall balancing exercise undertaken in order to determine a sentence of appropriate severity.
>
> [256] This amendment recognises the importance of rehabilitative justice. Rehabilitation of offenders decreases the likelihood of recidivism and is vital for public and community safety. However, state and territory correctional facilities advise that typically a non-parole period of 18 months to two years is required for offenders to be able to complete a relevant custodial sex offender treatment program"

The Court of Criminal Appeal in *Darke v R* [2022] NSWCCA 52 found it an error not to consider this factor when sentencing for child sex offences: [35]–[36].

Probable effect of sentence on offender's family or dependants: s 16A(2)(p)

Section 16A(2)(p) requires the court to take into account the probable effect of a sentence on an offender's family or dependents, and the hardship contemplated by the provision need not be exceptional: *Totaan v R* [2022] NSWCCA 75 (5 judge-bench) at [81]–[83] overruling *R v Sinclair* (1990) 51 A Crim R 418 and the cases which followed, including those of the Court of Criminal Appeal.

"Family" is defined in ss 16(1), 16A(4) and includes a de facto partner, a child of the victim, or anyone else who would be a member of the person's family if the de facto partner or child is taken to be a member of the person's family: s 16A(4).

The meaning under s 16A(2)(p) of the word "probable" was considered by the South Australian Court of Criminal Appeal in *R v Berlinsky* [2005] SASC 316. Justice Bleby stated at [42]:

> in the context of s 16A of the *Crimes Act* I consider that the effect to be considered is that which is more probable than not or more likely to occur than not. If a lesser standard were required, it is likely that the drafter would have used the word "possible" rather than "probable.

Justice Gray seemed to take a broader view at [58]:

> In the context of s 16A(2)(p), a provision obviously intended by the legislature to enable the Court to take into account a wide range of circumstances and eventualities, the term "probable" is correctly interpreted as including events that are possible, in the sense of being credible or having the appearance of truth, that is, events that are plausible outcomes, not merely fanciful postulations. Such an interpretation provides consistency of approach when sentencing.

[16-030] Penalties that may be imposed

There are various options available within the *Crimes Act* 1914 (Cth) for the sentencing of federal offenders. Generally, a court can sentence a federal offender as follows:

- Discharge without proceeding to conviction (s 19B);
- Fine (as provided by the offence provision);
- Conditional release forthwith on recognizance without conviction (s 20(1)(a)); or
- A term of imprisonment (s 20(1)(b)):
  - With immediate release, or release after a specified time, on recognizance with or without conditions.
  - If the total sentence does not exceed three years, the court must make a recognizance release order (subject to s 19AC(3), (4)) for that sentence (s 19AC(1)).
  - If the total sentence exceeds three years, the court must fix a non-parole period (subject to s 19AB(3)) for the sentence (s 19AB(1)).

Sentencing options from State law may be available: s 20AB (see **Additional sentencing alternatives: s 20AB** below**,** and for a detailed discussion of the NSW sentencing options, see **[3-500] Community-based orders generally**.

Sample orders for various Commonwealth penalties are included in the *Local Court Bench Book* at **[18-100]**.

Discharge without conviction

Section 19B(1) provides a court can dismiss the charge or discharge the offender without proceeding to conviction (with or without conditions), under paras (c) and (d) respectively, if it is inexpedient to inflict any punishment having regard to the character, antecedents, age, health or mental condition of the person (s 19B(1)(b)(i)), the extent (if any) to which the offence is of a "trivial nature" (s 19B(1)(b)(ii)), or the extent (if any) to which the offence was committed under "extenuating circumstances" (s 19B(1)(b)(iii)).

Any condition that an offender be of good behaviour may not exceed three years: s 19B(1)(d)(i). Reparation may be ordered under s 19B(1)(d)(ii) as can supervision for a period not exceeding two years under s 19B(1)(d)(iii).

The court cannot take into account customary cultural practice as a reason for excusing or justifying the offence, or which aggravates the seriousness of the behaviour: s 19B(1A).

Before making the order, the court is required to explain or cause to be explained to the offender the purpose of the order and the consequences that may follow if the order is breached: s 19B(2).

The application of s 19B(1) involves a two-stage inquiry: *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332 at [10]. The first is the identification of a factor or factors of the character specified in subparas (i), (ii) and (iii) of s 19B(1)(b), and the second is the determination that, having regard to that factor or factors, it is inexpedient to inflict any punishment, or to reach the other conclusions for which s 19B(1) provides: *Commissioner of Taxation v Baffsky* at [10]. The scope of considerations relevant to the exercise of the power in s 19B(1) encompass each of the matters identified in s 16A(2), which arise at the second stage of the inquiry: *Commissioner of Taxation v Baffsky* at [15].

The presence of any "extenuating circumstances" surrounding the commission of the offence, pursuant to s 19B(1)(b)(iii), requires a link between the circumstance said to be extenuating and the commission of the offence: *Commissioner of Taxation v Baffsky* at [47].

The fact that the offender is subject to adverse consequences (for example, legal and social consequences) if a conviction is recorded is a relevant consideration: *Commissioner of Taxation v Baffsky* at [38]; *R v Ingrassia* (1997) 41 NSWLR 447 at 449.

In *Director of Public Prosecutions (Cth) v Ede* [2014] NSWCA 282 at [33]–[37] the Court held a community service order could not be imposed as a condition of an order under s 19B as it would conflict with State laws, noting s 20AB provides no basis for imposing a community service order on any person who has not been convicted.

Fine

The maximum penalty for a federal offence may include the imposition of a fine (ss 20B(5), 20AB(4)) equating to the number of penalty units specified for the offence, or as otherwise provided. Section 4AA defines the amount for one penalty unit.

Section 16C(1) provides that, before imposing a fine, the court is required to consider the financial circumstances of the offender, although, s 16C(2) also provides that nothing prevents the court from imposing a fine because the offender's financial circumstances cannot be ascertained. The fact that an offender's financial circumstances must be taken into account does not dictate the fine to be imposed: *Mahdi Jahandideh v R* [2014] NSWCCA 178 at [15]. That is, financial capacity to pay is relevant but not decisive: *Darter v Diden* (2006) 94 SASR 505 at [30].

In *Soerensen v The Queen* [2020] WASCA 114 at [127], the Western Australian Court of Appeal held that the fact the corporate offender was in liquidation did not prevent the imposition of a fine which was said to also have a general deterrent effect (even though it could not be recovered).

Conditional release of offender after conviction and without passing sentence: s 20(1)(a)

Section 20(1)(a) provides that, where a court convicts a person of a federal offence, the court may order the conditional release of the person without passing sentence. The person must give security and the conditional release can include conditions such as to be of good behaviour (but for a period not exceeding 5 years) (s 20(1)(a)(i)); to make such reparation or restitution or pay such compensation or costs as the court specifies in the order (s 20(1)(a)(ii)), and/or comply with any other conditions not exceeding 2 years that the court thinks fit to specify (s 20(1)(a)(iv)).

A condition that the person pay to the Commonwealth such pecuniary penalty as the court dictates, not being more than the specific maximum penalty for the offence, may also be imposed: s 20(1)(a)(iii).

Nothing prohibits a judge, when making an order under s 20(1)(a), from imposing a good behaviour bond that extends beyond the period of imprisonment imposed under the order: *R v Smith* [2004] QCA 417 at [9].

If supervision conditions are ordered, the court must, pursuant to s 20(1A), state that the federal offender will not travel interstate or overseas without the written permission of the probation officer. The purpose and effect of the order and consequences of its breach must be explained to the offender: s 20(2).

Section 20 does not set out conditions that may be imposed on a federal offender who is conditionally released, to the same degree of specificity as some of the State and Territory sentencing legislation on recognizances/bonds.

Sample orders for various Commonwealth penalties are included in the *Local Court Bench Book* at **[18-100]**.

Recognizance release order, forthwith or with a minimum term of imprisonment: ss 19AC, 20(1)(b)

The court may convict and sentence a federal offender to imprisonment to be released on recognizance with or without conditions pursuant to s 20(1)(b). A recognizance

is only available where a person is convicted of a federal offence, or two or more federal offences in the same sitting, and the total sentence does not exceed 3 years imprisonment and when imposed, the offender is not already serving, or subject to, a federal sentence: ss 19AC(1), 20(1). The court may order the federal offender be released on recognizance forthwith upon giving security, with or without surety, with or without conditions, or after serving a minimum term of imprisonment: s 20(1)(a), (b).

The minimum period must reflect the minimum time that justice requires the applicant must serve having regard to all the circumstances of the offences; there is no prescribed ratio: see *Power v The Queen* (1974) 131 CLR 623; *Bugmy v The Queen* (1990) 169 CLR 525. Where the total sentence of imprisonment does not exceed 6 months, the court is not required to make a recognizance release order: s 19AC(3). Alternatively, the court can decline to make a recognizance release order if satisfied it is not appropriate to do so having regard to the nature and circumstances of the offence and the offender's antecedents, or the offender is expected to be serving a State or Territory sentence at the end of the federal sentence: s 19AC(4). If the court adopts this approach, it must state its reasons for not imposing a recognizance release order: s 19AC(5).

For a "Commonwealth child sex offence" (defined in s 3) committed on or after 23 June 2020, there is a presumption the offender will serve a minimum period of imprisonment before release to recognizance unless the court is satisfied there are "exceptional circumstances": s 20(1)(b)(ii), (iii). In such cases, s 20(1B) specifies the conditions which must be made as part of the order. "Exceptional circumstances" in s 20(1)(b)(ii) is not defined. By analogy, in the *Penalties and Sentences Act* 1992 (Qld), s 9 provides that when sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years of age, the offender must serve an actual term of imprisonment unless there are exceptional circumstances. In *R v GAW* [2015] QCA 166, the Queensland Court of Appeal at [54] applied the reasoning in *R v Tootell; ex parte Attorney General (Qld)* [2012] QCA 273 that the intention of the phrase "exceptional circumstances" read in its statutory context was to:

> make it the usual case that those who commit sexual offences against children will serve actual imprisonment. And, while that intent was not to be subverted by, for example, an over-readiness to regard as exceptional any circumstances peculiar to an offender's case, it was not the case that a combination of circumstances which would not individually be unusual can never be judged extraordinary.

Quoting *R v Tootell* at [24] the Queensland Court of Appeal in *R v GAW* stated at [54]:

> … there is no one clear prescription for what circumstances are capable of being regarded as exceptional. Consideration must be given not only to the unusualness of individual factors but to their weight; and factors which taken alone may not be out of the ordinary may in combination constitute an exceptional case.

Sample orders for various Commonwealth penalties are included in the *Local Court Bench Book* at **[18-100]**.

Imprisonment with non-parole period: ss 19AB, 20(1)(b)

Pursuant to s 19AB(1), where the court convicts and sentences a person of a federal offence, or two more federal offences in the same sitting, and the total sentence of

imprisonment exceeds 3 years, the court may convict and sentence a federal offender to imprisonment with a non-parole period and the balance of the term on parole: s 20(1)(b).

Alternatively, the court can decline to fix a non-parole period if satisfied it is not appropriate to do so having regard to the nature and circumstances of the offence and the offender's antecedents, or if the offender is expected to be serving a State or Territory sentence at the end of the federal sentence: s 19AB(3). If the court adopts this approach, it must state its reasons for not imposing a recognizance release order: s 19AC(4).

There is no prescribed ratio between the non-parole period and parole period, and therefore "special circumstances" are not required to displace a particular ratio. The minimum period must reflect the minimum time that justice requires the offender must serve having regard to all the circumstances of the offences: see *Power v The Queen* (1974) 131 CLR 623; *Bugmy v The Queen* (1990) 169 CLR 525.

For a "Commonwealth child sex offence" committed on or after 23 June 2020, there is a presumption the offender will serve a minimum period of imprisonment unless the court is satisfied there are "exceptional circumstances": s 20(1)(b)(ii), (iii). In such cases, s 20(1B) specifies the conditions which must be made as part of the order.

Sample orders for various Commonwealth penalties are included in the *Local Court Bench Book* at **[18-100]**.

Sentencing for certain offences:

- For a "terrorism offence" (defined in s 3), an offence against Div 80 Criminal Code, or an offence against ss 91.1(1), 91.2(1) Criminal Code, s 19AG provides for a minimum non-parole period.
- For certain child sex offences, s 16AAA prescribes mandatory minimum penalties.
- For second or subsequent convictions for certain child sex offences, s 16AAB prescribes mandatory minimum penalties.

Cumulative, partly cumulative or concurrent sentences of imprisonment: s 19

Section 19(1) addresses the situation where a person who is convicted of a federal offence is, at the time of that conviction, serving one or more federal, State or Territory sentences. The court must, when imposing the sentence for the present federal offence, direct when the federal sentence commences, but so that:

(a) no federal sentence commences later than the end of the sentences the commencement of which has already been fixed or the last to end of those sentences; and

(b) if a non-parole period applies in respect of any State or Territory sentences — the first federal sentence to commence after the end of that non-parole period commences immediately after the end of the period.

The intention of s 19 is to ensure that there is no gap between the end of a sentence which an offender is serving at the time they are convicted of a federal offence and the commencement of the sentence for the instant (federal) offence.

Determining the level of accumulative or concurrency in the structure of the ultimate disposition is a matter within the discretion of the sentencing judge, but ought to be applied principally: see for example, *Holt v R (Cth)* [2021] NSWCCA 14 at [74].

The common law principles, regarding structuring sentences cumulatively or concurrently that have developed for sentencing state offenders apply when sentencing federal offenders: *Holt v R (Cth)* at [75] endorsing the principles in *Cahyadi v R* [2007] NSWCCA 1 at [27]. Howie J in *Cahyadi v R* at [27] stated:

> In any event there is no general rule that determines whether sentences ought to be imposed concurrently or consecutively. The issue is determined by the application of the principle of totality of criminality: can the sentence for one offence comprehend and reflect the criminality for the other offence? If it can, the sentences ought to be concurrent otherwise there is a risk that the combined sentences will exceed that which is warranted to reflect the total criminality of the two offences. If not, the sentences should be at least partly cumulative otherwise there is a risk that the total sentence will fail to reflect the total criminality of the two offences. This is so regardless of whether the two offences represent two discrete acts of criminality or can be regarded as part of a single episode of criminality. Of course it is more likely that, where the offences are discrete and independent criminal acts, the sentence for one offence cannot comprehend the criminality of the other. Similarly, where they are part of a single episode of criminality with common factors, it is more likely that the sentence for one of the offences will reflect the criminality of both.

In *R v Hausman* [2022] NSWCCA 24 at [106] the Court of Criminal Appeal when considering multiple sentences for State and Federal offences stated:

> While it might be said that the High Court in Johnson and other decisions of this Court which have followed it …have considered that the preferred or conventional approach in applying totality principles is to determine the degree to which the individual sentences should be concurrent, partly concurrent or wholly accumulated (or a notional assessment of those considerations when an aggregate sentence is imposed), the ultimate question is whether in application of totality principles the ultimate and effective sentence adequately and fairly encompasses the totality of the criminality so as to arrive at a sentence which also satisfies the principle of proportionality.

Section 19(5)–(7) contain additional requirements when an offender is being sentenced for a Commonwealth child sex offence. In summary, there is a presumption that sentences of imprisonment for child sex offences are entirely cumulative. However, s 19(6), (7) provide that, the court may, with reasons, impose a sentence in a different manner if it would result in sentences that are of a severity appropriate in all the circumstances. This suggests s 19(6) does not unduly fetter the sentencing exercise, and principles of totality still apply: *Mertell v R* [2022] ACTCA 69 at [18].

Additional sentencing alternatives: s 20AB

Pursuant to s 20AB, additional sentences or orders under State or Territory law are available if they are listed in s 20AB(1AA), or are similar to a sentence or order listed in s 20AB(1AA) (s 20AB(1)(b)), or are prescribed under cl 6 *Crimes Regulations* 1990 (Cth) (s 20AB(1)(c)). In *CDPP v Evans* [2022] FCAFC 182 at [12], the Federal Court stated:

> It is readily apparent that s 20AB of the *Crimes Act* was intended to provide a court with additional sentencing options in respect of federal offenders by empowering it to pass

> certain types of sentences or make certain types of orders which were available under applicable laws of participating states and territories. There is nothing in the text or context of either ss 20 or 20AB which is suggestive of any legislative intention that the availability of the additional sentencing options in s 20AB would somehow exclude or limit the types of orders that the sentencing court could otherwise lawfully make under s 20(1) of the *Crimes Act*.

Whether a sentence or order is similar to one listed in s 20AB(1AA) is a question of degree to be considered in context and in light of the legislative purpose of extending sentencing options: *DPP (Cth) v Costanzo* [2005] 2 Qd R 385 at [23].

In NSW, applying s 20AB, additional sentencing options may include intensive correction orders (ICOs) and community correction orders (CCOs) under ss 7, 8 *Crimes (Sentencing Procedure) Act* respectively. If such sentences are being considered, then any statutory requirements, limitations or prescriptions pursuant to the *Crimes (Sentencing Procedure) Act* 1999 apply. This is to ensure the State laws are applied consistently to federal offenders: s 20AB(3).

There is no reference in s 20AB or cl 6 *Crimes Regulations* to a sentencing option of deferral of sentence (akin to that provided for in s 11 *Crimes (Sentencing Procedure) Act*) and, accordingly, is not available when sentencing federal offenders.

If the court is considering an ICO, Part 5 of the *Crimes (Sentencing Procedure) Act* 1999 applies. Therefore, when considering whether to impose an ICO for a federal offender, the court must engage with the assessment required in s 66(2) of the *Crimes (Sentencing Procedure) Act*: *Stanley v Director of Public Prosecutions (NSW)* [2023] HCA 3. Pursuant to s 66(3) of the *Crimes (Sentencing Procedure) Act*, when deciding whether to order an ICO the court must consider the purposes of sentencing in s 3A of the *Crimes (Sentencing Procedure) Act*: *Chan v R* [2023] NSWCCA 206 at [99]–[116]. In *Chan v R*, N Adams J (with Kirk JA and Rothman J agreeing) noted the "significant textual differences" between the purpose in s 3A(d) of the *Crimes (Sentencing Procedure) Act* which is "to promote the rehabilitation of the offender" and s 16A(2)(n) which lists as a factor the offender's "prospect of rehabilitation" Further, pursuant to s 67(1) of the *Crimes (Sentencing Procedure) Act* 1999, an ICO is unavailable for some Commonwealth offences including a terrorism offence (defined in s 3) or a "prescribed sexual offence" which includes certain federal offences pursuant to the definition in s 67.

For further detailed discussion, see **Intensive correction orders (ICOs) (alternative to full-time imprisonment)** at **[3-600]ff** and particularly **Federal offences** at **[3-680]**.

Failure to comply with condition of discharge or conditional release: s 20A

Section 20A sets out the consequences of failing to comply with a condition of an order under s 19B(1) or s 20(1).

Where a person has been conditionally discharged under s 19B(1) and has failed, without reasonable excuse, to comply with a condition of the order without reasonable excuse, the court may:

(i) revoke the order, convict the person of the offence, and resentence the person, or

(ii) take no action: s 20A(5)(a).

If a person who has been conditionally released under s 20(1) fails to comply with a condition of the order without reasonable excuse, the options available to the court are set out in s 20A(5)(b) and include (i) and (ii) above but also a pecuniary penalty of 10 penalty units.

Breach of a recognizance release order without reasonable excuse may result in the court: imposing a monetary penalty not exceeding $1000; extending the period of supervision to a period not greater than 5 years; revoking the order and either imposing an alternative sentencing option under s 20AB or imprisoning the person for that part of the sentence they had not served at the time of release from custody; or taking no action: s 20A(5)(c).

In *DPP (Cth) v Seymour* [2009] NSWSC 555, Simpson J concluded that s 20A does not permit a magistrate to set aside a duly executed conviction and substitute an order under s 20BQ: at [8]–[9]. The conviction can only be set aside by a proper appeal process at [10].

Discharge or variation of a recognizance

A recognizance (either made under ss 19B(1) or 20(1)) can be varied or discharged: s 20AA. Examples of variations include:

- extending or reducing the duration of the recognizance (within the limits allowed under s 20AA(4))
- inserting additional conditions
- reducing the amount of compensation
- altering the manner in which reparation is to be made: s 20AA(3).

Reparation for offences: s 21B

Where a person is convicted of a federal offence or is discharged under s 19B the court may, in addition to the penalty imposed on the person, order the offender to make reparation by way of monetary payment or otherwise, for any loss suffered or expense incurred by the Commonwealth by reason of the offence: s 21B(1)(c). The court may also order the offender to make reparation to any person, in the same terms, for any loss suffered, or any expense incurred, by the person by reason of the offence: s 21B(1)(d).

Section 21B(2) clarifies that a person is not to be imprisoned for failure to pay the amount required under the reparation order.

Failure to comply with sentencing order made under s 20AB

Section 20AC outlines the procedure when an offender fails to comply with a sentence passed or an order made under s 20AB. The court — if satisfied the offender has, without reasonable cause or excuse, failed to comply with the sentence or order or any requirements related to it — may impose a pecuniary penalty not exceeding 10 penalty units; revoke the alternative sentence and re-sentence the offender; or take no action: s 20AC(6).

Section 20AC does not authorise the court to amend or revoke the order when the offender has a reasonable excuse for failing to comply with it. The options in s 20AC only apply when the offender lacks a reasonable excuse. This situation was illustrated in *R v Rivkin* [2003] NSWSC 447 where the offender was convicted of the federal

offence of insider trading and sentenced to 9 months imprisonment, to be served by way of periodic detention. When the offender had difficulty complying with periodic detention, for medical and psychiatric reasons, a leave of absence was sought from the Commissioner of Corrective Services (NSW). In the absence of a judicial option, the problem was dealt with by the Commissioner agreeing to allow the offender to serve the eight remaining weekends of his periodic detention in one 16-day block.

[16-035] Relevance of decisions of other State and Territory courts

See also the extensive discussion concerning the issue of consistency, the use of other cases and the use of statistics in **Objective Factors at common law** at **[10-020]**ff and at **[10-024]**ff.

Sentencing principles

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

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

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

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

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

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

Achieving consistency in sentencing

In *Hili v The Queen* (2010) 242 CLR 520, the High Court held (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at [18]; Heydon J agreeing at [70]):

> Consistency in sentencing federal offenders is achieved by the proper application of the relevant statutory provisions, having proper regard not just to what has been done in other cases but why it was done, and by the work of the intermediate courts of appeal.

The plurality in *The Queen v Pham* (2015) 256 CLR 550 affirmed *Hili v The Queen* in the following passage at [18]:

> where a State court is required to sentence an offender for a federal offence, the need for sentencing consistency throughout Australia requires the court to have regard to sentencing practices across the country and to follow decisions of intermediate appellate courts in other States and Territories unless convinced that they are plainly wrong.

In *Hili v The Queen* the High Court added at [49]:

> [W]hat is sought is the treatment of like cases alike, and different cases differently. Consistency of that kind is not capable of mathematical expression. It is not capable of expression in tabular form.

The High Court has repeatedly emphasised that the consistent application of the relevant legal principles is more important than numerical equivalence and that, in seeking such consistency, it is important to have regard to what has been done in other cases: *Hili v The Queen* at [48]–[49], [53]–[54]; *Barbaro v The Queen* (2014) 253 CLR 58 at [40], [41].

There may be issues associated with achieving consistency when trying to equate certain Commonwealth offences with a State equivalent. In *R v Nakash* [2017] NSWCCA 196, Simpson JA (N Adams J agreeing) adopted one approach saying, at [18]:

> I see no reason why, in the absence of a pattern of sentencing for the federal offence, some guidance could not have been obtained from the many cases decided under the State legislation. Although, in *Pham*, the High Court rejected the proposition that a State court sentencing federal offenders should sentence in accordance with the sentencing practice of that State to the exclusion of sentencing practices in other Australian jurisdiction, there is nothing in the judgment of the plurality that prevents reference to sentences imposed in respect of comparable offences under State law. Particularly is that necessary where, as the Crown here asserted, there was no relevant pattern of sentencing in respect of the Code offence.

However, in *Rajabizadeh v R* [2017] WASCA 133, the Western Australian Court of Appeal concluded, at [68], that it was wrong in principle to seek to achieve consistency by equating sentences for certain Commonwealth offences with a State equivalent, observing:

> The idea that sentences for Commonwealth offences should be equated with similar State offences for the purposes of achieving consistency is wrong as a matter of principle. An approach that seeks consistency with similar State offences would create inevitable problems. The equivalent State offences in each jurisdiction may have differing maximum penalties and may attract differing ranges of sentences.

Use of information about sentences in other cases

The High Court has held Simpson J's approach in *DPP (Cth) v De La Rosa* at [303]–[305] accurately identified the proper use of information about sentences that have been passed in other cases: *Hili v The Queen* at [54]; *Barbaro v The Queen* (2014) 253 CLR 58 at [41]. Justice Simpson at [304] said that a range of sentences imposed in the past:

- does not fix boundaries which future courts must follow; and
- can, and should, provide guidance, and stand as a yardstick against which to examine a proposed sentence.

However, when considering past sentences "it is only by examination of the whole of the circumstances that have given rise to the sentence that 'unifying principles' may be discerned": *DPP (Cth) v De La Rosa* per Simpson J at [304], citing *Wong v The Queen* (2001) 207 CLR 584 at [59]; *Barbaro v The Queen* at [41]; *The Queen v Pham* at [29].

Having regard to comparable cases can assist in identifying the relevant sentencing principles, and the range of available sentences: *The Queen v Pham* at [29].

[16-040] Sentencing for multiple offences

Aggregate sentences

Section 4K *Crimes Act* 1914 states in part that:

(3) Charges against the same person for any number of offences against the same provision of a law of the Commonwealth may be joined in the same information, complaint or summons if those charges are founded on the same facts, or form, or are part of, a series of offences of the same or a similar character.

(4) If a person is convicted of 2 or more offences referred to in subsection (3), the court may impose one penalty in respect of both or all of those offences …

R v Bibaoui [1997] 2 VR 600 held that s 4K(3) was only concerned with summary offences and the words "information, complaint or summons" in the subsection did not embrace "on indictment".

Offences on indictment were covered by the application of s 68 *Judiciary Act* 1903 (Cth), which picked up the provisions of State legislation with regard to the procedures for the trial of indictable offences. The High Court in *Putland v The Queen* (2004) 218 CLR 174 per Gleeson CJ at [9], Gummow and Heydon JJ at [46], Kirby J at [86] confirmed that *R v Bibaoui* had been correctly decided.

Where multiple offences are being dealt with on indictment, *Pearce v The Queen* (1998) 194 CLR 610 may be applied: *Thorn v R* [2009] NSWCCA 294 at [47]. A judge sentencing an offender for multiple federal offences may also impose an aggregate sentence under s 53A *Crimes (Sentencing Procedure) Act* 1999. The power to do so does not derive from s 20AB: *Watson v R* [2020] NSWCCA 215 at [25]. As Pt IB *Crimes Act* 1914, which includes s 4K(4), does not cover the field, s 68(1) *Judiciary Act* applies to pick up the aggregate sentencing scheme under s 53A for federal offenders dealt with on indictment: *DPP (Cth) v Beattie* [2017] NSWCCA 301 at [141]–[146]; *Kannis v R* [2020] NSWCCA 79 at [10].

An aggregate sentence cannot be imposed for a combination of Commonwealth and State offences: *Sheu v R* [2018] NSWCCA 86 at [26]. Separate aggregate sentences must be imposed: *Fasciale v R* (2010) 30 VR 643 at [27].

