Judicial Commission of New South Wales

SENTENCING BENCH BOOK

Update 57

March 2024

SUMMARY OF CONTENTS OVERLEAF

Judicial Commission of New South Wales

Level 5, 60 Carrington Street, Sydney NSW 2000

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SUMMARY OF CONTENTS

Update 57

Update 57, March 2024

Update 57 amends the Bench Book to update and revise various chapters, and incorporate recent case law and legislative developments. The following chapters have been revised:

Fact finding at sentence

- **[1-470] Factual disputes following a committal for sentence** to update the reference to s 102(1) *Criminal Procedure Act 1986* as amended by the *Crime and Criminal Procedure Legislation Amendment Act 2024*, which clarifies that the District Court or the Supreme Court may sentence or otherwise deal with a person who pleads guilty during committal proceedings on the basis of a *court attendance notice, indictment or charge certificate*.

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

- **[3-620] Restrictions on power to make ICO** and **[3-630] ICO is a form of imprisonment** to add reference to *DG v R (No 1)* [2023] NSWCCA 320 where it was held a court cannot manipulate pre-sentence custody to bring a sentence within the jurisdictional ceiling for the imposition of an ICO.

Fines

- The chapter at **[6-100]**ff has been revised and updated in relation to the fine enforcement procedure under Pt 4 of the *Fines Act 1996*, and fines for Commonwealth offences.

Objective factors at common law

- **[10-024] Use of sentencing statistics** to add reference to *Alenezi v R* [2023] NSWCCA 283 regarding the use of sentencing statistics.

Subjective matters at common law

- **[10-470] Deprived background** to add reference to *Baines v R* [2023] NSWCCA 302 in which the principles in *Bugmy v The Queen* (2013) 249 CLR 571 were applied.
- **[10-485] Drug addiction** to add reference to *R v Boyd* [2022] NSWCCA 120 regarding the relevance of an offender's drug addiction.

Guilty pleas

- **[11-515] Guilty plea discounts for offences dealt with on indictment** to add reference to *Stubbings v R* [2023] NSWCCA 69 regarding the evaluative assessment as to whether a plea of guilty was entered as soon as practicable after the offender was found fit.

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

- **[12-500] Counting pre-sentence custody** to add reference to *Mattiussi v R* [2023] NSWCCA 289 regarding provision of pre-sentence custody information to the court.
- **[12-510] What time should be counted?** to add reference to *Kljaic v R* [2023] NSWCCA 225 regarding time spent in custody in relation to another matter for which the offender is acquitted, and *Marai v R* [2023] NSWCCA 224 regarding immigration detention.

Correction and adjustment of sentences

- The chapter at **[13-900]**ff has been revised.

Sexual assault

- **[20-775] Factors which are not mitigating at sentence** to add a cross reference to **Subjective matters at common law** at **[10-480]** regarding intoxication as a factor in sentencing.

Assault, wounding and related offences

- **[50-090] Use weapon/threaten injury to resist lawful apprehension: s 33B** to add reference to *Courtney v R* [2022] NSWCCA 223 regarding general sentencing principles where the offender uses an offensive weapon to prevent lawful apprehension.
- **[50-150] Intoxication** to clarify commentary.

Domestic violence offences

- **[63-505] Statutory framework** to add commentary on the offence of abusive behaviour toward intimate partners (*Crimes Act 1900*, s 54D(1) as inserted by *Crimes Legislation Amendment (Coercive Control) Act 2022*, commencing between 1 February and 1 July 2024) at **[63-540]**, to add the definition of "domestic violence offence" in s 11 *Crimes (Domestic and Personal Violence) Act 2007*, and to add reference to s 6A *Crimes Act* regarding "domestic abuse" as inserted by the *Crimes Legislation Amendment (Coercive Control) Act 2022*, which commenced 1 February 2024.

Money laundering

- **[65-250] Anti-Money Laundering and Counter-Terrorism Financing Act 2006** to update commentary regarding the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

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March 2024

FILING INSTRUCTIONS OVERLEAF

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FILING INSTRUCTIONS

Update 57

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

[3-600] Introduction

Last reviewed: March 2024

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 to enable the ICO to commence on the day it is imposed. See **[3-660]**. However, in determining the length of imprisonment, it is impermissible to deduct pre-sentence custody to circumvent the ceiling at which an ICO becomes unavailable. See **[3-630]**.
- 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: March 2024

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 at [43]–[44]; *DG v R (No 1)* [2023] NSWCCA 320 at [22]–[25].

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: March 2024

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]. It is also an impermissible exercise of the sentencing discretion to deduct pre-sentence custody at this stage to circumvent the 3-year ceiling at which an ICO becomes unavailable so as to facilitate imposing an ICO: *DG v R (No 1)* [2023] NSWCCA 320 at [22]–[25].

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]. However, in determining the length of imprisonment, it is impermissible to deduct pre-sentence custody to circumvent the ceiling at which an ICO becomes unavailable: *DG v R (No 1)* [2023] NSWCCA 320 at [22]–[25]. See also **[3-630]**, **[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.

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Fines

[6-100] Generally

Last reviewed: March 2024

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

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

The value of one penalty unit is prescribed in s 17 *Crimes (Sentencing Procedure) Act* and, currently, one penalty unit is equal to $110. See **[6-160]** for the value of a Commonwealth penalty unit.

[6-110] Availability

Last reviewed: March 2024

Any offence

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

Indictable offences

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

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

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

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

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

Discretion

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

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

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

Consideration of an accused's means to pay

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

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

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

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

Time to pay

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

Accumulation of fines

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

Corporations

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

Other general considerations

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

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

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

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

[6-120] Summary of procedure

Last reviewed: March 2024

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

(a) **Payment details**

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

(b) **Notification of fine**

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

(c) **Time to pay**

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

(d) **Enforcement order**

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

(e) **Withdrawal of enforcement order**

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

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

Last reviewed: March 2024

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

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

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

[6-140] Default provisions

Last reviewed: March 2024

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

(a) Service of fine enforcement order

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

(b) Licence and registration enforcement action

If the fine is not paid within the period specified, Transport for NSW takes action against the fine defaulter's driver licence, vehicle registration, visitor privileges or marine safety licence (see Div 3).

(c) Civil enforcement

Civil enforcement action in the form of a property seizure order, a garnishee order or the registration of a charge on land owned by the fine defaulter is taken if enforcement action under Div 3 is unavailable or unsuccessful, or if the Commissioner is satisfied that civil enforcement action is preferable (see Div 4).

(d) Order requiring community service

Civil enforcement action in the form of a property seizure order, a garnishee order or the registration of a charge on land owned by the fine defaulter is taken if enforcement action under Div 3 is unavailable or unsuccessful, or if the Commissioner is satisfied that civil enforcement action is preferable (see Div 5).

(e) Fines payable by corporations

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

(f) Fine mitigation

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

Part 4, Div 8, Subdiv 1 of the *Fines Act* provides for a "work and development order" scheme to divert vulnerable people from the fine enforcement process.

The Commissioner of Fines Administration may issue a fine enforcement order where a determination is made to make an order under s 100 (the "Centrepay" scheme), or a work and development order: ss 14(1A), 42(1AA). In either case, the Commissioner must postpone the enforcement costs payable and waive those costs if such orders are complied with: cl 6(2) *Fines Regulation* 2015.

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

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

[6-150] Financial payment in lieu of fines

Last reviewed: March 2024

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

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

[6-160] Fines for Commonwealth offences

Last reviewed: March 2024

Availability

Fines are noted in the Acts as numbers of penalty units. The value of one penalty unit is prescribed in s 4AA *Crimes Act* 1914 (Cth) (currently $313). A fine can be imposed if a fine is specified as a penalty for the offence or pursuant to s 4B(2) *Crimes Act* 1914:

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

As to corporations, see s 4B(3).

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

Relevant definitions for the indexation formula are contained in s 4AA(4). When the penalty unit amount is increased in accordance with s 4AA(3), the increased amount applies only to offences committed on or after the indexation day: s 4AA(8). For offences committed on or after 1 July 2023 a penalty unit is $313; for offences committed on or after 1 January 2023 until 30 June 2023 a penalty unit is $275; for offences committed from 1 July 2020 to 31 December 2022, a penalty unit is $222; for offences committed from 1 July 2017 until 30 June 2020 a penalty unit is $210.

Amount

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

Constraints

Matters to be taken into account

In determining a sentence, including whether to impose a fine, there are matters which the court must take into account under s 16A *Crimes Act* 1914.

Consideration of defendant's means to pay

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

Enforcement and recovery

Section 15A *Crimes Act* 1914 picks up State law in relation to the enforcement and recovery of fines imposed on Commonwealth offenders. For the NSW laws, see above at **[6-100]**ff.

As condition of recognizance

A pecuniary penalty may be imposed in relation to conditional release pursuant to s 20(1)(a) *Crimes Act* 1914 and s 20(5).

[6-170] Children's Court

Last reviewed: March 2024

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

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

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

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

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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

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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: March 2024

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]; *Simpson v R* [2014] NSWCCA 23 at [39].

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]. Although, 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*, the court held that the sentencing statistics in relation to sexual assault offences under s 61I were also of little value as they did not disclose which

aggravating factors were present in those cases, nor what discounts were applied, nor the circumstances of each case: [39]–[41]. Similarly, in *Alenezi v R* [2023] NSWCCA 283, the court found the sentencing statistics relied upon by the offender, which were limited by the use of filters, and the "range" derived from them, excluded a number of cases which provided a reasonable basis of comparison: [45], [57].

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: March 2024

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 include the following 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] Uncharged acts

Last reviewed: March 2024

Representative charges

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. However, see also *LN v R* [2020] NSWCCA 131.

Approach to sentencing for "representative" charges

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]. However, see also *LN v R* [2020] NSWCCA 131.

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

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

[10-040] Premeditation and planning

Last reviewed: August 2023

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

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

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

See discussion in **Fraud offences** 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

Last reviewed: March 2024

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: March 2024

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

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). See **[17-570] Mitigating Factors**.

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: March 2024

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 *Baines v R* [2023] NSWCCA 302 at [76], [107]; *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 and it provides that self-induced intoxication at the time of the offence is not to be taken into account as a mitigating factor on sentence (see below at **[10-480] Self-induced 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] Self-induced intoxication

Last reviewed: March 2024

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*. In s 428A *Crimes Act* (in Pt 11A), self-induced intoxication is defined as any intoxication except intoxication that—

(a) is involuntary, or

(b) results from fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force, or

(c) results from the administration of a drug [in accordance with a prescription where required]… or of a drug for which no prescription is required [in accordance with the recommended dosage and manufacturer's instructions].

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. Section 21A(5AA) confirms and extends the common law approach to intoxication.

The principle in Bugmy v The Queen and whether intoxication self-induced

In *Bugmy v The Queen* (2013) 249 CLR 571 (which preceded the introduction of s 21A(5AA)), *R v Fernando* (1992) 76 A Crim R 58 was approved, where French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ at [38] 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.]

In *Bourke v R* [2010] NSWCCA 22, which also preceded the introduction of s 21A(5AA), McClellan CJ at CL (Price and RA Hulme JJ agreeing) stated at [26]:

> …intoxication… will ordinarily not mitigate the penalty save where the intoxication is the result of an addiction and the original addiction did not involve a free choice.

In *Kelly v R* [2016] NSWCCA 246, which was decided after the introduction of s 21A(5AA), Rothman J (Hoeben CJ at CL and RA Hulme J agreeing) at [46]–[50] approved these comments, finding s 21A(5AA) did not abolish that part of *R v Fernando* approved in *Bugmy v The Queen*. His Honour stated at [50]:

> The effect of *Fernando* and *Bugmy* is to recognise that, in certain communities to which the circumstances in *Fernando* and *Bugmy* applied, the abuse of alcohol and drugs is so prevalent and accompanied by violence that the intoxication no longer fits the description of being "self-induced".

In *Kelly v R*, it was accepted the offender had used drugs of various kinds since he was 13 and, at that age, "was not at an age of "rational choice" that would give rise to the full responsibility for the moral culpability and the predictable consequences of a choice to become addicted": [54]. However, Rothman J found the use of drugs (benzodiazepine in this case) was still self-induced, even though the drug's effect on the offender was out of the ordinary: [65]. His Honour was unable to find that "the violent impulses and aggressive behaviour, caused by the benzodiazepine, and the disinhibiting effect of it, was a 'predictable consequence of his choice as to the use of drugs'" (referring to *Bourke v R*): [64].

In *Pender v R* [2023] NSWCCA 291, the offender argued on appeal (but not in the sentence proceedings) that s 21A(5AA) did not apply as his intoxication was not self-induced as it was the result of an addiction, and the original addiction did not involve a free choice (citing *Bourke v R* at [26] and *Kelly v R* at [47]). Simpson AJA (Rothman and Cavanagh JJ agreeing) did not accept, on the evidence, the offender's intoxication was not self-induced: [61]. Her Honour remarked that the proposition called for a considerable depth of examination, including as to whether the offender suffered an "addiction", notwithstanding that it was accepted his drug use was largely, if not entirely, a consequence of significant adversities of his early life: [60]–[61].

In *Tepania v R* [2018] NSWCCA 247, Johnson J (Payne JA and Simpson AJA agreeing) considered at [122]–[128] the application of s 21A(5AA) in the context of an offender who had a socially disadvantaged upbringing. His Honour held the sentencing judge did not fail to have regard to the offender's profound deprivation, and that the offender's self-induced intoxication was not a mitigating factor pursuant to s 21A(5AA): [123]–[124], [127]–[128].

In relation to state of mind/knowledge, or to explain offending conduct

Section 21A(5AA) precludes a sentencing court from taking into account self-induced intoxication to explain an offender's conduct, where such explanation reduces the offender's moral culpability and/or the objective seriousness of the offending: *Fisher v R* [2021] NSWCCA 91 per Adamson J (Fullerton J agreeing) at [225].

In *Fisher v R*, a sentence appeal relating to an offence of sexual intercourse without consent, Adamson J (Fullerton J agreeing, Brereton JA dissenting) held the sentencing judge erred by taking into account the offender's self-induced intoxication in determining whether he deliberately deceived the complainant and actually knew she was not consenting: [73]; [225], [231]. The judge's statement he had not taken the offender's self-induced intoxication into account in mitigation did not cure the error of using it to "explain" the offender's conduct: [76]; [225], [229].

Fullerton J, in additional reasons, held the judge was obliged to disregard the respondent's intoxication entirely when enquiring into his state of mind, awareness or perception at the time of the offending, where that enquiry was undertaken to assess the objective seriousness of the offending and the offender's moral culpability: [74], [77]. In *Pender v R*, Simpson AJA (Rothman and Cavanagh JJ agreeing) at [50]–[51] approved of Fullerton and Adamson JJ's construction of s 21A(5AA) in *Fisher v R* and said it stood as the construction of the Court of Criminal Appeal. Although *Fisher v R* and *Pender v R* concerned sexual offending and consent (including the application of repealed ss 61HA and 61HE), these decisions potentially apply more broadly.

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): *R v Boyd* [2022] NSWCCA 120 at [181].

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].

See also **[10-480] Self-induced intoxication** above.