See also **[7-507] Settled propositions concerning s 53A**.

Totality has application for multiple offences. See **Cumulative, partly cumulative or concurrent sentences of imprisonment: s 19** at **[16-030] Sentences of imprisonment** above.

Mixture of Commonwealth and State offences

Setting a non-parole period where there is a mixture of State and Commonwealth offences may pose difficulties for a court. There must be separate aggregate sentences imposed (see above at **Aggregate sentences**).

Ordinarily it is appropriate to apply the Commonwealth practice so far as the overall non-parole period is concerned where there is a mixture of State and Commonwealth offences and a Commonwealth offence is the most serious: *Cahyadi v R* [2007] NSWCCA 1 at [40].

Totality principle when previous sentence to be served: ss 16B, 19AD and 19AE

The totality principle, in the sense of taking into account other sentences to be served, is recognised in ss 16B, 19AD and 19AE *Crimes Act* 1914.

In sentencing a person convicted of a federal offence, the court must have regard to any outstanding sentence imposed on the offender by another court for a federal, State or Territory offence: s 16B(a). The court must also take into account any sentence the person is liable to serve because of the revocation of a parole order made or licence granted: s 16B(b).

When a court imposes a federal sentence on an offender who is serving a non-parole period for an existing federal sentence, the court must, in fixing the non-parole period, consider the existing non-parole period, the nature and circumstances of the offence concerned, and the antecedents of the person: s 19AD. The same principle applies under s 19AE to offenders who are already subject to an existing recognizance release order.

Options that the court may take are set out by ss 19AD and 19AE; namely, it may:

- make an order confirming the existing non-parole period or recognizance release order
- fix a new single non-parole period or recognizance release order in respect of all federal sentences that the offender is to serve or complete
- cancel the existing non-parole period/recognizance release order and decline to set a new one, where the court decides that a non-parole period or recognizance release order is not appropriate.

A court cannot fix a single non-parole period or make a recognizance release order for both a federal sentence of imprisonment and a State/Territory sentence of imprisonment: s 19AJ.

Possible deportation is no impediment to fixing non-parole period: s 19AK

Section 19AK clearly states that a court is not precluded from fixing a non-parole period in respect of the sentence imposed for that offence merely because the person is, or may be, liable to be deported from Australia. Cases touching on this topic include: *The Queen v Shrestha* (1991) 173 CLR 48 and *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370.

[16-045] Remissions

Pursuant to s 19AA(1), any remissions that are provided on the term of sentence to State or Territory offenders by the State or Territory in which the federal offender serves their sentence of imprisonment also apply to federal sentences. However, a State or Territory law that enables the remission or reduction of a non-parole period of a State

or Territory prison sentence does not apply to a federal sentence (unless the remission or reduction is due to industrial action by prison warders): ss 19AA(2) and (4). New South Wales does not allow remissions.

Detention of offender in State or Territory prison: ss 18 and 19A

Section 18 provides that where, under State or Territory law, a convicted person may be imprisoned in a particular kind or class of prison, a person convicted of an offence against the law of the Commonwealth may, in corresponding cases, be imprisoned in the kind or class of prison appropriate to the circumstances. Section 19A provides that a federal offender who is ordered by a court or a prescribed authority to be detained in prison in a State/Territory, may be detained in any prison in that jurisdiction and may be removed from one prison to another prison as if the person were detained as a State/Territory offender.

[16-050] Conditional release on parole or licence

The function of directing release on parole or licence resides with the Attorney-General (Cth) (or departmental delegate). The Attorney-General also retains other important decision-making powers, such as revoking parole and amending the conditions attached to it. By contrast, the court's role is to determine the length of the sentence and of any non-parole period.

Release on parole — making of parole order

If a federal offender has been sentenced to more than 3 years, the Attorney-General must, before the end of a non-parole period fixed for one or more federal sentences imposed on a person, either make, or refuse to make, an order directing that the person be released from prison on parole: s 19AL(1). (See s 19AC for sentences less than 3 years.)

If the Attorney-General refuses to make a parole order for a person under s 19AL(1) or s 19AL(2)(b), the Attorney-General must give the person a written notice, within 14 days after the refusal, and reconsider the making of a parole order for the person and either make, or refuse to make, such an order, within 12 months after the refusal. Section 19ALA contains a non-exhaustive list of the matters which may be considered by the Attorney-General in making a parole decision.

The Attorney-General is not required to make, or to refuse to make, a parole order if the offender is serving a State or Territory sentence or non-parole period and it ends after the federal sentence(s): s 19AL(5).

Discretionary release on licence: s 19AP

Release on licence is another form of conditional release of a federal offender. An offender, or someone acting on their behalf, must apply to the Attorney-General for such an order: s 19AP(2). The application must specify the exceptional circumstances relied upon, and the Attorney-General must be satisfied that those exceptional circumstances exist to justify the grant of the licence: s 19AP(3) and (4). Release on licence may be granted whether or not a non-parole period has been fixed, or a recognizance release order has been made, and whether or not the non-parole period or pre-release period has expired. Two examples of circumstances in which early

release may be granted are when an offender requires medical treatment that cannot be provided in the prison system and when an offender has provided assistance to law enforcement authorities, but this was not taken into account at sentence.

Decision-making process

The Attorney-General's Department makes its parole determinations on the basis of written material, and there is no opportunity for the offender to appear in person at a parole hearing. This contrasts with the practice in NSW for State offences, whereby the State Parole Authority may invite the offender to appear at a hearing and make submissions if the Authority forms an initial intention to refuse parole. The State Parole Authority has a statutory basis under the *Crimes (Administration of Sentences) Act* 1999 (NSW). There is no formal parole board at the federal level, although the Attorney-General's delegate may consult an advisory panel in difficult or controversial cases. The panel's members include representatives from the Office of the Commonwealth Director of Public Prosecutions.

Conditions and supervision: ss 19AN and 19AP

Certain conditions are automatically attached to parole or release on licence. These are that the offender must be of good behaviour, must not violate any law during the period of parole or licence, and that, if subject to supervision, the offender must obey all reasonable directions of the supervisor: ss 19AN(1) and 19AP(7). The Attorney-General may also specify any other conditions in the order. The conditions applicable to a parole order or licence may be changed by written order of the Attorney-General at any time before the end of the parole or licence period: s 19APA.

Supervision following release on parole/licence is intended to reduce the risk of reoffending and to assist the offender in reintegrating into the community. There is no limit on the period of supervision. "Supervision period" is defined in s 16(1) by reference to the time between a person's release on parole or licence and when either the relevant order, or nominated period of supervision, expires.

Parole order where offender is serving State sentence: s 19AM

Section 19AM(2) confirms that an offender is not to be released on parole for a federal offence if the offender is serving (or is to serve) a State or Territory sentence.

[16-055] Revocation of parole or licence

A federal offender on parole or licence (conditional release) is still serving their sentence until the parole or licence period ends: s 19APB(1)(a). If an offender fails to comply with the conditions of their release the Attorney General may revoke their parole or licence: s 19AU. There will be an automatic revocation of an offender's parole or licence, if the offender on conditional release commits an offence resulting in the imposition of a sentence of more than 3 months' imprisonment: s 19AQ(1)–(2).

Because there is no federal equivalent of the NSW parole board, a court determines how much of the outstanding sentence the federal offender is liable to serve and fix a new non-parole period (or decline to do so): s 19AQ(3)–(4). This does not involve "re-sentencing" the offender for the outstanding sentence: *Nweke v R (No 2)* [2020] NSWCCA 227 at [23].

The provisions do not apply to suspended sentences: s 19AQ(5).

Revocation of parole or licence by Attorney-General

The Attorney-General may revoke parole or a licence where a federal offender fails to comply with their conditions, or there are reasonable grounds for suspecting that the offender has failed to comply: s 19AU(1).

A person who is arrested (with or without warrant) after their parole or licence is revoked by the Attorney-General must, as soon as practicable, be brought before a magistrate in the State or Territory where they were arrested: s 19AV(3). The magistrate must direct the person be detained in prison for the unserved part of the sentence: s 19AW. This is calculated in accordance with NSW laws with an offender being taken to have served their sentence from release on parole or licence until its revocation therefore taking clean street time into account: s 19AA(1)–(3); see *Crimes (Administration of Sentences) Act* 1999, ss 171, 254 and 255.

Automatic revocation of parole or licence

A federal parole order or licence is automatically revoked when an offender commits a further federal, State or Territory offence (new offence) on conditional release for which they are sentenced to a term of imprisonment of more than 3 months: s 19AQ. This includes an aggregate sentence of more than 3 months but not a suspended sentence: s 19AQ(1)–(2), (5). Parole will be automatically revoked even if the sentence has expired, so long as the offence which attracted a sentence of at least 3 months imprisonment was committed while the offender was on conditional release: s 19APB(2).

When sentencing the offender for the new offence, the court will generally deal with the outstanding sentence by:

1. Determining when the parole order or licence was revoked (s 19AQ(1)–(3));
2. Determining how much of the sentence the person is liable to serve (s 19AQ(4));
3. Imposing a new non-parole period for the outstanding sentence (s 19AR) (the court cannot impose a recognizance release order); and
4. Issuing a warrant for the offender's imprisonment for the unserved part of the outstanding sentence (s 19AS).

When determining how much of the outstanding sentence the offender is liable to serve, s 19AQ(4)(b) provides the court may, where appropriate, take into account the person's good behaviour between conditional release and revocation (clean street period). The earlier version of s 19AQ which applies to parole or licences revoked before 20 July 2020, when read together with s 19AA(2) also requires the clean street period to be taken into account: *Nweke v R* [2020] NSWCCA 153 at [75]–[77].

When sentencing the offender for the new offence/s, the court must fix a single non-parole period for all outstanding and new federal offences: s 19AR(1). A non-parole period for any new State or Territory offences committed while the offender was on conditional liberty must be fixed separately: ss 19AJ, 19AR(3). A court may decline to set a non-parole period but must provide reasons: s 19AR(4)–(5).

Section 19AS(1)(e) provides an offender "must begin to serve the unserved part of the outstanding sentence… on the day that the new sentence is… imposed" and the court is not able to backdate a sentence. Where an offender is entitled to the benefit

of pre-sentence custody, the court's inability to backdate the sentence means it is "not possible to impose a sentence that does not involve some distortion of the common law and statutory principles that govern the sentencing task": *Nweke v R (No 2)* [2020] NSWCCA 227 at [41]. Instead, courts should make allowance for pre-sentence custody while providing "a transparent process of reasoning" and ensure the sentence structure is "not distorted so as to exceed or fall short of what would otherwise have been imposed": at [41]. One option is to reduce the total effective sentence while an alternative option is to backdate the sentence for the new offences to reflect the pre-sentence custody relating to the original offences. Neither approach is wrong or wholly satisfactory: *Nweke v R (No 2)* at [35], [39]–[41].

[16-060] Children and young offenders

Section 20C *Crimes Act* 1914 provides that children and young persons may be tried and punished for federal offences in accordance with the law of the State or Territory in which they were charged or convicted. This enables the States and Territories to apply their respective juvenile justice regimes. However, it does not preclude the application of federal sentencing laws and considerations in Pt IB of the *Crimes Act* (Cth).

There is no definition of "child" or "young person" under the *Crimes Act* 1914. The definition used in the respective State or Territory is generally adopted, which may result in discrepancies in the treatment received between jurisdictions.

If the child is tried or punished for a federal offence in accordance with NSW laws, key provisions of the *Children (Criminal Proceedings) Act* 1987 are engaged, such as the principles in s 6, the procedure in s 31 and the penalties in s 33.

[16-065] Imposing restrictions on passports at sentence

Section 22 authorises a court that passes a "relevant sentence" or makes a "relevant order" with regard to a person convicted of a "serious drug offence", or other prescribed offence against the Commonwealth, to surrender possession of their Australian passport or refrain from applying for an Australian passport.

A serious drug offence means an offence involving or relating to controlled substances and punishable by a maximum penalty of 2 years imprisonment or more: s 22(7). The other offences currently prescribed under cl 6AA *Crimes Regulations* 1990 (Cth) are indictable passport offences.

"Relevant sentence" is defined by s 22(7) as a sentence of imprisonment, other than a suspended sentence, or sentencing alternatives available pursuant to s 20AB (for example, intensive correction orders for offenders sentenced in NSW). "Relevant order" refers to remanding a person in custody or on bail, suspending the sentence upon entering a recognizance, or ordering a conditional release.

[16-070] Offenders with mental illness or intellectual disability

Divisions 6–9 of Pt IB cover unfitness to be tried and other issues relating to mental illness.

Only the provisions relevant to sentencing (under Divs 8 and 9) will be discussed here. Specific alternatives are available to the court instead of passing sentence.

Summary jurisdiction: s 20BQ

In the summary jurisdiction, if a federal offender is suffering from a mental illness within the meaning of the civil law of the State or Territory, or is suffering from an intellectual disability, and the court considers it would be "more appropriate" to deal with the offender within s 20BQ, the Court can dismiss the charge and discharge the offender conditionally or unconditionally into the care of a responsible person. See discussion in *Local Court Bench Book* at **[18-140] Persons suffering from mental illness or intellectual disability**.

Hospital orders: ss 20BS–20BU

Where a person has been convicted of an indictable federal offence the court may, without passing sentence, order that the person be detained in a hospital for a specified period for the purpose of receiving certain treatment. However, to make such an order, the court must be satisfied that:

(a) the person is suffering from a mental illness within the civil law of the relevant State/Territory

(b) the illness contributed to the commission of the offence by the person

(c) appropriate treatment for the person is available in a hospital in the State/Territory, and

(d) the proposed treatment cannot be provided to the person other than as an inmate of a hospital: s 20BS(1).

Before reaching an opinion on these matters, the court must obtain and consider the reports of two "duly qualified psychiatrists with experience in the diagnosis and treatment of mental illness": s 20BS(5).

Furthermore, the court must not make a hospital order unless it would have otherwise sentenced the person to a term of imprisonment, but for the person's mental illness: s 20BS(2). The court must not specify a period that is longer than the period of imprisonment that would have been imposed if the hospital order had not been made: s 20BS(3).

Psychiatric probation orders: ss 20BV–20BX

Where a person is convicted of any federal offence, the court may, without passing sentence, order that the person reside at (or attend) a specified hospital or other place for the purpose of receiving psychiatric treatment, where the court is satisfied that:

(a) the person is suffering from a mental illness within the civil law of the relevant State/Territory

(b) the illness contributed to the commission of the offence by the person

(c) appropriate psychiatric treatment for the person is available in a hospital in the State/Territory, and

(d) the person consents to the order, and the person (or their legal guardian) consents to the proposed treatment: s 20BV(1) and (2).

Program probation orders: s 20BY

Where a person is convicted of any federal offence, the court may, without passing sentence, order that the person be released on condition that he or she undertake the

program or treatment specified in the order, where the court is satisfied that: (a) the person is suffering from an intellectual disability (b) the disability contributed to the commission of the offence by the person, and (c) an appropriate education program or treatment is available for the person in the State/Territory: s 20BY(1).

[The next page is 9001]

Particular offences

Dangerous driving and navigation

Detain for advantage/kidnapping

Drug Misuse and Trafficking Act 1985 (NSW) offences

Fraud offences

Offences against justice/in public office

Robbery

Car-jacking and car rebirthing offences

Sexual assault

Murder

Manslaughter and infanticide

Assault, wounding and related offences

COMMONWEALTH

Commonwealth drug offences

Money laundering

Conspiracy

[The next page is 9051]

Fraud offences

[19-930] Introduction

Last reviewed: November 2023

Fraud offences are governed by New South Wales and Commonwealth legislation. While many of the same sentencing principles apply to both jurisdictions, the statutory regimes and the statutory factors that are to be taken into account under s 21A *Crimes (Sentencing Procedure) Act* 1999 and s 16A *Crimes Act* 1914 (Cth) differ. It is not uncommon to have a combination of Commonwealth and State offences in the one sentencing proceeding and it is important to differentiate between the two statutory schemes. The regimes in New South Wales and the Commonwealth are therefore dealt with separately, although parts of the New South Wales regime are relevant to Commonwealth offences. For commentary on Commonwealth sentencing generally, see **[16-000] Crimes Act 1914 (Cth) — sentencing Commonwealth offenders**.

[19-935] The NSW statutory framework

Last reviewed: November 2023

In 2010, a statutory scheme for fraud and identity crimes was introduced into Pts 4AA and 4AB of the *Crimes Act* 1900 by the *Crimes Amendment (Fraud, Identity and Forgery Offences) Act* 2009. This was intended to bring NSW into line with the national approach for fraud, forgery and identity crimes, with offences based on the Model Criminal Code.

All offences under Pts 4AA, 4AB and 5 of the *Crimes Act* are to be dealt with summarily unless elected otherwise: *Criminal Procedure Act* 1986, Sch 1, Table 1. When dealt with summarily in the Local Court the jurisdictional maximum of 2 years applies (*Criminal Procedure Act*, s 267(2)) and the aggregate sentence or total term of consecutive or partly consecutive sentences cannot exceed 5 years (*Crimes (Sentencing Procedure) Act*, s 58). No fraud offences have a standard non-parole period: *Crimes (Sentencing Procedure) Act*, s 54D. See also **Maximum penalties and the jurisdiction of the Local Court** in **[10-000]**; **[20-035] Fraud offences — ss 192E–192H Crimes Act 1900**.

The principles and cases concerning the current fraud offences in NSW are set out below at **[20-035]**–**[20-039]**. Where relevant, the sentencing principles applying to the equivalent repealed offences are included. While some of the sentencing principles developed for current offences may be relevant to repealed offences, the different maximum penalties, elements of the offence etc should be borne in mind.

[19-940] General sentencing principles for NSW fraud offences

Last reviewed: November 2023

General deterrence and the inevitability of full-time imprisonment

General deterrence is an important sentencing factor for fraud offences. Such crimes frequently involve a serious breach of trust and are usually only able to be committed because of the previous good character of the person who has been placed in the

position of trust: Gleeson CJ in *R v El-Rashid* (unrep, 7/4/95, NSWCCA). In *R v Mungomery* [2004] NSWCCA 450, a case involving three counts of defrauding a company under s 176A *Crimes Act* 1900 (rep, now see s 192E(1)(a)), Hulme J said at [41]:

> The cases in this area also stress the importance of general deterrence. Organisations, be they business or government, cannot operate effectively without placing a good deal of trust in their employees. Opportunities for the abuse of that trust are legion and breaches are often difficult to detect. Commonly, offenders are able to continue their depredations for long periods. Often matters only come to light when the total amounts involved become too large to be overlooked. It seems to me an inevitable inference that there must be many cases where offending is never discovered — a factor also arguing for sentences which are substantial deterrents.

The difficulty in detecting and successfully prosecuting white-collar crime is also a reason why general deterrence is important: *R v Wall* (2002) 71 NSWLR 692 at [89]; *R v Donald* [2013] NSWCCA 238 at [41]. In *McMahon v R* [2011] NSWCCA 147 Hoeben J (Hodgson JA and Grove AJ agreeing) noted that the:

> … community now views white collar crime very seriously, having regard to the fact that it is easy to commit and difficult and expensive to track down: at [83].

Further, both personal and general deterrence are of particular significance for offences which involve the systematic exploitation of the electronic banking system: *Stevens v R* [2009] NSWCCA 260 at [79].

The general sentencing principles applied by the courts with respect to earlier fraud provisions in the *Crimes Act* continue to apply despite their repeal. However, cases which state that serious fraud requires that general deterrence be the primary ore pre-eminent sentencing consideration for such offences, or that a sentence of imprisonment must be imposed unless exceptional or unusual circumstances exist, need to be approached with caution following the five-judge-bench decisions of *Parente v R* (2017) 96 NSWLR 633 and *Totaan v R* [2022] NSWCCA 75. Such propositions find no support in the text of the legislation and are incompatible with the judicial sentencing discretion: *Totaan v R* at [81]–[83], [90]–[91]; *Parente v R* at [101], [108]–[110].

In *Totaan v R*, a social security fraud case, the court also stated the judicial gloss placed on statutory provisions, including that general deterrence has pre-eminent importance in fraud cases, should be removed: at [93]. General deterrence should not be the primary sentencing consideration in such cases so that personal mitigating factors such as prior good character, age and prospects for rehabilitation are given less weight than might otherwise be the case: *Totaan v R* at [100]. The structure of s 16A *Crimes Act* 1914 (Cth) does not permit of such a hierarchy of sentencing considerations: *Totaan v R* at [78], [100]. The reasoning in *Totaan v R* can be applied to the similar principles that have developed with respect to general deterrence in NSW fraud cases and s 21A *Crimes (Sentencing Procedure) Act* 1999.

The need for general deterrence in any given case must always be assessed by reference to the personal circumstances of the offending and which may have operated on the offender: *Totaan v R* at [98]–[100], [130]; *Kovacevic v Mills* (2000) 76 SASR 404 at [43].

In respect of the presumption of imprisonment, *Hili v The Queen* (2010) 242 CLR 520, a Commonwealth tax fraud case, the High Court said the notion of there being a "norm" or "proposition of universal application" in setting sentences is apt to mislead: *Hili v The Queen* at [36]–[38], [44]. *Hili v The Queen* was applied in the context of NSW offences in *Parente v R* at [100]–[104] where the Court observed at [95]:

> An approach to sentencing in drug supply cases of first determining whether there has been trafficking to a substantial degree giving rise to an assumption that there must be a full-time custodial sentence, and then to inquire whether there are exceptional circumstances that would justify some alternative imposition, may be characterised as a "two-staged" approach that is contrary to the "instinctive synthesis" approach of taking into account all of the relevant factors in order to arrive at a single result which takes due account of them all.

The same may be said in relation to fraud offences. See also *Totaan v R* at [90]–[93].

Care must be taken when applying general principles in relation to "white collar crime" offences. In *R v Brown* (unrep, 1/8/94, NSWCCA) Simpson J said:

> white collar crime itself is so various in its manifestations and nature that it is scarcely susceptible of precise definition or of defined sentencing principles. I do not read the cases cited as laying down any proposition of the inevitability of a full-time prison sentence in any case which could be brought within the description of "white collar crime."

Similar principles were described in the earlier Commonwealth fraud case of *Kovacevic v Mills* (2000) 76 SASR 404 at [43]:

> In our view in the more serious cases of sustained and deliberate fraud, deterrence is very important, imprisonment is likely to be required, but all mitigating circumstances and the rehabilitation of the offender must still be considered. Substantial mitigating circumstances, and in some cases considerations of mercy and leniency may lead to the conclusion that a sentence of imprisonment is inappropriate or that such a sentence is appropriate, but that the imprisonment need not be served.

Kovacevic v Mills was applied in *Totaan* at [99]. See also *Sabbah v R (Cth)* [2020] NSWCCA 89 at [2]–[10].

Not a victimless crime

Even though for some fraud offences, a specific victim cannot be identified, it is wrong to regard white-collar crime as a victimless crime. For example, in respect of insider trading, McCallum J (as she then was) said in *R v Curtis (No 3)* [2016] NSWSC 866 at [24]:

> It causes loss (albeit unquantifiable) to individual traders and it causes harm to the community at large by damaging the integrity of the market as a level playing field.

Youth

The principles that apply to youth in respect of physical violence extend to "white collar" crimes and offences involving fraud and financial deception. However, in fraud cases, the very nature of the offences will require a level of sophistication and intelligence, albeit misguided, especially where numerous acts of defalcation are involved: *Singh v R* [2020] NSWCCA 353 at [41], [55]. For example, in *Hartman v R*

[2011] NSWCCA 261, the offender's youth (aged 21) and relative immaturity did not have any role to play in downgrading or lessening the importance of general deterrence because he was operating in the adult sphere of business and commerce in every respect and was educated and worldly: at [93]; see also *Singh v R* at [43]–[46], [54]–[57] and **Sentencing principles applicable to children dealt with at law** at **[15-090]**; **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]** and **Age — advanced age and youth** at **[10-430]**.

Limited utility of statistics and schedules

The dangers of comparative sentencing for fraud cases was discussed in *R v Hawker* [2001] NSWCCA 148 where Wood CJ at CL said:

> There is a danger in endeavouring to extract a "range" from a limited group of decisions on appeal, or from sentencing statistics.
>
> …
>
> [G]reater assistance is to be derived by reference to general sentencing policy which has seen something of a hardening attitude to white collar crime in view of its difficulty of detection, and in view of the fact that its impact may fall upon a wider group of investors or creditors: *Pont* [2000] NSWCCA 419.

When sentencing for fraud offences, greater assistance is gained from general sentencing principles rather than by reference to statistics or "schedules of fraud appeals" because of the enormous variation in objective and subjective circumstances involved: *R v Martin* [2005] NSWCCA 190; *PC v R* [2020] NSWCCA 147 at [118]. In *R v Martin*, Johnson J said at [56]:

> This Court has observed that reference to sentencing statistics is of limited value in the case of fraud offences, given the enormous variation in objective and subjective circumstances involved, and the Court has expressed concern when an attempt is made to compare sentences for a specific offence of dishonesty with other cases involving dishonesty of a different kind: *R v Hawker* [2001] NSWCCA 148 at paragraphs 17–18; Woodman at paragraphs 22–24; *R v Swadling* [2004] NSWCCA 421 at paragraphs 29, 54. In each of those cases, the Court has emphasised that far greater assistance is derived from reference to general sentencing principles with respect to white-collar crime.

In *Tweedie v R* [2015] NSWCCA 71 at [45], where the applicant committed, inter alia, 27 offences under s 192E, the court said at [45]: "the database relied upon in relation to the fraud offences contained only five cases of sentencing in the District Court or resentencing in this Court which makes the statistics of no use at all." See also *Scanlan v R* [2006] NSWCCA 238 at [93] decided in respect of the previous form of the fraud offence. See generally **Use of information about sentences in other cases** at **[10-022]** and **Use of sentencing statistics — Hili v The Queen** at **[10-024]**.

[19-970] Objective seriousness — factors of common application to fraud

Last reviewed: November 2023

The objective seriousness of a fraud offence is assessed by reference to the elements of the offence and the statutory maximum: *Muldrock v The Queen* (2011) 244 CLR 120 at [27]. Although sentencing for fraud should not be approached in a formulaic manner,

the courts have recognised several factors that bear generally upon the objective seriousness of a given offence. The interplay of these factors help to place the offence on the spectrum of like offences:

1. The amount of money involved (*R v Hawkins* (1989) 45 A Crim R 430, *R v Mungomery* [2004] NSWCCA 450 at [40], *R v Woodman* [2001] NSWCCA 310, *R v Finnie* [2002] NSWCCA 533 at [59]) and whether the loss is irretrievable: *R v Todorovic* [2008] NSWCCA 49 at [19].
2. The length of time over which the offences are committed: *R v Pont* [2000] NSWCCA 419 at [74], [75], *R v Mungomery* [2004] NSWCCA 450 at [40].
3. The motive for the crime: *R v Mears* (1991) 53 A Crim R 141 at 145, *R v Hill* [2004] NSWCCA 257 at [6], *R v Woodman* [2001] NSWCCA 310 at [29].
4. The degree of planning and sophistication: *R v Mille* (unrep, 1/5/98, NSWCCA), *R v Pont* [2000] NSWCCA 419 at [43]–[44], *R v Murtaza* [2001] NSWCCA 336 at [15], *Stevens v R* [2009] NSWCCA 260 at [59], [78].
5. An accompanying breach of trust: *R v El-Rashid* (unrep, 7/4/95, NSWCCA), *R v Pont*, *R v Hawkins* (1989) 45 A Crim R 430.