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]

Guilty pleas

[11-500] Introduction

Last reviewed: March 2024

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

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

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

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

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

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

Last reviewed: March 2024

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

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

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

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

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

Last reviewed: March 2024

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

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

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

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

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

[11-505] Setting aside a guilty plea

Last reviewed: March 2024

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

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

An accused seeking to withdraw a guilty plea after conviction must demonstrate a miscarriage of justice has occurred: *R v Boag* (unrep, 1/6/94, NSWCCA); *White v R* [2022] NSWCCA 241 at [58]. The authorities emphasise that the issue is one of the integrity of the plea by reference to the circumstances in which it was entered: *Mao v DPP* [2016] NSWSC 946 at [60] citing *R v Sagiv* (unrep, 30/5/96, NSWCCA);

R v Van [2002] NSWCCA 148 at [48]–[50] and *Wong v DPP* [2005] NSWSC 129 at [16]; *Brown Brothers v Pittwater Council* (2015) 90 NSWLR 717 at [156]–[163] extensively reviews the case law.

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

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

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

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

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

Last reviewed: March 2024

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

1. A mandatory sentencing discount scheme contained in Pt 3, Div 1A which applies to an offence dealt with on indictment: see **[11-515]**.
2. Section 22 concerns offences dealt with summarily or an offence dealt with on indictment to which Pt 3, Div 1A does not apply: see **[11-520]** and **[11-525]**.

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

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

Last reviewed: March 2024

Part 3, Div 1A of the *Crimes (Sentencing Procedure) Act* 1999 provides for a scheme of fixed sentencing discounts for the utilitarian value of a guilty plea for offences dealt with on indictment.

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

The scheme does not apply to:

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

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

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

Mandatory discounts

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

Section 25D(1) requires a sentencing court to apply a discount for the utilitarian value of a guilty plea, in accordance with the balance of the section, if the offender pleaded guilty before being sentenced. It is clear from the language of s 25D(1)

that such discounts are made solely "for the utilitarian value of a guilty plea": *Doyle v R* [2022] NSWCCA 81 at [18]. Remorse (s 21A(3)(i) *Crimes (Sentencing Procedure Act)*) and/or a willingness to facilitate the administration of justice (s 22A *Crimes (Sentencing Procedure Act)*) are conceptually distinct and must be considered separately: *Doyle v R* at [16]–[19].

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

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

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

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

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

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

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

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

The scheme also applies to an offender who pleads guilty after being found fit to be tried and whose matter was not remitted to a magistrate for further committal proceedings: s 25D(5). A 25% discount is only available if the offender pleads guilty as soon as practicable after being found fit to be tried: s 25D(5)(a). In *Stubbings v R* [2023] NSWCCA 69, the court found the offender did not plead guilty as soon as practicable after he was found fit: [56].

In determining whether a plea was entered as soon as practicable, the court is to take into account whether the offender had a reasonable opportunity to obtain legal advice and give instructions to a legal representative: s 25D(6). In *Stubbings v R*, the court held that this evaluative assessment is made from the offender's point of view, taking into account the time period which, viewed objectively, is appropriate or suitable in the circumstances: [51].

Discounts when plea offer to different offences refused when made

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

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

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

A "negotiations document" is defined in s 25B to include a case conference certificate. In *Ke v R* [2021] NSWCCA 177, the court concluded it was unfair that the applicant's sentence was discounted by 10%, and not 25%, following her guilty plea in the District Court to an offence of dealing with the proceeds of crime being reckless to that fact (*Crimes Act* 1900, s 193B(3)). She had offered to plead guilty to that offence before being committed for trial but it had been rejected. Nor was it recorded in the case conference certificate filed on committal as required by s 75 *Criminal Procedure Act* 1986. Bellew J (Adamson J agreeing; see also Brereton JA at [63] to similar effect) held that the phrase "an offer recorded in a negotiations document" in s 25E(2)(a) should be construed as meaning "an offer which was recorded *or which was required to be recorded* in a negotiations document" (emphasis added): at [339]. His Honour said, at [338], that accepting any other interpretation would:

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

The phrase "the offence the subject of the proceedings", in s 25E(1)(b) and s 25E(2)(b), was considered in *Black v R*. Simpson AJA (Ierace and Dhanji JJ agreeing) concluded that it was clear that only one offence, the principal offence, was intended to be the subject of the proceedings, and that it was irrelevant that, for the purposes of the charge certificate, multiple offences may be "the subject of the proceedings": [30]–[36]. This, her Honour observed, produced a fair result: at [38]. Denying a discount to an offender

who had offered a realistic plea of guilty to an alternative charge, merely because it was specified in either the charge certificate or case conference certificate, undermines the purpose for which the reduction was prescribed, and was potentially unfair: at [41].

Not allowing or reducing the discount

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

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

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

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

Last reviewed: March 2024

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

(a) the fact of the guilty plea,

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

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

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

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

Guideline for guilty plea discount

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

> (i) A sentencing judge should explicitly state that a plea of guilty has been taken into account. Failure to do so will generally be taken to indicate that the plea was not given weight.
>
> (ii) Sentencing judges are encouraged to quantify the effect of the plea on the sentence insofar as they believe it appropriate to do so. This effect can encompass any or all

of the matters to which the plea may be relevant — contrition, witness vulnerability and utilitarian value — but particular encouragement is given to the quantification of the last mentioned matter. Where other matters are regarded as appropriate to be quantified in a particular case, e.g. assistance to authorities, a single combined quantification will often be appropriate.

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

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

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

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

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

The R v Borkowski principles

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

1. The discount for the utilitarian value of the pleas will be determined largely by the timing of the plea so that the earlier the plea the greater discount: *Thomson* at [154]; *Forbes* [2005] NSWCCA 377 at [116].

2. Some allowance may be made in determining the discount where the trial would be particularly complicated or lengthy: *Thomson* at [154].

3. The utilitarian discount does not reflect any other consideration arising from the plea, such as saving witnesses from giving evidence but this is relevant to remorse: *Thomson* at [119] to [123]; nor is it affected by post-offending conduct: *Perry* [2006] NSWCCA 351.

4. The utilitarian discount does not take into account the strength of the prosecution case: *Sutton* [2004] NSWCCA 225.

5. There is to be no component in the discount for remorse nor is there to be a separate quantified discount for remorse: *MAK and MSK* [2006] NSWCCA 381; *Kite* [2009] NSWCCA 12 or for the "Ellis discount"; *Lewins* [2007] NSWCCA 189; *S* [2008] NSWCCA 186 [Principle 5 no longer applies: see below].
6. Where there are multiple offences and pleas at different times, the utilitarian value of the plea should be separately considered for each offence: *SY* [2003] NSWCCA 291.
7. There may be offences that are so serious that no discount should be given: *Thomson* at [158]; *Kalache* [2000] NSWCCA 2; where the protection of the public requires a longer sentence: *El-Andouri* [2004] NSWCCA 178.
8. Generally the reason for the delay in the plea is irrelevant because, if it is not forthcoming, the utilitarian value is reduced: *Stambolis* [2006] NSWCCA 56; *Giac* [2008] NSWCCA 280.
9. The utilitarian value of a delayed plea is less and consequently the discount is reduced even where there has been a plea bargain: *Dib* [2003] NSWCCA 117; *Ahmad* [2006] NSWCCA 177; or where the offender is waiting to see what charges are ultimately brought by the Crown: *Sullivan and Skillin* [2009] (*sic* [2008]) NSWCCA 296; or the offender has delayed the plea to obtain some forensic advantage: *Stambolis* [2006] NSWCCA 56; *Saad* [2007] NSWCCA 98, such as having matters put on a Form 1: *Chiekh and Hoete* (*sic* Cheikh) [2004] NSWCCA 448.
10. An offer of a plea that is rejected by the Crown but is consistent with a jury verdict after trial can result in a discount even though there is no utilitarian value: *Oinonen* [1999] NSWCCA 310; *Johnson* [2003] NSWCCA 129.
11. The discount can result in a different type of sentence but the resulting sentence should not again be reduced by reason of the discount: *Lo* [2003] NSWCCA 313.
12. The amount of the discount does not depend upon the administrative arrangements or any practice in a particular court or by a particular judge for the management of trials or otherwise.

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

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

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

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

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

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

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

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

Transparency

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

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

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

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

Whether a failure to explicitly state that a guilty plea has been taken into account indicates it was not given weight depends on the circumstances of the particular case and the content of the reasons: *Woodward v R* [2014] NSWCCA 205 at [6]. Where

there is a real possibility the plea was not properly considered, failure to refer to the issue in the judgment should be treated as a material error: *Lee v R* [2016] NSWCCA 146 at [37].

Aggregate sentences

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

Willingness to facilitate the course of justice

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

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

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

In *R v Sharma* (2002) 54 NSWLR 300 the court held that the reasoning of the majority in *Cameron v The Queen* concerning the application of general sentencing principles, in the context of a WA statute, was not applicable in NSW because the common law principles enunciated there had been modified by statute: at [38]. The court found that the proper construction of s 22 *Crimes (Sentencing Procedure) Act* 1999 permits the sentencer to take into account the objective utilitarian value of the plea: at [62]. Spigelman CJ (with whom Mason P, Barr, Bell and McClellan JJ agreed) said at [52]:

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

Thus a court must take the plea into account even if there is no subjective intention to "facilitate the administration of justice", as explained in *Cameron v The Queen*. The

principles outlined in *R v Thomson and Houlton* (2000) 29 NSWLR 383, regarding the weight to be given to the utilitarian value of the plea, for saving the expense of a "contested hearing", must therefore be given their full force.

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

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

Last reviewed: March 2024

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

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

[11-530] Combining the plea with other factors

Last reviewed: March 2024

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

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

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

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

[The next page is 5851]

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

Section 24 *Crimes (Sentencing Procedure) Act* 1999 provides that the court must take into account time served in custody and the fact that the person has been the subject of a community correction order, conditional release order or an intervention program order.

24 Court to take other matters into account

In sentencing an offender, the court must take into account:

(a) any time for which the offender has been held in custody in relation to the offence, and

(b) in the case of an offender who is being sentenced as a result of failing to comply with the offender's obligations under a community correction order, conditional release order or intervention program order:

(i) the fact that the person has been the subject of such an order, and

(ii) anything done by the offender in compliance with the offender's obligations under the order, and

(c) in the case of an offender who is being sentenced as a result of deciding not to participate in, or to continue to participate in, an intervention program or intervention plan under an intervention program order, anything done by the offender in compliance with the offender's obligations under the intervention program order, and

(d) in the case of an offender who is being sentenced following an order under section 11(1)(b2):

(i) anything done by the offender in compliance with the offender's obligations under the order, and

(ii) any recommendations arising out of the offender's participation in the intervention program or intervention plan.

[12-500] Counting pre-sentence custody

Last reviewed: March 2024

The ambit of the phrase in s 24(a) — "any time for which the offender has been held in custody in relation to the offence" — has been a source of ambiguity. The provision is silent on the question of whether pre-sentence custody attributable both to other offences and the offence for which the offender stands for sentence should be taken into account. The section also leaves the issue of exactly how such time is to be taken into account to the sentencer's discretion.

Section 47(2) *Crimes (Sentencing Procedure) Act* 1999 allows the court to direct that a sentence is taken to have commenced before the date on which the sentence is imposed ("backdating") and s 47(3) provides, inter alia, that:

> … in deciding the day on which the sentence is taken to have commenced, the court must take into account any time for which the offender has been held in custody in relation to the offence to which the sentence relates.

The section does not oblige a court to backdate a sentence, but the pre-sentence custody served by an offender "in relation to the offence" must be taken into account when deciding whether the sentence should commence before the sentence date: *Kaderavek v R* [2018] NSWCCA 92 at [20].

An offender granted bail on one charge is not in custody "in relation to" it for the purposes of s 47(3) if they are being held on remand for an unrelated charge: *Rafaieh v R* [2018] NSWCCA 72 at [44], [50]. The fact an offender is not entitled to be released from custody for one offence but was granted bail in respect of another does not alter their bail status in respect of the latter: at [59]–[60].

Section 47(2)(b) provides for a court to direct that a sentence of imprisonment commence 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 consecutively) with some other sentence of imprisonment. See further **Forward dating sentences of imprisonment** at [7-547].

Backdating the sentence is usual practice

Backdating a sentence by a period equivalent to the pre-sentence custody is the preferable, and usual, approach: *Wiggins v R* [2010] NSWCCA 30 at [2], [3]–[6]; *Martinez v R* [2015] NSWCCA 5 at [19]; *Salafia v R* [2015] NSWCCA 141 at [65]; *Kaderavek v R* [2018] NSWCCA 92 at [20]. Before the enactment of the provisions of the Act, it was accepted at common law, in cases such as *R v McHugh* (1985) 1 NSWLR 588, that where there had been a continuous period of pre-sentence custody, the practice was to backdate a sentence to take account of pre-sentence custody, rather than to discount or reduce it. Nothing in s 47 of the Act prevents backdating a sentence for an offence even where there has been discontinuous custody: *R v Newman and Simpson* [2004] NSWCCA 102 at [26].

In *R v Newman and Simpson* at [26]–[31], Howie J summarised the reasons in favour of backdating:

- It preserves the denunciatory and deterrent value of the sentence so that it is, and appears to be, adequate both to public perception and when it appears in statistical information.
- It makes it clear to the defendant and to the appeal court that the offender has received a reduction in sentence for pre-sentence custody.
- It avoids questions of disparity when comparing one sentence to another that has been markedly reduced by pre-sentence custody.
- It avoids skewing statistical information on that offence where there are very few comparable sentences for similar offences and avoids giving a false indication of the range of sentence that have been imposed for a similar offence or similar offender.
- It avoids lengthy sentences being imposed in years, months and days, which may suggest that sentencing is an exact science and that a sentence can be determined to a precise number of days.

When reducing a sentence may be appropriate

The length of a sentence should not be discounted unless reasons are clearly articulated for adopting that approach: *Wiggins v R* at [3], [8]; *R v Newman and Simpson* at [25];

R v Jammeh [2004] NSWCCA 327 at [18] and *R v Howard* [2001] NSWCCA 309 at [24]. However, there are some situations where it will not be appropriate or even permissible to backdate a sentence and, in such cases, the sentence can be reduced to take this time into account.

One such situation, identified by Badgery-Parker J in *R v Deeble* (unrep, 19/9/91, NSWCCA) at 3–4 and applied in *R v Leete* [2001] NSWCCA 337 at [29], is where a sentencer may reduce a sentence to three years or less, thereby making an offender's release upon expiry of the non-parole period an entitlement rather than based on eligibility: *Wiggins v R* at [8]; *White v* R [2009] NSWCCA 118. See also s 158 *Crimes (Administration of Sentences) Act* 1999.

Another relates to the nature of the sentencing option selected by the sentencer as it is not possible to backdate some sentencing options. Intensive correction orders (ICOs), community correction orders and community release orders each commence on the date on which they are made (ss 71(2), 86 and 96 respectively) and therefore cannot be backdated to take into account any period of pre-sentence custody. Thus, any such period must be taken into account by reducing the term of sentence. Taking this approach with respect to an ICO was endorsed by the court in *Mandranis v R* [2021] NSWCCA 97 at [61]. See also *R v Edelbi* [2021] NSWCCA 122 at [79]–[80].