The courts have also regarded the impact on public confidence: *R v Pont* at [74], [75] and the impact on the victim: at [74], [75] as relevant matters.

Factors 1–5 above are discussed in greater detail below.

1. Amount of money involved

The amounts of money involved in premeditated deception cases is a significant consideration in assessing the objective seriousness of the offence because it indicates the extent to which the prisoner is prepared to be "dishonest and to flout the law and to advance whatever are his own purposes": *R v Hawkins* (1989) 45 A Crim R 430 at 435.

In *R v Mungomery* [2004] NSWCCA 450 Hulme J said at [40]:

> authority makes it clear that the amount of money involved in premeditated deception is an important, and the period of time over which offences are committed a relevant, factor in determining the extent of criminality — see *Hawkins* (1989) 45 A Crim R 430, *R v Mears* (unrep, 14/3/91, NSWCCA), referred to by Wood CJ at CL and SperlingJ in *R v Woodman* [2001] NSWCCA 310.

In *R v Howard* (unrep, 28/3/95, NSWCCA), the offender defrauded a total of $6,500 over a four year period. The court held that the offender was entitled to the benefit of the fact that the amounts subject of the charges were relatively small. However, in *R v Finnie* [2002] NSWCCA 533 at [59] it was held that although the amount of money defrauded is not determinative of the seriousness of the offence it "is relevant to a degree and particularly where the offences are premeditated, committed on a number of separate occasions and involve a degree of planning, and are for substantial amounts of money".

In *Matthews v R* [2014] NSWCCA 185 at [21], the total amount of property obtained by the four deceptions encompassed by the charges and Form 1 matters was just over $1,200. The court noted at [21] that this was a relatively small amount and that s 192E captures offences which can run to defalcations in the millions of dollars. In *R v Hawkins* (1989) 45 A Crim R 430 at 435 on the other hand the court said the very great amounts of money involved (more than $5 million) and the long period of time over

which they were committed were significant. This was no temporary "dipping into the till" crime, but a consistent and persistent demonstration of fraud by a trusted solicitor over a significant period.

In *Stevens v R* [2009] NSWCCA 260, although $209,182 of the $402,935 defrauded was recovered, the court noted that "the applicant's criminality was not dependent upon whether the banks had been successful in retrieving any part of the money"; it was the amount fraudulently obtained that was to be reflected in the seriousness of the offences: at [69]. However, in *Whiley v R* [2014] NSWCCA 164, Adams J (Bathurst CJ and Hoeben CJ at CL agreeing) held that the undamaged return of vehicles obtained by deception significantly reduced the objective seriousness of the offences as "the extent of the loss … [is] the most significant … measure": at [39].

In the case of a Ponzi scheme, the precise calculation of the scale and amount of the fraud is less significant than the brazen and continued conduct: *Fasciale v R* (2010) 30 VR 643, endorsed in *Finnigan v R* [2013] NSWCCA 177 at [31]. In *Finnigan*, Campbell J (Macfarlan JA and Barr AJ agreeing) held that it "matters little" whether a victim was robbed of $300,000 or $500,000, in the overall context of a Ponzi scheme causing losses of $1.96 million to eight "mum and dad investors" over four years. That the effect on each victim was ruinous was more compelling than precise calculation of the amount involved: at [32].

Similarly, the value of individual transactions constituting individual counts becomes of lesser importance as the pattern of offending is more blatant, frequent and entrenched: *Tweedie v R* [2015] NSWCCA 71 at [31], where the offending in question was a systematic, frequent and fraudulent use of stolen credit cards.

In *Abellanoza v R* [2021] NSWCCA 4, the offender, an accounting supervisor with no prior record, misappropriated $3.7 million from her employer by a sophisticated operation over a four-year period, with $2.6 or $2.7 million of the funds remaining unaccounted for. The court found her aggregate sentence of eight years imprisonment with a non-parole period of 5 years for the seven fraud and associated offences, was substantial but within the available range for such serious offending: [38], [144]. In sentencing, the judge was not required to make a finding as to motive for the offence, whether it be gambling, greed or disgruntlement in her employment: [3], [26].

See also **Remorse demonstrated by making reparation of loss under s 21A(3)(i)** below at **[20-000] Mitigating factors**.

2. Length of time over which the offences are committed

The length of time over which the offences are committed is a relevant factor in determining the level of criminality involved. The length of time can also be relevant to indicate the degree of planning and to show it was not an impulsive offence: *R v Mears* (1991) 53 A Crim R 141 at 145; *R v Murtaza* [2001] NSWCCA 336 at [15]. In *Cordoba v R* [2021] NSWCCA 144, the offender was sentenced to 6 years imprisonment for defrauding a TAFE of about $1.65 million (two-thirds of their yearly budget), by engaging in 50 fraudulent transactions over 7 months. The offence involved a significant degree of planning and sophistication and a significant breach of trust. Further, the offender lied to investigators and at a public hearing, secured an adjournment for his sentencing on the basis that he needed surgery but instead was at large for nearly a year, assumed a false identity and continued to work in the same field until he was finally apprehended.

In addition, where an offence is committed over a significant period of time this may ameliorate the weight that may be afforded to good character: *Luong v R* [2014] NSWCCA 129 at [21]; *R v Smith* [2000] NSWCCA 140 at [20]–[22].

3. Motive

The motive for committing the offence will be a relevant factor when assessing the criminality: *R v Mears* (1991) 53 A Crim R 141 at 145; *Cordoba v R* [2021] NSWCCA 144. If the fraud is based on greed rather than need the sentence imposed should be longer: see *R v Medina* (unrep, 28/5/90, NSWCCA); *R v Mears* at 145. However, in *Abellanoza v R* [2021] NSWCCA 4, the sentencing judge was not required to make a finding as to motive for the offence, whether it be gambling, greed or disgruntlement in her employment: at [3], [26]. Further, the fact an offence is committed for a motive other than personal greed is not to be considered a matter of mitigation: *Khoo v R* [2013] NSWCCA 323 at [78].

4. Degree of planning

Offences committed on impulse have been distinguished from offences where there has been planning with a degree of sophistication: *R v Mille* (unrep, 1/5/98, NSWCCA), *R v Pont* [2000] NSWCCA 419 at [43]–[44]; *R v Murtaza* [2001] NSWCCA 336 at [15]; *Cordoba v R* [2021] NSWCCA 144 at [111]. The fact that the offence was part of a planned or organised activity is an aggravating factor to be taken into account under s 21A(2)(n) *Crimes (Sentencing Procedure) Act* 1999: see **Aggravating factors** at **[19-990]** below. However, this would need to be proved beyond reasonable doubt: *Meis v R* [2022] NSWCCA 118 at [29], [47]; *Olbrich v The Queen* (1999) 199 CLR 270 at [27].

5. Breach of trust

Breach of trust can be relevant where it is an element of the offence or as a key feature of aggravation: *R v Pont* [2000] NSWCCA 419 at [43]–[44], *R v Murtaza* [2001] NSWCCA 336 at [15]. The fact that the offence involved a breach of trust is an aggravating factor to be taken into account under s 21A(2)(k) *Crimes (Sentencing Procedure) Act* 1999. However, where the breach of trust is an element of the offence, it is not to be taken into account additionally as an aggravating factor: *R v Martin* [2005] NSWCCA 190 at [40] and see **Aggravating factors** at **[19-990]** below.

What is a breach of trust? The breach of trust must be in direct contravention of what the offender was engaged to do: *R v Stanbouli* [2003] NSWCCA 355 at [35]. Hulme J said at [34]:

> The cases where, traditionally, breach of trust has been regarded as exacerbating criminality are where it is the victim of the offence who has imposed that trust — an employer defrauded by his employee, a solicitor who appropriates trust funds to his own use — or where the criminality involves a breach of that which the offender was engaged or undertook to do, e.g. a teacher or baby-sitter who indecently deals with the subject of his or her charge.

Those placed in a special position of trust by the law and the community, such as solicitors and other professionals, who abuse that trust, call their profession into question and merit sentences calculated to ensure that other professionals will be left in no doubt that serious consequences will follow: *Pont* at [47].

In *R v Pantano* (1990) 49 A Crim R 328, Wood J (with whom Carruthers J agreed) said at 330:

> those involved in serious white collar crime must expect condign sentences. The commercial world expects executives and employees in positions of trust, no matter how young they may be, to conform to exacting standards of honesty. It is impossible to be unmindful of the difficulty of detecting sophisticated crime of the kind here involved, or of the possibility for substantial financial loss by the public. Executives and trusted employees who give way to temptation cannot pass the blame to lax security on the part of management. The element of general deterrence is an important element of sentencing for such offences.

In *Suleman v R* [2009] NSWCCA 70, the judge erred by finding the applicant's dealings with investors, particularly those within the Assyrian community, amounted to a breach of trust. The fact the applicant was considered to be a successful businessman within the Assyrian community did not impose a position of trust upon him in relation to any person in that community with whom he dealt. Nor did the applicant occupy a position of trust because the investors were commercially naïve. For a relationship of trust to exist, there must have been at the time of the offending a special relationship between the victim and offender, which transcends the usual duty of care arising between persons in the community in their everyday contact or their business and social dealings: at [22], [27].

In *R v Edelbi* [2021] NSWCCA 122, the court applied *Ridley v R* [2008] NSWCCA 324 at [85] and said the applicant, who was lodging false compulsory third party insurance claims for services not provided, had breached the trust he had with the community who contribute to the provision of compulsory third party insurance and have an interest in the integrity of the system: at [48]–[50].

Professionals

Legal practitioners

In the two-judge bench decision of *Marvin v R* (unrep, 1/11/95, NSWCCA), the offender, a solicitor, was convicted of 41 counts of fraudulent misappropriation of funds contrary to s 178A *Crimes Act* 1900, and two counts of making and the using of a false instrument contrary to ss 300(1) and (2) *Crimes Act* 1900. Sully J said:

> Any solicitor who misappropriates clients' funds for whatever reason, great or small, arguably good or arguably bad, commits a serious offence, not only in terms of contravening the relevant particular provisions of the *Crimes Act*, but in terms of the betrayal of public trust and confidence which such behaviour represents. It is appropriate to say simply that that must always be regarded by the Courts, of all institutions, as serious conduct meriting in any but the most exceptional cases, a custodial sentence.

Marvin was cited with approval in *R v Houlton* [2000] NSWCCA 183 at [25]. The court in *R v Smith* [2000] NSWCCA 140 at [16] endorsed the sentencing judge's observation that "It is necessary for the court to impose significant penalties as a lesson to other legal professionals … in a position of trust [so] that this kind of misconduct will not be tolerated".

In *Houlton*, the respondent, a solicitor, pleaded guilty to five counts of fraudulent misappropriation totalling $347,000 under s 178A *Crimes Act* 1900, including 80

offences on a Form 1. His appeal against the three-year period detention sentence was dismissed. *R v Hawkins* (1989) 45 A Crim R 430 at 436 involved misappropriation of $6.6 million from clients and a company by a solicitor over a three and a half year period. Following a Crown appeal, the offender was resentenced to 10 years with a balance of term of five years. *Assi v R* [2006] NSWCCA 257 involved fraudulent misappropriation and obtaining money by deception by a solicitor: ss 178A, 178BA. Following an appeal the offender was sentenced to a term of sentence of seven years and six months with a non-parole period of four years and six months.

The fact that the offender will be struck off the roll of solicitors can be to be taken into account as a matter of extra-curial punishment: *Oudomvilay v R* [2006] NSWCCA 275 at [19].

Accountants

In *R v Sellen* (unrep, 5/12/91, NSWCCA) the offender, a chartered accountant, fraudulently misappropriated $1.25 million of his client's funds over a five year period. Following an appeal the offender was resentenced to five years imprisonment with a balance of term of three years.

Directors

R v Houghton [2000] NSWCCA 62 involved a company director fraudulently applying company property. He was convicted for 26 counts under s 173 *Crimes Act* 1900. Following his appeal his effective sentence was confirmed as a non-parole period of 18 months with a balance of term of six months. Barr J (Fitzgerald JA and Abadee J agreeing) said at [19]: "sentences imposed for offences involving such serious and persistent breaches of trust must be sufficient to deter others from offending, not least because they are so difficult to detect".

In *R v Hinchliffe* [2013] NSWCCA 327, the court allowed a Crown appeal against a managing director who defrauded a body corporate of $1.5 million and was sentenced to two years imprisonment to be served by way of intensive correction order (ICO). He was resentenced to an overall sentence of four years imprisonment with a non-parole period of two years three months.

Other professionals

Coles v R [2016] NSWCCA 32 involved a leading art dealer who sold $8 million worth of artworks to investors who were unaware the paintings had already been on-sold, or belonged, to others. The sentencing judge regarded the offending as "a brazen breach" of the trust his clients had reposed in him: at [13].

Senior employees

Positions of seniority in a company make it easier to cover tracks and discourage scrutiny and detection. The obligation to uphold the trust of employers in their employees and to deter breaches of such trust by senior employees means that the courts frequently respond to offences committed by senior employees with the imposition of a custodial sentence: *R v Scott* (unrep, 7/11/91, NSWCCA). This case involved a senior employee but a very small amount of money and a custodial sentence was imposed on the offender, however on appeal a sentence of periodic detention was imposed to preserve parity with the sentence imposed on the offender's wife.

The court in *R v Pantano* (1990) 49 A Crim R 328 at 338 explained the different positions of employees and senior executives in sentencing for fraud offences:

> Although it is difficult to generalise and each case must be taken on its merits, the cases in which a subordinate employee guilty of serious dishonesty should receive a sentence of the same order as a senior executive are likely to be relatively few. This is because of the control exercised by the senior executive, his greater ability to defer and perhaps avoid detection, his grosser breach of trust by reason of has senior position, his greater duties and greater responsibility.

Nursing home operators

Fraud committed by nursing home proprietors, particularly making claims for work not performed (ghosting), should be regarded as the most serious fraud in the community. Such offences are committed against frail aged persons who are often not in a position to complain against dishonesty: *R v Boian* (1997) 96 A Crim R 582. Ghosting was held to be an aggravating feature taken into account in *R v Giallussi* [1999] NSWCCA 56 at [15].

[19-980] Section 21A Crimes (Sentencing Procedure) Act 1999 and fraud offences

Last reviewed: November 2023

The limitations on applying aggravating and mitigating factors in accordance with s 21A *Crimes (Sentencing Procedure) Act* 1999 is discussed in detail in **Limitations on the use of s 21A — aggravating and mitigating circumstances** at **[11-040]**. A key limitation is that factors which are elements integral to the offence are not to be taken, of themselves, as aggravating features because this would constitute impermissible "double counting": *R v Martin* [2005] NSWCCA 190; *R v Wickham* [2004] NSWCCA 193 at [22]–[23]. However, while such factors cannot be taken into account as aggravating factors they can be taken into account as circumstances of the offence: *Arvinthan v R* [2022] NSWCCA 44 at [39]. See also **[11-000] Section 21A factors "in addition to" any Act or rule of law**.

[19-990] Aggravating factors

Last reviewed: November 2023

Breach of trust under s 21A(2)(k)

Breach of trust is a key consideration in sentencing for many fraud offences and is discussed generally above in **Objective Seriousness – factors of common application to fraud** at **[19-970]**. This section focuses on the issue of "double-counting" in the application of s 21A(2)(k) *Crimes (Sentencing Procedure) Act* 1999.

A judge can only have "additional regard" to the abuse of a position of trust as an aggravating factor under s 21A(2)(k) where it is not an element of the offence. In *R v Martin* [2005] NSWCCA 190 the judge was found to err by having "additional regard" to s 21A(2)(k) where the fraud offence (trustee fraudulently disposing of property under s 172 *Crimes Act* 1900 (rep)) had "abuse of authority or a position of trust" as an element of the offence. While mention of the abuse of trust is permissible in respect of characterising the objective gravity of the offence, to pay "additional regard" under s 21A constitutes impermissible "double counting": *R v Wickham* [2004] NSWCCA 193 at [22]–[23] applied.

In *Martin* the court said at [40]:

> With respect to general fraud or dishonesty offences, where breach of trust is not an essential element of the offence, common law sentencing principles have recognised that abuse of a position of trust, where it exists on the facts of a particular case, is an aggravating factor on sentence. Examples of this include the following:
>
> (a) larceny as a servant contrary to s 156 *Crimes Act* 1900 by a senior accounts clerk: *R v Pantano* (1990) 49 A Crim R 328 at 330;
>
> (b) fraudulently omitting to account contrary to s 178A *Crimes Act* 1900 by a real estate agent: *R v Woodman* [2001] NSWCCA 310 at paragraphs 14-15;
>
> (c) making false accounting entries contrary to s 158 *Crimes Act* 1900 and using a false instrument to the prejudice of another contrary to s 300 *Crimes Act* 1900 by a bank employee: *R v El-Rashid* (CCA(NSW), 7 April 1995, BC9504681 at page 4;
>
> (d) defrauding the Commonwealth Bank contrary to s 29D *Crimes Act* 1914 (Cth) by a bank loans manager: *R v Chaloner* (1990) 49 A Crim R 370 at 375; and
>
> (e) offences by a solicitor comprising forging of documents contrary to s 67B *Crimes Act* 1914 (Cth), defrauding the Commonwealth contrary to s 29D *Crimes Act* 1914 (Cth), forging and uttering bills and notes contrary to s 273 *Crimes Act* 1900, fraudulent misappropriation contrary to s 178A *Crimes Act* 1900: *R v Hawkins* (1989) 45 A Crim R 430 at 436.
>
> In cases such as these, where breach of trust is not an element of the offence, there is scope for s 21A(2)(k) to permit a court to have "additional regard" to the abuse of a position of trust or authority in relation to the victim as an aggravating factor on sentence. This reflects the position at common law.

In *Lu v R* [2014] NSWCCA 307, the judge made no error in finding the aggravating factor under s 21A(2)(k) established. Although it was an element of the offence under s 176A *Crimes Act* 1900 (rep) that the offender be a director of a company, "not all company directors accept other peoples' money for the purpose of investment", which was the essence of the position of trust abused in that case: at [21].

However, in *Suleman v R* [2009] NSWCCA 70, the judge erred by taking into account as an aggravating factor, pursuant to s 21A(2)(k), that the applicant's dealings with investors, particularly those within the Assyrian community, amounted to a breach of trust. See discussion above in **Objective Seriousness — factors of common application to fraud** at **[19-970]**.

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

Class of victims under s 21A(2)(l)

Where the victim was vulnerable, for example, because the victim was very young or very old or had a disability, or because of the victim's occupation (such as a taxi driver, bus driver or other public transport worker, bank teller or service station attendant), s 21A(2)(l) *Crimes (Sentencing Procedure) Act* 1999 will be relevant. The aggravating feature under s 21A(2)(l) "the victim was vulnerable" is concerned with the vulnerability of a particular class of victim and is not directed to vulnerability in a general sense: *R v Tadrosse* (2005) 65 NSWLR 740. In *Tadrosse*, the general approach taken by the judge to the s 21A factors and the fact it was unclear in his reasons whether any particular factor was present for each offence, made it was impossible to know

whether s 21A(2)(l) was applied to all or only some of the offences and if so which ones. The court concluded that there was no evidence that any of the victims fell within the categories under s 21A(2)(l): *Tadrosse* at [24].

See also **Section 21A(2)(l) — the victim was vulnerable** at **[11-170]**.

Multiple victims or a series of criminal acts under s 21A(2)(m)

The aggravating factor in s 21A(2)(m) *Crimes (Sentencing Procedure) Act* 1999 is concerned with the situation where a single offence contains multiple criminal acts or victims. For example, in *Johnston v R* [2017] NSWCCA 53, when considering the question of manifest excess it was relevant that the plea was to a "rolled up count" involving 156 fraudulent transactions, meaning the criminality involved was greater than a charge involving only one episode of criminal conduct: at [68]–[70].

However, s 21A(2)(m) is not concerned with offenders who are being sentenced for a series of offences, separately charged, even when committed against multiple victims because that would constitute "double counting": *R v Tadrosse* (2005) 65 NSWLR 740 at [28]–[29]; *Clinton v R* [2018] NSWCCA 66 at [27]–[29]. Such factors can be taken into account as a circumstance of the offending: *Clinton v R* at [37]–[39]. In *Tadrosse*, the sentencing judge erred by taking s 21A(2)(m) into account because the applicant was being sentenced for multiple offences and the numerous victims and acts of criminality would be dealt with in accordance with the principle of totality: [29]. Similarly, in *R v Kilpatrick* [2005] NSWCCA 351, the judge erred by referring to multiple victims in the context of the offences, each of which was individually charged. In *Clinton*, while the agreed facts revealed uncharged criminal acts were involved in the commission of each fraud offence, s 21A(2)(m) did not apply because the acts were not particularised in the offences: [38]–[40].

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

Part of a planned or organised criminal activity under s 21A(2)(n)

An offence involving systematic dishonesty accompanied by planning, sophistication and repetition will constitute an aggravating factor under s 21A(2)(n) on sentence: *R v Pont* [2000] NSWCCA 419 at [43]–[44]. Offences committed on impulse have been distinguished from offences where there has been planning with a degree of sophistication: *R v Mille* (unrep, 1/5/98, NSWCCA), *R v Pont* at [43]–[44]; *R v Murtaza* [2001] NSWCCA 336 at [15].

The aggravating factor was established in *Yow v R* [2010] NSWCCA 251 as the nine offences of making and using a false instrument were committed in the context of an organised criminal syndicate and the applicant had arrived in Australia with the sole purpose of using the counterfeit credit cards to obtain goods for the purposes of on-sale: at [13]–[14].

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

The offence was committed for financial gain under 21A(2)(o)

Committing a fraud for financial gain, will sometimes constitute an aggravating factor on sentence, but care must be taken to ensure there is no "double counting". In *Whyte v R* [2019] NSWCCA 218, the sentencing judge erred by taking into account

financial gain under s 21A(2)(o), when financial gain was an element of the offences of obtaining financial advantage by deception contrary to s 178BA (rep) and s 192E and the financial gain was not present to an unusual extent: *Whyte v R* at [30]–[34]. The magnitude of the defalcations in *Whyte* was considered in the offences' totality and,to add "the further consideration of financial gain beyond what would normally be expected of offences of the kind for which sentence is to be imposed would be to double count": at [34]; see also *Clinton v R* [2018] NSWCCA 66 at [10], [12], [20]–[22].

Financial gain is not an inherent characteristic of identity fraud and may constitute an aggravating factor in some cases: *Lee v R* [2019] NSWCCA 15 at [83]; see also **[20-037] Identity crime offences — ss 192J–192L *Crimes Act* 1900**.

[20-000] Mitigating factors

Last reviewed: November 2023

Mental condition

This sentencing factor is discussed in more depth and with reference to High Court decisions in **Mental health or cognitive impairment** at **[10-460]**. Briefly, mental illness is one of the factors that forms part of the complex interplay of factors relevant to the sentencing process. It may be relevant to the emphasis to be given to specific and general deterrence. It is also a matter which can reduce an offender's moral culpability by affecting their ability to understand the wrongfulness of their actions, or to make reasonable judgments, or to control faculties and emotions. It is accepted that the nature and severity of the mental illness, may render a custodial penalty more onerous: *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [177]; *R v Donald* [2013] NSWCCA 238 at [75].

In cases of fraud, care must be taken where an offender has claimed a mental condition and the offence has involved deception over a long period of time. The court must take particular care in determining whether there is a causal connection between the offender's mental condition and the commission of the offence(s). The following cases provide illustrations.

- In *R v Hinchliffe* [2013] NSWCCA 327 the respondent made unauthorised transfers over a one-year period to a company of which he was the sole director. The sentencing judge erred in finding there was a causal connection between the offences and the respondent's bipolar disorder: at [246]. The respondent did not give evidence at sentence. Over the course of the offending he was functioning in a responsible business position, which he had occupied with apparent success for years prior, and no character witnesses gave evidence to support a finding of any apparent difference in demeanor: *R v Hinchliffe* at [239].
- The offender's narcissistic personality disorder in *De Angelis v R* [2015] NSWCCA 197 was neither causally connected to the offending nor of sufficient severity to warrant any significant amelioration of sentence: at [62]. The nature of the offending was a vast, deliberate and continuing fraudulent scheme involving (inter alia) perseverance, cunning and intelligence: at [66].
- In *Hartman v R* [2011] NSWCCA 261 a nexus was established between the offences and the applicant's psychiatric condition: *Hartman v R* at [80]. In that case, the applicant was suffering from a genuine and long term depression spectrum that

contributed to his compulsive insider trading. The offending gave him temporary but misguided relief from his major depressive symptoms: *Hartman v R* at [91]. The applicant's moral culpability was lessened and some moderation of general deterrence warranted: at [92].

– Similarly, in *R v Donald* [2013] NSWCCA 238, the respondent's bipolar disorder was accepted to have compromised his ability to control his faculties and emotions but did not render him unable to understand the wrongfulness of his actions or to make reasonable judgments. The respondent's moral culpability was moderately reduced, however there was still a significant role for general deterrence to play: at [76].
– In *R v Joffe* [2015] NSWSC 741 the offender's mental condition was "to an extent casually connected" with the offences and thus reduced his moral culpability and the need for denunciation: at [121]. The judge also accepted that he was suffering from anorexia nervosa which would render any custodial sentence more onerous: [121].
– In *Subramaniam v R* [2013] NSWCCA 159, the impact of the offender's personality disorder was a complex issue, and the causal relationship between her condition and the offending lay in her compromised intellectual and emotional restraints, such that the offender's moral culpability was found to be moderately reduced: [58].

Absence of criminal record under s 21A(3)(e) and prior good character under s 21A(3)(f)

Prior good character is a mitigating factor to be taken into account under s 21A(3)(e) and (f). However, in the case of fraud, where the offender has been appointed to a position of trust because of his or her good character, and it is abused, general deterrence will become a major consideration and good character will be of less relevance: *R v Gentz* [1999] NSWCCA 285 at [12]. In *R v El Rashid* (unrep, 7/4/95, NSWCCA) Gleeson CJ said:

> Considerations of general deterrence are of particular importance in sentencing for crimes of this nature.
>
> Such crimes frequently involve, as in the present case, a serious breach of trust. Such breaches of trust are usually only able to be committed because of the previous good character of the person who has been placed in a position of trust.

Similarly, where there are repeated offences over a period of time, or the offender has engaged in a course of conduct to avoid detection, prior good character will carry less weight: *R v Smith* [2000] NSWCCA 140 at [20]–[24]; *R v Phelan* (1993) 66 A Crim R 446; *R v Houghton* [2000] NSWCCA 62 at [18].

An offender's lack of a previous criminal record will not be accorded the significance it might have had where he or she has committed a large number of offences over a long period of time: *R v Chan* [2000] NSWCCA 345 at [20] (a two-judge bench decision referred to in a schedule in *R v Hare* [2007] NSWCCA 303).

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

Remorse demonstrated by making reparation of loss under s 21A(3)(i)

Section 21A(3)(i) *Crimes (Sentencing Procedure) Act* 1999 provides that remorse demonstrated by making reparation of loss is a factor to be taken into account as

a mitigating factor. Remorse will only be relevant as a mitigating factor where the offender has provided evidence that he or she has accepted responsibility for his or her actions, and the offender has acknowledged any injury, loss or damage caused by his or her actions or made reparation for such injury, loss or damage (or both).