Method of crediting custody time

Where a defendant is given credit for a period of pre-sentence custody, this time should be reflected in both the total sentence and the non-parole period: *R v Newman and Simpson* at [25] and *R v Youkhana* [2005] NSWCCA 231 at [10]. Under the proper approach — fixing the sentence and the non-parole period, and then making allowance for the period in custody — the applicant gets the benefit of the whole of the period served where it is deducted from the non-parole period. The judge erred in *R v Youkhana* by taking into account the periods spent in custody when setting the head sentence. The period spent in custody must be deducted from the whole of the sentence including the non-parole period. The difference between the approach adopted and the correct approach is most obvious when there is no finding of special circumstances. In such a case, the offender obtains the benefit of only 75% of the period served by way of a reduction in the non-parole period. The mathematical problem would not have arisen had the judge backdated the commencement of the sentence.

On some occasions it is sufficient for a sentencing judge to express in the remarks on sentence that a period of pre-sentence custody has been "taken into account": *R v Frascella* [2001] NSWCCA 137; *R v Rose* [2001] NSWCCA 370 and *R v Deron* [2006] NSWCCA 73 at [9]. However, such an incantation may not be sufficient where there has been an irregular period of pre-sentence custody. Where a sentence is expressed in whole years, it may be more difficult to infer the sentencing judge has actually taken this period of custody into account: *R v Galati* [2003] NSWCCA 148.

In *R v Bushara* [2006] NSWCCA 8 at [37] it was held that when sentencing an offender for multiple offences, a judge must ensure that pre-sentence custody is deducted from the aggregate non-parole period. Consideration must be given to the period of pre-sentence custody when considering the relationship between the aggregate non-parole period and balance of the term: at [22], [24], [35]. The effective sentence in *Bushara* did not reflect the finding of special circumstances.

It is an error for a judge to revoke bail so a period of custody counts towards the sentence by reason of s 24(a): *R v West* [2014] NSWCCA 250. In *R v West*, the judge unilaterally revoked the offender's bail while an intensive correction order (ICO) report was obtained, stating this gave the offender about four months of full-time custody, after which the judge imposed an ICO for a period of two years. This approach did not accord with usual sentencing practice which requires that the sentencing discretion be exercised immediately before a sentence is passed, rather than conditionally in advance and in two stages: at [36], [41], [43].

Provision of pre-sentence custody information

In *Mattiussi v R* [2023] NSWCCA 289, Hulme AJ (Adamson JA and Button J agreeing) at [70]–[73] made observations regarding the need for simplicity in the Crown's provision of pre-sentence custody information to a sentencing judge. The date, or range of dates, to which a sentence should be backdated is an essential matter of which the judge should be informed in addition to the actual period of pre-sentence custody: [71]. It is unhelpful to *only* tell a judge there was a period of pre-sentence custody of a certain number of years, months or days: [73].

[12-510] What time should be counted?

Last reviewed: March 2024

Parole revoked as a consequence of a subsequent offence

When a person commits an offence whilst on parole, they may spend time in custody referable to that offence ("the second offence"), if bail is refused. However, the Parole Authority may, on occasions, revoke the person's parole due to the second offence and order the person to serve the remaining period of the first sentence. An offender may thus be in custody referable to two offences; namely, the revocation of parole for the first offence(s) and the second offence.

Where parole is revoked as a consequence of the commission of a subsequent offence(s), it is a matter within the sentencer's discretion whether the subsequent sentence should be backdated only to the time the offender was taken into custody for the subsequent offence: *Callaghan v R* [2006] NSWCCA 58 at [21]–[23]. Simpson J said at [22]–[23]:

> [22] … a discretion exists. There is no clear rule which will govern all cases. The circumstances that bring an offender before a court for sentence after parole has been revoked are far too varied to permit a single absolute rule.
>
> [23] It would, in my opinion, in some cases be unfair not to backdate to some point (not necessarily the date of revocation of parole) before the expiration of the earlier parole period. It is always open to an offender to seek and be granted parole even after a revocation; to sentence in such a way as to commence the subsequent sentence only on the date of expiration of the whole of the previously imposed head sentence is to assume that, absent the subsequent offences, the offender would not have been granted a second chance at parole.

A number of matters inform the exercise of the discretion: first, the fact that imprisonment for the period of the revoked parole is due to the original sentence and

revocation occurred because the offender had been unable to adapt to civilian life; second, the fact that the revocation arises in consequence of a new offence for which a fresh sentence is being imposed, rather than for some unconnected cause; third, the proportion of time the offender complied with the terms of parole; and, fourth, the periods of revocation: *R v DW* [2012] NSWCCA 66 at [35].

This principle does not apply if parole has not been revoked by the Parole Authority. In a case where an offender has committed a subsequent offence, the court should not treat parole as having been notionally revoked: *R v Skondin* [2006] NSWCCA 59 at [16]–[17].

In *R v Callaghan* and *R v DW*, parole was revoked for an earlier sentence solely due to commission of the second set of offences. The court in both cases held that the judge did not err by refusing to backdate to the date the applicant was taken into custody.

Parole revoked as a consequence of breach of another condition of parole

Where parole is revoked for unrelated reasons, such as a breach of the conditions of parole and not the commission of the subject offence (for example, reporting or non-association requirements or for an unrelated offence), time spent in custody as a consequence of the breach is not taken into account upon sentence for the second offence: *R v Bojan* [2003] NSWCCA 45 and *R v Walker* [2004] NSWCCA 230. This time is not "referable" to the second offence, as required by ss 24 and 47 *Crimes (Sentencing Procedure) Act* 1999. As an example, see *R v Kitchener* [2003] NSWCCA 134 at [56] (a two-judge bench case).

However, the matter is not as clear cut as it seems. The parole status of the defendant may be affected by the commission of the second offence. In such a case, the court may need to attempt the hypothetical exercise of deciding what the applicant's parole position would have been, had the second offence not been committed: *R v Walker*. It was said in *R v Walker* that the court will need to determine whether the second offence has caused a continuation of the revocation of parole. In *R v Walker* it was held that where the revocation of parole has been continued partly due to the commission of the second offence, pre-sentence custody referable to the continuation of the revocation of the parole may be taken into account upon sentence for the second offence.

A court has a discretion to impose a partially concurrent or wholly cumulative sentence upon a revoked parole period. The discretion has to be exercised in a principled way: *Barnes v R* [2014] NSWCCA 224 at [28]–[29].

In *Barnes v R*, the applicant had his parole revoked for an offence and was then sentenced for a subsequent offence with the sentence to commence at the expiry of the revoked parole period. The court, at [27], rejected the applicant's argument that imposing a sentence that was totally cumulative made no allowance for the offender having a second chance at parole for the first offence.

Time already counted in previous proceedings

If a court takes account of the whole period of pre-sentence custody, it is not appropriate to again take that pre-sentence custody into account when sentencing the defendant for the second group of offences: *R v Wood* [2005] NSWCCA 159 at [5]; *Martinez v R* [2015] NSWCCA 5.

Time spent in custody in relation to another matter for which the offender is acquitted

Where an offender is sentenced in relation to one matter, time spent in custody referable exclusively to an unrelated offence, which has been successfully appealed, is not to be taken into account as a form of credit: *R v Niass* (unrep, 16/11/88, NSWCCA); *R v David* (unrep, 20/4/95, NSWCCA). In *R v Niass*, Lee CJ at CL said at 2:

> … there is good reason to keep intact the division between the functioning of the court dealing with a particular offender in respect of the offence on which he comes before the court and taking into account periods spent in custody in respect of that offence, and the function which the State has undertaken on occasions to recompense persons who, when the justice system has miscarried may seek solatium.

R v Niass was subsequently confirmed by the five-judge bench decision of *Hampton v R* [2014] NSWCCA 131 at [35].

Although not taken into account as a form of credit, time spent in custody in relation to another offence, which is successfully appealed, may be taken into account where the sentence has been served under particularly onerous conditions. For example, see *R v Evans* (unrep, 21/5/92, NSWCCA) and *Kljaic v R* [2023] NSWCCA 225.

In *R v Karageorge* [1999] NSWCCA 213 it was held that the time spent in custody was referable not only to the offence, which was subsequently successfully appealed, but also to a different offence, for which the offender was sentenced. The case emphasises the prudence for defence representatives of ensuring bail is formally refused to enable the custody time to be "referable" to that offence.

Similarly, time spent in custody in relation to offences for which an offender is discharged or acquitted is not to be taken into account as a form of credit: *Hampton v R* at [27]; *Rafaieh v R* [2018] NSWCCA 72 at [74]. Bare reliance on a period of custody for an unrelated matter, without more, is extraneous to the exercise of sentencing discretion for other matters, particularly in the case of broken periods of custody: *Hampton v R* at [30].

Although statutory provisions in NSW confirm that time in custody relating to the instant offence is a mandatory factor to be taken into account on sentence, there is nothing requiring a judge to take custody for an unrelated offence into account: *Hampton v R* at [26], [28]; *Rafaieh v R* at [74]; ss 24(a), 47(3) *Crimes (Sentencing Procedure) Act*.

Pre-sentence custody served in protection

The courts no longer assume that being in protective custody will place an offender in a more onerous prison environment than that of the general prison population: *Clinton v R* [2009] NSWCCA 276. If an offender wants such a consideration taken into account, the offender should present evidence of it: *R v Jarrold* [2010] NSWCCA 69 [26]–[27]. Where an offender has spent a period of pre-sentence custody in protection which is more onerous, this may be given greater value than the actual time spent in custody: *R v Rose* [2004] NSWCCA 326. The reduction depends on the circumstances of the particular case.

The decision of *R v Rose* "is not authority for a mathematical approach to determining the relevance of time spent in protection": *Clinton v R* at [21]. A mathematical formula is not appropriate as there are too many variables, there is not

always a significant difference between being on protection and being part of the normal prison population and there may be some benefits from being on protection that offset some of the deprivations: at [25].

Form 1 offences and pre-sentence custody

Pre-sentence custody referable to a Form 1 matter "should normally be taken into account" by backdating the sentence for the principal offence to which the Form 1 is attached, because Form 1 matters "normally have an impact, sometimes a substantial impact on the sentence passed for the principal offence": *Sultana v R* [2007] NSWCCA 107 at [15].

Immigration detention

A court may have regard to detention in an immigration facility notwithstanding an offender has been granted bail for an offence. The sentencing judge in *R v Parhizkar* [2013] NSWSC 871 took into account "in an unquantifiable sense" that the length of time the offenders were kept in immigration detention was "exacerbated by the fact that there have been pending criminal proceedings against them": at [108]. On appeal, the applicant argued that he should have been given a quantified allowance for immigration detention: *Parhizkar v R* [2014] NSWCCA 240 at [69]. Basten JA noted at [70] that the argument was not drawn to the judge's attention and that no evidence of the circumstances of the period in immigration detention was presented to the judge. Basten JA held (Price J at [93] and McCallum J at [98] agreed) that in those circumstances it could not be said the judge erred in the approach that was taken.

In *R v Dadash* [2012] NSWSC 1511 and *Marai v R* [2023] NSWCCA 224, immigration detention after the offender was granted bail was taken into account as part of the backdating of the sentence. In *Marai v R*, Sweeney J (Kirk JA agreeing) held the applicant's detention was referable to the offence for sentence as the Commonwealth Director of Public Prosecutions requested the applicant's visa be cancelled after bail was granted: [95].

In the ACT, immigration detention time linked to the offending is taken into account: *Islam v R* [2014] ACTCA 2 at [6]. The Crown conceded before the sentencing judge that the seven-month-period of immigration detention while Mr Islam was awaiting trial should be accounted for in determining the backdating of his sentence: at [7]. The backdating provision in s 63(2) *Crimes (Sentencing) Act* 2005 (ACT) uses the same expression — "held in custody in relation to the offence" — in s 24 *Crimes (Sentencing Procedure) Act* 1999 (NSW).

[12-520] Intervention programs

Last reviewed: March 2024

Section 24(b) *Crimes (Sentencing Procedure) Act* 1999 requires a sentencing court to take into account the fact an offender has been the subject of an intervention order and "anything done by the offender in compliance with the offender's obligations under the order". Part 4 of the *Criminal Procedure Act* 1986 provides for the recognition and operation of intervention programs. According to s 346, an intervention program is "a program of measures declared to be an intervention program under s 347." Clause 31 *Criminal Procedure Regulation* 2017 declares that the Circle Sentencing Intervention Program is an intervention program for the purposes of Ch 7, Pt 4 of the *Criminal Procedure Act* 1986: see **Intervention programs** at [5-430].

An accused person or offender may be referred to an intervention program:

- as a condition of bail under the *Bail Act* 2013
- with an adjournment and a grant of bail before a finding of guilt is made
- where there is a finding of guilt and a dismissal of charges without a conviction under s 10 of the *Crimes (Sentencing Procedure) Act*, or
- where sentence is deferred under s 11.

See Note to Ch 7, Pt 4 *Criminal Procedure Act* 1986.

Section 11(4) *Crimes (Sentencing Procedure) Act* permits the court to make an order that an offender may participate, or be assessed for participation, in a program for treatment or rehabilitation that is not an intervention program.

[12-530] Quasi-custody bail conditions — residential programs

Last reviewed: March 2024

Time spent in a residential program, either in conformity with a bail requirement or under a s 11 adjournment, may constitute a period of quasi-custody, which may be taken into account to reduce the sentence eventually imposed: *R v Eastway* (unrep, 19/5/92, NSWCCA); *R v Campbell* [1999] NSWCCA 76; *R v Delaney* (2003) 59 NSWLR 1; *Kelly v R* [2018] NSWCCA 44. This may be done by reducing or backdating the sentence: *Reddy v R* [2018] NSWCCA 212 at [31]. A failure of a court to take account of time actually spent in a residential program constitutes an error in the exercise of the sentencing discretion: *Renshaw v R* [2012] NSWCCA 91 at [29]; *Hughes v R* [2008] NSWCCA 48 at [38]. Where there is an evidentiary foundation for it to be taken into account, the sentencing judge may be obliged, in some circumstances, to have regard to it even when not specifically requested: *Bonett v R* [2013] NSWCCA 234 at [50]; see also *Kelly v R* at [48]–[49].

Residential rehabilitation programs that have constituted quasi-custodial conditions include Odyssey House, the Salvation Army's Bridge Program, Guthrie House, Selah House, the Glen Rehabilitation Centre, ONE80TC (a Teen Challenge initiative), the Northside Clinic, Byron Private Treatment Centre, William Booth House and Bennelong Haven.

A reduction in sentence does not depend entirely on whether the residential program has been productive. The rationale for the allowance is the need to factor into the sentencing exercise the restriction on the offender's liberty during the period of the program: *Truss v R* [2008] NSWCCA 325 at [22]; *R v Marschall* [2002] NSWCCA 197 at [30]; see also *Hughes v R* [2008] NSWCCA 48 at [38]; *Kelly v R* at [4], [11], [46]. Nor is the offender's motive for undertaking the program a relevant consideration when determining entitlement to some credit as a result of being subjected to quasi-custody: *R v Delaney* at [23]. As it is invariably the offender who moves the court for an order to enable attendance at a program, such attempts at rehabilitation are to their credit: *Reddy v R* at [33].

To qualify for a discount on sentence the conditions on the program must closely resemble imprisonment and thus impose a form of punishment on the defendant. Whether the conditions imposed amount to quasi-custody is a question of fact: *Kelly v R* at [10], [50]; *Bonett v R* at [50].

Factors relevant to that determination include:

- whether the course was residential: *R v Eastway*; *Kelly v R* at [11]
- whether the environment is a disciplined one, and how strict that discipline is: *R v Delaney* at [22]; *Kelly v R* at [11]
- whether the person is subject to restrictions and if so, the nature and extent of those restrictions: *R v Campbell* at [24]; *Kelly v R* at [3], [11]
- whether the time spent in rehabilitation has been productive: *Hughes v R*; *Kelly v R* at [11].

If conditions amounting to quasi-custody are established, the extent to which the sentence should be adjusted is a matter of discretion for the sentencing judge: *Kelly v R* at [50]; *Bonett v R* at [50]. The discount given for time spent in a residential program does not need to be quantified: *R v Sullivan* [2004] NSWCCA 99 at [67]. However, a figure of between 50–75% of the period spent on the program has been allowed in a number of cases: *R v Cartwright* (1989) 17 NSWLR 243; *R v Eastway*; *R v Douglas* (unrep, 4/3/97, NSWCCA); *Kelly v R* at [51], [53]; *Hughes v R* at [38]. This figure may be reduced as the conditions in the program become less strict: *R v Psaroudis* (unrep, 1/4/96, NSWCCA).

MERIT — Magistrates Early Referral Into Treatment program

The completion of a MERIT program should not be equated with a period of quasi-custody: *R v Brown* [2006] NSWCCA 144. James J said at [59] that if any allowance was made "it would, in my opinion, only be a very small allowance".

Hodgson JA said at [4] that completion of the program was a powerful consideration in the applicant's favour. He went on to say:

> I think there is public interest in having successful completion of such a program explicitly adverted to as a factor favourable to a defendant in the sentencing process, in order to encourage others to successfully complete such programs.

Drug Court

The approach to participation in the Drug Court program prior to being sentenced should be the same as when an offender has been on bail for a lengthy period with strict conditions: *R v Bushara* [2006] NSWCCA 8 at [28]. Participation in the Drug Court is not equivalent to imprisonment. It is not a form of pre-sentence custody that would require a sentence to be backdated. The fact of participation is simply another matter the court takes into account when considering the appropriate sentence without attributing to it "any mathematical equivalence that would have a direct bearing on the length of the sentence".

See **Diversionary programs** on JIRS for further information on diversionary and intervention programs.

Other onerous bail conditions

Onerous bail conditions may be taken into account at sentence but there is no obligation to do so. It is a discretionary matter which depends on the circumstances of the individual case: *R v Fowler* [2003] NSWCCA 321 at [242]; *R v Webb* [2004] NSWCCA 330 at [18]; *Hoskins v R* [2016] NSWCCA 157 at [36]; *Frlanov v R* [2018] NSWCCA 267 at [24]; *Banat v R* [2020] NSWCCA 321 at [18].

The test of what is "onerous" or "stringent" seems difficult to satisfy. Delay combined with onerous bail conditions may constitute a form of punishment to be taken into account on sentence: see, for example, *R v Khamas* [1999] NSWCCA 436; see also **Relevance of onerous bail conditions during delay** at **[10-530] Delay**. Under the *Bail Act* 2013, bail conditions imposed for the purpose of mitigating an unacceptable risk may require the defendant to report or reside at a particular residence, or may include financial requirements (such as giving security) and non-association and place restriction conditions. Restrictive accommodation requirements will not necessarily amount to a form of quasi-custody: *Bland v R* [2014] NSWCCA 82 at [128]. In *Banat v R* the imposition of a curfew condition and the requirement for electronic monitoring were appropriately taken into account on sentence: at [25]–[27]. By comparison, in *Frlanov v R* the sentencing judge did not err by not taking into account the applicant's daily reporting condition as that was not particularly onerous: at [26].

The nature of the offence and the purposes of punishment may determine whether bail conditions are taken into account upon sentence: *R v Fowler* at [242]. In *R v Fowler* the applicant argued that the sentencing judge had failed to take into account the lengthy period during which the applicant was subject to bail conditions (including reporting). However, the court held at [242] that while in an appropriate case the length and terms of an offender's period on bail awaiting trial or sentence is relevant to determining the proper sentence, the weight given to such a matter will vary, depending upon other factors to be considered and what sentence is required in the particular case to address the purpose of punishment.

There is no specific formula for taking into account onerous bail conditions and delay. Nor is there a principle that dictates a reduction in sentence as a direct equivalent of a period of time spent subject to strict conditions on bail: *Hoskins v R* at [36]. It is enough for a sentencing court to make clear in its remarks that those factors have been recognised and taken into account. While in *R v Cartwright* the court gave the appellant credit for 75% of the time spent on bail, this figure has not been applied more generally.

Delay in proceedings

The length of time spent on bail due to delay in the proceedings may, similarly, be seen as a form of punishment sometimes referred to as a "penal consequence" already suffered by an offender that may be taken into account: *R v Yeo* [2005] NSWCCA 49 at [109]; *R v Fowler* [2003] NSWCCA 321 at [242]–[243].

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Correction and adjustment of sentences

[13-900] Correcting a sentence via an implied power or the slip rule

Last reviewed: March 2024

At common law a court may review, correct or alter its judgment any time until its orders have been perfected: *Achurch v The Queen* (2014) 253 CLR 141 at [17]. The power is inherent in superior courts and implied in statutory courts including inferior courts and may be extended by statutory provisions: *Achurch v The Queen* at [17].

The slip rule allows for a limited correction of an order after its final entry: *Achurch v The Queen* at [18]. Under Pt 53, Div 1, r 12 District Court Rules 1973, entry of the sentence on the court file, signed by the judge, constitutes a formal record of the sentence: *Rickard v R* [2007] NSWCCA 332 at [7].

The Court of Criminal Appeal has a power to set aside or vary an order under r 50C Criminal Appeal Rules within 14 days after the order is entered. The power to correct mistakes falling within the "slip rule" exists independently of r 50C. The rule does not limit the operation of the slip rule: *R v Green* [2011] NSWCCA 71 at [24], [27].

[13-910] Re-opening proceedings under s 43

Last reviewed: March 2024

Section 43 *Crimes (Sentencing Procedure) Act 1999* makes provision for a court to reopen proceedings to correct sentencing errors either on its own initiative or on the application of a party to the proceedings. It provides:

> (1) This section applies to criminal proceedings (including proceedings on appeal) in which a court has:
>
> (a) imposed a penalty that is contrary to law, or
>
> (b) failed to impose a penalty that is required to be imposed by law,
>
> and so applies whether or not a person has been convicted of an offence in those proceedings.
>
> (2) The court may reopen the proceedings (either on its own initiative or on the application of a party to the proceedings) and, after giving the parties an opportunity to be heard:
>
> (a) may impose a penalty that is in accordance with the law,
>
> …

Section 43 provides a conditional statutory power to correct a penalty beyond the limits of the inherent and implied powers of the courts and the slip rule: *Achurch v The Queen* (2014) 253 CLR 141 at [19]. It is to be distinguished from the implied or inherent power to correct accidental "slips" or omissions to ensure that orders reflect the intention of the court: *R v Green* [2011] NSWCCA 71 at [21], [27].

Section 43 applies to criminal proceedings (including proceedings on appeal) in which a court has: (a) imposed a penalty that is contrary to law, or (b) failed to impose

a penalty that is required to be imposed by law: s 43(1). Upon reopening the court may impose a penalty that is in accordance with the law, and if necessary, may amend any relevant conviction or order: s 43(2).

The section only applies to criminal proceedings in which one of two conditions [in ss 43(1)(a) and 43(1)(b)] is fulfilled. For the purposes of s 43(1)(b) what must be contrary to law is the "penalty". Merely by demonstrating that the court has erred in law or fact does not meet the condition in s 43(1)(a).

The High Court in *Achurch v The Queen* at [32] set out examples of circumstances in which a penalty may be said to be contrary to law:

- a penalty which exceeds the maximum penalty prescribed for the offence
- a penalty which is beyond the power of the court to impose because some precondition for its imposition is not satisfied eg the existence of an aggravating factor or the existence of prior convictions for the same kind of offence.

The section does not extend to a general re-opening of proceedings. It does not permit sentenced offenders to re-litigate what has already been litigated, or seek a different outcome on new or different evidence: *Bungie v R* [2015] NSWCCA 9 at [40], [41].

[13-920] The limits of the power under s 43

Last reviewed: March 2024

The principle of finality — that resolved controversies are not to be reopened except in a few, narrowly defined circumstances — informs the construction of s 43 *Crimes (Sentencing Procedure) Act 1999* and the limit of its purpose: *Achurch v The Queen* (2014) 253 CLR 141 at [16]. The power cannot be applied to any penalty where the court was influenced by an error of law or fact because such an approach does not fit with the text of s 43, or its limited purpose: *Achurch v The Queen* at [32], [36].

The principle of finality can only be qualified by clear statutory language. The broad construction given by earlier Court of Criminal Appeal decisions (*Erceg v The District Court (NSW)* (2003) 143 A Crim R 455, *Ho v Director of Public Prosecutions* (1995) 37 NSWLR 393, *Meakin v Director of Public Prosecutions* (2011) 216 A Crim R 128 and *R v Finnie (No 2)* [2004] NSWCCA 150 at [31]–[32]) "leaves the boundaries between correction and appeal porous and protected only by the exercise of the sentencing court's discretion": *Achurch v The Queen* at [36].

Further, in *Taylor v R* [2013] NSWCCA 157, it was held s 43 can be utilised to remedy the miscalculation of commencement dates or parole periods: [7]. In *Achurch v R (No 2)* (2013) 84 NSWLR 328, the court said s 43 can be used where the court has made an "error of computation or the like": [66]. Computation errors or errors in relation to commencement dates (after the High Court decision of *Achurch v The Queen*) have to be corrected using the courts inherent or implied power or under the slip rule referred to above.

Section 43 cannot be used by first instance courts to review *Muldrock v The Queen* (2011) 244 CLR 120 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]. Section 43 cannot be used to alter a driving

disqualification period after a s 10A order (under the *Crimes (Sentencing Procedure) Act*) has been imposed: *Davis v Director of Public Prosecutions (NSW)* [2011] NSWSC 153 at [43].

[The next page is 7001]

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

Firearms and prohibited weapons offences

Damage by fire and related offences

Domestic violence offences

COMMONWEALTH

Commonwealth drug offences

Money laundering

Conspiracy

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Sexual assault

[20-600] Statutory scheme in Crimes Act 1900

Part 3 Div 10 *Crimes Act* 1900 is titled "Offences in the nature of rape, offences relating to other acts of sexual assault etc". Division 10A contains offences relating to sexual servitude. Unless otherwise specified, references to sections below are references to sections of the *Crimes Act*.

For commentary on the following offences relating to children see **Sexual offences against children** at **[17-400]**ff: ss 61M(2), 66A–66EB, 73, 77 and 80AA (child sexual assault), ss 91C–91H (child prostitution and pornography) and ss 91I–91M (grooming and voyeurism).

A brief legislative history describing the significant reforms to the laws relating to sexual assault in the past 30 years can be found at [1-025] in the *Sexual Assault Trials Handbook*.

[20-604] Change in community attitudes to sexual assault and harm

In *R v MJR* (2002) 54 NSWLR 368 at [11], Spigelman CJ said that sexual assault has generally "come to be regarded as requiring increased sentences … by reason of a change of community attitudes". Mason P at [57] explained the increased pattern of sentencing for child sexual abuse by reference to the greater understanding of the long-term psychological consequences for the victims and the considered judicial response to changing community attitudes to these crimes.

In *DBW v R* [2007] NSWCCA 236, the court held that the decision of *R v Muldoon* (unrep, 13/12/90, NSWCCA) — where it was held that to prove harm, the Crown must adduce evidence in the form of studies of the lasting effects of sexual abuse and, if necessary, a psychiatric assessment — is no longer of assistance today. Chief Justice Spigelman said at [39] that the effect of sexual abuse was not a matter for expert evidence and "the public and the courts have become much more aware of, and knowledgeable about, the effects of child sexual abuse".

The court again considered the issue of harm in *R v King* [2009] NSWCCA 117 at [41]:

> It should not be assumed, without evidence to the contrary, that there is no significant damage by way of long-term psychological and emotional injury resulting from a sexual assault of a child who is old enough, as was the complainant, to appreciate the significance of the act committed by the offender. It should be assumed that there is a real risk of some harm of more than a transitory nature occurring. That should be a factor taken into account when sentencing for a child sexual assault offence. It is an inherent part of what makes the offence so serious.

The High Court remarked in *The Queen v Kilic* (2016) 259 CLR 256 at [21]:

> current sentencing practices with respect to sexual offences may be seen to depart from past practices by reason, inter alia, of changes in understanding of the long-term harm done to the victim.

[20-610] Effect of increase in maximum penalties

This issue is dealt with comprehensively in **Objective factors at common law** at **[10-000]**ff. It is well settled that the legislature may be taken to indicate that sentences for an offence must increase following an increase in the maximum penalty: *Baumer v The Queen* (1988) 166 CLR 51 at 56; *R v Slattery* (1996) 90 A Crim R 519 at 524. In the context of sexual assault, the 1989 amendments substantially increased the maximum penalties for sexual assault offences. The maximum penalty for sexual intercourse without consent was increased from 8 years (under s 61D (rep)) to 14 years (under s 61I). Similarly, the maximum penalty for aggravated sexual assault increased from between 12–14 years (under s 61C (rep)) to 20 years (under s 61J).

In the 1990s, the Court of Criminal Appeal repeatedly declared that the *Crimes Amendment Act* 1989 was designed to reflect community standards and the seriousness with which the community regards sexual assault offences: *R v Hartikainen* (unrep, 8/6/93, NSWCCA); *R v Gilbert* (unrep, 24/2/94, NSWCCA); and *R v May* [1999] NSWCCA 40 at [7]. The amendments make it incumbent upon the courts to give effect to the concerns of Parliament in almost doubling the penalties, at least for s 61J: *R v Truong* (unrep, 8/12/97, NSWCCA).

The court in both *Upton v R* [2006] NSWCCA 256 at [47] and *R v MAK* [2005] NSWCCA 369 at [130] observed that the introduction of a maximum penalty of life imprisonment for offences under s 61JA manifests an intention on the part of Parliament to substantially increase penalties for aggravated sexual assault committed in company.

Importance of maximum penalty

In *Markarian v The Queen* (2005) 228 CLR 357 at [30]–[31], Gleeson CJ, Gummow, Hayne and Callinan JJ said:

> Legislatures do not enact maximum available sentences as mere formalities. Judges need sentencing yardsticks. It is well accepted that the maximum sentence available may in some cases be a matter of great relevance …
>
> It follows that careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick.

[20-620] Standard non-parole period sexual assault offences

The statutory regime for standard non-parole period offences is dealt with in detail in **Standard non-parole period offences** at **[7-890]**ff. Offences committed on or after 1 February 2003 are subject to the standard non-parole period provisions. Standard non-parole periods have been prescribed for the following sexual offences:

- sexual assault (s 61I) — 7 years
- aggravated sexual assault (s 61J) — 10 years
- aggravated sexual assault in company (s 61JA) — 15 years
- aggravated indecent assault (s 61M(1)) — 5 years, increased to 7 years for offences committed on or after 1 January 2009.