See also **Section 21A(3)(i) — remorse shown by the offender** at **[11-290]**.

Restitution can be a mitigating factor where it involves a degree of sacrifice. It can also indicate a degree of remorse where it occurs, after the defendant became aware of the full consequences of his criminality: *R v Phelan* (1993) 66 A Crim R 446, *R v Giallussi* [1999] NSWCCA 56 and *R v Strano* [2002] NSWCCA 531 at [76]. See also *Subramaniam v R* [2013] NSWCCA 159 at [53]–[54].

In *R v Woodman* [2001] NSWCCA 310 (a two-judge bench decision) Wood CJ at CL said at [32]:

> The offer by the applicant to make reparation was of limited value to him, particularly in the absence of any earlier attempt to do so. It is not the case that an offender found guilty of fraud offences can purchase mitigation by way of a voluntary repayment. While the degree of sacrifice involved can be taken into account it cannot be overlooked that an order for compensation, or reparation does no more than require the return of illgotten gains to which the offender had no entitlement.
>
> Moreover, as Hunt CJ at CL pointed out in *Phelan* (1993) 66 A Crim R 446:
>
> > It is more of a matter of aggravation when there has been a loss which is effectively irretrievable than a matter of mitigation where the loss has been made good.

Hidden J (McClellan CJ at CL and Grove AJ agreeing), in obiter remarks in *Job v R* [2011] NSWCCA 267, noted that the above observation should be approached with some caution. His Honour stated:

> I doubt that the former Chief Judge was saying anything more than that, in determining sentence, an offence which has caused a loss which cannot be made good is likely to be viewed more seriously, but the extent to which reparation sounds in mitigation will depend upon the degree of sacrifice involved: at [50]; cf *Blackstock v R* [2013] NSWCCA 172 at [66].

In *R v Fell* [2004] NSWCCA 235, a case involving 14 counts of obtaining money by deception under s 178BA *Crimes Act* 1900 and 70 offences on a Form 1, the court found that the sentencing judge was entitled to have regard to fact that the respondent had repaid almost $280,000 to his employer. Aside from being demonstrative of contrition and remorse, the reparation significantly reduced the losses suffered by the victim. This itself was significant enough to have a mitigating effect on sentence: at [29].

The sentencing judge in *Job v R* erred by neglecting to take the applicant's offer of restitution into account: at [48]. While its significance may well have been diminished by the fact the applicant had made no payment at the time of sentence, the undertaking to make reparation, and the steps he had taken to that end by putting two properties on the market, were entitled to some weight in his favour: at [48]–[49].

In *Upadhyaya v R* [2017] NSWCCA 162, there was no error in the judge not taking the compensation direction under s 97(1) *Victims Rights and Support Act* 2013 into account as a mitigating factor: at [68]. Under the common law, confiscation orders and the like could only be taken into account in mitigation in exceptional circumstances, and even then, not when the order was to forfeit the proceeds, or was in the nature

of a pecuniary order reflecting the benefit derived from committing the offence: *Upadhyaya v R* at [64]; *R v Brough* [1995] 1 NZLR 419; *R v Kalache* [2000] NSWCCA 2 at [76]. A direction under s 97(1) is in the nature of a claw-back or disgorgement of an offender's "ill-gotten gains", and therefore by definition does not operate in mitigation of sentence: *Upadhyaya v R* at [65]–[66].

Guilty plea under s 21A(3)(k)

The statutory framework which provides the mandatory discounts for guilty pleas to offences dealt with on indictment is contained in Pt 3, Div 1A *Crimes (Sentencing Procedure) Act* 1999. See **[11-515] Guilty plea discounts for offences dealt with on indictment**. For fraud offences dealt with summarily to which the common law still applies, see **[11-520] Guilty plea discounts for offences dealt with summarily and exceptions to Pt 3 Div 1A**. It was said before the guideline judgment of *R v Thomson and Houlton* (2000) 49 NSWLR 383 that pleading guilty is a factor which in white collar crimes especially, attracts a considerable measure of leniency: *R v Falzon* (unrep, 20/2/1992, NSWCCA). In *R v Halabi* (unrep, 17/2/92, NSWCCA) the court said:

> in white collar crimes the difficulty of detection and the difficulty and expense of investigation and proof means that particular consideration and greater discount should be allowed to an accused person who pleads guilty thus saving the State from the expense of proving the matters associated with the white collar crimes.

The length and complexity of a prospective fraud trial is a matter relevant to the utilitarian discount for a plea of guilty: *R v Todorovic* [2008] NSWCCA 49 at [24].

See also **Guilty pleas** at **[11-500]**. Note that the position in relation to Commonwealth offences is different: see **[16-010] General sentencing principles applicable at plea of guilty: s 16A(2)(g)**.

Delay

Delay in having the matter finalised leaves the offender in a position of uncertainty and can be taken into account: *R v Houlton* [2000] NSWCCA 183 at [23], [41]–[42]; *DPP v Hamman* (unrep, 1/12/1998, NSWCCA); and *R v Phelan* (1993) 66 A Crim R 446. It is not every case where delay has occurred in the prosecution of an offender that a reduced sentence results, since each case depends upon its own particular circumstances: *Coles v R* [2016] NSWCCA 32 at [20]. Delay is not uncommon in complex fraud cases because of the difficulty in detection, investigation and proof. Consequently, delay will have less significance where the offender has engaged in complex fraud and made conscious and deliberate attempts to avoid detection: *R v Houlton*; *Miller v R* [2014] NSWCCA 34 at [183]–[186]; see also *R v Zerafa* [2013] NSWCCA 222 at [88]–[89]; *Giourtalis v R* [2013] NSWCCA 216 at [1791]–[1793]; *R v Donald* [2013] NSWCCA 238 at [41]–[57] in the context of Commonwealth fraud.

Where delay is taken into account, it is preferable that is done so in the overall assessment of sentence rather than as a quantified reduction on the sentence imposed: *R v Boughen* [2012] NSWCCA 17 at [105].

See also **Subjective matters at common law** at **[10-530]**.

Hardship to third parties

See **Subjective matters at common law** at **[10-490]**.

[20-010] The relevance of a gambling addiction

Last reviewed: November 2023

It is not uncommon for fraud offenders to suffer from a gambling addiction: *R v Todorovic* [2008] NSWCCA 49 at [12]–[13], [62].

The court in *Johnston v R* [2017] NSWCCA 53 extensively reviewed the authorities on relevance of a gambling addiction. It has been consistently held that the fact offences were committed to feed a gambling addiction will not generally be a mitigating factor at sentence: *Johnston v R* at [36]; *R v Molesworth* [1999] NSWCCA 43 at [24], [30]; *Le v R* [2006] NSWCCA 136 at [32]; *Assi v R* [2006] NSWCCA 257 at [27]; *R v Huang* [2007] NSWCCA 259 at [42]; *R v Todorovic* at [62]; *Marks v R* [2009] NSWCCA 24 at [29]. Even when the gambling addiction is pathological, it will be a rare case that an offender can seek mitigation of his or her penalty: *Johnston v R* at [36] citing *Assi v R* at [27].

A gambling addiction will not generally reduce the offender's moral culpability where the offence is committed over an extended period, because the offender has had a degree of choice as to how to finance their addiction: *Johnston v R* at [38].

A gambling addiction will not often be connected to the commission of the offence but merely provide a motive or explanation for its commission and is therefore only indirectly responsible for the offending conduct: *Johnston v R* at [38] quoting the Victorian Court of Appeal decision of *R v Grossi* (2008) 183 A Crim R 15 at [56]–[57].

In cases where general deterrence is important, it is inappropriate to treat an underlying explanation that the motive was gambling as a mitigating circumstance or factor reducing moral culpability, particularly where the frauds are perpetrated and skilfully executed over an extended period: *Johnston v R* at [38]. A gambling addiction may explain why an offender has committed an offence(s) but it has been treated by the courts in the same way as a drug addiction.

In the guideline judgment of *R v Henry* (1999) 46 NSWLR 346 at [203], Spigelman CJ expressly rejected the proposition that an addiction to gambling is a matter in mitigation. Spigelman CJ and Wood CJ at CL stated that addiction (including drugs or gambling) is not of itself a mitigating circumstance: *Johnston v R* at [40] citing *R v Henry* at [178]–[203], [273].

The remarks of Wood CJ at CL in *R v Henry* at [273], concerning the commission of robbery offences to feed a drug addiction apply equally to fraud offences committed to feed a gambling addiction: *Johnston v R* at [40]–[41]. (These remarks of *R v Henry* at [273] are extracted in **Drug addiction** at **[10-485]**.) A gambling addiction may be an important consideration in the assessment of the offender's prospects of rehabilitation and likelihood of re-offending: *Luong v R* [2014] NSWCCA 129 at [23], [24]; *Hartman v R* [2011] NSWCCA 261 at [52].

[20-020] Totality

Last reviewed: November 2023

The majority of fraud cases involve multiple offences and consequently most sentences imposed will be aggregate sentences under s 53A *Crimes (Sentencing procedure) Act* 1999: see **Aggregate sentences** at **[7-505]**ff.

The totality principle is to be applied, and in the case of imprisonment, this may involve fixing an appropriate sentence for each offence and then considering matters of accumulation or concurrency: *R v Pearce* (1998) 194 CLR 610 at [45]. This task requires consideration of the fact the offender is being sentenced for multiple offences and to ensure that the ultimate sentence imposed is appropriate to the totality of the applicant's offending and their personal circumstances: *Stratford v R* [2007] NSWCCA 279 at [29]. See also *R v Chan* [2000] NSWCCA 345 at [26].

However, the application of the totality principle must not result in a "blanket assessment" of each offence. In *Subramaniam v R* [2013] NSWCCA 159, the judge erred by imposing indicative sentences of two years, one month for each of the 23 fraud offences and three money laundering offences. This was notwithstanding significant variations in the amounts of money the subject of the deceptions in each offence and the fact the fraud offences carried a maximum penalty of 5 years while money laundering offences carried a maximum of 15 years: at [29]. The sentencing judge in *Suleman v R* [2009] NSWCCA 70 fell into similar error by treating all 14 counts of s 178BB as possessing the same level of criminality regardless of the amount invested or lost: at [38].

See further **Concurrent and Consecutive Sentences** at **[8-200]–[8-230]** and *R v Tadrosse* (2005) 65 NSWLR 740; *R v Finnie* [2002] NSWCCA 533.

[20-035] Fraud offences — ss 192E–192H Crimes Act 1900

Last reviewed: November 2023

Sections 192B, 192C and 192D are definition provisions, and appear in Division 1 of Pt 4AA. The offence provisions appear in Division 2 of Pt 4AA.

Section 192E provides a person who, by any deception, dishonestly obtains property belonging to another or obtains any financial advantage or causes any financial disadvantage, commits the offence of fraud. While actual dishonesty, not reckless dishonesty, is required, a deception may operate either by recklessness or intent, and the two concepts must not be confused: *Bazouni v R* [2021] NSWCCA 256 at [87] and [90]; see also *Selkirk v DPP* [2020] NSWSC 1590 at [57]. The maximum penalty is 10 years imprisonment. This represents an increase from some of the repealed offences, for example, the 5-year maximum penalty which was applicable to obtaining money by deception under s 178BA (rep). The introduction of a higher maximum penalty than existed for a corresponding repealed offence "requires some adjustment to the range of sentences that would formerly have been considered appropriate": *Baumer v The Queen* (1988) 166 CLR 51 at 57. However, many of the sentencing principles discussed in cases dealing with the predecessor provisions remain relevant.

When sentencing for offences against s 192E it should be borne in mind that the provision captures offences which can run to defalcations in the millions of dollars: *Matthews v R* [2014] NSWCCA 185 at [21]. In that case, despite unsophisticated deceptions amounting to just over $1,200, there was a need for deterrence in credit card fraud cases which required the imposition of a custodial sentence: at [21]. The offender received two years, three months imprisonment, with a non-parole period of one year, three months.

The disparity in amounts involved in s 192E offences may be demonstrated by contrasting *Matthews v R* with *Zhao v R* [2016] NSWCCA 179, where a single count of s 192E related to a fraudulent benefit of US$730,773.39, with a fraud offence involving an additional US$190,224.28 taken into account on a Form 1: *Zhao v R* at [10]. The offender in *Zhao* received a sentence of three years imprisonment with a non-parole period of one year, eight months.

In *Whiley v R* [2014] NSWCCA 164, the court held that a starting point of 4 years for each of two offences against s 192E represented a far greater proportion of the 10-year maximum penalty than justified given the objective circumstances of the offences: at [40]. In each offence, the applicant had purchased a vehicle using a fraudulent cheque and a false name, but returned the vehicles shortly after, undamaged with the keys and a note apologising to each victim: at [39].

In *Clinton v R* [2018] NSWCCA 66 uncharged criminal acts were relevant to the determination of the objective seriousness of the applicant's offending and his moral culpability, but they could not also be taken into account as an aggravating factor under s 21A(2)(m): [38]–[40]; see also **Multiple victims or a series of criminal acts under s 21A(2)(m)** above at **[19-990]**. Likewise, financial gain is an inherent characteristic of s 192E(1)(b) offences and cannot be taken into account as an aggravating feature under s 21A(2)(o) unless there is something unusual about this aspect of the offending: *Clinton v R* at [10], [12], [20]–[22]; see also *Whyte v R* [2019] NSWCCA 218 at [44]; [67]; [76]; see also **The offence was committed for financial gain under s 21A(2)(o)** above at **[19-990]** .

In *McLaren v R* [2021] NSWCCA 12 the offender was sentenced to an aggregate sentence of 12 years with a non-parole period of nine years for 17 offences against s 192E(1)(b) and one against s 193B(2) (deal with proceeds of crime) following his successful sentence appeal for operating a $7.6 million "Ponzi scheme" involving 15 victims. The court acknowledged this was a "grave example of fraud" because of the amount of money, planning, and the fact it was committed over an extended period of time with devastating consequences for the victims. The judgment helpfully reviews sentences for a number of similar cases at [83]–[96]. See also *Singh v R* [2020] NSWCCA 353 where the offender was sentenced to 6 years imprisonment with a non-parole period of 4 years for three offences against s 192E(1)(b), with three other s 192E(1)(b) offences taken into account on a Form 1. The offender, a 23-year-old assistant accountant, defrauded an advertising agency of $3,286,125 over a three-year period.

Section 192G makes it an offence to dishonestly make or publish, or concur in making or publishing, any statement that is misleading in a material particular intending to obtain property belonging to another or obtain a financial advantage or cause a financial disadvantage. The maximum penalty is five years imprisonment, the same maximum applicable to the predecessor offence under s 178BB.

In *Edelbi v R* [2021] NSWCCA 122, over a period of 2 years, the offender used his prior position in the compulsory third party claims department of an insurance company to cause fraudulent payments, totalling $299,809, to be paid to various fictitious physiotherapy providers. The offender was sentenced for five offences against s 192G(b), five against s 192E(1)(b), and one against s 93T (participate in a criminal group). The judge was found to have erred by not considering whether the

sentence could be served by way of intensive correction order (ICO). The offender was resentenced to an aggregate sentence of one year 11 months to be served by way of ICO (taking into account 13 months already served in custody).

In *Kapua v R* [2023] NSWCCA 14, the offender, over a period of four months, used the identities of six people to obtain $15,387.30 in cash and goods and attempted to obtain $1,374,502, committing multiple offences contrary to s 192E(1)(b). An appeal against a sentence of 6 years imprisonment with a non-parole period of 4 years, 3 months was dismissed. While there was evidence of a mental health condition, an equally significant consideration was a drug addiction, and a desire to commit offences to fund that drug use.

There are also fraud offences relating to the destruction of accounting records (s 192F) and concerning fraudulent offending by officers of an organisation (s 192H) which carry maximum penalties of imprisonment of five years and seven years respectively.

Equivalent offences under previous statutory scheme

Directors etc cheating or defrauding — s 176A Crimes Act 1900 (repealed)

"Defraud" has been taken to require a loss to the victim of something of value. The loss may be intangible, but must at best involve prejudice to the victim's "proprietary rights": *Baldini v R* [2007] NSWCCA 327 at [42]–[46]; *Bikhit v R* [2007] NSWCCA 202 at [49].

In *Stratford v R* [2007] NSWCCA 279 at [43] the Court of Criminal Appeal set out a number of decisions and their relevant features where the offender has been charged with an offence under s 176A or a similar offence.

In relation to offences against s 176A, Dunford J in *R v Giam (No 2)* [1999] NSWCCA 378 said at [27]:

> Courts have drawn attention in the past to the seriousness of white collar crime, and offences under s 176A in particular, as it involves not only fraud but also breach of the trust involved in being a director of a company. Such offences call for significant sentences, particularly where the amount fraudulently obtained is large: *R v Glenister* [1980] 2 NSWLR 597, *R v Pantano* [1990] 49 A Crim R 328.

Fraudulently misappropriate money collected/received — s 178A Crimes Act 1900 (repealed)

In *R v Higgins* [2006] NSWCCA 38, a case involving 15 counts under s 178A, Spigelman CJ stated at [12]–[13]:

> The objective gravity of the offences was substantial. The amount of money misappropriated was over $1.7 million from a significant number of victims, all of whom were small investors and vulnerable to varying degrees, some to a very high degree of vulnerability.
>
> The frauds took place over a period of some five years and involved premeditation and planning. Of particular significance is the gross breach of trust involved both directly to each investor for whom he was an adviser and by purporting to act with the authority of a financial corporation in whom the investors would also have trust. The element of general deterrence is entitled to considerable weight in white collar crimes involving a breach of trust (see eg *R v Glenister* [1980] 2 NSWLR 597; *R v Pantano* (1990) 49 A Crim R 328 at 330).

In *R v Higgins*, the sentence appeal was dismissed and the aggregate sentence of 8 years imprisonment with a non-parole period of 5 years was confirmed.

It is important to ensure that when considering breach of trust as an aggravating feature under s 21A(2)(k) *Crimes (Sentencing Procedure) Act* 1999, it is not a an element of the offence. A breach of trust in the sense of misconduct by a trustee may not necessarily be synonymous with abusing a position of trust as expressed in s 21A(2)(k): *R v Higgins* [2006] NSWCCA 326 (unrelated to the case cited above).

The amount of money misappropriated is only one of the relevant considerations in determining the seriousness of the offences and is not necessarily decisive, especially where there is a period of repeated offending and false expectations are created for the victims who engaged the offender as a trusted member of a profession: *Assi v R* [2006] NSWCCA 257.

Obtain money or valuable thing by deception — s 178BA Crimes Act 1900 (repealed)

The courts have made a number of important observations concerning credit card fraud under the previous form of the offence. In *R v Araya* [2005] NSWCCA 283, Johnson J said at [98]:

> Members of the community use credit cards for a very wide range of transactions conducted by telephone. The honest use of credit cards in this way is of great importance. In passing sentence for offences of the present type, general deterrence is an important factor. Further, where there is a pattern of fraudulent activity by an offender over an extended period using several credit cards and associated paraphernalia (such as fraudulent drivers' licences), specific deterrence is also an important consideration on sentence.

These remarks become increasingly important given the shift towards a cashless society. In *Yow v R* [2010] NSWCCA 251 at [30], Fullerton J (Hodgson JA and Price J agreeing) made the following remarks:

> The cost to the community of syndicated credit card fraud is not only that it undermines consumer confidence. The losses generated by frauds of this magnitude are invariably passed on to the consumer through the imposition of higher levies or fees. The general public who increasingly use credit cards as a convenient substitute for cash on a daily basis, and the financial institutions that offer and provide a secure range of credit card facilities to both traders and consumers, are entitled to expect that the perpetrators of fraudulent schemes of the kind with which the applicant was involved are appropriately punished both to deter those who may be tempted to participate in credit card fraud and to dissuade those who might be tempted by financial reward to come to Australia with the express purpose of doing so.

In *Cranshaw v R* [2009] NSWCCA 80, 62 offences were committed, including multiple offences contrary to s 178BA (the predecessor to s 192E), with a further 156 offences of using or making a false instrument taken into account on a Form 1, occuring over a 3-month period. The total exposure to financial institutions was $1,099,200, and of that amount $435,900 was obtained; the offender himself received a net gain of $43,590. The offender was sentenced to 4 years imprisonment with a non-parole period of 2 years 6 months. The judge did not err in failing to refer to alternatives to full time imprisonment, for "no sentencing option other than full time imprisonment" was appropriate: at [64].

[20-037] Identity crime offences — ss 192J–192L Crimes Act 1900

Last reviewed: November 2023

In recognition of the problems associated with the theft and misuse of personal identification information, a series of identity fraud offences were created in Pt 4AB.

It is an offence to either deal in (s 192J), or possess (s 192K), identification information intending to commit or facilitate the commission of an indictable offence. The maximum penalty for the s 192J offence is 10 years imprisonment, and seven years imprisonment for the s 192K offence. The terms "deal" and "identification information" are defined in s 192I. A person who possesses equipment, material or a thing which is capable of making identification documents, intending to use it to commit an offence, commits an offence contrary to s 192L. The maximum penalty is 3 years imprisonment.

There are a number of features of identity crimes which involve aggravated effects on victims and the community generally when compared with other forms of obtaining benefit by deception: *Stevens v R* [2009] NSWCCA 260 at [2]. Therefore, the use of past sentencing practices for offences such as s 178BA (repealed) of the *Crimes Act* 1900, must be treated with some care: *Stevens v R* at [2]. The "ease with which identity crimes can be committed has expanded well beyond the traditional means of stealing mail or eavesdropping to obtain personal data" and the "significance of general deterrence in the exercise of the sentencing discretion will remain a matter to which particular weight must be given": *Stevens v R* at [6]–[7], applied in *Krol v R* [2011] NSWCCA 175 at [81] and *Lee v R* [2019] NSWCCA 15 at [83]. It is appropriate to recognise the prevalence of identity offences and the need for general deterrence: *Lee v R* at [84].

The need for both personal and general deterrence, and the imposition of severe punishment, in cases of identity fraud was again reiterated by the Court of Criminal Appeal in *Thangavelautham v R* [2016] NSWCCA 141 at [37], [104]–[105]. These offences "not only have the potential to cause serious financial hardship and embarrassment to a large number of consumers but also have the capacity to undermine confidence in the country's financial system": *Thangavelautham v R* at [86].

In *Chen v R* [2015] NSWCCA 277, the offender was sentenced for his involvement in a large identity fraud operation as a producer of false credit cards, driver's licences and Medicare cards. He received a sentence of 6 years imprisonment with a non-parole period 4 years 6 months for six counts against s 192J, one count against s 192K, one count of possessing a false document (s 255) and five counts of possessing equipment to make false documents (s 256(1)). An additional 12 offences were taken into account on a Form 1.

In *Islam v R* [2020] NSWCCA 236, the offender was the "ringleader" of a group of taxi drivers who "skimmed" the credit cards of more than 550 taxi passengers over a 3-year period, obtaining a total of between $250,000–$300,000. He was on bail at the time of the offences and had a prior record for fraud. He was sentenced for this offence (s 192J) and an offence of participating in a criminal group (s 93T(1A)), to an aggregate sentence of 4 years 3 months with a non-parole period of 3 years 8 months.

In *Lou v R* [2021] NSWCCA 120, the offender, who was employed at a store, installed a card skimming device on the store's ATM cloning credit cards onto gift

cards. She obtained more than 1,300 credit cards, gift cards and $1.3 million in cash. Multiple offences were committed contrary to s 192J, s 192K and s 192E, and some of the offences were committed while on conditional liberty. The appeal against an aggregate sentence of 4 years imprisonment with a non-parole period of 2 years 3 months was dismissed. The court noted the increasing prevalence of credit card fraud and identity offences, and the offending was sophisticated and difficult to detect.

The fact an offender commits an offence of dealing with identification information contrary to s 192J for financial gain can be taken into account as an aggravating factor pursuant to s 21A(2)(o) of the *Crimes (Sentencing Procedure) Act* 1999. Financial gain is not an inherent characteristic of the offence. It is not uncommon for false identity documents to be created for purposes unrelated to financial gain: *Lee v R* [2019] NSWCCA 15 at [55]–[56], [61], [63]. In *Lee v R*, the offender's sentence of 4 years imprisonment with a non-parole period of 18 months for four offences including two against s 192J was appropriate given the offender's skill in creating false documents of high quality was essential to the success of the sophisticated and organised criminal operation which resulted in a loss of $595,821 to banks: at [81].

[20-038] Forgery offences — ss 253–256 Crimes Act 1900

Last reviewed: November 2023

It is an offence for a person to make (s 253) or knowingly use (s 254) a false document intending it to be used to induce some person to accept it as genuine and, because of that acceptance, to obtain another person's property, obtain any financial advantage or cause any financial disadvantage or influence the exercise of a public duty. The maximum penalty for offences against ss 253 and 254 is 10 years imprisonment. An offence is committed if a person possesses a false document knowing it is false, with the intention to induce another to accept it as genuine, and in so doing to obtain property, a financial advantage, or to influence exercise of a public duty: s 255. An offence is committed if a person possesses equipment, material or a thing, designed to make a false document, knowing it so designed and intending it will be used to commit forgery: s 256(1). The maximum penalty for offences against s 255 or s 256(1) is 10 years imprisonment.

In *R v Grover* [2013] NSWCCA 149, the offender used false driver licences to purchase cold and flu medication. The court dismissed the submission that head sentences of 1 year 3 months for each of the two counts under s 254 were manifestly excessive as the fraudulently obtained cold and flu medication was for the purpose of on-sale to enable the pseudoephedrine in it to be used in drug manufacture, and the offences were committed over an extended period and motivated by commercial gain: at [85]–[86].

Equivalent offence under previous statutory scheme

Make or use false instrument — s 300 Crimes Act 1900 (repealed)

In *O'Keefe v R* (1992) 60 A Crim R 201 at 204, a case involving nine charges under s 300(1) (rep) and nine under s 300(2) (rep), Lee AJ (Gleeson CJ and Priestly JA agreeing), said:

> In these and similar cases, the consideration of general deterrence looms large.
>
> …

> It is of the utmost importance that employers carrying on business and entrusting members of their staff with control of money as must be done, should be entitled to maximum honesty in that activity and the courts play an important role and must play an important role in imposing sentences in cases of this nature which are often called white collar crimes — which will operate effectively as a deterrent to others.

In *R v El-Rashid* (unrep, 7/4/95, NSWCCA) the respondent was a bank employee who defrauded two customers of US $120,000 and was convicted of two charges under s 300. Gleeson CJ said:

> crimes of this kind are to be taken seriously …
>
> Considerations of general deterrence are of particular importance in sentencing for crimes of this nature. Such crimes frequently involve, as in the present case, a serious breach of trust. Such breaches of trust are usually only able to be committed because of the previous good character of the person who has been placed in a position of trust.

In *R v Tadrosse* (2005) 65 NSWLR 740, the offender was convicted of six counts under s 300, one count under s 302, and two under each of ss 178B and 178BA. More than $200,000 was defrauded by the applicant using false documents. He was sentenced to 6 years imprisonment with a non-parole period of 3 years 6 months.

[20-039] Larceny by clerk or servant — s 156 Crimes Act 1900

Last reviewed: November 2023

Section 156 *Crimes Act* 1900 provides:

> Whosoever, being a clerk, or servant, steals any property belonging to, or in the possession, or power of, his or her master, or employer, or any property into or for which it has been converted, or exchanged, shall be liable to imprisonment for ten years.