In the area of child sexual assault standard non-parole periods were introduced for offences under ss 61M(2) (8 years), 66A (15 years), 66B (10 years), 66C(1) (7 years), 66C(2) (9 years) and 66C(4) (5 years) (discussed separately in **Sexual offences against children** at **[17-400]**).

It is an error to decline to set a non-parole period for a sexual offence with a standard non-parole period: *Leddin v R* [2008] NSWCCA 242 at [13].

The Table of standard non-parole periods does not include attempt offences, except for the various manifestations of the offence of attempt murder: *R v DAC* [2006] NSWCCA 265 at [10]. In *R v DAC*, the judge erred in applying the Table to an aggravated attempt to have sexual intercourse without consent under ss 61J and 61P.

It was predicted that the effect of the standard non-parole period would generally be to increase the level of sentencing for offences to which it applies: *R v AJP* (2004) 150 A Crim R 575. See the statement of the High Court in *Muldrock v The Queen* (2011) 244 CLR 120 at [31] and an earlier study by the Judicial Commission of NSW that found the introduction of standard non-parole periods in fact resulted in significant increases in sentences: P Poletti and H Donnelly, *The impact of the standard non-parole period sentencing scheme on sentencing patterns in New South Wales*, Research Monograph 33, Judicial Commission of NSW, Sydney, 2010. See **Move upwards in the length of non-parole periods?** at **[7-990]**.

[20-630] Assessing objective gravity of sexual assault

An important step in determining the appropriate sentence is to assess where the particular sexual assault offence lies on the spectrum or scale of seriousness: *Ibbs v The Queen* (1987) 163 CLR 447. In *R v Gebrail* (unrep, 18/11/94, NSWCCA), Mahoney JA emphasised the importance of making clear findings about the objective seriousness of the crime in sexual assault cases:

> it is important to understand why assessments of the seriousness of the instant offence [s 61J] are made and the significance of such assessments. As I have indicated, every offence of this kind is a serious offence. But those whose duty it is to deal with crimes of this kind and to sentence those who commit them know that though each case is inherently serious, some are more serious than others. In some cases, the degree of violence, the physical hurt inflicted, the form of forced intercourse and the circumstances, of humiliation and otherwise, are much greater than are involved in this case. It is to be understood that in sentencing it is appropriate — indeed, in most cases it is necessary — that the sentencing judge form and record his assessment of where, on the relevant scale of seriousness, the particular offence lies.

Part of the assessment of the objective seriousness of the sexual assault involves taking into account the nature of the sexual act. In *Ibbs v The Queen* at 452, Mason CJ and Wilson, Brennan, Toohey and Gaudron JJ stated:

> The inclusion of several categories of sexual penetration within the offence described as sexual assault carries no implication that each category of sexual penetration is as heinous as another if done without consent. When an offence is defined to include any of several categories of conduct, the heinousness of the conduct in a particular case depends not on the statute defining the offence but on the facts of the case. In a case of sexual assault, a sentencing judge has to consider where the facts of the particular case lie in a spectrum, at one end of which lies the worst type of sexual assault perpetrated by any act which constitutes sexual penetration as defined …

Ibbs v The Queen requires the sentencer to assess and take into account where the sexual act fits in the continuum of seriousness for a given offence. In *R v PGM* (2008) 187 A Crim R 152 at [26], Fullerton J summarised the position as follows:

> While there is no hierarchy of sexual acts that constitute sexual intercourse for the purposes of the criminal law, it is generally accepted that some forms of sexual activity may be regarded as more serious than others (see *Ibbs v The Queen* (1987) 163 CLR 447). This is of course necessarily modified by the context in which the offence occurred, and other circumstances of the particular offending to which Simpson J referred in *AJP* at [24]–[26].

Forms of sexual intercourse and objective seriousness

Section 61H(1) *Crimes Act* 1900 provides, inter alia:

> "*sexual intercourse*" means:
>
> (a) sexual connection occasioned by the penetration to any extent of the genitalia (including a surgically constructed vagina) of a female person or the anus of any person by:
>
> (i) any part of the body of another person, or
>
> (ii) any object manipulated by another person,
>
> except where the penetration is carried out for proper medical purposes, or
>
> (b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person, or
>
> (c) cunnilingus, …

The Court of Criminal Appeal has at various times drawn distinctions between the relative seriousness of the acts referred to in s 61H. The cases are discussed below. The discussion demonstrates that drawing distinctions between specific sexual acts for the purpose of assessing the objective seriousness of an offence cannot be pressed too far. It is only one part of the task. The objective seriousness of an offence depends on *all* the circumstances of the case and is not confined to the nature of the act committed by the offender. While the form of intercourse "is an important factor, it is not to be regarded as the sole consideration": *R v Hibberd* (2009) 194 A Crim R 1 at [56]. Other relevant matters in deciding where on the continuum of seriousness an offence lies include: "the degree of violence, the physical hurt inflicted, the form of the forced intercourse, the circumstances of humiliation … the duration of the offence": *R v Hibberd* at [56], cited with approval in *R v Daley* [2010] NSWCCA 223 at [48]. In *R v Daley* at [48], Price J (Hodgson JA and Fullerton J agreeing) clarified what was said in *R v Hibberd* about the duration of an assault:

> the short duration of a sexual assault would not ordinarily be considered as a factor which reduces the objective seriousness of the offence. Most sexual assaults will not be prolonged as the offender will seek to avoid apprehension. On the other hand, a sexual assault of an extended duration will necessarily add to the seriousness of the offending as the suffering and the humiliation of the victim will be increased.

The context in which the offending occurs is an important part of determining the objective seriousness of a particular offence. In *R v Hall* [2017] NSWCCA 313, two forcible acts of penetration occurred over a period of about 20 to 30 minutes while the victim was threatened with being killed with a knife and dragged around a motel room

while blindfolded. In those circumstances, the court described the victim's ordeal as "utterly terrifying" and concluded the fact the victim did not sustain any significant physical harm did not lessen the objective seriousness of two offences against s 61D(1) (an earlier form of s 61J(1)): *R v Hall* at [118]. The offences were not of "short duration": *R v Hall* at [53], [118]. Further, the sentencing judge's description of the violence as "limited" and involving "a degree of rough handling" was a significant understatement: *R v Hall* at [55].

Fellatio, cunnilingus and penile-penetration

In *R v O'Donnell* (unrep, 1/7/94, NSWCCA), Hunt CJ at CL said that "[f]ellatio, in my opinion, is clearly less criminal than, say, anal or vaginal penetration". Justice Grove said in *R v Andrews* [2001] NSWCCA 428 at [6] that Hunt CJ at CL's statement "clearly did not intend … to reveal some matter of law" and he could only have expressed it as a matter of opinion. Further:

> the penetration of a victim by a sexual organ derives its seriousness from a consideration of the particular circumstances of the case rather than from the nature of the sexual act itself.

Although *R v Andrews* was a two-judge bench decision it was cited with approval and applied in *R v Hajeid* [2005] NSWCCA 262 at [52]; *R v MS* [2005] NSWCCA 322 at [16]; and *R v Sanoussi* [2005] NSWCCA 323 at [32].

In *R v AJP* (2004) 150 A Crim R 575 at [23]–[25], Simpson J reviewed the authorities on the question of whether some acts, such as penile-vaginal penetration, are more serious than others, and what factors should be considered in assessing the objective seriousness in the context of the standard non-parole period provisions. Those provisions require the judge to determine whether an offence falls in the middle of the range of objective seriousness. Her Honour said:

> In *R v Davis* [1999] NSWCCA 15 Wood CJ at CL wrote:
>
> > "[66] In *Ibbs v The Queen* … the High Court rejected the proposition that each kind of sexual penetration as defined in the section, there under consideration, was to be regarded as neither more nor less heinous than another. The Court said that such a proposition cannot be accepted. It appears to me that any other view would beggar common sense, and that penile-vaginal penetration of a child is significantly more serious than many of the other forms of conduct encompassed within s 66A [sexual intercourse — child under 10 years] …"
>
> It might be true, as senior counsel suggested, that penile-vaginal intercourse would, in the circumstances, have amounted to a more serious offence. But does that avail the respondent? Let it be supposed that his Honour had not excluded as irrelevant the nature of the sexual activity in question. It is difficult to think that that of itself would have led him to the conclusion that the offence was of something less than mid-range gravity. It is not possible to create some kind of hierarchy of the seriousness of the various kinds of sexual intercourse contemplated by s 66A (and defined in s 61H). It is the facts and circumstances of each case, including the nature of the intercourse, that enables the proper evaluation of objective seriousness. While penile-vaginal penetration might be taken to be more serious than enforced fellatio, that does not mean that enforced fellatio necessarily falls somewhere below the mid-point of objective seriousness. There are many instances of conduct that come within the definition of sexual intercourse that would be significantly less serious than enforced fellatio. Had his Honour considered

> the nature of the sexual intercourse as relevant, he must, in my view, have come to the view that enforced fellatio falls somewhere in the middle, or towards the upper end, of that scale.
>
> Other appropriate areas of inquiry in the consideration of the objective seriousness of a s 66A offence are, for example, how the offences took place, over what period of time, with what degree of force or coercion, the use of threats or pressure before or after the offence to ensure the victim's compliance with the demands made, and subsequent silence, and any immediately apparent effect on the victim. Although the sentencing judge was fully conversant with the facts of the offences, he has not explicitly considered these matters in the specific context of the evaluation of objective seriousness.

In *R v PGM* (2008) 187 A Crim R 152, the court held that it was open for the trial judge to find that the acts of cunnilingus were in general terms less serious than the penile penetration: However, at [28] Fullerton J said:

> to reason to the conclusion that the act of penile penetration … was of the same order of seriousness as cunnilingus simply by reason of the fact that the respondent's penis penetrated the child's genitalia only to a small extent, is to fail to give account to the fact that penile penetration of a young child involves conduct of a quite different order and criminality of a more serious kind than other forms of sexual intercourse contemplated by the statutory definition in s 61H of the *Crimes Act*. In that connection I note the observation of the Chief Justice in *RJA v R* [2008] NSWCCA 137 at [33] that a limited degree of penetration is not necessarily indicative of a lower level of objective criminality.

The court held in *R v MS* [2005] NSWCCA 322 at [16], that in some cases little may differentiate the objective seriousness of an act of fellatio from an act of penile-vaginal intercourse:

> The circumstances of an act of fellatio may place it in a position on that spectrum consistent with an act of penile-vaginal intercourse. For example, where the complainant's head is forced and held onto the offender's penis to the point of ejaculation into the complainant's mouth, while threats and insults are uttered, in the company of a number of other offenders who are waiting their turn, little may objectively differentiate such an offence from an act of penile-vaginal intercourse, absent overt threats where the offender wears a condom.

R v Oloitoa [2007] NSWCCA 177 is clearly an example of a very serious assault involving fellatio. The act of enforced fellatio was the basis of an aggravated sexual assault charge under s 61J. It was committed during a home invasion in the early hours of the morning. The respondent was armed and in company with another offender. The act was accompanied by threats of violence and completed by the respondent ejaculating in the victim's mouth in front of her children. McClellan CJ at CL said at [42]: "the offence was marked by the personal degradation of the victim", and later at [43]:

> these features should have led the sentencing judge to conclude that the crime was above the mid range of objective seriousness. It called for a non-parole period greater than 10 years.

R v Oloitoa was cited in *Cole v R* [2010] NSWCCA 227 at [87] to justify a high sentence for an offence involving fellatio.

Any physical injury inflicted by penile penetration is also relevant. In *R v Shannon* [2006] NSWCCA 39 at [37], Howie J said:

> with young children it seems to me that penile penetration is the most serious form of sexual assault for the obvious reason that it is the most likely to result in physical injury to the child.

Digital and penile penetration

Non-consensual sexual intercourse by digital penetration is generally less serious than an offence of penile penetration, but each case depends on its own facts: *R v Hibberd* (2009) 194 A Crim R 1 at [56]; *R v Da Silva* (unrep, 30/11/95, NSWCCA), per Grove J at 3. However, there is no canon of law which mandates a finding that digital penetration must be considered less serious than other non-consensual acts of sexual intercourse: *R v Hibberd* at [56]. In *R v Hibberd* at [21], Tobias JA said that the law should change:

> the time has come for this Court to depart from any prima facie assumption, let alone general proposition, that digital sexual intercourse is to be regarded as generally less serious than penile sexual intercourse …
>
> [T]he objective seriousness of the offence is wholly dependent on the facts and circumstances of the particular case …

Justice James agreed with Price J — who had applied *R v Da Silva* — and his Honour reserved his position on whether the court should depart from previous statements that digital penetration is generally less serious than penile penetration at [27]. The court held nevertheless that the judge erred by focusing too heavily on the form of the forced intercourse (digital penetration) and had failed to give sufficient weight to the extent of the violence used in the offence: *R v Hibberd* at [66].

In *R v King* [2009] NSWCCA 117 at [36], the court said in response to a submission that it was open for the trial judge to find that digital penetration was less serious than penile penetration and that this was a very significant fact in the assessment of the degree of criminality:

> What is to be considered is the type of penetration in all the circumstances surrounding the offending. The type of penetration is simply one factor and by itself does not indicate how serious the particular offence is. The simple fact is that had the intercourse in this case been penile penetration it would have been an offence of very great seriousness if for no other reason than because of the age of the child. In such a case the seriousness of the offence may have been above mid range. But the fact that it was not penile penetration does not mean that the offence is reduced to low range.

Anal penetration

The s 61J offence in *R v Russell* (unrep, 21/6/96, NSWCCA) involved anal intercourse. Justice Dunford said:

> The nature of the offences is further aggravated, in my view, by the degrading nature of the anal intercourse, even though this offence in any circumstance is of its nature always degrading.

Age gap between offender and victim

In *R v Shortland* [2018] NSWCCA 34, the court found the lack of a significant age gap between the 25-year-old offender and 31-year-old victim was immaterial

when determining the objective seriousness of the offence. In cases of non-consensual intercourse between adults, age difference is rarely likely to be relevant: *R v Shortland* at [15], [87].

[20-640] Sexual intercourse without consent: s 61I

Sexual intercourse without consent carries a maximum sentence of 14 years imprisonment. Where it is committed on or after 1 February 2003 it is also subject to a standard non-parole period of 7 years. The courts have always regarded sexual intercourse without consent as a serious offence: *R v Russell* (unrep, 21/6/96, NSWCCA). In *R v Hartikainen* (unrep, 8/6/93, NSWCCA), Gleeson CJ said that non-consensual intercourse is an extreme form of violence and one which the community expects the courts to take very seriously. This remains so even in cases where there is no additional violence perpetrated against the victim: *R v May* [1999] NSWCCA 40 at [7]. Even before the introduction of the standard non-parole period for the offence of sexual intercourse without consent the Court of Criminal Appeal held that it would be unusual if a conviction under s 61I did not ordinarily result in a sentence of full-time imprisonment: *R v Crisologo* (1997) 99 A Crim R 178 at 179; *R v May* at [10].

Counsel for the appellant in *Sabapathy v R* [2008] NSWCCA 82 at [71] submitted that the appellant's mental state of recklessness and his subjective circumstances warranted a sentence other than full-time custody. The court held:

> that [a] conviction for the offence of sexual intercourse without consent will ordinarily bring a custodial sentence. There may be unusual or exceptional circumstances in which a sentence other than a custodial sentence will be appropriate, but there is no litmus test for when that might be so. It is part of the exercise of the broadly based sentencing discretion in the light of all the facts in the particular case.