In *Itaoui v R* [2005] NSWCCA 415, the applicant stole $135,199.40 from her employer over a period of 15 months. The Court of Criminal Appeal held that the applicant's criminal behaviour in breach of trust of her employer clearly warranted a significant prison sentence for the sentencing judge's reasons including general deterrence.

In *R v Swadling* [2004] NSWCCA 421 the applicant, an accounts clerk, diverted a total of $322,766 of her employer's funds into her own bank account over a period of 21 months. She was convicted of nine counts under s 156, with 11 offences taken into account on a Form 1. The appeal against sentence was allowed and the applicant was re-sentenced to an aggregate term of sentence of 6 years 3 months with a non-parole period of 3 years 3 months. The court found the offences were in the middle of the range of seriousness, the methods employed by the applicant were unsophisticated, the amount taken was not large, and she did little to cover her tracks and was a relatively junior employee.

[20-045] The Commonwealth statutory framework

Last reviewed: November 2023

The Criminal Code (Cth) contains offences of fraudulent conduct (Pt 7.3), false or misleading statements (Pt 7.4) and forgery (Pt 7.7). The general fraud provision in s 134.2(1) Criminal Code covers a wide range of criminal conduct including tax evasion, Medicare and social security fraud as well as Commonwealth employees

fraudulently diverting payments. There are additional federal fraud offences and fraud-related offences in other legislation, including the *Corporations Act* 2001 (Cth), the *Customs Act* 1901 (Cth), the *Crimes (Currency) Act* 1981 (Cth) and others. The more common federal fraud offences are dealt with in more detail in **Types of Commonwealth fraud** at **[20-065]** below.

The *Crimes Act* 1914 (Cth) contains matters of general application to federal offences including summary/indictable disposal, time limits, powers of arrest, search and seizure and sentencing. Generally, Commonwealth fraud offences are indictable but many offences may be dealt with summarily in accordance with s 4J of the *Crimes Act* 1914. Section 4J(4) also provides for the summary disposal of offences relating to property valued at $5,000 or less, upon the request of the prosecutor. A federal offender must be sentenced in accordance with Part IB *Crimes Act* 1914 (Cth). In particular, a sentencing court must impose a sentence of a severity appropriate in all the circumstances taking into account any "relevant and known" matters listed in s 16A(2): see **General sentencing principles applicable: s 16A** at **[16-010]**. There are also specific provisions in the *Crimes Act* in relation to the imposition of sentences of imprisonment, including that imprisonment is a sentence of last resort and is only available in "exceptional circumstances" for certain minor property offences: see **Sentences of Imprisonment** at **[16-040]**.

Common law principles also apply to the sentencing of federal offenders: *Aboud v R* [2021] NSWCCA 77 at [87]. For example, even though there is no specific reference to delay in the factors listed in s 16(A)(2), it remains a relevant sentencing consideration: *Aboud v R* at [92].

[20-050] Relevance of NSW fraud principles and comparative cases for Commonwealth matters

Last reviewed: November 2023

While specific sentencing principles have been developed in respect of Commonwealth fraud offences, many of the principles that apply to State fraud offences also apply: see *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [297]; *Scook v R* [2008] WASCA 114 at [16]. For example, the scale and complexity of the offence, the level of sophistication and planning involved, the way in which and time over which the fraud was pursued and implemented, the offender's role and any detailed knowledge of the relevant system defrauded, general deterrence, the possibility of detection and the amount defrauded are relevant to sentencing for Commonwealth fraud: *Dickson v R* [2016] NSWCCA 105 at [166]–[167]. See also **[19-940] General sentencing principles for NSW fraud offences** and **[19-970] Objective seriousness — factors of common application to fraud**.

In *Hili v The Queen* (2010) 242 CLR 520 the plurality said at [63]:

> [t]he applicants' offending was sustained over a long time. It was planned, deliberate and deceitful, requiring for its implementation the telling of many lies. The applicants acted out of personal greed. The amount of tax evaded was not small. Detection of offending of this kind is not easy. Serious tax fraud, which this was, is offending that affects the whole community. As has been pointed out in [previous cases], the sentences imposed had to have both a deterrent and a punitive effect, and those effects had to be reflected in the head sentences and the recognizance release orders that were made.

Reference can also be made, in some circumstances, to State comparative cases where the same maximum penalty applies and there is similar criminal conduct: *Nakash v R* [2017] NSWCCA 196 at [18]; *R v Cheung* [2010] NSWCCA 244 at [129]–[131].

Care should be taken when sentencing for a mixture of Commonwealth and State fraud offences. Aggregate sentences are available for sentences of more than one Commonwealth offence, applying *Crimes (Sentencing Procedure) Act* 1999, s 53A: *DPP (Cth) v Beattie* [2017] NSWCCA 301 at [146], [210]. However, a single aggregate sentence cannot be imposed for a combination of Commonwealth and State offences: *Sheu v R* [2018] NSWCCA 86 at [26]; *Burbridge v R* [2016] NSWCCA 128 at [12]–[16]; *DPP (Vic) v Swingler* [2017] VSCA 305 at [78]–[86]; *Crimes Act* (Cth), s 19AJ. See also **Fixing non-parole periods and making recognizance release orders** at **[16-050]**.

[20-055] Statutory factors under s 16A(2) Crimes Act 1914

Last reviewed: November 2023

Section 16A *Crimes Act* 1914 (Cth) contains a list of diverse sentencing factors that must be taken into account where "relevant and known": see **General sentencing principles applicable: s 16A** at **[16-010]**. Care must be taken to ensure that sentencing principles developed in respect of s 16A do not fetter the sentencing court's discretion: *Totaan v R* [2022] NSWCCA 75 at [98] (five-judge bench decision). Section 16A is to be applied according to its terms and unwarranted judicial glosses should not be placed on the simple language of the section: *Totaan v R* at [78], [82]. Principles elucidated in the earlier judgments and discussed in this section, need to be understood in light of *Totaan v R*. See **General deterrence and the inevitability of imprisonment** at **[19-940] General sentencing principles for NSW fraud offences**, and below at **General deterrence — s 16A(2)(ja)**.

The s 16A(2) sentencing factors that have been extensively considered in the context of federal fraud prosecutions include general deterrence (s 16A(2)(ja)) and prior good character (s 16A(2)(m)). Also, it is not uncommon for charges to be "rolled up" when an offender pleads guilty to fraud. For example, in *R v Donald* [2013] NSWCCA 238, 30 separate transactions were rolled into one offence of dishonestly using a position to gain advantage contrary to s 184(2) of *Corporations Act* 2001 and the sentencing judge was obliged to consider "the series of criminal acts of the same or a similar character" under s 16A(2)(c) in determining an sentence appropriate in all the circumstances. See also **Offence consists of a series of criminal acts of the same or a similar character: s 16A(2)(c)** at **[16-010]**.

General deterrence — s 16A(2)(ja)

General deterrence may be a significant sentencing consideration in serious Commonwealth frauds. Such frauds may not be easy to detect and may produce great rewards. General deterrence may also be more effective in the case of white-collar criminals: *R v Boughen* [2012] NSWCCA 17 at [59]–[91], [96]–[98]; *Aitchison v The Queen* [2015] VSCA 348 at [66]; *DPP (Cth) v Gregory* (2011) 34 VR 1 at [15]. In *DPP (Cth) v Gregory* the Court said at [53]:

> … general deterrence is likely to have a more profound effect in the case of white-collar criminals. White-collar criminals are likely to be rational, profit-seeking individuals who

> can weigh the benefits of committing a crime against the costs of being caught and punished. Further, white-collar criminals are also more likely to be first time offenders who fear the prospect of incarceration.

See also *Milne v R* [2012] NSWCCA 24 at [296]–[297]; *Keefe v R* [2014] VSCA 201 at [77]; *Zaky v R* [2015] NSWCCA 161 at [49].

However, care must be taken not to give general deterrence pre-eminent or primary significance over and above other sentencing factors, s 16A does not fetter discretion and establish a hierarchy of sentencing considerations, and the need for general deterrence in any given case, must always be assessed by reference to the personal circumstances of the offending and which may have operated on the offender: *Totaan v R* at [98]–[100], [130]. See also *Kovacevic v Mills* (2000) 76 SASR 404 at [43]; *R v Newton* [2010] QCA 101 at [7]–[8], [29], [38]; and **[19-940] General sentencing principles for NSW fraud offences**.

Despite the recognised significance of general deterrence, white collar crime has traditionally been treated more leniently than other forms of criminality: *DPP (Cth) v Gregory* [2011] VSCA 145 at [53]–[56]; *R v Nguyen* [1997] 1 VR 386 at 389–390. There is a tendency to place a disproportionate emphasis on a dollar value concept of the loss and effect on the personal circumstances of the offender and their family, sometimes resulting in a lack of deterrence and proportionality: *DPP (Cth) v Gregory* at [55]. In *DPP v Bulfin* [1998] 4 VR 114 at 131–132 the Court said:

> the consequences of discovery and punishment and the havoc that a custodial sentence usually wreaks on the lives of the white collar criminal and his or her family, may have a tendency to distract attention from the importance that general deterrence ought to carry in the imposition of sentences.

Character, antecedents, age, means and physical or mental condition of the person — s 16A(2)(m)

For white collar offences, such as those against the *Corporations Act* 2001 (Cth), less weight is attached to prior good character where it facilitates the offender committing the offence: *R v Rivkin* (2004) 59 NSWLR 284 at [410]; *R v Boughen* [2012] NSWCCA 17 at [73]; *Merhi v R* [2019] NSWCCA 322 at [52]–[53]; *Elomar v R* [2018] NSWCCA 224.

While the presumed anxiety or distress of standing twice for sentence cannot be read into s 16A(1), actual mental distress can be taken into account under s 16A(2)(m): *Bui v Director of Public Prosecutions (Cth)* (2012) 244 CLR 638 at [20]–[23]. See also **Character, antecedents, age, means and physical or mental condition: s 16A(2)(m)** in **[16-010] General sentencing principles applicable**.

[20-060] General sentencing principles for federal offending

Last reviewed: November 2023

Below are some of the general common law principles that have developed in respect of federal fraud. Many of the NSW fraud principles may also be applicable: see *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [297]; *Scook v R* [2008] WASCA 114 at [16]; see **[19-940] General sentencing principles for NSW fraud offences** and **[19-970] Objective seriousness — factors of common application to fraud**. Reference can

also be made, in some circumstances, to State comparative cases where the same maximum penalty applies and there is similar criminal conduct: *Nakash v R* [2017] NSWCCA 196 at [18]; *R (Cth) v Cheung* [2010] NSWCCA 244 at [129]–[131].

Breach of trust

There is no principle or precedent which limits a finding of a breach of trust to offences which happen during the period when the offender is employed. Not only current employees but also former employees should be trusted with the knowledge and confidential information they gain through their employment: *Merhi v R* [2019] NSWCCA 322 at [32], [39]; *R v Standen* [2011] NSWSC 1422; *Suleman v R* [2009] NSWCCA 70. In *Merhi v R*, a tobacco revenue fraud case, the judge found the fact the offender was using information and knowledge she had obtained while previously employed by the Australian Border Force aggravated the offence: at [33], [38]–[39].

In *Ridley v R* [2008] NSWCCA 324, the offender committed a number of Commonwealth dishonesty offences by falsely claiming goods and services tax refunds in activity statements submitted to the Australian Taxation Office. Allsop P noted the self-assessment system relies on "the honesty of individual taxpayers" and said the primary judge's finding that the offence involved a breach of trust and fraud on all members of the community who pay their taxes was an entirely legitimate consideration. The Tax Commissioner's reliance on information the taxpayer has provided, and that the taxpayer has made a reasonable and honest attempt to meet their obligations, is in terms a kind of trust. Members of the community rely on each other for honesty for the operation of the tax system: at [83]–[85].

Breach of trust is not made out simply because the victim trusted the offender for some reason or other, for example because of the offender's standing in the community or because they appeared to be a successful businessman. Nor is it made out because the offender dealt with "commercially naïve people". There must be, at the time of the offending, a particular relationship between the offender and the victim that transcends the usual duty of care arising between persons in the community in their everyday contact or their business and social dealings. It is not enough that the two persons are involved in a commercial relationship: *Suleman v R* at [22], [25] (a NSW fraud case). See also **Breach of trust under s 21A(2)(k)** at **[19-990] Aggravating factors** above.

Delay

While delay is not a specific s 16A(2) factor, it may be taken into account in mitigation on sentence in some circumstances: see also **Delay** at **[10-530]**; also **List of factors under s 16A(2) is not exhaustive** in **[16-010]**.

In cases involving complex financial transactions, the difficulty of detection and proof must be taken into account when considering delay: *R v Zerafa* [2013] NSWCCA 222 at [89]–[92]; *R v Kearns* [2003] NSWCCA 367 at [68]. In *Giourtalis v R* [2013] NSWCCA 216 the court said at [1789]–[1791]:

> … in the case of a complex fraud it will always be necessary to balance the effect of the delay on the offender against the difficulty and complexity of proving the offence and the need for general deterrence. In particular, although an accused person is entitled to rely on the rights and protection of the criminal law, in circumstances where such reliance has necessitated a complex and lengthy investigation which is carried out with reasonable expedition, the extent that delay can be called upon as a mitigating factor is limited

> … Further, there may be cases where the delay is so inordinate that notwithstanding the complexity of the investigation, the fact that the accused has been left in a state of uncertainty for a considerable period of time would be a significant mitigating factor.

See also the discussion above in **General sentencing principles for NSW fraud offences** at **[19-940]** and **Fixing non-parole periods and making recognizance release orders** at **[16-050]**.

Relevance of civil penalties to sentence

Receiving criminal and civil penalties in separate proceedings does not amount to double jeopardy: *Adler v R* [2006] NSWCCA 158 at [52]–[54]. In *Adler v R* the offender's conduct was not a standalone offence under s 184(2) but rather a deliberate fraud causing a succession of other deliberately and intentionally fraudulent acts: at [87]. The severe criminal fraud warranted a sentence very much towards the top rather than the mid-point of the sentencing range: at [89].

[20-065] Types of Commonwealth fraud

Last reviewed: November 2023

Tax fraud

Protecting the Australian taxation system from loss by fraud is important to maintaining public confidence in the taxation system. Tax fraud offences which are not prosecuted by the Australian Taxation Office (ATO) are generally dealt with under s 134.1(1) Criminal Code (dishonestly obtaining Commonwealth property), s 134.2(1) (obtain financial advantage by deception) and s 135.4(3) (dishonestly cause a loss to the Commonwealth).

In *DPP (Cth) v Goldberg* [2001] VSCA 107 the Court discussed the nature of tax fraud at [32]:

> Tax evasion is not a game, or a victimless crime. It is a form of corruption and is, therefore, insidious. In the face of brazen tax evasion, honest citizens begin to doubt their own values and are tempted to do what they see others do with apparent impunity. At the very least, they are left with a legitimate sense of grievance, which is itself divisive. Tax evasion is not simply a matter of failing to pay one's debt to the government. It is theft and tax evaders are thieves.

While the ATO is the ostensible victim, serious tax fraud will inevitably have a flow on effect to the honest taxpayer: *R v Liddell* [2000] VSCA 37 at [74]; *Hili v The Queen* (2010) 242 CLR 520 at [63]. Courts have discussed the rationale for the imposition of severe sentences. In *DPP (Cth) v Goldberg* the court said at [51]:

> The maintenance and integrity of the revenue collection systems, upon which the administration of government and the provision of a wide range of necessary services to the community are dependent, is vitally important to the proper functioning of our society.

In *DPP (Cth) v Gregory* (2011) 34 VR 1 the court said at [57]:

> A sentence imposed for fraud upon the taxation revenue, is intended to reaffirm basic community values that all citizens according to their means should fairly share the burden of the incidence of taxation so as to enable government to provide for the

> community, that the revenue must accordingly be protected and that the offender should be censured through manifest denunciation. When these considerations are not reflected in the responses of the courts, the criminal justice system itself fails to achieve its objectives.

While many cases suggest serious tax fraud should ordinarily attract imprisonment unless there are exceptional circumstances, ss 16A(1) and 17A of the *Crimes Act* 1914 are inconsistent with such statements and more recent case law: see *Sabbah v R (Cth)* [2020] NSWCCA 89 at [2]–[10]; *Kovacevic v Mills* (2000) 76 SASR 404 at [43]; *Totaan v R* [2022] NSWCCA 75 at [90]–[100] and *Hili v The Queen* (2010) 242 CLR 520 at [36]–[38], [41]; see also **General deterrence and the inevitability of imprisonment** at **[19-940] General sentencing principles for NSW fraud offences**.

Although general deterrence may be an important sentencing consideration in taxation offences, it should not be the primary or pre-eminent consideration: *Totaan v R*; see also above **[20-055]** at **General deterrence — s 16A(2)(ja)**.

Courts have observed that Commonwealth tax fraud has not always been sufficiently reflected in the sentence imposed, compared to other forms of criminality: *R v Nguyen* [1997] 1 VR 386 at 389–390; *DPP (Cth) v Gregory* at [54]–[55]. The consequences of discovery and punishment and the havoc a custodial sentence usually wreaks on the lives of white-collar criminals and their families, may distract attention from the importance of general deterrence: *DPP (Vic) v Bulfin* [1998] 4 VR 114 at 131–132.

Persistent offending over a long period of time in disregard to warnings by the ATO and attempts to hamper ATO investigations will increase the gravity of the offence. In *Noble v R* [2018] NSWCCA 253 the offender lodged 140 false business activity statements with the ATO with a total of $958,050 being claimed (of which $394,500 was obtained). Despite error having been established, the Court of Criminal Appeal found the effective sentence for the two offences of five years imprisonment, with a non-parole period of two years six months was well within the range for comparable offending involving similar amounts of money defrauded and a guilty plea was entered: at [17]–[18]; see also comparable cases of *Hughes v R* [2011] NSWCCA 226 and *Edwards v R* [2013] NSWCCA 54.

In *R v Hawkins* [2013] NSWCCA 208 the Court of Criminal Appeal found the effective sentence of 3 years 4 months, with a non-parole period of 1 year 8 months, imposed on the respondent, who had been convicted of eight tax fraud offences under s 134.2(1) Criminal Code, was so inadequate that it amounted to an affront to justice. The respondent was re-sentenced to 6 years imprisonment with a non-parole period of 3 years 6 months: *R v Hawkins* at [44], [49].

The respondent in *Dickson v R* [2016] NSWCCA 105 was convicted of conspiracy to defraud the Commonwealth (Criminal Code (Cth), s 135.4) and money laundering (s 400.3). The court found the offending fell into the worst category of Commonwealth fraud offences warranting a sentence of 9 years imprisonment (against a maximum penalty of 10 years). The offender, a finance and tax professional, falsified tax depreciation claims in respect of false expenses incurred by his company's acquisition of medical technologies. This enabled him and his co-offender to avoid tax liabilities of approximately $100 million. The Court found the fact the money the subject of a fraud is not proven to have been used for purposes such as terrorism does not prevent the offence from falling into the worst category: *Dickson v R* at [164], [165], [168].

Social security fraud

Persons who abuse the system of social welfare must expect to face heavy penalties: *Zaky v R* [2015] NSWCCA 161 at [43]; *R v Van Tang Luu* (unrep, 17/12/94, NSWCCA); *R v Purdon* (unrep, 27/3/97, NSWCCA); *R v Winchester* (1992) 58 A Crim R 345; *R v White* [2001] NSWCCA 343 at [36]. Like other Commonwealth fraud, general deterrence and punishment are important considerations when sentencing for social security fraud offences: *Dagher v R* [2017] NSWCCA 258 at [31]; *Crimes Act* 1914, ss 16A(2)(ja), (k). In *R v Annecchini* (unrep, 24/4/96, NSWCCA), Gleeson CJ said:

> It is generally the fact that considerations of general deterrence are of importance in dealing with social security fraud. One of the reasons for that is that conduct such as that engaged in by the present appellant is difficult to detect, indeed it is probably detected in a relatively small proportion of cases, and when it is detected it is appropriate that other people in the community who might be tempted to engage in such conduct should understand the penal consequences that attach to it. Indeed, questions of morale become involved if those in the community come to think that people who practise fraud of this kind upon the Commonwealth can get away with it or, if apprehended, will be dealt with leniently ...

Although general deterrence may be an important sentencing consideration in social security fraud, it should not be the primary or pre-eminent consideration: *Totaan v R* [2022] NSWCCA 75; see also **General deterrence and the inevitability of imprisonment** at **[19-940]** and **General deterrence — s 16A(2)(ja)** at **[20-055]**.

The amount of money dishonestly obtained is also a relevant factor: *R v Hawkins* (1989) 45 A Crim R 430 at 435. The amount is indicative of the extent to which an offender is prepared to be dishonest for the purposes of advancing their own purposes. Offending that is isolated or spontaneous will, as a general proposition, be regarded as less serious than that which involves a repetitive course of conduct which continues over an extended period of time: *Tham v R* [2020] NSWCCA 338 at [50]–[51]; *R v De Leeuw* [2015] NSWCCA 183 at [116]. The use to which the dishonestly appropriated funds were put should also be taken into account. For example, whether it is because of a need or greed: *Dagher v R* [2017] NSWCCA 258 at [17]. Moreover, because offending of this nature is easy to commit but difficult to detect, the fact that such offending only ceased after detection will also be relevant, as will any breach of trust: *Tham v R* at [52], [54]; *R v Lopez* [1999] NSWCCA 245 at [17]–[18]. In *Tham v R*, Bellew J explained the breach of trust in such cases:

> Those who claim social security benefits are often in such genuine and urgent need of assistance that there is no time to undertake an investigation of the veracity of the information submitted in support of a claim at the time that it is made. If a system of more stringent checks were introduced, it may cause delay in the payment of benefits to those genuinely in need … Those circumstances necessarily create a relationship in which the Government relies upon, and trusts, the honesty of those who make applications for monetary benefits, and the veracity of the information which is provided.

In *Tham v R*, the offender fraudulently obtained $103,873.22 in social security payments involving a significant breach of trust over a six-year period in a premeditated and sophisticated operation facilitated by the creation of a false identity, and only ceased when he was arrested. See also *Assie v R (Cth)* [2020] NSWCCA 249 for an example of social security fraud where the offender and her husband received

payments for making a range of false claims including carer payments and carer allowances, from four co-conspirators who were not entitled to them. The offender was refused leave to appeal her aggregate sentence of five years, with a non-parole period of three years three months.

In *R v White* [2001] NSWCCA 343, the sentencing judge imposed sentences of imprisonment for five counts of social security fraud (*Crimes Act* 1914, s 29B) committed by a single mother with no prior record. Two of the offences involved $882.30 and $1242.00 respectively. His Honour took into account that the applicant did not have the means to pay a fine and that any fine imposed would not be "cut out" during the currency of a sentence of imprisonment imposed in respect of the remaining counts: at [4]–[12]. The offender's appeal was allowed on a different basis, however the Court of Criminal Appeal noted at [54] that no sentence other than imprisonment was appropriate in the circumstances of the case.

Like other fraud, the period of time over which the offences were committed is relevant: *R v Hawkins* (1989) 45 A Crim R 430 at 435; *R v Delcaro* (1989) 41 A Crim R 33 at 38.

Disparity between sentences for tax fraud and social security fraud

A review of the case law on social security fraud (see *R v Boughen* [2012] NSWCCA 17 at [60]–[65]) suggests that statements of principle on fraud are applied less rigorously in tax cases so that tax offenders are treated more leniently than social security offenders: *R v Boughen* at [66], [91]. It has been observed that the frequency of Crown appeals in tax cases (including *DPP (Cth) v Goldberg* [2001] VSCA 107, *DPP (Cth) v Gregory* [2011] VSCA 145 and *R v Jones; R v Hili* [2010] NSWCCA 108) reflects that "sentencing judges find it difficult to impose sentences that reach the high level which they have, in theory, accepted as being appropriate": *R v Boughen* at [69]. Social security offenders are "almost universally less privileged, less prosperous, less educated, in possession of fewer resources, intellectual and otherwise" whereas tax offenders are often "middle aged men, intelligent, professionally successful, financially secure, prosperous": *R v Boughen* at [76], [96]. Simpson J observed at [96]:

> The community cannot afford for judges to be squeamish about discharging their duty, however personally painful it may sometimes be. To fail to sentence middle class offenders commensurately with social security offenders risks bringing the administration of justice into disrepute as perpetrating class bias.

Corporate fraud

Section 184 of the *Corporations Act* 2001 (Cth) provides the offences of director or other officer of a corporation failing to exercise power in good faith in the best interests of a corporation (s 184(1)); a director, officer or employee of a corporation recklessly or dishonestly using their position with intent to gain an advantage (s 184(2)) and a person recklessly or intentionally dishonestly using information obtained because they are a director, officer or employee of a corporation with intent of gaining an advantage (s 184(3)). The maximum penalty is 15 years imprisonment and/or a fine of 4,500 penalty units for an individual. The *Corporations Act* also contains other forms of corporate fraud, including engaging in dishonest conduct in relation to providing financial services contrary to s 1041G(1).

In *Sigalla v R* [2021] NSWCCA 22 the offender was convicted, following trial, of 24 offences under s 184(2) for using his position as director of a public company to

transfer $8.6 million to companies controlled by him, his wife, another director and directly to himself. Over half of the money was used to repay his gambling debts. His appeal against sentence on the basis the judge misapplied the totality principle was allowed and he was re-sentenced to a head sentence of 9 years imprisonment with a global non-parole period of 5 years 9 months.

In *R v Donald* [2013] NSWCCA 238 the offender, a client adviser for a stockbroking company, transferred profitable shares from client accounts he controlled to accounts in the name of family members on 30 separate occasions, over almost three years, resulting in a total advantage of $1,781,707.71. He was sentenced to two years six months' imprisonment but released upon entering a recognizance for two years. Following a successful Crown appeal, the offender was resentenced to two years imprisonment, to be released after one year upon entering a recognizance for one year. The sentence failed to reflect the gravity of the offence and failed to serve as an effective deterrent to similarly intelligent, competitive professionals in the financial markets, and was therefore manifestly inadequate. The court noted there is a considerable advantage to an offender in a "rolled up" charge, because it restricts the maximum penalty to that applicable for one offence, instead of what is in reality a number of discrete offences: [84], [85]; *R v Glynatsis* [2013] NSWCCA 131. Further, there is an inherent leniency in suspended sentences and it has been repeatedly observed that the real bite of general deterrence takes hold only when a custodial sentence is imposed: [84], [86]; *R v Boulden* [2006] NSWSC 1274 at [51].

In the *DPP (Cth) v Northcote* [2014] NSWCCA 26 the Crown appealed an aggregate sentence of 2 years imprisonment to be served by way of intensive correction order imposed on an offender convicted of three offences including using his position as director dishonestly to gain an advantage of $1.1 million (s 184(2)). Although the offender was charged with a single offence under this provision, because that offence included all of the conduct which involved the various acts of breach of duty as a director, each act was accompanied by the dishonesty to which he pleaded guilty. This was objectively a very serious example of offending of the kind charged and ought to have been assessed as at the higher end of the range; it occurred over an extended period of time, was premeditated and planned, involved several conscious decisions not to disclose the conflict of interest and delivered $1.1 million in personal profit to the offender: [79], [81]–[83]. The fact there was no actual detriment caused to company was irrelevant having regard to the nature and circumstances of the case: [61], [90]. The Court held an ICO was manifestly inadequate and offensive to the administration of justice and a sentence of 3 years 6 months imprisonment was substituted: [117].

In *Kwok v R* [2007] NSWCCA 281, where the offender was convicted of two offences against s 184(2), the court found the degree of advantage gained was no more than the assurance of obtaining the leases, and thus the offence was intrinsically less serious. However, the element of dishonesty in terms of concealment, not merely by omission but by active steps, remained a matter of significance bearing on the seriousness of the offence. This was particularly so "in the context of directorial obligation within a board, where honesty from the chief executive is fundamental and its lack not excused by good intention": at [107].

The offender in *Nakhl v R* (Cth) [2020] NSWCCA 201 was sentenced to a total of ten years imprisonment with a non-parole period of six years, with a reparation order under s 21B *Crimes Act* 1914 for $4,631,918, for eight counts of engaging in

dishonest conduct in relation to providing financial services contrary to s 1041G(1) of the *Corporations Act* 2001 (Cth). The offender, a financial planner, invested money for 12 clients over a period of four years resulting in a total loss of $5,121,707.

In *R v Silver* [2020] QCA 102, the offender, who was aged 19–21 at the time of the offences, pleaded guilty to seven counts of fraud under s 408C of the Criminal Code (Qld) and six counts of using his potion dishonestly with the intention of gaining a financial advantage contrary to s 184(2). The offences occurred over a "lengthy period of time" and involved a "sophisticated" scheme assisting pensioner investors to obtain large loans from banks on fraudulent documentation and investing that money in unregistered investment schemes used to purchase properties. The applicant received more than $4.1 million from the sale of the properties. Taking into account the offender's late guilty plea, undertaking of future co-operation, remorse, delay, his youth, and some restitution, he was sentenced to 8 years imprisonment for the s 408C offence and 3 years imprisonment for the s 184(2) offence with a recognisance release order after 2 years 6 months.

Currency fraud and offences against the financial system

Additional fraud offences in the context of currency, and the federal banking system, may be prosecuted under other specific Commonwealth enactments. In *Hayward v R (Cth)* [2021] NSWCCA 63, the offences included uttering and possessing counterfeit currency contrary to ss 7(1) and 9 of the *Crimes (Currency) Act* 1981 (Cth) and presenting false identification documents to banks, and receiving banking services using a false name, contrary to ss 137(1) and 140 of the *Anti-Money Laundering and Counter-Terrorism Financing Act* 2006 (Cth). Over 3 months, in various places across Australia, bank accounts were opened in false names with false passports to deposit counterfeit Euros and thereby obtain Australian currency. The counterfeit Euros totalled $306,162.57. Counterfeit money offences undermine community confidence in currency and its place in the banking system: *Hayward* at [63]; *R v Institoris* [2002] NSWCCA 8 at [38]; *DPP v Rohde* (1985) 17 A Crim R 166 at 173. The quantity and quality of counterfeit notes uttered was a significant factor on sentence, as was the value of the proceeds derived from the uttering offences: at [66]; *R v Institoris* at [78]; *R v Gittani* [2002] NSWCCA 139 at [22]–[23]. For further commentary on **Money laundering** more broadly, see **[65-200]**.

General fraud

General fraud includes frauds against the Commonwealth benefit or assistance schemes such as Medicare fraud, child care benefit fraud, identity fraud and fraud-related money laundering. The majority of these frauds are prosecuted under s 134.2 of the Criminal Code (Cth) (obtain a financial advantage by deception), s 135.1 (general dishonesty offences) and s 135.4 (defraud the Commonwealth). Reference should be made to the sentencing principles set out in **[19-940] General sentencing principles for NSW fraud offences** and **[20-055] Statutory factors under s 16A(2) Crimes Act 1914** above.

Other useful references — Commonwealth DPP, "Sentencing of federal offenders in Australia: a guide for practitioners", 4th edn, February 2021.

[The next page is 9541]

Robbery

[20-200] The essence of robbery

Last reviewed: November 2023

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

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

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

[20-210] The statutory scheme

Last reviewed: November 2023

Part 4, Div 2 *Crimes Act* 1900 ("the Act") sets out five sections under the heading "Robbery", containing various offences set out in the table below. The related offence of demanding property with intent to steal is contained in s 99, Pt 4, Div 3 of the Act.

Offence	Section	Penalty (Max)/SNPP
Robbery or assault with intent to rob	s 94(a)	14 yrs
Steal from the person	s 94(b)	14 yrs
Aggravated robbery or assault with intent to rob	s 95(1)	20 yrs
Aggravated robbery with wounding or grievous bodily harm	s 96	25 yrs
Robbery or assault with intent to rob, whilst armed, or in company	s 97(1)	20 yrs
Stop any mail, or vehicle, railway train, or person conveying a mail, with intent to rob, whilst armed, or in company	s 97(1)	20 yrs
Aggravated s 97(1) offence	s 97(2)	25 yrs
Robbery or assault with intent to rob, whilst armed, or in company, and immediately before/after, or at the time, assaults, wounds, or inflicts grievous bodily harm upon the person	s 98	25 yrs/SNPP 7 yrs

The provisions in Pt 4, Div 2 of the Act "establish a series of offences, in ascending degrees of seriousness, and with ascending orders of maximum penalty, depending on

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

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

[20-215] The Henry guideline judgment for armed robbery

Last reviewed: November 2023

It was said over twenty years ago that a robbery, whether with or without arms, is to be regarded "in virtually all circumstances as an offence of the utmost gravity, which must carry a custodial sentence": *R v Murray* (unrep, 11/9/86, NSWCCA) per Lee J; *R v Valentini* (1989) 46 A Crim R 23 at 26. This approach was affirmed in the guideline judgment of *R v Henry* (1999) 46 NSWLR 346. It applies to armed robbery (s 97) sentences and has sentencing implications for other robbery offences elsewhere in the Act: see **[20-230]**; **[20-250]**; **[20-270]**; and **[20-280]**.

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

See further, L Barnes and P Poletti, *Sentencing Robbery Offenders since the Henry Guideline Judgment*, Research Monograph 30, Judicial Commission of NSW, 2007, pp 47 and 51.

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

Last reviewed: November 2023

Section 94 provides:

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

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

Summary disposal of s 94 offences

Offences under s 94 may be dealt with summarily.

An offence of robbery or assault with intent to rob contrary to s 94(a) is a Table 1 offence and subject to a maximum penalty of 2 years imprisonment or a fine of 100 penalty units: s 267(2), (3) *Criminal Procedure Act* 1986. An offence of stealing from the person contrary to s 94(b), where the value of the property, matter or thing stolen exceeds $5,000, is a Table 1 offence and is subject to a maximum penalty of

2 years imprisonment or a fine of 100 penalty units: s 267(2), (3) *Criminal Procedure Act*. Where the value does not exceed $5,000 it is a Table 2 offence and subject to a maximum penalty of 2 years imprisonment or a fine of 50 penalty units, or both. Where the value does not exceed $2,000 the maximum penalty that the Local Court may impose is a penalty of 2 years' imprisonment or 20 penalty units, or both: s 268(2)(b) *Criminal Procedure Act*.

The jurisdictional maximum set by the *Criminal Procedure Act* does not supplant the maximum penalty for the offence. Nor is the jurisdictional maximum necessarily to be reserved for a worst category case (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256; see also **[10-005] Cases that attract the maximum**): *R v Doan* (2000) 50 NSWLR 115 at [35]; *Park v The Queen* [2021] HCA 37 at [19], [23].

The fact that stealing from the person can be dealt with in the Local Court is not automatically a matter in mitigation if the offender is dealt with on indictment in the District Court. The offender's case must come within the exceptional circumstances outlined in *Zreika v R* [2012] NSWCCA 44 at [107]–[109].

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

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

Bag snatching

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

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

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

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

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

The De Simoni principle and s 94

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

However, in *Edwards v R* [2009] NSWCCA 199 at [40], it was asserted that the judge breached the *De Simoni* principle by finding that it "was an offence where violence was offered during the stealing". The finding was based on the action of the applicant of squeezing the victim's hand. The applicant submitted it was available for a robbery offence but not for an offence of stealing from the person. Johnson J at [41] rejected the submission on the basis that both robbery and stealing from a person have the same maximum penalty and that the latter offence "usually involves a personal confrontation and the potential for personal conflict and force or fear, particularly if the victim endeavours to stop the theft: *R v Delk* (1999) 46 NSWLR 340 at 343 [15]. Stealing from the person is a variant of robbery rather than a variant of larceny: *R v Delk* at 345 [29]. Not every offence of stealing from the person is less serious than robbery, with such an assessment depending upon the particular facts of the case: *R v Hua* [2002] NSWCCA 384 at [19]".

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

It is a breach of the *De Simoni* principle if a judge takes into account circumstances of aggravation that would have warranted a conviction for any of the offences found in s 97: see **Robbery etc or stopping mail, being armed or in company: s 97(1)** at **[20-250]**. For example, the fact that the offender was armed: *R v Grainger* (unrep, 3/8/94, NSWCCA); or for example, that the offence was committed in company: *Rend v R* [2006] NSWCCA 41 at [103]; *Iese v R* [2005] NSWCCA 418 at [18].

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

Last reviewed: November 2023

Section 95 provides:

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

Section 95(2) sets out three circumstances of aggravation: namely, the use of corporal violence; the infliction of actual bodily harm, whether intentional or reckless; and deprivation of liberty.

When the circumstance of aggravation relied upon is the use of corporal violence, the nature and extent of the violence will be relevant to the seriousness of the offence: *R v Atonio* [2005] NSWCCA 200 at [29]. Sentences must reflect the distinction

between using force and inflicting actual injuries "lest it be thought that there is no point in limiting the violence used to commit crimes": *Gray v R* [2007] NSWCCA 366 at [28] per Adams J.

The Henry guideline and s 95 offences

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

The De Simoni principle and s 95

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

Where the s 95 robbery offence is based on conduct consisting of the threat of violence, it is permissible to apply s 21A(2)(b) *Crimes (Sentencing Procedure) Act* 1999 and take into account any actual violence without double counting: *Hamze v R* [2006] NSWCCA 36 at [26]. The statements in *R v Mauai* [2005] NSWCCA 207 at [13]–[16] concerning the application of s 21A(2)(b) *Crimes (Sentencing Procedure) Act* to offences under s 95 should be read in light of *Hamze v R*.

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

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

In *Melaisis v R* [2018] NSWCCA 184, the offending was held to be at a low level of seriousness due to the offence being spontaneous and unpremeditated, the threatening and physical conduct being short-lived, the actual bodily harm having no significant long-term consequences, and the victim not permanently losing his property: [16].

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

Last reviewed: November 2023

Section 96 provides:

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

All offences under s 96 involving the infliction of grievous bodily harm are serious, but those resulting in permanent disability are necessarily more so: *R v MS2* [2005] NSWCCA 397 at [13]. This must be reflected in the severity of the sentence.

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

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

Last reviewed: November 2023

Section 97(1) provides:

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

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

The Henry guideline and armed robbery

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

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

Robbery in company and the guideline

The *R v Henry* guideline judgment is equally applicable to an offence of robbery in company, which has the same maximum penalty as an offence of armed robbery and which can be seen as broadly equivalent: *R v Murchie* [1999] NSWCCA 424 at [20]; *R v Lesi* [2005] NSWCCA 63 at [31]; *R v II* [2008] NSWSC 325 at [24].

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

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

Full time custody unless exceptional circumstances

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

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

"Henry" factors

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

Spigelman CJ promulgated the following guideline at [162]:

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

> Whilst it is possible to determine a starting point in a case of this kind, i.e. a sentence of X years imprisonment, I do not believe that the Court should do so. Rather, I propose the Court should identify a narrow sentencing range within which this Court would expect sentences in such cases to fall.
>
> There are two principal reasons why a sentencing range is appropriate for this offence:
>
> (i) The seven characteristics identified above do not represent the full range of factors relevant to the sentencing exercise.
>
> (ii) Many of the seven identified characteristics contain within themselves an inherent variability, eg different kinds of knives or weapons in (ii); extent of "limited actual violence" in (iv); degree of vulnerability in (v); amount in (vi).
>
> In my opinion sentences for an offence of the character identified above should generally fall between four and five years for the full term. I have arrived at this figure after drawing on the collective knowledge of the other four members of the Court with respect to sentence ranges. I have also reviewed the sentences which this Court has imposed on occasions when it has intervened, including in Crown appeals where the principle of double jeopardy applies. The proposed range is broadly consistent with this body of prior decisions in this Court.
>
> …
>
> Aggravating and mitigating factors will justify a sentence below or above the range, as this Court's prior decisions indicate. The narrow range is a starting point.
>
> In addition to factors which may arise in any case eg youth, offender's criminal record, cooperation with authorities, guilty plea in the absence of a strong case, rehabilitation efforts, offence committed whilst on bail etc, a number of circumstances are particular to the offence of armed robbery. These include:
>
> (i) Nature of the weapon
>
> (ii) Vulnerability of the victim
>
> (iii) Position on a scale of impulsiveness/planning
>
> (iv) Intensity of threat, or actual use, of force
>
> (v) Number of offenders
>
> (vi) Amount taken
>
> (vii) Effect on victim(s).

Spigelman CJ has since clarified that the guilty plea component (number (vii)) at [162] refers to a late plea of guilty for the purposes of the application of the guideline promulgated in *R v Thomson and Houlton* (2000) 49 NSWLR 383 at [161]. Therefore, where there is an early plea, all other things being equal, the sentence should be lower than the suggested range: *R v Thomson and Houlton* per Spigelman CJ at [161]. Note: s 25D *Crimes (Sentencing Procedure) Act* 1999 provides the mandatory sentencing discounts for a guilty plea for offences dealt with on indictment. For dealing with a late guilty plea, see *R v Thomas* [2007] NSWCCA 269 at [26].

Spigelman CJ said in *Legge v R* [2007] NSWCCA 244 at [59]: "a guideline is not a tramline." It is not the case exceptional circumstances must be demonstrated before a sentence of less than the guideline promulgated in *R v Henry* may be imposed: at [44]. Such an approach impermissibly confines the exercise of sentencing discretion. It is also inconsistent with the nature of guideline as a check, a guide or an indicator or as a sounding board: *Legge v R* at [59]. The *R v Henry* guideline is not to be approached

as a 'mechanical checklist' as the particular facts of each case will inform the relative seriousness of the offence: *Harris v R* [2021] NSWCCA 322 at [77]. In *Foaiaulima v R* [2020] NSWCCA 270 at [23], Johnson J noted that 21 years had passed since the *R v Henry* guideline judgment, there had been significant changes to statutory and common law over that period, and the guideline is be applied within the context of evolving sentencing law.

The guideline judgment and s 21A

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

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

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

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

The De Simoni Principle and s 97(1)

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

Where a single s 97(1) offence can be proved by the existence of one of two elements (eg being in company, or the use of an offensive weapon), it is not a breach of the *De Simoni* principle to take into account the presence of the other element in assessing the objective seriousness of the offending and to give it due weight: *R v Fangaloka* [2019] NSWCCA 173 at [24].

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

Last reviewed: November 2023

Section 97(2) provides:

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

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

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

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

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

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

However, a s 97(2) offence will not necessarily be more serious than a s 97(1) offence where an offender is armed with an offensive weapon; it will depend on the nature of the dangerous weapon itself. In *Barnes v R* [2022] NSWCCA 40, the offender was armed with a pistol that could not be established as genuine. As it was not a weapon capable of killing or inflicting serious injury, it was held that the seriousness of the offending was less than that of a 'typical' *R v Henry* guideline case: [71].

The De Simoni principle and s 97(2)

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

Armed robbery and s 21A

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

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

In *Hamze v R* [2006] NSWCCA 36 at [26] and *R v Dougan* [2006] NSWCCA 34 at [30], and *McDonald v R* [2015] NSWCCA 280 at [100]–[101], it was held that the threatened use of violence is a necessary element of armed robbery, but that actual use of violence as referred to in s 21A(2)(b) is not necessarily an element. The nature and extent of the threat (as opposed to the bare fact of the threat) can be taken into account via s 21A(2)(b) to assess the seriousness of the crime: *R v Way* (2004) 60 NSWLR 168 at [106]–[107]; *Antonio v R* [2008] NSWCCA 213 at [27] (although this decision involved robbery simpliciter under s 94. Thus, in *Dougan*, the court held at [29] that it would have been permissible for the judge to have assessed the precise circumstances in which violence was threatened as a factor which increased the seriousness of the offence. Similarly in *Hamze v R* at [29], it would have been permissible for the judge to have regard to "the nature of the threatened use of violence in considering the seriousness of the offence". However in both cases the sentencing judge erred by failing to make clear precisely how s 21A(2)(b) was applied to the facts of the case.

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

> The Judge was satisfied that the applicant's offences were aggravated by factors (b), (c) and (m). The threatened use of violence and the threatened use of the knife were each elements of the offences and it was not open to the Judge to regard them as factors that aggravated the offence: *R v Ibrahimi* [2005] NSWCCA 153 at [17]–[18]; *R v Street* [2005] NSWCCA 139 at [32]; *R v House* [2005] NSWCCA 88 at [8]–[9]; *R v Suaalii* [2005] NSWCCA 206 at [12]–[15]; *R v McNamara* [2005] NSWCCA 195 at [31].

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

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

In *R v Dougan* [2006] NSWCCA 34, the judge was entitled to take into account that the offence involved actual or threatened use of a pistol, as an aggravating factor in sentencing for the offence of assault with intent to rob while armed with a dangerous weapon. This is because "actual or threatened *use* of a weapon" is not an element of the offence under s 97(2) of the *Crimes Act*. The requirement that the offence was committed "while armed with a dangerous weapon" means possession of a weapon available for immediate use (*R v Farrar* (1983) 78 FLR 10), *not* its actual or threatened use: at [32]. Hoeben J said at [32]:

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

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

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

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

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

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

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

> Section 97(2) builds upon s 97(1), and incorporates the commission of an offence under s 97(1). The two limbs in s 97(1) can also be cumulative, and the applicant was charged with an offence with the two elements … It would be an error in this case to take into account that the robbery was [committed] in company. It would still be open to a sentencing judge, in assessing the seriousness of an offence, to conclude that the company of a number of men rather than a few increased the seriousness; this would depend on the facts (see *R v Way* [(2004) 60 NSWLR 168]). But I am unable to conclude that the judge took this approach … In my opinion, there was error in this respect.

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

It is double counting for a judge to take into account as an aggravating feature pursuant to s 21A(2)(g), the effects of a crime upon a victim of an armed robbery where the effects are those that would be expected to result from the commission of that type of offence. In *R v Solomon* [2005] NSWCCA 158, Howie J stated at [19] that: "… the court assumes, without evidence, that the victim of a robbery would be affected both physically and psychologically from the commission of the offence …". Therefore "something more is required" to aggravate the offence.

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

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

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

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

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

In the armed robbery case of *Bichar v R* [2006] NSWCCA 1, when considering the mitigating factors under s 21A(3)(a), the sentencing judge concluded "so far as the long term is concerned" the injury and emotional harm caused by the offence was not substantial. The CCA held that there was simply no evidence on the subject and the judge erred in assuming that there was no lasting impact upon the victim. Howie J said

at [22] that, as was explained in *R v Solomon* [2005] NSWCCA 158, the court assumes that the effect upon a victim of an armed robbery is substantial and this is taken into account in the penalty to be imposed. Had there been evidence of a long-lasting effect on the victim, this might have been a matter of aggravation.

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

Last reviewed: November 2023

Section 98 provides:

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

Robbery with wounding in company will usually constitute a serious offence, and will be more serious if it extends over a longer period, involves a more serious degree of bodily harm or results in a greater loss of property: *Krishna v DPP* [2007] NSWCCA 318 at [37]. The involvement of a high level of violence will also affect the objective seriousness of the offending and the offender's criminality: *Calhoun (a pseudonym) v R* [2018] NSWCCA 150 at [40].

Standard non-parole period

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

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

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

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

Simpson J stated in *R v Tobar* [2004] NSWCCA 391 at [55] that, in relation to the offence of armed robbery with wounding, the introduction of the standard non-parole period "must be taken to have excluded, or at least significantly reduced, the application of the guideline judgment in *R v Henry*".

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

armed robbery *R v Henry* guideline, that fact alone should cause the court to consider whether the sentence is justified, given that s 98 has a higher maximum penalty than s 97(1): at [34].

His Honour said at [35]:

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

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

Section 98 offences and s 21A

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

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

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

Last reviewed: November 2023

Section 99 provides:

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

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

The jurisdictional maximum set by the *Criminal Procedure Act* 1986 does not supplant the maximum penalty for the offence. The jurisdictional maximum is not necessarily to be reserved for a worst category case (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256; *R v Doan* (2000) 50 NSWLR 115 at [35]. See also **Cases that attract the maximum** at **[10-005]**).

The significance of the loss of a chance to be dealt with in the Local Court will vary from case to case and if the offender's criminality was too serious for the matter to be dealt with in the Local Court it will have little effect: *R v El Masri* [2005] NSWCCA 167 at [29]. In *R v Cage* [2006] NSWCCA 304, the respondent pleaded guilty to two offences under s 99. The court held that the sentencing judge had placed undue emphasis on the fact that the offences could theoretically have been disposed of summarily. Although capable of summary disposition, the offences were the result of very generous concessions made by the prosecution for the purposes of securing the pleas of guilty: at [32].

The Henry guideline and s 99

The *R v Henry* guideline judgment is not applicable when sentencing an offender pursuant to s 99(1): *R v Smith* [2004] NSWCCA 95 at [15]. The court held that it was "unnecessary and unhelpful" for the sentencing judge to have referred to the guideline judgment in such a case, and that: "[t]he guidelines laid down in the Court of Criminal Appeal in *R v Henry* are not to be extended outside the range of cases in circumstances to which it was directed": at [13].

The De Simoni principle and s 99

It is a breach of the *De Simoni* principle for a sentencing judge to take into account a circumstance that elevates a s 99 offence to one of robbery. Thus in *R v Smith*, it was held that in sentencing for an offence of demanding money with menaces, the sentencing judge should not have mentioned in his remarks the fact that the applicant took $200 from the person of the victim: at [16].

[20-290] Objective factors relevant to all robbery offences

Last reviewed: November 2023

Joint criminal enterprise

A joint criminal enterprise exists where two or more persons reach an understanding or arrangement amounting to an agreement between them that they will commit a crime: *R v Cotter* [2003] NSWCCA 273 at [87]. If the agreed crime is committed by one or other or all of the parties to the joint criminal enterprise, all parties are equally guilty of the crime regardless of the part played by each in its commission: at [88]. It is inappropriate to attempt to assess with any degree of precision the role which each played in the consummation of the criminal enterprise: *R v Hoschke* [2001] NSWCCA 317 at [18].

This does not automatically mean that every participant in a joint enterprise shares the same degree of objective criminality. There may be a proper basis for differentiation, for example, if one offender stands out as the obvious ring-leader, or is the person who elects to carry out the threat of violence by using the weapon to injure the victim. However where the robbery proceeds according to plan, without violence beyond that contemplated and threatened by the presence of the weapon, each participant shares equal responsibility: *R v Goundar* [2001] NSWCCA 198 at [30]–[34].

In *R v Alameddine* [2004] NSWCCA 286, the applicant had pleaded guilty to one count of robbery in company while armed with a dangerous weapon under s 97(2). The applicant submitted that he was less objectively culpable than the other offenders involved in the robbery, as he had not entered the premises or personally participated in the violence. Wood CJ at CL at [52] stated:

> While there is a difference between the circumstances which are sufficient to render a person criminally liable for conduct that comes within joint [criminal] enterprise principles, and that which establish the extent of such offender's culpability, inevitably this becomes a question of degree.

The court ultimately held at [59]–[61] that even if the applicant did not enter the premises, he was "centrally involved". He was the co-ordinator of what occurred at the scene and therefore his culpability was equally as great as the others who were there: *R v Hoschke* applied.

In *R v Fepuleai* [2007] NSWCCA 325, the applicant had pleaded guilty to one count of assault with intent to rob whilst armed with a dangerous weapon under s 97(2). The offence was committed in the company of four co-offenders. Latham J said at [21]:

> It is rare that precise quantifications can be made as to the extent to which each offender in a joint criminal enterprise contributes to the planning and execution of an offence … [I]t matters not whether the respondent was involved in the planning of the offence to a substantial extent or not. The fact that he was a party to such a criminal enterprise is the essence of his liability.

The *R v Henry* guideline judgment may be considered when sentencing a person who is not the principal offender, and whose criminal liability is founded upon the doctrine of joint criminal enterprise or common purpose, even though *R v Henry* did not expressly deal with such an offender: *R v Donovan* [2003] NSWCCA 324 at [26].

Aiders, abettors and principals in the second degree

It is not always the case that an aider and abettor will be less culpable than a principal offender. "A manipulative or dominant aider and abettor may be more culpable than a principal. And even when aiders and abettors are less culpable, the degree of difference will depend upon the circumstances of the particular case": *GAS v The Queen* (2004) 217 CLR 198 at [23]; *R v Swan* [2006] NSWCCA 47 at [72].

In *R v Anderson* [2002] NSWCCA 485, the appellant drove the car involved in a robbery and pleaded guilty to robbery in company as a principal in the second degree. Hidden J at [28] found that the offender's role was "very much less" than that of her co-offenders.

The *R v Henry* guideline judgment is relevant to sentencing for an offence of aiding and abetting an armed robbery: *R v Goundar*, above, at [37]–[38]. Sections 345 and 346 *Crimes Act* clarify that an abettor or accessory to the commission of an offence is liable to the same penalty as the person who commits the principal offence.

Parity

In the armed robbery case of *Lowe v The Queen* (1984) 154 CLR 606 Dawson J, with whom Wilson J agreed, said of the principle of parity at 623:

> There is no rule of law which requires co-offenders to be given the same sentence for the same offence even if no distinction can be drawn between them. … [However] any difference between the sentences imposed on co-offenders for the same offence ought not to be such as to give rise to a justifiable sense of grievance on the part of the offender with the heavier sentence or to give the appearance that justice has not been done.

Matters such as the age, background, criminal history and general character of the offender and the part which they played in the commission of the offence may result in different sentences for offenders involved in the same robbery: *Lowe v The Queen*, above, at 609.

Where co-offenders are broadly involved in a joint criminal enterprise, the parity principle may not be applied if there are significant differences between the respective offences for which each co-offender is to be sentenced, the objective roles of each co-offender, and their subjective circumstances: *Hiron v R* [2018] NSWCCA 10 at [54].

The parity principle may still apply even when co-offenders have been convicted of robbery offences with different maximum penalties: *R v Rend* [2006] NSWCCA 41.

See also **Parity** at **[10-800]** above.

Multiple counts/totality

Where a court sentences an offender for more than one offence, or sentences an offender serving an existing sentence, the aggregate or overall sentence must be "just and appropriate" to the totality of the offending behaviour: *Johnson v The Queen* (2004) 78 ALJR 616 at [18], citing *Mill v The Queen* (1988) 166 CLR 59 at 63.

Multiplicity of offences calls for a total sentence well in excess of the guideline promulgated in *R v Henry* in relation to one offence. As the offending continues, each succeeding offence calls for a greater punishment than the earlier offence, to reflect the need for specific deterrence: *R v Smith* [2007] NSWCCA 100 at [66].