In *R v Shortland* [2018] NSWCCA 34, Basten JA (R A Hulme J agreeing at [37]) observed that, although it was unhelpful to talk of the principle in *Sabapathy v R* as a general rule or presumption, it was apparent it had been followed: *R v Shortland* at [6]. However, his Honour concluded it would be unusual or extraordinary to impose a non-custodial sentence in a case where there was no guilty plea or an accompanying finding that the offender was remorseful: *R v Shortland* at [7].

The 7-year standard non-parole period will most likely increase sentences for offences committed under s 61I since that is generally the effect of the standard non-parole period: *R v AJP* (2004) 150 A Crim R 575. This statement should be read in light of later statements by the High Court in *Muldrock v The Queen* (2011) 244 CLR 120 at [31].

Summaries of the Crown and severity appeals for offences committed under s 61I since the introduction of the standard non-parole period can be accessed via the SNPP appeals component of JIRS.

Attempted intercourse: s 61P

A sexual assault offence is not to be regarded as at the lower end of the scale merely because intercourse did not actually occur. An attempted sexual intercourse without consent may be a serious offence, in particular where there are aggravating features: *R v Grech* [1999] NSWCCA 268. Section 61P provides that an attempt to commit

sexual intercourse without consent carries the same penalty as if the completed offence was committed: *R v Gulliford* (2004) 148 A Crim R 558. It applies to ss 61I–61O inclusive.

The standard non-parole period provisions in Pt 4 Div 1A *Crimes (Sentencing Procedure) Act* do not apply, except for the various manifestations of the offence of attempt murder, to attempt offences: *R v DAC* [2006] NSWCCA 265 at [10]. The judge erred in *R v DAC* by applying the standard non-parole period to the offence of aggravated attempt to have sexual intercourse without consent contrary to ss 61J and 61P.

[20-645] Consent must be addressed when in issue

Where consent is an issue on sentence, it is erroneous not to address the offender's arguments or explain the basis upon which the issue was resolved: *R v Alcazar* [2017] NSWCCA 51 at [44]. In *R v Alcazar* at [45], the court held that this error contributed to a manifestly inadequate sentence because the seriousness of the offending was not properly identified.

See **Suggested direction — sexual intercourse without consent (s 61I) where the offence was allegedly committed on and after 1 January 2008** at [5-1566] and **Notes** at [5-1568] of the *Criminal Trial Courts Bench Book*.

[20-650] De Simoni principle and s 61I

The court must disregard a matter of aggravation if to take it into account would be to punish the offender for an offence which was more serious than that for which the offender stands for sentence: *The Queen v De Simoni* (1981) 147 CLR 383. This consideration is most likely to arise when the court has regard to factors which are often found as aggravating features of offences in the *Crimes Act*, such as: the offence was committed in company; the offender used a weapon; or the offender was in a position of trust: *R v Wickham* [2004] NSWCCA 193 at [26]. None of the aggravating matters in s 61J (listed below) can be taken into account in aggravation for an offence under s 61I.

The sentencing judge erred in *R v Bakewell* (unrep, 27/6/96, NSWCCA) by taking into account the psychological impact of the crime on the victim and the applicant's forcefulness during sexual intercourse. This was held to be impermissible since these matters, described in a victim impact statement, effectively constituted an aggravated form of the offence found under s 61J.

In *R v Johnson* [2005] NSWCCA 186 at [26], the sentencing judge erred by taking into account as a matter of aggravation that the offences involved violence of a sexual character. According to Hunt AJA at [23], violence can be taken into account provided that it does not involve the infliction of actual bodily harm:

> When defining the offence of sexual intercourse without consent, s 61I of the *Crimes Act* 1900 makes no reference to violence, and its title "Sexual Assault" does not go beyond the common assault which is inherent in the "sexual connection" to which the definition of "sexual intercourse" in s 61H refers. It does not include any suggestion of either violence or (as violence is usually defined) the exercise of physical force. Many sexual assaults do involve violence, and that violence is appropriately taken into account by way of aggravation in a sexual assault charge under s 61I — provided that it does not involve the infliction of actual bodily harm, when the offender becomes exposed

> to a greater maximum sentence, one of imprisonment for 20 years (s 61J "Aggravated Sexual Assault"), in lieu of imprisonment for 14 years (s 61I "Sexual Assault"). The principle laid down in *The Queen v De Simoni* (at 388–392), that a matter may be taken into account in aggravation of sentence only where it does not render the accused liable to a greater punishment, would otherwise be infringed.

[20-660] Aggravated sexual assault: s 61J

Sexual intercourse without consent committed in circumstances of aggravation carries a maximum sentence of 20 years. Where it is committed on or after 1 February 2003 it is also subject to a standard non-parole period of 10 years. "Circumstances of aggravation" are defined in s 61J(2):

(a) intentional or reckless infliction of actual bodily harm

(b) threat of actual bodily harm by means of an offensive weapon/instrument

(c) in company

(d) victim under the age of 16 years

(e) victim under the authority of the offender

(f) victim has a serious physical disability

(g) victim has a cognitive impairment

(h) break and entry into dwelling-house or other building with the intention of committing the offence or any other serious indictable offence

(i) deprivation of victim's liberty for a period before or after the commission of the offence.

For offences committed prior to 15 February 2008, the previous form of s 61J(2)(a) applies, that is "malicious" infliction of actual bodily harm.

Section 61J(2)(h) and (i) were inserted by the *Crimes Amendment (Sexual Offences) Act* 2008, which commenced on 1 January 2009.

The aggravating factors under s 61J(2) are not all of equal seriousness: *Thorne v R* [2007] NSWCCA 10 at [82]. For example, a threat to inflict actual bodily harm may be less serious than actually inflicting harm. There can also be other aggravating factors applicable to this offence not mentioned in s 61J(2), such as acts degrading the complainant: *Thorne v R* at [82].

Range for s 61J

In *R v AEM* [2002] NSWCCA 58 at [103]–[143], the court reviewed the pattern of sentencing for offences under s 61J at that time and concluded that the cases cited by counsel did not establish a relevant pattern of sentencing. The court also cautioned against the use of Judicial Commission of NSW statistics for sexual assault offences: at [110]–[117].

Whatever view may be taken on the question of whether there is an established range, the introduction of a standard non-parole period of 10 years will have the effect of generally increasing sentences for this offence. In *R v AD* [2005] NSWCCA 208 at [43], Howie J said in the course of dealing with a severity appeal for a s 61J offence:

> the judge in the present matter was obliged to have regard to the standard non-parole period of 10 years even though it was not applicable to the applicant's case. In [*R v AJP*

> (2004) 150 A Crim R 575] it was made clear that the effect of the standard non-parole period will generally be to increase the level of sentencing for offences to which it applies. If the provisions prescribe a standard non-parole period of 10 years, as against a maximum penalty of 20 years, as is the case with an offence under s 61J, it follows that the head sentence must exceed half the maximum penalty for the offence notwithstanding that the offence is one of only mid-range seriousness.

Summaries of the Crown and severity appeals for offences committed under s 61J since the introduction of the standard non-parole period can be accessed via the SNPP appeals component of JIRS.

Section 61J cases that attract the maximum

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

R v Anderson [2002] NSWCCA 304 is an example of near worst case category of a s 61J offence. *Anderson* was said to be worse than *R v AEM* [2002] NSWCCA 58 because it involved infliction of actual bodily harm. The offender had a long history of criminal conduct and committed numerous violent offences after escaping from a prison.

In *R v Boatswain* (unrep, 15/12/93, NSWCCA) the offender committed seven counts of aggravated sexual intercourse without consent against two different victims on different occasions. The court imposed an effective sentence of 23 years with a non-parole period of 15 years. *R v Presta* [2000] NSWCCA 40 was also a serious case. The applicant received a minimum term of 14 years and 3 months and additional term of 4 years and 9 months.

[20-670] Aggravated sexual assault in company: s 61JA

Section 61JA(1) provides that:

> A person:
>
> (a) who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse, and
>
> (b) who is in the company of another person or persons, and
>
> (c) who:
>
> (i) at the time of, or immediately before or after, the commission of the offence, intentionally or recklessly inflicts actual bodily harm on the alleged victim or any other person who is present or nearby, or
>
> (ii) at the time of, or immediately before or after, the commission of the offence, threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument, or
>
> (iii) deprives the alleged victim of his or her liberty for a period before or after the commission of the offence,
>
> is liable to imprisonment for life.

In *R v MRK* [2005] NSWCCA 271 at [3], Spigelman CJ stated :

> As indicated by the maximum penalty of life imprisonment, the offence under s 61JA is in the highest level of sexual assault offences under the *Crimes Act*, above the offences

> for which s 61J provides being sexual assault in circumstances of aggravation. This represents a recognition by the legislature of the particular heinousness which often accompanies gang rapes.

R v Hoang [2003] NSWCCA 380 involved the applicant having sexual intercourse with the victim without her consent, in company, having deprived her of her liberty for a period prior to the commission of the offence. According to Wood CJ at CL at [40]–[42], the sexual assault offence:

> fell within the upper range of seriousness for such an offence, the seriousness of which is, itself, underlined by the fact that the maximum available penalty for it is imprisonment for life … This community will not, and it cannot, tolerate the activities of marauding young gangs of the kind to which this appellant attached himself, and it is time that he and his ilk understood that to be the case, at the penalty otherwise of facing lengthy terms of imprisonment.

In *R v Upton* [2006] NSWCCA 256 at [50], the applicant played a lesser role than his co-offender and the Crown relied on the doctrine of extended joint criminal enterprise. The court agreed that the crime was one of the worst of its type and held that a sentence of imprisonment of 7 years with a non-parole period of 4 years "might be considered lenient": *R v Upton* at [50].

In *R v MAK* [2005] NSWCCA 369, the crime was characterised as falling into the worst category of offence (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256) under s 61JA. MRK's brothers were sentenced respectively to terms of imprisonment of 16 years, with a non-parole period of 12 years; 22 years, with a non-parole period of 16 years; and 22 years, with a non-parole period of 13 years. Justice Grove said that, having regard to the maximum penalty, the applicants were treated leniently: *R v MAK* at [97], [130].

Summaries of the Crown and severity appeals for offences committed under s 61JA since the introduction of the standard non-parole period legislation can be accessed via the SNPP Appeals component of JIRS.

[20-680] Assault with intent to have sexual intercourse: s 61K

Section 61K provides that any person who "intentionally or recklessly" (prior to 15 February 2008, "maliciously") inflicts actual bodily harm, or threatens to inflict actual bodily harm by means of an offensive weapon or instrument, with intent to have sexual intercourse with another person, is liable to imprisonment for 20 years. Appeals against sentences for s 61K offences include *R v Jones* (1993) 70 A Crim R 449; *R v Armand-Iskak* [1999] NSWCCA 414; *R v Smith* (1993) 69 A Crim R 47; *R v Leys* [2000] NSWCCA 358 and *R v Sanderson* [2000] NSWCCA 512.

[20-690] Indecent assault

Section 61L provides:

> Any person who assaults another person and, at the time of, or immediately before or after, the assault, commits an act of indecency on or in the presence of the other person, is liable to imprisonment for 5 years.

In *R v O'Sullivan* (unrep, 20/10/89, NSWCCA), Priestley JA said that the sentencing judge had taken an "over-strict approach" in saying that a custodial sentence had to be imposed in every case of indecent assault, as it was then defined.

Section 61M — "in circumstances of aggravation"

Section 61M is dealt with under **Sexual offences against children** at [17-510].

Under s 61M(1) any person who assaults another person in circumstances of aggravation is liable to imprisonment for 7 years. "Circumstances of aggravation" are defined in s 61M(3). Under s 61M(2):

> any person who assaults another person, and, at the time of, or immediately before or after, the assault, commits an act of indecency on or in the presence of the other person, is liable to imprisonment for 10 years, if the other person is under the age of 16 years.

Parliament has set a standard non-parole period of 5 years for an offence under s 61M(1) and 8 years for an offence under s 61M(2): items 9A, 9B, Table of Standard non-parole periods, see [8-000].

[20-700] Sexual assault procured by intimidation, coercion and other non-violent threats

Section 65A was repealed by the *Crimes Amendment (Consent—Sexual Assault Offences) Act* 2007, which commenced 1 January 2008. It provided:

(1) In this section: "non-violent threat" means intimidatory or coercive conduct, or other threat, which does not involve a threat of physical force.

(2) Any person who has sexual intercourse with another person shall, if the other person submits to the sexual intercourse as a result of a non-violent threat and could not in the circumstances be reasonably expected to resist the threat, be liable to imprisonment for 6 years.

(3) A person does not commit an offence under this section unless the person knows that the person concerned submits to the sexual intercourse as a result of the non-violent threat.

In *R v Aiken* (2005) 63 NSWLR 719 the court held that s 65A was inserted in 1987 for the purpose of criminalising non-violent threats. The elements of intimidation, coercion and non-violent threats are now incorporated in s 61HA(6)(b) as grounds for establishing that a person does not consent to sexual intercourse.

[20-710] Victim with a cognitive impairment: s 66F

The *Crimes Amendment (Cognitive Impairment — Sexual Offences) Act* 2008 clarified and extended the nature of sexual offences committed against persons who have a cognitive impairment. The amending Act replaced the term "intellectual disability" with "cognitive impairment", which includes not only intellectual disability, but extends to developmental or neurological disorders, dementia, severe mental illness or brain injury, which results in the person requiring supervision or social habilitation in connection with daily life activities.

Section 66F(2) provides that a person who has sexual intercourse with a person who has a cognitive impairment, and who is responsible for the care of that person (whether generally or at the time of the sexual intercourse only), is liable to a maximum

penalty of 10 years imprisonment. A person is responsible for the care of a person with a cognitive impairment if the person provides care to that person at a facility or at the home of that person in a program under which care is provided to persons with a cognitive impairment.

Section 66F(3) provides that any person who has sexual intercourse with a person who has a cognitive impairment, with the intention of taking advantage of that cognitive impairment, is liable to a maximum penalty of 8 years imprisonment.

In *R v Grech* [1999] NSWCCA 268 at [37], Carruthers J said deterrence looms large for offences under s 66F(2). His Honour explained the gravamen of the offence at [33]–[34]:

> strong emotional relationships are quite capable of developing between carer and intellectually disabled person, whether they are of the same gender or not. It is essential, therefore, that persons in authority exercise the utmost care to avoid such situations developing, and immediately there are indications of such a situation arising, the obligation is on the person in authority to remove himself or herself from the relationship or, at the very least, immediately to seek expert counselling.
>
> Neither of these courses was adopted in the subject case and, intolerably, the relationship developed into one of a continuing and prolonged violation of the provisions of s 66F(2) … The fact that the relationship may have developed, as the applicant contends, into a mutual loving relationship could fairly be described as an aggravating feature of the case rather than a mitigating factor.

[20-720] Sexual assault by forced self-manipulation: s 80A

Section 80A(2) provides that any person who compels another person to engage in self-manipulation, by means of a threat that the other person could not reasonably be expected to resist, is liable to imprisonment for 14 years. If there are circumstances of aggravation (outlined in s 80A(1)), the person is liable to imprisonment for 20 years under s 80A(2A). Section 80A(3) provides that a person does not commit an offence under this section unless the person knows that the other person engages in the self-manipulation as a result of the threat.