In *Vaovasa v R* [2007] NSWCCA 253 at [19], the judge failed to properly apply the principle of totality by imposing wholly concurrent sentences for three robbery in company offences upon the basis that the offences, committed against three victims, were part of one course of criminality of short duration.

See also **Concurrent and Consecutive Sentences** at **[8-200]**.

Form 1 offences

Where a Form 1 includes serious offences, they must be taken into account at sentence. This involves taking into account the totality of the offender's criminality. However, the penalty imposed should be significantly less than that which would have been imposed had the Form 1 offence(s) been prosecuted separately: *R v Bavadra* [2000] NSWCCA

292 at [31]; *R v Harris* [2001] NSWCCA 322 at [27]; *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146 (Form 1 guideline judgment) per Spigelman CJ at [66].

The judge erred in *TS v R* [2007] NSWCCA 194 by failing to impose a longer sentence for the principal offence by reason of the offences on the Form 1, than that imposed for the other offences. Imposing identical sentences for all of the offences breached the principles set out in *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002*: at [24].

Conversely, in *Cummins v R* [2019] NSWCCA 163, the judge erred in increasing the objective seriousness of the principal offences by considering additional offences placed on Form 1. A permissible use of Form 1 offences however is in giving greater weight to personal deterrence and retribution: [44], [51]–[53]; *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* at [42]–[44].

See also **Taking Further Offences into Account (Form 1 Offences)** at **[13-200]**.

Use of weapons

The objective seriousness of a robbery will be affected by whether a weapon or weapons are used, and if so, the nature of the weapons and the manner in which they are used: *R v Jenkins* [1999] NSWCCA 110 at [5]; *R v Anaki* [2006] NSWCCA 414 at [38]; *R v Readman* (1990) 47 A Crim R 181 at 185.

Firearms

> Robberies can be viewed in escalating seriousness of carrying a firearm, of a firearm being loaded, of the loaded firearm being discharged, and of discharge being deliberately aimed at a victim or important target: *R v Readman* (1990) 47 A Crim R 181 at 185.

A loaded shotgun is much more dangerous than a knife and much more capable of causing death or grievous bodily harm. Even if not loaded, a shotgun is prone to cause panic and fear in victims: *R v Campbell* [2000] NSWCCA 157 at [22].

The fact that the firearm may not have been loaded means that the offence was not as serious as it may have been but is still a very serious offence: *R v Mangan* [1999] NSWCCA 194 at [13]. It can be inferred from the fact that a firearm was found to be loaded when the accused was arrested a short time after the robbery that the firearm was loaded at the time of the robbery: *R v Taha* [2000] NSWCCA 520 at [32].

While a replica pistol used in the course of a robbery may not pose a physical risk to victims or members of the public and in this respect is a less serious factor than a weapon such as a loaded gun or a knife, a sentence for a robbery involving a replica pistol should recognise that the use of the weapon was designed to strike fear into victims: *R v Majstrovic* [2000] NSWCCA 420 at [9]–[10].

Syringes

The use of a syringe apparently filled with blood is a particularly serious factor because of the terror and revulsion it causes in victims: *R v Fernando* [2002] NSWCCA 28 at [17]. The use of a blood-filled syringe is more serious than the use of a knife or the category of weapon envisaged in the *R v Henry* guideline judgment: *R v Kyrogolu*

[1999] NSWCCA 106 at [88]; *Rumble v R* [2006] NSWCCA 211 at [40]. Sentences for offences involving the use of syringes should deter anyone from adopting this "easy and terrifying method of imposing their will on others": *R v Hodge* (unrep, 2/11/93, NSWCCA).

Knives

Those who use knives when perpetrating criminal offences must expect to receive a significant measure of criminal punishment: *R v House* [2005] NSWCCA 88 at [18] quoting *R v Underhill* (unrep, 9/5/1986, NSWCCA).

The degree of seriousness involved in the use of a knife is not proportionate to its size: *R v Doorey* [2000] NSWCCA 456 at [27]. The fact that the type of knife used is a Swiss army knife does not make the offence less serious, since such a weapon can inflict a serious or mortal wound: *R v Randell* [2004] NSWCCA 337 at [32]

Victims

As noted above, armed robbery is not simply a crime against property. It is a crime against persons. "[T]he fear engendered by the perpetrator of this crime, together with the continued adverse effects on its victims, establish armed robbery to be a serious crime which requires condign punishment": *R v Henry* (1999) 46 NSWLR 346 per Spigelman CJ at [99]. The actual impact of an offence on victims will vary from case to case and cause variations in the sentences imposed: *R v Henry* at [95]. The devastating psychological damage that can result from the trauma of being the victim of an armed robbery offence is a matter that should be given due weight in the sentencing process: *R v Broxam* (unrep, 28/9/95, NSWCCA) at 3; *R v Sotheren* [2001] NSWCCA 425 at [44]–[46].

In respect of an offence of assault with intent to rob, the sentence should take into account the effect of the assault on the victim: *R v Hall* (unrep, 28/9/95, NSWCCA). When robbery is committed under the threat of a knife, an offender's assurance to a victim that they will not hurt the victim will not alleviate the seriousness of the offence: *R v Speeding* [2001] NSWCCA 105 per Giles JA at [24].

Vulnerable victims

One of the characteristics of the category of cases to which the *R v Henry* guideline judgment applies is that the victim was in a vulnerable position, such as a shopkeeper or taxi driver: *R v Henry* at [162]. In relation to taxi drivers, see also *R v Sotheren*, above, at [27] and *R v Matthews* [2007] NSWCCA 294 at [27]. The seriousness of robbery offences involving other types of vulnerable victims has also been recognised. For example, service station attendants (*R v Goundar* (2001) 127 A Crim R 331 at [36], citing *R v Thwaites* (unrep, 6/10/93)), motel receptionists (*R v Sharma* (2002) 54 NSWLR 300 at [75]), operators of small retail shops (*R v Fernando* [2002] NSWCCA 28 at [62]) and tobacconists (*R v El Sayah* [2018] NSWCCA 64 at [61]. Section 21A(2)(l) lists the fact that the victim was vulnerable as an aggravating factor. In addition to taxi drivers and service station attendants, s 21A(2)(l) gives as examples of vulnerable victims bus drivers and other public transport workers, and bank tellers.

The examples of vulnerable victims given in s 21A(2)(l) do not comprise an exclusive list and the CCA has declined to decide the precise scope of vulnerability for the purposes of the section. In *R v Ibrahimi* [2005] NSWCCA 153, a robbery in

company case, Latham J said at [19] that s 21A(2)(l) is not limited to a vulnerability that depends upon either the personal attributes of the victim or arising out of the victim's occupation. The judge had not erred in taking into account as a factor aggravating the offence that the robbery victims were young men relying upon public transport late in the evening. Even if such victims did not fall within the s 21A(2)(l) definition of "vulnerable", the factor could be taken into account in light of s 21A(1), which allows other matters required or permitted to be taken into account under any Act or rule of law to be considered: at [20]–[24].

In *R v Atonio* [2005] NSWCCA 200, a case involving an offence of aggravated assault with intent to rob, the victim was "on the railway station in circumstances where it [wa]s difficult … to escape, with the drop onto the railway tracks on each side." Hislop J declined to rule upon the issue of whether these circumstances meant that the victim was vulnerable pursuant to s 21A(2)(l), stating at [32]:

> The matters which caused his Honour to categorise the victim as vulnerable were objective factors which affected the relative seriousness of the offence, and which his Honour was entitled to take into account pursuant to s 21A(1)(c) if those matters were not appropriately categorised as within s 21A(2)(l). Accordingly, it is unnecessary and unproductive to seek to determine the precise meaning and extent of the word "vulnerable" in s 21A(2)(l).

Offending in a custodial setting

In *Tammer-Spence v R* [2021] NSWCCA 90, the offender was sentenced for an offence of demanding money with menaces (s 99(1) *Crimes Act*) from an inmate in custody, as well as further offences against the person. Section 56 applied so that the s 99(1) sentence is to be consecutive on the other sentences as the offence was committed while the offender was a convicted inmate in a correctional centre. The Court also emphasised the need for general deterrence in sentencing for violent offences committed while in custody as it was important to maintain discipline in the custodial environment: [45]–[46].

[20-300] Subjective factors commonly relevant to robbery

Last reviewed: November 2023

Drug addiction

See **Drug addiction** at **[10-485]**.

Mental health and intellectual functioning

The sentencing principles to be applied in respect of an offender who suffers from a mental disorder or severe intellectual disability are discussed at **[10-460]**.

Deprived background

Where a young offender's resort to violence during an aggravated robbery is a product of their deprived childhood, the principles in *Bugmy v The Queen* (2013) 249 CLR 571 apply and the weight to be given to general deterrence should be moderated in favour of other purposes of punishment, particularly rehabilitation: *IS v R* [2017] NSWCCA 116 at [62]–[65]. This especially will be the case where the offending occurs at a time when an offender has not yet gained maturity and the effect of the deprivation is at its

fullest: *IS v R* at [62]. Notwithstanding a strong subjective case involving a severely deprived background, a sentence for robbery must still be reasonably proportionate to the gravity of the offending: *Edwards v R* [2021] NSWCCA 57 at [65].

See further **Deprived background** at **[10-470]**.

Rehabilitation

Where an offender has made substantial effort, and achieved progress, towards rehabilitation, this warrants a significant 'downward departure' from the *R v Henry* guideline: *Gardiner v R* [2018] NSWCCA 27 at [60].

Youth

Youth is a recognised mitigating factor and, generally, the younger an offender, the greater the weight that should be given to the element of youth: *R v Hearne* [2001] NSWCCA 37 at [27]. The rehabilitation of youthful offenders will for the most part take precedence over deterrence and retribution in the sentencing exercise: *R v GDP* (1991) 53 A Crim R 112; *R v DM* [2005] NSWCCA 181 at [61].

However, when a juvenile offender conducts themself in a way that an adult does, and commits a crime that involves violence or is one of considerable gravity, it is the function of the court to protect the community, and to appropriately give effect to the retributive and deterrent elements of sentencing: *R v Pham* (1991) 55 A Crim R 128 at [13]; *R v Tran* [1999] NSWCCA 109 at [10].

In *R v Sharma* (2002) 54 NSWLR 300, Spigelman CJ observed at [74] in relation to armed robberies committed by youthful offenders:

> Armed robberies of the character involved in the present proceedings, committed by young persons, generally with an addiction problem, are so prevalent that the objective of general deterrence is entitled to significant weight in the process of sentencing for this offence, notwithstanding the youth of the typical offender.

It has been held that youth is not a cloak of convenience behind which those who deliberately engage in armed robbery can shelter from the just consequences of their conduct: *R v Mastronardi* [2000] NSWCCA 12 at [20]; *R v Drollett* [2002] NSWCCA 13 at [19]. Simply because offenders are in their late teens does not signify deterrence and retribution cease to be important, particularly where the crimes entail physical violence on a vulnerable victim: *R v El Sayah* [2018] NSWCCA 64 at [61]. In *TM v R* [2023] NSWCCA 185, the court held that the qualification to the relevance of youth where young people "conduct themselves in an 'adult-like manner'" should be applied with some caution. The gravity of an offence does not of itself demonstrate "adult-like" behaviour, an assessment is required of maturity and conduct and not only of the degree of violence: at [49]. The judge failed to take account of the youth of the 15-year-old offender in assessing his moral culpability: at [61], [66].

In the *R v Henry* guideline judgment, Spigelman CJ included the expression "young offenders" among the characteristics of the category of cases which was "sufficiently common for purposes of determining a guideline" at [162]. The youth of the offender is one of the factors that might mitigate a sentence below the indicative range: at [170]. In addition to chronological age, it is also important to be mindful of an offender's relative maturity or otherwise when applying the *R v Henry* guideline judgment: *Yildiz v R* [2020] NSWCCA 69 at [61].

Although the *R v Henry* guideline judgment was not specifically addressed to the sentencing of offenders under 18 years of age, there is no error in using the guideline as a starting point when sentencing a child: *R v SDM* (2001) 51 NSWLR 530 at [40]–[43]; *TS v R* [2007] NSWCCA 194 at [25]. The special considerations that apply under s 6 of the *Children (Criminal Proceedings) Act* 1987 can be taken into account, along with all the other aspects of sentencing policy and principle relevant to offenders who were children at the time of offending, within the ambit of the guideline judgment: *R v SDM*, above, at [20].

Adult offenders' Children's Court criminal histories (where no convictions are recorded) are not admissible in sentencing proceedings and it is an error to take such matters into account: *Dungay v R* [2020] NSWCCA 209 at [95]; ss 14, 15 *Children (Criminal Proceedings) Act* 1987; see further **Child offenders** at **[10-405] Prior record** .

See further **Youth** at **[10-440]** and **Sentencing principles applicable to children dealt with at law** at **[15-090]**.

Juvenile and adult co-offenders — sentencing parity

It is not uncommon when robbery offences are committed by multiple offenders for one or more of the offenders to be a juvenile and the other or others an adult. Examples include *DGM v R* [2006] NSWCCA 296, *Ersman v R* [2007] NSWCCA 161 and *DFS v R* [2007] NSWCCA 77. The different sentencing objectives and considerations applicable to sentencing offenders in the Children's Court and adult courts restrict comparison of the sentences handed down to co-offenders under the two regimes: *R v Ho* (unrep, 28/2/97, NSWCCA).

In *R v Colgan* [1999] NSWCCA 292 Spigelman CJ said at [15]: "… an individual sentenced as an adult may very well have a justifiable sense of grievance with respect to that very difference of the regimes": following *R v Govinden* [1999] NSWCCA 118 at [36]–[38]. It was subsequently held in the two judge bench case of *R v Boney* [2001] NSWCCA 432 at [14] per Wood CJ; approved in *Ersman v R* at [74]:

> There is no longer an inflexible rule that there is no utility in comparing the sentences imposed upon co-offenders who are separately dealt with: one in the Children's Court and the other as an adult.

In *R v Tran* [2004] NSWCCA 6 the court held at [17] that, while the sentences were within the range indicated in the *R v Henry* guideline judgment, the appellant had a justifiable sense of grievance arising from the difference between his sentence and that of his co-accused. The latter received a control order in the Children's Court of 15 months. Despite the fact that there are different sentencing objectives in the Children's Court, which limit the worth of any comparison, the sentencing judge should have paid some regard to the control order imposed on the co-offender.

The relevance of comparing such sentences is the greater in cases where all offenders were sentenced in the District Court in accordance with law pursuant to the *Children (Criminal Proceedings) Act* 1987: *R v Cox* [2004] NSWCCA 413 at [28].

See further **Juvenile and adult co-offenders** at **[10-820]**.

[The next page is 9601]

Commonwealth drug offences

[65-100] Criminal Code offences

Last reviewed: November 2023

Commonwealth serious drug and precursor (chemical substances used in making illicit drugs) offences are found in "Serious drug offences" Pt 9.1 Criminal Code (Cth). The offences fall into two broad groups:

1. import-export offences, including possession in this context (Div 307), and import-export offences involving children (Div 309, ss 309.12–309.15); and
2. offences arising in a domestic context, including trafficking controlled drugs (Div 302), commercial cultivation of controlled plants (Div 303), selling controlled plants (Div 304), commercial manufacture of controlled drugs (Div 305), pre-trafficking controlled precursors (Div 306), possession offences (Div 308), and drug offences involving children (Div 309, excluding ss 309.12–309.15, Div 310).

For Commonwealth drug offences the pure quantity of the drug is the critical amount: see **Quantity and purity of drug**, below, at **[65-130]**.

Aggregation provisions enable quantities of drugs, plants, or precursors from the same occasion or different occasions (within seven days) to be combined: (Div 311).

The import-export offences are the most commonly prosecuted offences, but many of the principles discussed in these cases are relevant to all Commonwealth drug offences. These principles include: the importance of general deterrence (see **[65-110]**); the significance of the drug quantity and the offender's role in the offence as key determinants of objective seriousness (see **[65-130]**); the fact prior good character may carry less weight than for other offences (see **[65-140]**. Division 307 also includes offences relating to the possession (and attempted possession) of imported drugs. A sentencing court must be astute when sentencing an offender charged with such discrete offences not to also punish that offender for the drug's importation: see discussion at **Different offences and De Simoni** at **[65-130]**.

Offences arising in the domestic context tend to have fewer comparative sentencing cases. This issue is discussed at **[65-150] Achieving consistency**.

For a discussion of the rationale for the introduction of the new offences and a brief outline of relevant provisions, see Ch 2 "Commonwealth serious drug offences framework" in P Mizzi, Z Baghizadeh and P Poletti, *Sentencing Commonwealth drug offenders*, Research Monograph 38, Judicial Commission of NSW, Sydney, 2014.

Summary disposal

Commonwealth indictable and summary offences are defined respectively in ss 4G and 4H *Crimes Act* 1914 (Cth). Section 4J provides for indictable offences to be dealt with summarily if certain conditions are met. Unless there is provision to the contrary, offences with a maximum penalty of greater than 10 years are strictly indictable.

[65-110] The requirements of s 16A Crimes Act 1914 (Cth)

Section 16A(1) *Crimes Act* 1914 (Cth) requires a court to "impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence". This subsection does not stand alone but must be read in conjunction with s 16A(2), which obliges a court sentencing a federal offender to take into account such matters identified as are "relevant and known to the court".

See **[16-025] Section 16A(2) factors** in **Sentencing Commonwealth offenders**. See also Ch 4 "The relevant sentencing principles" in P Mizzi, Z Baghizadeh and P Poletti, *Sentencing Commonwealth drug offenders*, Research Monograph 38, Judicial Commission of NSW, Sydney, 2014.

Johnson J summarised the relevant sentencing principles for Commonwealth serious drug offences in *R v Nguyen; R v Pham* [2010] NSWCCA 238 at [72]. That summary has been referred to with approval in Victoria in *R v Nguyen* (2011) 31 VR 673 at [33] and in Queensland in *R v Hill* [2011] QCA 306 at [277].

The importance of deterrence

In *Wong v The Queen* (2001) 207 CLR 584, Gaudron, Gummow and Hayne JJ held at [64] that the difficulty of detecting the offence of being knowingly concerned in the importation of heroin and the great social consequences flowing from its commission, suggest that deterrence is to be given chief weight in the sentencing task and that stern punishment will be warranted in almost every case. The majority identified other features of the offence at [64]:

> Those features will also include those that differentiate between particular cases: the quantity of drug involved, the offender's knowledge about what was being imported, the offender's role in the importation, the reward which the offender hoped to gain from participation. All these are matters properly to be taken into account in determining a sentence.

The significance of general deterrence in the context of serious drug offences irrespective of an offender's role and because of the pernicious nature of the drug trade has been repeatedly emphasised by appellate courts: *R v Chen* [2002] NSWCCA 174 at [286]; *R v Riddell* [2009] NSWCCA 96 at [57]–[58]; *Nguyen v R* (2011) VR 673 at [34]; *DPP (Cth) v Bui* (2011) 32 VR 149 at [38]–[39].

In very limited circumstances, such as when an offender comes forward to assist law enforcement authorities to frustrate the completion of a drug offence, deterrence may be of less significance: *RCW v R (No 2)* [2014] NSWCCA 190 at [74]. In such circumstances the offender should be sentenced "to provide an example of what might become of someone who has the good conscience to come forward and assist … in order to thwart serious criminal activity".

Non-custodial sentences for drug importation must be restricted to truly exceptional cases: *R v Wong and Leung* (1999) 48 NSWLR 340 per Spigelman CJ at [104]; *R v Fabian* (unrep, 16/10/92, NSWCCA) per Sully J.

[65-130] Objective factors relevant to all Commonwealth drug offences

For a discussion of the use of appellate cases and statistics in sentencing for drug offences, see **Special Bulletin 9 — November 2015 The Queen v Pham [2015] HCA**

39 and **Special Bulletin 10 — December 2015 Post The Queen v Pham (2015) 90 ALJR 13 appellate cases**. The latter Bulletin has a collection of intermediate appellate cases for importing a marketable quantity of a border controlled drug which has regard to *The Queen v Pham* (2015) 256 CLR 550.

Quantity and purity of drug

While Parliament distinguishes between the maximum sentence that may be imposed for both Commonwealth and State offences on the basis of quantity, for Commonwealth offences the relevant quantity refers to the pure weight of the narcotic: *R v King* (1978) 24 ALR 346.

The lists of applicable trafficable, marketable and commercial quantities for each type of border controlled, or controlled, drug are set out in the *Criminal Code Regulations* 2019 (Cth): see Pt 3, Div 1 and Schs 1 and 2. The amounts for Commonwealth drug offences are based on the pure amount of the drug.

In *Wong v The Queen* (2001) 207 CLR 584, Gaudron, Gummow and Hayne JJ held that the Court of Criminal Appeal erred in offering a grid founded entirely on the gravity of the offence, as measured only by the weight of narcotic concerned and against which future sentences were to be judged: at [71]. The starting point given by the Court of Criminal Appeal was based on the false premise that the gravity of the offence can usually, or perhaps even always, be assessed by reference to the weight of the narcotic involved: at [73]; see also Kirby J at [135].

The matters properly taken into account in fixing a sentence include the quantity of the drug involved, the offender's knowledge and role in the importation and the offender's anticipated reward from participating. Weight is not the chief factor to be considered in fixing a sentence: *Wong v The Queen* at [67]ff.

Both Parliament and the courts have eschewed the approach that penalties should be proportional to quantity: *R v Doan* (unrep, 27/9/1996, NSWCCA); *R v Postiglione* (1991) 24 NSWLR 584; *R v Schofield* [2003] NSWCCA 3. In *R v Vo* [2000] NSWCCA 440, Wood CJ at CL said at [32]:

> Error can enter into the sentencing process if an attempt is made thereafter to graduate sentences by some mathematical exercise referable to the precise quantity involved or known by the offender to have been imported.

However, that there is some relationship between the quantity of drug involved in the offence and the sentence ultimately imposed is reflected by the statement of the majority in *Wong v The Queen* at [64]:

> In general, however, the larger the importation, the higher the offender's level of participation, the greater the offender's knowledge, the greater the reward the offender hoped to receive, the heavier the punishment that would ordinarily be exacted. It is by these kinds of criteria that comparisons are to be made between examples of the offence and the sentences that are or were imposed.

See also: *Tyn v R* [2009] NSWCCA 146 at [28]; *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [307]. In *R v Nguyen* [2005] NSWCCA 362 at [110], Howie J concluded that in an appropriate case the quantity involved might place an offence in the worst

case category (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256). His Honour's approach was endorsed by the WA Court of Appeal in *Sukkar v R (No 2)* [2008] WASCA 2 at [46].

In *Wong v The Queen* at [68], the court recognised that not all offenders involved in importation of narcotics will know or even suspect how much pure narcotic is being imported but the size of an importation has increased significance when an offender does have some knowledge of the quantity involved.

In addition, as Greg James J observed in *R v Soonius* (unrep, 29/5/98, NSWCCA) in referring to reliance being placed upon quantity alone:

> The very provisions of the *Crimes Act* 1914, and in particular s 16A, speak against such a simplistic approach. The quantities involved must be considered along with all the matters to which a court's attention is directed by the Act and by principle.

Importing more than one border controlled drug

Whether importing more than one kind of border controlled drug on the same occasion significantly increases the overall criminality of the offending conduct depends on the facts of the particular case. Some degree of accumulation is not necessarily required where the importation of more than one type of drug is the subject of separate counts. The guiding principle is to ensure the total effective sentence properly reflects the overall criminality involved in all the offences: *MEG v R* [2017] WASCA 161 at [22].

Prohibition on harm-based categories

Any attempt to rank the seriousness of narcotics either under the *Customs Act* 1901 (Cth) or the *Criminal Code* (Cth) is inappropriate. In *Adams v The Queen* (2008) 234 CLR 143, Gleeson CJ, Hayne, Heydon, Crennan and Kiefel JJ stated at [10]:

> … Parliament has made its own judgment as to an appropriate penal response to involvement in the trade in illicit drugs. The idea that sentencing judges, in the application of that quantity-based system, should apply a judicially constructed harm-based gradation of penalties (quite apart from the difficulty of establishing a suitable factual foundation for such an approach) cuts across the legislative scheme.

The High Court in *Adams v The Queen* rejected the appellant's assertion that he should have been sentenced on the basis that MDMA was less harmful than heroin: at [9]–[10].

In *R v Corbett* [2008] NSWCCA 42 (decided before *Adams v The Queen*), the sentencing judge erred by concluding that "GBL is a drug of a lesser order than the so called 'hard drugs'": at [4]. The many border controlled drugs and quantities listed in s 314.4 *Criminal Code* (Cth) "are only connected by the common thread of legislative proscription": at [45]. Harrison J stated at [47]:

> Except by reference to quantity, there would appear to be no scope for judicial or forensic enquiry about the individual characteristics of any of the listed substances. For example, even with the benefit of the most highly respected expert opinion that listed substance "A" is socially, pharmacologically, or in every other relevant way wholly benign or alternatively exceedingly dangerous, there does not appear to be a legitimate avenue for the use of that information to inform the sentencing discretion or to substantiate a submission.

Notwithstanding these statements of principle, past analysis of the sentences imposed for offences involving different types of drugs suggest that there is some difference

of treatment, in terms of the sentence imposed, based on drug type. See "Ch 6 Sentencing patterns for the period 2008–2012" in particular at 6.3.11–6.3.12 in P Mizzi, Z Baghizadeh and P Poletti, *Sentencing Commonwealth drug offenders*, Research Monograph 38, Judicial Commission of NSW, Sydney, 2014. See also *DPP (Cth) v Maxwell* [2013] VSCA 50; *R v Hill* [2011] QCA 306.

Role of offender and level of participation

In order to determine an offender's culpability in an importation offence it is essential for the sentencer, if possible, to determine the offender's role in the criminal enterprise: *R v Laurentiu* (unrep, 1/10/92, NSWCCA); *R v Bimahendali* [1999] NSWCCA 409. The shortcomings of attempting to categorise the role of the offender were recognised by the majority, Gleeson CJ, Gaudron, Hayne and Callinan JJ, in *Olbrich v The Queen* (1999) 199 CLR 270 at [14]:

> However, the utility of such an exercise is necessarily limited by the extent to which the material facts are known. What may be a convenient shorthand method of describing the facts of particular cases should not be elevated to an essential task to be undertaken in every case, regardless of whether that is possible or appropriate.

Sometimes, the offender's role is not known to the court. In such cases, the court is not obliged to find facts favourable to the offender or to accept his or her version of events: *Olbrich v The Queen* at [27]–[28]. In *Giles-Adams v R* [2023] NSWCCA 122, very little was known about the criminal enterprise responsible for the attempted importation and it was held the sentencing judge erred in finding the applicants had "intermediate-level" roles in the absence of evidence as to the identity/roles of others involved and other features of that enterprise: at [112]–[115].

It is accepted that the offender's role and level of participation in the criminal enterprise are more important than the mere quantity of drugs, subject to the recognition that the gradation of seriousness is reflected in the increase in statutory maximum penalties as the quantity of drug increases: *R v MacDonnell* [2002] NSWCCA 34. The quantity of the drug remains material, given that the size of the profit and the harm inflicted are likely to be proportional to the weight of the drug: *R v Stanbouli* [2003] NSWCCA 355 at [102].

In *R v Stanbouli*, Spigelman CJ at [3], with whom Carruthers AJ agreed at [179], held that life imprisonment should be reserved as "the norm" for those at the top of the importation hierarchy, rather than those who "provide important assistance", as Hulme J held at [113]. Note the schedule of cases assembled by Hulme J at [144]–[170], including several where sentences of life imprisonment were imposed on offenders described as "mid-level executives". See **Mandatory Life Sentences under s 61** at **[8-600]**.

In *R v Flavel* [2001] NSWCCA 227, the court rejected a submission that the categorisation of the offender's role as a mid-level manager in the importation of 117 kg of pure cocaine called for the imposition of less than the statutory maximum penalty. The court upheld a sentence of life with a non-parole period of 25 years as being within the sentencing judge's discretion. Similarly, in *R v Gonzales-Betes* [2001] NSWCCA 226, the court upheld the sentence of life with a non-parole period of 22 years for a co-offender regarded as a "mid-level" executive, "not the ring leader, chief executive or chairman of the board" in the same importation.

Distinguishing between "couriers" and "principals"

In *Olbrich v The Queen* (1999) 199 CLR 270, the majority, Gleeson CJ, Gaudron, Hayne and Callinan JJ, recognised that a distinction between "couriers" and "principals" may usefully describe different kinds of participation in a single enterprise of importation. However, too much reliance should not be placed upon these terms when sentencing a particular offender. The majority said at [19]:

> Further, it is always necessary, whether one or several offenders are to be dealt with in connection with a single importation of drugs, to bear steadily in mind the offence for which the offender is to be sentenced. Characterising the offender as a "courier" or a "principal" must not obscure the assessment of what the offender did.

The importance of this principle and the difficulty of making an assessment of a particular offender's role were reiterated in *Kuo v R* [2018] NSWCCA 270 at [118] and in *Klomfar v R* [2019] NSWCCA 61 at [40]. Drug syndicates, which by their nature are secretive, do not operate transparently and the "rank" of a drug offender within the criminal organisation is necessarily opaque and "more a matter of speculation than a process of rationally drawing inferences": *Kuo v R* at [118], [123]. It remains important for a sentencer to focus on what the offender actually did: *Kuo v R* at [118]; see also *Kook v R* [2001] NSWCCA 122 at [15].

Couriers, and those low in the drug hierarchy, generally receive a lesser sentence than persons at a higher level: *Tyler v R* [2007] NSWCCA 247 at [79]; *R v Chea* [2008] NSWCCA 78 at [34]. Justice Simpson explained in *Tyler v R* at [79]–[80]:

> Those low in the hierarchy, such as couriers, are usually to be sentenced less harshly, because, although they are of fundamental importance in the execution of the object of the conspiracy — in a drug importation conspiracy, without couriers, no drug could or would be imported — they have no managerial or decision making function; and, experience shows, usually derive the least monetary reward.
>
> By contrast, those who have managerial or decision making functions are seen to occupy a more senior position, and, accordingly, to be more culpable. A relevant factor here is the level of profit to be derived.

Nonetheless, there is no inevitable correlation between an offender said to be in the lower echelon of a hierarchy, and the severity of the punishment they can expect to, and will, receive: *Klomfar v R* at [41].

Couriers involved in the same importation can be differentiated on the basis of their reward: *Seng v R* [2007] NSWCCA 335. At first instance, the applicant in *Seng v R* was sentenced by the same judge to an identical non-parole period as the co-offender, and a head sentence of only 6 months less. The couriers travelled on the same flight after ingesting pellets of heroin but the Court of Criminal Appeal found that their roles were materially different. The co-offender participated in the importation for significant financial reward, being promised a cash payment of $30,000 to $35,000, and he secured the applicant's involvement, whereas the applicant acted out of a sense of obligation to a man higher in the enterprise: at [22]. The applicant's financial gain amounted to payment of his expenses while he stayed in Cambodia for a month, and the airfare to Australia which would allow him to see his son.

Role and conspiracies

The Court of Criminal Appeal in *Tyler v R* [2007] NSWCCA 247 confirmed that the relevance of the offender's role in sentencing for drug conspiracies refers to

the seniority of the offender whose sentence is under consideration: at [79]. The court found that the sentencing judge erred in assessing the role of one co-offender, Chalmers, who booked flights and obtained tickets for the courier (the other co-offender, Tyler), as being relatively minor in the overall operation. The judge also found that the role of Chalmers was diminished by his lack of involvement in travelling overseas to obtain the drugs. Ordinarily, those who carry the drugs are at the bottom of the hierarchy, while those in higher positions distance themselves from physical contact with the drugs: at [75]. To treat Tyler as more culpable because of his close physical connection to the drugs inverts the conventional approach to blameworthiness in drug conspiracies: at [76]. Justice Simpson stated at [83]–[84]:

> Identifying the "role" of a participant by reference to his position in the organisational hierarchy is a very different proposition from isolating the precise physical acts that can be attributed to the particular offender, and selecting the punishment by reference solely to those isolated acts. It would be quite artificial, and contrary to the very concept of a conspiracy, to dissect with precision the physical acts of each of the conspirators, and to sentence that conspirator for those acts alone. That would be a negation of the complex inter-connection between the various participants, and the organisational nature of a conspiracy. It would represent too literal an application of the decisions that identify the "role" of any participant as a relevant factor in the sentencing exercise. It would be to ignore the essential feature of the offence of conspiracy — the agreement to participate in an organised criminal activity.
>
> That is not to say that the physical acts of the offender whose sentence is under consideration are irrelevant. They are relevant, as one part of a complex tapestry: see *R v Nguyen* [2005] NSWCCA 362; 157 A Crim R 80 at [102]. That, in my opinion, is the first, and most fundamental, flaw in the approach to sentencing here taken.

Different offences and De Simoni

There has been a debate about the extent to which a judge can take into account at sentence facts relating to an importation when an offender is charged with a possession offence (and attempted possession): *El-Ghourani v R* [2009] NSWCCA 140. The starting point is that there is no obligation to inquire about the course of events before or after an offence and it is wrong to sentence an offender for criminality for which they have not been charged: *El Jamal v R* [2021] NSWCCA 105 at [24], [26]; [64]; *The Queen v Olbrich* (1999) 199 CLR 270 at [18], [22]; *The Queen v De Simoni* (1981) 147 CLR 383 at 389.

However, some circumstances relating to the process of the drug's importation may also be relevant to a charge of possession: *El-Ghourani v R*, per Spigelman CJ at [30]. His Honour said at [33] that:

> … the act of possession can be attended by a wide range of moral culpability. The circumstances in which a person charged with a possession offence came into possession of the offending matter, and what it was that the person intended to do with that matter, can all be relevant to determining the degree of moral culpability attached to the act of possession itself.

Having regard to the broader circumstances or overall context of an offender's involvement in a drug importation for a possession offence is not inconsistent with *The Queen v Olbrich* provided the sentencing judge focuses on the crime charged and does not treat complicity in the uncharged importation as an aggravating factor: *El-*

Ghourani v R [2009] NSWCCA 140 at [30]; *The Queen v Olbrich* at [18] referring to *The Queen v De Simoni*. Prosecuting authorities have an obligation not to seek to rely on circumstances as aggravating the possession offence, where those circumstances constitute proof of a distinct charge: *El Jamal v R* at [64] per Garling J (Payne JA and Wright J agreeing).

It is not always easy to distinguish between permissible and impermissible evidence concerning an importation when an offender is only charged with possession: *El Jamal v R* at [32], referring to *Balloey v R* [2014] NSWCCA 165 at [24]. The judge must keep firmly in mind that the offender is not charged with importing the drugs and acknowledge that the evidence could not be used to impose a greater penalty on the offender: *R v Guiu* [2002] NSWCCA 181 at [2]–[3]; *El-Ghourani v R* at [6], [9], [32]. In *El Jamal v R*, the Court of Criminal Appeal found the sentencing judge erred by making frequent references to "the importation offence" and placing importance on the findings about the offender's role in the uncharged importation: at [38]. Likewise, the judge in *R v Bousehjin* [2003] NSWCCA 86 erred by incorrectly focusing on the uncharged importation and failing to focus on the attempted possession offence: at [26]. By contrast, the judge in *El-Ghourani v R* stated that the offender "was acting as a principal in Australia in this importation" but correctly maintained the focus on the possession charge: at [35].

[65-140] Subjective factors

Assistance to authorities

In sentencing federal offenders, ss 16A(2)(h) and 16AC (previously s 21E) *Crimes Act* 1914 (Cth) provide statutory obligations for an offender's assistance to authorities to be taken into account.

Assistance to authorities takes on particular significance in importation offences because of the "notorious difficulties of detecting the crime of importation": *R v Wong and Leung* (1999) 48 NSWLR 340. The fundamental importance of general deterrence in sentencing drug offenders, at whatever level in the hierarchy, gives way to the greater community interest in allowing a significant discount for assistance by couriers whose implication of principals contributes to the disruption of drug importation networks: *R v Perrier (No 2)* [1991] 1 VR 717 at 725.

However, as was said by Gleeson CJ in *R v Gallagher* (1991) 23 NSWLR 220 at 232:

> 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 support the principles set out above, it constitutes an affront to community standards

ZZ v R [2019] NSWCCA 286 is an importation case under s 307.2 of the *Criminal Code* (Cth), in which fresh evidence established that the applicant's assistance to the authorities was of much greater value than was thought at the time of sentence: at [30]. Evidence of events post-sentencing is only admissible to determine whether to quash a sentence in confined circumstances. One exception is to show the true significance of facts in existence at the time of sentence: *ZZ v R* at [20]–[22]; *R v Smith* (1987)

44 SASR 587 at 588; *Khoury v R* [2011] NSWCCA 118 at [113]. In resentencing the applicant, the initial discount of 25% for the plea of guilty was increased 35% to also take account of the assistance: *ZZ v R* at [33].

See **Power to Reduce Penalties for Assistance to Authorities** for constraints on the application of the discount at **[12-200]**ff and *Co-operation with law enforcement agencies: ss 16A(2)(h) and 16AC* at **[16-025] Section 16A(2) factors** for a discussion of the relevant principles.

Entitlement to discount and extent of the benefit

In *R v A* [2004] NSWCCA 292, Wood CJ at CL said at [25]:

> The availability of a discount for assistance, depending on its worth, in order to foster the interests of law enforcement and to recognise the contrition involved as well as the potential risks to the offender, is well recognised: *R v Salameh* (1991) 55 A Crim R 384, *R v Gallagher* (1991) 23 NSWLR 220, *R v Cartwright* (1989) 17 NSWLR 243 and *R v Dinic* NSWCCA 3 September 1997. It is important, if the purpose for allowing a discount is to be achieved, that the offender standing for sentence be clearly appraised of the fact that a benefit was conferred.

While entitlement to a discount does not necessarily depend on the effectiveness of the information supplied, the value of the assistance is relevant to the evaluation of the discount. In *R v Barrientos* [1999] NSWCCA 1, Abadee J reviewed the authorities on assistance in Commonwealth offences, including *R v Dinic* (1997) 149 ALR 488 and *R v Cartwright* (1989) 17 NSWLR 243, and said at [47]:

> Thus in the determination of any discount the relevance and importance of the benefits flowing from assistance is important: see also *R v Gallagher* (1991) 23 NSWLR 220. There is no fixed tariff for assistance given. Where there is significant assistance the amount "customarily given in New South Wales which with few exceptions, appears to range from 20 per cent to 50 per cent": see *R v Chu* per Spigelman CJ at 6–7. That said, the law does not mandate the identification of a precise discrete quantifiable discount for assistance or that the assistance falls within the range. The matter of that discount or its quantification will depend upon a number of factors and the facts of the particular case under consideration. I do not see the authorities suggesting that once any assistance is found then the allowance for such must reflect a range. The worth of the assistance may take it below the range. Whether it does is a matter of fact to be evaluated in accordance with the proved circumstances of the case.

Good character

Good character carries less weight in crimes involving drugs than for many other offences: *R v Leroy* [1984] 2 NSWLR 441 per Street CJ at 446–447. This principle is usually of particular relevance in relation to drug couriers involved in importation where persons with clear records are selected so as to not attract suspicion: *R v Lopez-Alonso* (unrep, 7/3/96, NSWCCA); *R v Salgado-Silva* [2001] NSWCCA 423.

In *R v X* [2002] NSWCCA 40, the court rejected a submission that, as good character has limited significance in crimes involving drugs, then having a previous conviction cannot be of major significance in determining an appropriate sentence. On the contrary, Smart AJ said at [57] that:

> This does not follow. Having a conviction for a previous serious drug offence is significant for sentencing purposes.

[65-150] Achieving consistency

The primary responsibility of a sentencing judge is to ensure that the sentence imposed on an offender is consistent with others and the primary mechanism for achieving this is through the application of the relevant sentencing principles: *Hili v The Queen* (2010) 242 CLR 520 at [40]; *Barbaro v The Queen* (2014) 253 CLR 58 at [26].

In *Barbaro v The Queen*, the High Court held (at [40]) that the prosecutor's duty to assist the court on sentence did not extend to providing the court with an available range of sentences but that that practice was to:

> … be distinguished from the proper and ordinary use of sentencing statistics and other material indicating what sentences have been imposed in other (more or less comparable cases.

The synthesis of "raw material" which includes sentencing statistics and information about the sentences imposed in comparable cases is the task of the sentencing judge: *Barbaro v The Queen* at [41]. See *Achieving consistency in sentencing* in **Relevance of decisions of other State and Territory courts** at **[16-035]**.

In *Wong v The Queen* (2001) 207 CLR 584, the High Court overturned the guideline promulgated by the Court of Criminal Appeal in *R v Wong and Leung* (1999) 48 NSWLR 340. In their joint judgment, Gaudron, Gummow and Hayne JJ held at [87] that, not only was there no jurisdiction or power to issue the guideline, but the principles which informed its construction were flawed by the error in selecting weight of the narcotic as the chief factor in sentencing.

As to the continuing usefulness of the guideline promulgated by the Court of Criminal Appeal in *R v Wong and Leung* see in particular *Guideline judgments and s 16A* in **General sentencing principles applicable** at **[16-010]** and *Impact of repeal of s 16G* in **Remissions** at **[16-060]**.

A number of intermediate appellate decisions concerning Commonwealth serious drug offences annex comparative case schedules: see, for example, *R v Lee* [2007] NSWCCA 234; *Law v R* [2006] NSWCCA 100; *R v To* [2007] NSWCCA 200; *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1; *DPP (Cth) v Maxwell* (2011) 31 VR 673; *OPQ v R* [2012] VSCA 115; and *Pham v R* [2014] VSCA 204. These schedules may usefully promote sentence consistency at a national level because they can inform a court of national sentencing practice: *DPP (Cth) v De La Rosa* at [193]. However, it would be wrong to use schedules, such as the one reproduced in *DPP (Cth) v De La Rosa*, by endeavouring to fit an offender into one of the nominated categories, because of the individual nature of each sentencing exercise: *R v Holland* [2011] NSWCCA 65 at [3].

In *R v Maldonado* [2009] NSWCCA 189 at [54], the court accepted that cases decided in respect of different offences under the Code with the same maximum penalty provided "a rough guide to the range of sentences imposed for Commonwealth offences".

For some of the newer offences in Pt 9.1 Criminal Code (Cth), such as manufacturing or trafficking controlled drugs, it is also open to a sentencing judge to have regard to sentences imposed for the more established Commonwealth drug offences and to seek guidance from the long-established State equivalent offences: see *R v Cheung* (2010) 203 A Crim R 398 at [130]–[131]; *R v Nakash* [2017] NSWCCA 196 at [18].

However, in *Rajabizadeh v R* [2017] WASCA 133, the WA Court of Appeal observed that equating sentences for Commonwealth offences with similar State offences to achieve consistency was wrong as a matter of principle and that attempting to achieve consistency with the State offences in each jurisdiction could result in inconsistency between States in sentences for the same federal offence due to differing maximum penalties and sentencing ranges: *Rajabizadeh v R* at [68]. Given the sentencing framework under Pt IB *Crimes Act* 1914 (Cth) applies, in the absence of comparable cases, an assessment of the sentence imposed must have regard to the maximum penalty, the seriousness of the offence, the relevant mandatory factors set out in s 16A(2) *Crimes Act* and any other relevant aggravating or mitigating factors: *Rajabizadeh v R* at [71].

See further the discussion at 5.3.2.3 concerning the use of comparable cases in Ch 5: **The imperative of achieving reasonable consistency** in P Mizzi, Z Baghizadeh and P Poletti, *Sentencing Commonwealth drug offenders*, Research Monograph 38, Judicial Commission of NSW, Sydney, 2014.

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Appeals

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Appeals

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Appeals

[70-000] Introduction

This chapter first discusses sentence appeals for matters dealt with on indictment and then appeals from the Local Court. A creature of statute, the precise nature of a sentence appeal depends on the language and context of the statutory provision(s): *Dinsdale v The Queen* (2000) 202 CLR 321 at [57]; *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573 at [8].

[70-020] Section 5(1)(c) severity appeals

Section 5(1)(c) *Criminal Appeal Act* 1912 provides that a person convicted on indictment may appeal against sentence to the Court of Criminal Appeal with leave.

Time limits and applications out of time

The provisions of the *Criminal Appeal Act* and the Criminal Appeal Rules (repealed but now see Supreme Court (Criminal Appeal) Rules 2021, with similar provisions) relating to time limits and applications out of time are explained in *Kentwell v The Queen* (2014) 252 CLR 601 at [11]–[13]. Section 10(1)(a) *Criminal Appeal Act* requires notice of intention to apply for leave to appeal to be given within 28 days from the date of sentence. If notice is not given by the defendant, the applicable period for a notice of appeal is three months after the sentence: r 3.5(2)(b) Supreme Court (Criminal Appeal) Rules 2021. A notice of appeal against a sentence under s 5D *Criminal Appeal Act* must be filed 28 days after the sentence: r 3.5(3). If a notice of appeal is filed after the time for filing has expired, the application for leave may only be made with the leave of the Court: r 3.5(5). The Court has a discretion to dispense with the rules in particular cases: r 1.4.

Section 10(2)(b) provides the court may, at any time, extend the time within which the notice under s 10(1)(a) is required to be given to the court or, if the rules of court so permit, dispense with the requirement for such a notice.

An application should not be approached by requiring the applicant to demonstrate that substantial injustice would be occasioned by the sentence: *Kentwell v The Queen* at [4], [30], [44]; *O'Grady v The Queen* (2014) 252 CLR 621 at [13]. In considering whether to grant an extension of time a court must consider what the interests of justice require in the particular case. The principle of finality does not provide a discrete reason for refusing to exercise the power to extend the time limit where the sentence is being served: *Kentwell v The Queen* at [32].

The prospect of success of the appeal is relevant. This involves considering the merits of an appeal. That issue is addressed by reference to s 6(3) *Criminal Appeal Act*: *Kentwell v The Queen* at [33]–[34]. As to the approach the court must take to s 6(3), see further below at **[70-040]**.

The courts have drawn a distinction between an order refusing leave to appeal and an order dismissing a severity appeal. In the former case, an applicant may return to the court and make subsequent applications. Where a subsequent application for

leave raises issues determined by the court in a previous application, there may be a discretionary bar, but no jurisdictional bar to the application: *Lowe v R* [2015] NSWCCA 46 at [14].

[70-030] The ordinary precondition of establishing error

Severity appeals under s 5(1)(c) *Criminal Appeal Act* 1912 are not rehearings. It is not enough that the appeal court considers that had it been in the position of the judge, it would have taken a different course: *Lowndes v The Queen* (1999) 195 CLR 665 at [15]. Nor is an appeal the occasion for revising and reformulating the case presented below: *Zreika v R* [2012] NSWCCA 44 per Johnson J at [81]. The applicant must establish the sentencing judge made an error in the exercise of their discretion: *House v The King* (1936) 55 CLR 499 at 505. In *Markarian v The Queen* (2005) 228 CLR 357 at [25], Gleeson CJ, Gummow and Callinan JJ said:

> As with other discretionary judgments, the inquiry on an appeal against sentence is identified in the well-known passage in the joint reasons of Dixon, Evatt and McTiernan JJ in *House v The King* … itself an appeal against sentence. Thus is specific error shown? (Has there been some error of principle? Has the sentencer allowed extraneous or irrelevant matters to guide or affect the decision? Have the facts been mistaken? Has the sentencer not taken some material consideration into account?) Or if specific error is not shown, is the result embodied in the order unreasonable or plainly unjust? It is this last kind of error that is usually described, in an offender's appeal, as "manifest excess", or in a prosecution appeal, as "manifest inadequacy".

See also the explanation of specific error in *Kentwell v The Queen* (2014) 252 CLR 601 at [42].

Manifest inadequacy of sentence, like manifest excess, is a conclusion and intervention on either ground is not warranted simply because the result arrived at below is markedly different to other sentences imposed for other cases: *Hili v The Queen* (2010) 242 CLR 520 at [59], referring to *Dinsdale v The Queen* (2000) 202 CLR 321 at [6] and *Wong v The Queen* (2001) 207 CLR 584 at [58]. Intervention is only justified where the difference is such that the court concludes there must have been some misapplication of principle, even though where and how cannot be discerned from the reasons: *Hili v The Queen* at [59].

Failure to attribute sufficient weight to an issue

The failure of a judge to attribute sufficient weight to an issue at sentence is not a ground of appeal that falls within the types of error in *House v The King* (1936) 55 CLR 499: *Bugmy v The Queen* (2013) 249 CLR 571 at [22], [53]; *CMB v Attorney General for NSW* (2015) 256 CLR 346 at [48].

Such a ground of appeal has the inherent problem of implicitly acknowledging that some weight has been placed on the issue: *DF v R* [2012] NSWCCA 171at [77]; *Hanania v R* [2012] NSWCCA 220 at [33]. The only means to test an assertion of that kind is to examine the sentence: *Hanania v R* at [33].

Failure of defence to refer to matters at first instance later relied upon

It will be rare for an applicant to succeed in a severity appeal where appellate counsel relies upon a subjective matter open on the evidence but barely raised before the

sentencing judge: *Stewart v R* [2012] NSWCCA 183 at [56]. This is because appeals are not an opportunity to reformulate the case below: *Stewart v R* at [56], citing *Zreika v R* [2012] NSWCCA 44.

Errors of fact and fact finding on appeal

Factual findings are binding on the appellate court unless they come within the established principles of intervention: *AB v R* [2014] NSWCCA 339 at [44], [50], [59]; *R v Kyriakou* (unrep, 6/8/87, NSWCCA); *Skinner v The King* (1913) 16 CLR 336 at 339–340; *Lay v R* [2014] NSWCCA 310 at [52]. These principles require that error be shown before the CCA will interfere with a sentence: *AB v R* at [52], [59]; *R v O'Donoghue* (unrep, 22/7/88, NSWCCA); *Kentwell v The Queen* (2014) 252 CLR 601 at [35]; *Hopley v R* [2008] NSWCCA 105 at [28]. It is necessary to identify specific error within the terms of *House v The King* (1936) 55 CLR 499 as a ground of appeal: *Carroll v The Queen* (2009) 83 ALJR 579 at [8], [24]; *Camm v R* [2009] NSWCCA 141 at [68]; *Cao v R* [2010] NSWCCA 109 at [48].

It is incumbent on the applicant to show that the factual finding was not open: *Turnbull v Chief Executive of the Office of Environment and Heritage* [2015] NSWCCA 278 at [26], [32]. A factual error may be demonstrated if there is no evidence to support a particular factual finding, or if the evidence is all one way, or if the judge has misdirected himself or herself. Error can be identified, either in the approach to the fact finding exercise, or in the principles applied: *AB v R* at [59]. The court cannot review the finding of fact made and substitute its own findings: *R v O'Donoghue* at 401.

In *Clarke v R* [2015] NSWCCA 232 at [32]–[36] and *Hordern v R* [2019] NSWCCA 138 at [6]–[20], Basten JA (Hamill J agreeing in each case) disapproved of *R v O'Donoghue* and opined that it was enough if the judge had made a mistake with respect to a factual finding that was material to the sentence. However that view has failed to receive support in subsequent judgments of the court: see *Yin v R* [2019] NSWCCA 217 at [27]; *Gibson v R* [2019] NSWCCA 221 at [2]–[6]; *TH v R* [2019] NSWCCA 184 at [1]; [22]–[23].

If the factual findings of the sentencing judge are not challenged on appeal, the appeal court must consider the appeal having regard only to those factual findings by the judge: *R v MD* [2005] NSWCCA 342 at [62]; *R v Merritt* (2004) 59 NSWLR 557 at [61]; *Carroll v The Queen* (2009) 83 ALJR 579 at [8], [24].

There is a distinction between a sentencing judge's assessment of facts and what they are capable of proving, and factual findings which the CCA might make were it to come to its own view of agreed facts: *Lay v R* at [51]; *Aoun v R* [2011] NSWCCA 284. Where a factual error has been made in the *House v The King* sense, the CCA does not assess whether, and to what extent, the error influenced the outcome. The sentencing discretion having miscarried, it is the duty of the CCA to exercise the sentencing discretion afresh: *Lay v R* at [53] applying *Kentwell v The Queen* at [40]–[43].

[70-035] Appellate review of an aggregate sentence

Last reviewed: November 2023

A court may impose an aggregate sentence when sentencing an offender for multiple offences: *Crimes (Sentencing Procedure) Act* 1999, s 53A(1). See **[7-505] Aggregate sentences**.

In *JM v R* [2014] NSWCCA 297, the seminal case on aggregate sentencing, R A Hulme J (Hoeben CJ at CL and Adamson J agreeing) at [3] set out nine propositions established by the cases considering s 53A: see **[7-507] Settled propositions concerning s 53A**. His Honour set out "further propositions" in relation to appellate review of aggregate sentencing (numbering continues from [39] (see **[7-507]**), 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 principal 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.

The principle or ultimate focus of the appeal is against the aggregate sentence, not the individual indicative sentences: *Lee v R* [2020] NSWCCA 244 at [32], *R v Kennedy* [2019] NSWCCA 242 at [78]; *DS v R* [2017] NSWCCA 37 at [63]–[64]; *JM v R* at [40] (proposition 11). However, in determining whether an aggregate sentence is manifestly excessive, regard may be had to the indicative sentences and to "potentials for accumulation" although without beginning and end dates for each indicative sentence, it may be more difficult to demonstrate a relevant error: *Lee v R* at [32], *JM v R* at [40] (propositions 11 and 13); *Gibson v R* [2019] NSWCCA 221 at [88]. Propositions 11, 12 and 13 were also affirmed in *Kerr v R* [2016] NSWCCA 218 at [114] and in *Kresovic v R* [2018] NSWCCA 37 at [42].

[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 **[70-035] Appellate review of an aggregate sentence**.

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).

[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

Last reviewed: November 2023

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] HCA 13 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 relation to a finding of objective seriousness, 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 …

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].

With appropriate modification the principles with respect to appeals of aggregate sentences on the grounds of manifest excess "equally apply" to a complaint of manifest inadequacy: *DPP (NSW) v TH* [2023] NSWCCA 81 at [53]–[54]; see also discussion in **[70-035] Appellate review of an aggregate sentence**. In *DPP (NSW) v TH*, while the "ultimate issue" was whether the aggregate sentence was manifestly inadequate, the fact that three of the four indicative sentences were "below any conception of the proper range of sentences for such offending" meant it almost inevitably followed that the aggregate sentence was also manifestly inadequate: at [56]–[58].

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

Last reviewed: November 2023

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 in the context of an appeal under the *Supreme Court Act* 1970. Referring to the "requirements, and limitations, of such an appeal" the plurality 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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