[20-730] Incest

Section 78A(1) states that "any person who has sexual intercourse with a close family member who is of or above the age of 16 years is liable to imprisonment for 8 years". Under s 78B any person who attempts to commit an offence under s 78A is liable to imprisonment for 2 years. In *R v GS* [2002] NSWCCA 4, the applicant had engaged in a sexual relationship with his natural daughter over a 14-year period. On the three counts of incest, the court sentenced him to 4 years and 6 months, with a non-parole period of 3 years.

[20-740] Bestiality

Last reviewed: August 2023

Section 79 provides that "any person who commits an act of bestiality with any animal" shall be liable to imprisonment for 14 years. Any person who attempts to commit an act of bestiality with any animal shall be liable to imprisonment for 5 years: s 80.

Bestiality is not defined in the *Crimes Act* 1900, but at common law it has been held to consist of any form of sexual intercourse with an animal: *R v Brown* (1889) 24 QBD 357. No particular mode of penetration is required: *R v Bourne* (1952) 36 Cr App R 125; applied by the High Court in *Bounds v The Queen* [2006] HCA 39. A woman may commit bestiality: *R v Packer* [1932] VLR 225. In *Chesworth v R* [2023] NSWCCA 115 at [19], the court noted the objective seriousness of bestiality offences should be assessed having regard to the animal's inability to consent to any form of activity with a human.

[20-750] Intensive correction order not available for a "prescribed sexual offence"

Section 67(1)(b) *Crimes (Sentencing Procedure) Act* 1999 states that an intensive correction order (ICO) must not be made in respect of a sentence of imprisonment for a "prescribed sexual offence". A "prescribed sexual offence" is defined in s 67(2) as:

(a) an offence under Pt 3, Divs 10 or 10A *Crimes Act* 1900, being:

  (i) an offence where the victim is under 16 years of age, or

  (ii) an offence where the victim is any age and the elements of which includes sexual intercourse (as defined by s 61H)

(b) an offence against ss 91D, 91E, 91F, 91G or 91H *Crimes Act*

(c) an offence against ss 91J, 91K or 91L *Crimes Act*, where the victim is under 16 years, or

(d) an offence that, at the time it was committed, was a prescribed sexual offence within the meaning of this definition.

Section 67(2)(d)–(f) also lists a number of Commonwealth offences which are purported to fall within the definition of a "prescribed sexual offence" in respect of which an ICO must not be made.

[20-760] Other aggravating circumstances

Breach of trust

In *R v Qin* [2008] NSWCCA 189, offences under ss 61I and 61L that were committed in the context of a relationship between a masseuse and his customer were aggravated by a breach of the trust inherent in that relationship: at [36], [49].

See "Breach of trust" in **Sexual offences against children** at **[17-560]**.

Risk of pregnancy

The risk of pregnancy is an aggravating factor that can be taken into account in sentence: *KAB v R* [2015] NSWCCA 55. The court (Wilson J and Ward JA agreeing, Simpson J in dissent) in *KAB v R* held that there was no denial of procedural fairness for the judge to take into account that there was a "high risk of pregnancy" when the agreed facts included that the offender had penile/vaginal intercourse with his step-daughter and ejaculated into her vagina where neither party had raised the issue at the sentencing hearing. On appeal, the offender argued that had he known the judge was going to take this factor into account he would have submitted evidence that he had undergone a vasectomy.

Use of weapon

The use of a knife in sexual offences, where it can be taken into account as a matter of aggravation, is regarded by the court as abhorrent to the community, and will lead to a significant increase in the sentence: *R v Rothapfel* (unrep, 4/8/92, NSWCCA) per Studdert J at [12]. Offenders who use knives in sexual attacks must expect stern punishment: *R v H* (unrep, 23/8/96, NSWCCA) per Studdert J.

Home invasion

It is an aggravating circumstance where a victim is assaulted in his or her own home both at common law and under s 21A(2)(eb) *Crimes (Sentencing Procedure) Act*. Break and entry into a dwelling-house is also a specified circumstance of aggravation under ss 61J(2)(h) and 66C. In *R v Preston* (unrep, 9/4/97, NSWCCA) at 25, Dunford J said:

> sexual assault is a serious offence at any time, but its criminality is aggravated when it is committed against a defenceless woman in the sanctity of her own home.

Examples where sexual assault offences were committed in the context of break and enter offences include: *R v Johnston* [2002] NSWCCA 201; *R v Anderson* [2002] NSWCCA 304; *R v Hoang* [2003] NSWCCA 380; *R v Allan* [2004] NSWCCA 107; *R v DAC* [2006] NSWCCA 265 and *R v Oloitoa* [2007] NSWCCA 177.

Offences committed by medical practitioner

The gravity of sexual offences is magnified by the circumstance that it involved a breach of trust which the patient reposed in a medical practitioner: *R v Arvind* (unrep, 8/3/96, NSWCCA) per Grove J at [16]. Criminal interference with the bodies of persons seeking health care by medical practitioners will be met with stern retribution. Patients are extremely vulnerable and taking advantage of that situation for self-gratification means that general and personal deterrence will be part of an appropriate sentence: *R v Arvind*.

Drink spiking

Sexual offences which are preceded by spiking the victim's drink are ordinarily dealt with under ss 38 and 38A. See discussion in **Assault, wounding and related offences** at [50-110].

Intoxication

Intoxication as a factor in sentencing is discussed in **Subjective matters at common law** at **[10-480]**.

[20-770] Mitigating circumstances

Youth of offender

The general principle is that in cases involving young offenders, general deterrence is given less weight and more emphasis is placed on rehabilitation. However, where a youth behaves like an adult and commits a sexual assault of considerable gravity, the function of the courts and the primary objective of sentencing is the protection of the community: *R v Nichols* (1991) 57 A Crim R 391; *R v Gordon* (1994) 71 A Crim R 459 at 469; *R v BUS* (unrep, 3/11/95, NSWCCA); *R v DAR* (unrep, 2/10/97, NSWCCA); *R v AEM* [2002] NSWCCA 58; *R v Alcazar* [2017] NSWCCA 51 at [122]–[124]. It is not the youth of an offender per se that justifies the amelioration of a sentence, but

the circumstances of a particular juvenile offender and a particular offence that may indicate that general deterrence and retribution should play a lesser role: *IE v R* (2008) 183 A Crim R 150 at [16]. Special considerations must be applied under Pt 2 Div 4 *Children (Criminal Proceedings) Act* 1987 where the offender is under 18 years of age at the time of the offence and under 21 years when charged.

See the further discussion of this factor in **Subjective matters at common law** at **[10-430]**.

Mental condition

See discussion of this factor in **Subjective matters at common law** at **[10-460]**.

Delay

The suspense or uncertainty suffered by an offender who remains silent in the hope that his or her offences will not be discovered must not be taken into account on sentence: *R v Spiers* [2008] NSWCCA 107 at [37]–[38] and cases cited therein. The delay enabled the sentencing judge to conclude that this offender was unlikely to re-offend, but the court noted at [39] that this was "perhaps not properly regarded as rehabilitation".

In *R v Hall* [2017] NSWCCA 313, the court observed that there are cases where the descriptor "delay" is inapt and suggests "something that might have occurred earlier was deferred, postponed or put off until later": *R v Hall* at [98]. In that case, the 23-year delay between the offences (in respect of which the victim had immediately complained) and his arrest was solely attributable to the respondent evading detection. The court found that the concepts of delay and "stale crime" do not automatically lead to certain consequences in sentencing, such as leniency. The underlying circumstances and their impact on the assessment of sentence must be considered: *R v Hall* at [98]–[99].

Rehabilitation and established good character in the time since offending is a relevant consideration: *R v Hall* at [100]. However, general deterrence still has a role to play. It is important it is known that the criminal justice system will punish, denounce and make an offender accountable for serious criminal offending, no matter how long it takes for them to be brought to account (where the time required to do so is not the fault of anyone else): *R v Hall* at [122].

See also discussion of delay in **Sexual offences against children** at **[17-570]** and **Subjective matters at common law** at **[10-530]**.

Extra-curial punishment

The court is entitled to take into account punishment meted out by others, such as abuse and harassment and threats of injury to person and property: *R v Allpass* (1993) 72 A Crim R 561 at 566. In *R v Holyoak* (1995) 82 A Crim R 502 at 506, the court took account of the fact that the applicant had suffered substantially from personal harassment by media representatives and received a large volume of "hate" communications from members of the public. The punishment commenced, in a real sense, before his sentence.

In *Sharwood v R* [2006] NSWCCA 157, the judge erred by excluding evidence that the applicant was beaten in his home in the presence of his wife and daughter by two men in relation to his offences under s 61M(1). The attack resulted in physical

injury and damage to the applicant's house. The court held at [67] that the incident was a matter which should have been taken into account as a subjective circumstance justifying some degree of leniency.

See further discussion of this factor in **Subjective matters at common law** at **[10-520]**.

Possibility of summary disposal

The *Criminal Procedure Act* 1986 makes provisions in Ch 5 of the Act for some indictable offences to be dealt with summarily in certain circumstances. Section 260 provides:

> (1) An indictable offence listed in Table 1 to Schedule 1 is to be dealt with summarily by the Local Court unless the prosecutor or the person charged with the offence elects in accordance with this Chapter to have the offence dealt with on indictment.
>
> (2) An indictable offence listed in Table 2 to Schedule 1 is to be dealt with summarily by the Local Court unless the prosecutor elects in accordance with this Chapter to have the offence dealt with on indictment.

Section 260 applies to the following sexual assault offences:

- indecent assault — s 61L [Table 2 offence]
- aggravated indecent assault — s 61M [Table 1 offence]
- act of indecency — s 61N [Table 2 offence]
- aggravated act of indecency — s 61O(1), (1A) [Table 2 offence] and s 61O(2), (2A) [Table 1 offence]
- sexual intercourse — child between 14 and 16 — s 66C(3) [Table 1 offence]
- attempting, or assaulting with intent, to have sexual intercourse with child between 10 and 16 — s 66D [Table 1 offence, where victim 14 years of age or over]
- procuring or grooming child under 16 for unlawful sexual activity — s 66EB [Table 1 offence]
- attempt to commit bestiality — s 80 [Table 1 offence]
- procuring person for prostitution — s 91A [Table 1 offence]
- procuring person for prostitution by drugs, etc — s 91B [Table 1 offence]
- production, dissemination or possession of child abuse (previously child pornography) material — s 91H [Table 1 offence]
- aggravated voyeurism — s 91J(3) [Table 1 offence]
- aggravated offence of filming a person engaged in private act — s 91K(3) [Table 1 offence]
- aggravated offence of filming a person's private parts — s 91L(3) [Table 1 offence].

Where an offence that could have been dealt with summarily is prosecuted on indictment, the court may have regard to that fact but only in the exceptional circumstances outlined in *Zreika v R* (2012) 223 A Crim R 460 at [107]–[109].

See further discussion of this factor in **Objective factors at common law** at **[10-080]**.

Hardship of custody

Sentencers should no longer assume that persons convicted of sexual assault, who serve their sentences in protection, will spend their time in more onerous custodial conditions than the general prison population: *R v Mostyn* (2004) 145 A Crim R 304 at [179]; *R v Way* (2004) 60 NSWLR 168 at [177] and *R v Gu* [2006] NSWCCA 104 at [33]. The court must base such a conclusion on evidence: *R v Durocher-Yvon* (2003) 58 NSWLR 581 at [22].

This factor is discussed further in **Subjective matters at common law** at **[10-500]**.

[20-775] Factors which are *not* mitigating at sentence

Last reviewed: March 2024

The relevance of a prior relationship

The mere fact that there was a pre-existing relationship between an offender and a victim does not mitigate the criminality of the sexual assault: *R v Cortese* [2013] NSWCCA 148 at [55] and cases discussed therein. The fact that an offence occurred in a domestic context does not lessen its gravity: *R v Hamid* (2006) 164 A Crim R 179; *Heine v R* [2008] NSWCCA 61 at [40]; *R v Harvey* (unrep, 23/8/96, NSWCCA); *R v Grech* [1999] NSWCCA 268 at [34]–[35]. The assessment of the seriousness of the crime will ultimately depend on the facts of the case. One common circumstance in which a pre-existing relationship has been found to diminish the seriousness of a sexual offence is where it suggests some prevarication or at least initial consent on the part of the victim: *Bellchambers v R* [2011] NSWCCA 131 at [47]; *NM v R* [2012] NSWCCA 215 at [59]; *R v Cortese* at [55].

This circumstance has been contrasted to an assault committed by a stranger where there is no such potential prevarication: *R v Cortese* at [50]. See also *Boney v R* (2008) 187 A Crim R 167 at [106] and *NM v R* at [59]. Where the offender is a stranger, a further element of fear and terror would be expected: *ZZ v R* [2013] NSWCCA 83 at [103]. The fact that victim knew the offender and trusted him or her will "provide little comfort": *ZZ v R* at [103]. An offence which is committed where two people are engaged in intimate contact by consent and one of them fleetingly goes too far, is to be distinguished from one where the victim made her lack of consent clear and struggled: *Stewart v R* [2012] NSWCCA 183 at [69]. Offences committed in a domestic context as distinct from an attack from a stranger does not lessen their seriousness: *ZZ v R* at [104]. Sully J said in *R v O'Grady* (unrep, 13/5/97, NSWCCA) that where a relationship breaks down:

> the woman who is involved in the relationship is entitled to feel that, whatever other consequences ensue, her personal safety will not be threatened at all, let alone threatened by the commission of criminal offences of the gravity of those with which we are now called upon to deal.

Grove J said, in *Raczkowski v R* [2008] NSWCCA 152 at [46]:

> a violent and pre planned attack … in … a domestic setting is not a matter of mitigation. This Court has repeatedly stressed that it is a circumstance of significant seriousness: *R v Edigarov* [2001] 125 A Crim R 551; *R v Dunn* [2004] 144 A Crim R 180; *R v Burton* [2008] NSWCCA 128.

Manner of dress and sexual history of victim

It is entirely inappropriate to focus on the prior sexual conduct of the victim or to characterise the victim's manner of dress or behaviour as provocative and as somehow contributing to the commission of the offence: *R v Radenkovic* (unrep, 6/3/90, NSWCCA); *R v King* (unrep, 18/7/91, NSWCCA). The mere fact that the victim permitted the offender to sleep in her bed with her is not a mitigating factor: *R v O'Grady* (unrep, 13/5/97, NSWCCA).

Sex workers are as entitled to the protection of the law against sexual assault as other citizens. In such cases it is wrong to sentence on the basis that the psychological effect on the victim or the gravity of the offence will be less than that experienced by others: *R v Leary* (unrep, 8/10/93, NSWCCA) per Kirby ACJ at 6, disapproving *R v Hakopian* (unrep, 11/12/91, VicCCA).

"Cultural" conditioning

In *R v MAK* [2005] NSWCCA 369 counsel for MSK submitted that the court should favourably consider his appeal because, having come from Pakistan, he was culturally conditioned by its "very traditional views about women". This submission was emphatically rejected by McClellan CJ at CL at [4]:

> Whatever be its intended meaning the submission must be rejected. It is a fundamental right of every person in a civilised society to live without fear of being assaulted, whether it be physical assault or assaults of a sexual nature. For this reason the legislature has made all forms of assault upon the person a crime imposing heavy penalties on those who do not respect that right. When, as happened in the matters under appeal, the conduct of an offender demonstrates a complete disregard for that right our community expects the courts to impose penalties which punish the offender and mark out the seriousness of the offence so that others will be deterred from acting in a similar manner.

Counsel for MSK raised the issue of the relevance of cultural conditioning again at first instance in *R v MSK* [2006] NSWSC 237. Justice Hidden at [45] rejected the submission because it had no factual basis:

> he must have had sufficient exposure to the Australian way of life to be aware that the place occupied by women in the traditional culture of his area of origin is far removed from our social norms. He can have been in no doubt that to treat those two young women in the manner he did was utterly unacceptable.

Intoxication

Intoxication as a factor in sentencing is discussed in **Subjective matters at common law** at **[10-480]**.

[20-780] Sentencing for offences committed many years earlier

The court in *R v Hall* [2017] NSWCCA 313, confirmed that, in sentencing for sexual assault offences committed many years prior, judges should adopt the approach outlined by Howie J in *R v Moon* (2000) 117 A Crim R 497 at [70]–[71]. That is, where there is an absence of reliable statistical data for sentencing patterns at the time of the offence, the nature of the criminal conduct involved and the maximum penalty will be important factors in determining the appropriate sentence: *R v Hall* at [74]–[75].

This topic is further dealt with in **Sexual offences against children** at **[17-410]**.

[20-790] Utility of sentencing statistics

In *R v Shannon* [2006] NSWCCA 39 the applicant was charged with three counts of sexual intercourse with a 12-year-old victim under s 66C *Crimes Act* 1900. His counsel relied on available statistics and an examination of comparable cases dealt by the Court of Criminal Appeal to argue that the sentences imposed were at the "upper higher level" of punishment imposed for offences against this section. Justice Howie stated at [36]:

> The decisions referred to, the schedule relied upon by the applicant and the statistics maintained by the Judicial Commission indicate that there is a wide variation in the sentences that are imposed for offences of this type. That no doubt reflects the range of activity included within the concept of sexual intercourse and in the varying circumstances surrounding the offending. They are of little assistance in my view except as indicating the sentence imposed by the judge is at the upper end of the range.

In *R v Shortland* [2018] NSWCCA 34, the respondent to the Crown appeal was sentenced, after a trial, to a suspended sentence of 2 years imprisonment on each of three counts of sexual intercourse without consent contrary to s 61I. The sentencing judge was provided with Judicial Commission statistics which showed that 237 cases, where a s 61I offence was the principal offence, were dealt with between 2010 and 2016. In 47 of those cases, there was a conviction after trial and a custodial sentence was imposed in all but one. In 26 cases, offenders received suspended sentences but pleas of not guilty were entered in only three of those cases. Basten JA (RA Hulme J agreeing at [37]) concluded that the judge erroneously used sentencing precedent partly by focusing on the 26 cases where suspended sentences were imposed, observing that three out of 237 cases did not constitute a relevant sentencing pattern: *R v Shortland* at [6].

[20-800] Victim impact statements

See **Victims and victim impact statements** at **[12-820]**.

[20-810] Section 21A Crimes (Sentencing Procedure) Act 1999

The application of s 21A generally is discussed in detail at **[11-000]**.

Substantial injury, emotional harm, loss or damage: ss 21A(2)(g), (3)(a)

There must be evidence before the court to warrant a finding that the injury and emotional harm caused by the offence was substantial within the terms of s 21A(2)(g). Additional evidence of harm ordinarily found in a victim impact statement is required. In *R v Cunningham* [2006] NSWCCA 176, a child sexual assault case, the judge erred by taking into account as an aggravating factor that the impact of the offence on the victims was substantial. No evidence was led regarding the emotional or psychological harm suffered by any of the complainants.

R v Cunningham should be read with *DBW v R* [2007] NSWCCA 236, where the court held that it was not necessary for expert evidence to be led on matters that have become common knowledge and which could be inferred by common sense. In this case, it was open for the judge to infer, from reports tendered at sentence, a link between the applicant's sexual abuse of his son and his son's inappropriate sexual conduct at school: at [29]. The judge "would have been entitled to act on the basis that there was a substantial harm": at [38]. It was said in *R v King* [2009] NSWCCA 117 at [41] that

it should not be assumed, without evidence to the contrary, that there is no significant damage by way of long-term psychological and emotional injury resulting from a sexual assault of a child: see extract from the judgment at [20-604].

Victim was vulnerable: s 21A(2)(l)

The age of the victim is relevant to determining the objective seriousness of an offence. The younger the victim the more serious the crime: *RJA v R* (2008) 185 A Crim R 178 at [13]. Offences arising out of the home invasion of a 78-year-old woman were aggravated by her age: *R v DAC* [2006] NSWCCA 265 at [19]. On the other hand, an 18-year-old victim was not vulnerable for the purposes of s 21A(2)(l) on account of her age since 18 is the age of adulthood and cannot be regarded as "very young" under s 21A(2)(l): *Perrin v R* [2006] NSWCCA 64 at [35]. However, the victim was vulnerable on the basis that she was affected by alcohol which markedly lowered what she could appreciate and do at the time.

[20-820] Totality and sexual assault offences

Given that it is common for offenders to commit multiple offences, the totality principle has a central role in the sentencing exercise for sexual assault.

The totality principle is a well-established principle of sentencing to be applied by the court when sentencing an offender for more than one offence. It requires a judge or magistrate to determine an appropriate sentence for each offence, consider questions of cumulation or concurrence and then, when reviewing the aggregate sentence consider whether it is "just and appropriate": *Pearce v The Queen* (1998) 194 CLR 610.

The principle of totality requires that the effective sentence imposed on an offender represent a proper period of incarceration for the total criminality involved: *R v AEM* [2002] NSWCCA 58 at [69] per Beazley JA, Wood CJ at CL and Sully J.

The issue is discussed in detail with particular reference to sexual assault offences at **Concurrent and consecutive sentences** at **[8-230]**.

[20-830] Circumstances of certain sexual offences to be considered in passing sentence: s 61U

Section 61U states that where a person is convicted of:

(a) both an offence under s 61I and an offence under s 61K, or

(b) both an offence under s 61J and an offence under s 61K, or

(c) both an offence under s 61JA and an offence under s 61K,

whether at the same time or at different times, the judge passing sentence on the person in respect of the two convictions or the later of the two convictions is required, if it appears that the two offences arose substantially out of the one set of circumstances, to take that fact into account in passing sentence. *R v Ridgeway* (unrep, 16/7/98, NSWCCA) contains a short discussion of s 61U.

[20-840] Use of evidence of uncharged criminal acts at sentence

Last reviewed: March 2024

The court may take into account uncharged acts of a similar nature for the limited purpose of placing the offences charged into context and to rebut an assertion that the

offence is an isolated act or was out of character. The offender is denied leniency to which they might have been entitled if the offence(s) was an isolated incident: *R v H* (1980) 3 A Crim R 53; *R v Burchell* (1987) 34 A Crim R 148; *R v Kozakiewicz* (unrep, 11/6/91, NSWCCA); *R v Hartikainen* (unrep, 8/6/93, NSWCCA); *R v JCW* (2000) 112 A Crim R 466, *MJL v R* [2007] NSWCCA 261 at [15].

In *R v EMC* (unrep, 21/11/96, NSWCCA), the applicant was sentenced on the basis that several of the charges were representative of a wider series of offences. Chief Justice Gleeson said:

> This did not, of course, mean that his Honour was punishing the applicant for those other offences or treating them as part of the criminality in respect of which he was imposing the sentence … it meant that the applicant was not being dealt with on the basis that these were isolated instances.

This use of uncharged acts for this limited purpose does not infringe the principle that a person should not be punished for crimes for which they have not been convicted. There is a distinction between not increasing a penalty based on the presence of an aggravating fact and refusing to extend leniency on account of the fact that the events as charged were not isolated incidents: *R v JCW* (2000) 112 A Crim R 466 per Spigelman CJ at [68]; *MJL v R* [2007] NSWCCA 261 at [15]. However, see also *LN v R* [2020] NSWCCA 131 at [41].

[The next page is 15001]

Assault, wounding and related offences

[50-000] Introduction and statutory framework

This chapter deals with the key personal violence offences under the *Crimes Act* 1900, listed below:

Offence	Section	Penalty (Max)
Common assault	s 61	2 yrs
Assault with intent to commit a serious indictable offence	s 58	5 yrs
Assault occasioning actual bodily harm	s 59	5 yrs
Assault occasioning actual bodily harm in company	s 59(2)	7 yrs
Reckless wounding	s 35(4)	7 yrs/SNPP 3 yrs
Reckless wounding in company	s 35(3)	10 yrs/SNPP 4 yrs
Reckless infliction of grievous bodily harm	s 35(2)	10 yrs/SNPP 4 yrs
Reckless infliction of grievous bodily harm in company	s 35(1)	14 yrs/SNPP 5 yrs
Wound or inflict grievous bodily harm with intent to cause grievous bodily harm or resist arrest	s 33(1)–(2)	25 yrs/SNPP 7 yrs
Use or possess weapon to resist arrest	s 33B(1)	12 yrs
Assault causing death	s 25A(1)	20 yrs
Assault causing death when intoxicated	s 25A(2)	25 yrs
Choke, suffocate or strangle	s 37(1A)	5 yrs
Choke, suffocate or strangle being reckless as to rendering other unconscious etc	s 37(1)	10 yrs
Choke, suffocate or strangle and render unconscious, with intent to commit serious indictable offence	s 37(2)	25 yrs
Administer intoxicating substance	s 38	25 yrs

There are also specific offences of assaulting law enforcement officers and frontline emergency and health workers under Pt 3 Div 8A, with penalties ranging up to 14 years (see **[50-120]**).

In general terms, personal violence offences may be differentiated according to the degree of harm inflicted upon the victim and the intention of the offender, ranging from common assault to those offences where the offender has the intention to inflict a particular type of harm, such as the intentional infliction of grievous bodily harm.

A heavier maximum penalty applies to certain offences due to the occupational status of the victim.

[50-020] Offences of personal violence generally viewed seriously

Offences of personal violence cover a wide spectrum of behaviour and consequences. Such offences are viewed very seriously by the courts. Deterrence is an important consideration, particularly in cases involving violence on the streets: *R v Mitchell* [2007] NSWCCA 296 at [29]; *R v McKenna* [2007] NSWCCA 113 at [2], [33]–[35], and unprovoked attacks on people going about their ordinary business: *R v Woods* (unrep, 9/10/90, NSWCCA), per Lee CJ at CL. The assault causing death offences under s 25A *Crimes Act* 1900 (see [50-085]) were enacted in 2014 because of a concern about unprovoked serious assaults.

[50-030] The De Simoni principle

The *Crimes Act* 1900 creates an escalating statutory scheme for assault and wounding offences. The principle that a court cannot take into account as an aggravating factor a circumstance that would warrant conviction for a more serious offence (*The Queen v De Simoni* (1981) 147 CLR 383 at 389 quoted in *Elias v The Queen* (2013) 248 CLR 483 at fn 65) is an important consideration when sentencing for offences of personal violence — both in terms of the nature of the injury inflicted and the intention or mental element with which the offence is committed.

The *De Simoni* principle is discussed further below in relation to particular offences.

[50-040] Factors relevant to assessment of the objective gravity of a personal violence offence

There are three factors particularly relevant to assessing the objective gravity of a personal violence offence: the extent and nature of the injuries; the degree of violence; and the mental element of the offence. These factors are elaborated upon below and, where relevant, discussed further under each particular offence.

Extent and nature of the injuries

The nature of the injury caused to the victim will, to a very significant degree, determine the seriousness of the offence and the appropriate sentence: *R v Mitchell* [2007] NSWCCA 296 at [27]; *Siganto v The Queen* (1998) 194 CLR 656 at [29]; *R v Zhang* [2004] NSWCCA 358 at [4]. However, there is no rule or principle which mandates that the nature of the injuries sustained will be the most important factor or necessarily determine the assessment of the objective seriousness of the offence: *Waterfall v R* [2019] NSWCCA 281 at [33], [35]. In general terms, the graver the injury, the more serious the offence. An offence may be characterised as falling close to the worst of its kind by reason of the injuries inflicted upon the victim.

Degree of violence

The degree of violence used or ferocity of the attack is a material consideration on sentence: *R v Bloomfield* (1998) 44 NSWLR 734 at 740; *R v Zhang* [2004] NSWCCA 358 at [18]. This is so even if the consequences of the attack on the victim are minimal: *R v Kirkland* [2005] NSWCCA 130 at [33] per Hunt AJA.

Conversely, a victim may suffer very serious injuries but the violence used may have been slight: *R v Bloomfield*, above, at 740.

Intention/mental element

The intention with which the offender inflicts harm is also an important consideration. This factor is referred to in the discussion of particular offences, below.

[50-050] Common assault: s 61

Section 61 *Crimes Act* 1900 provides, "Whosoever assaults any person, although not occasioning actual bodily harm, shall be liable to imprisonment for two years". An assault may be established by proof of either physical contact (battery), or an act which intentionally or recklessly causes another person to apprehend immediate and unlawful violence: *R v Knight* (1988) 35 A Crim R 314 at 316–317; *Barton v Armstrong* [1969] 2 NSWLR 451 at 454–455; *R v Venna* [1976] QB 421; *R v McNamara* [1954] VLR 137.

Extent of injury

As a charge of common assault does not involve actual bodily harm, an offence is not mitigated by virtue of the fact the injuries suffered by the victim were minor: *R v Williams* (unrep, 30/5/94, NSWCCA). The offence in that case was found to be objectively serious, as the offender had punched the victim in a cold and calculated manner.

Degree of violence

The criminality in a s 61 offence is not generally mitigated on account of there being minimal violence. In *R v Lardner* (unrep, 10/9/98, NSWCCA) it was held that a submission to that effect "overlooks the fact that the degree of violence involved in common assault cases is invariably moderate, because if the violence is more severe it causes actual bodily harm or wounding and results in a more serious charge."

In *R v Abboud* [2005] NSWCCA 251, the offender assaulted his partner on three separate days by punching, choking, grabbing her face, kicking and biting. It was accepted that the criminality and circumstances involved in the assaults were of the most serious kind for an offence under s 61: *R v Abboud* at [17], [33].

De Simoni considerations

In *R v Lardner* (unrep, 10/9/98, NSWCCA) the court considered whether the sentencing judge infringed the *De Simoni* principle by taking into account matters which constituted the more serious offence of assault occasioning actual bodily harm. It was observed that "bodily harm" includes any hurt or injury calculated to interfere with the health or comfort of the victim; it need not be permanent but must be more than merely transient or trifling. Physical and emotional reactions to an assault such as difficulty sleeping, memory problems, anxiety and poor concentration were therefore matters properly taken into account in sentencing for common assault. However, a psychiatric condition could constitute "actual bodily harm" and such a condition should not be taken into account in sentencing for common assault.

Evidence which seeks to demonstrate actual bodily harm should not be admitted on sentence for common assault. In *R v Abboud* [2005] NSWCCA 251 at [19], the court said:

> It is impermissible for the Crown to tender, or for a court to admit, evidence in sentencing proceedings for common assault which evidence seeks to demonstrate actual bodily harm. While it may be that this occurs because of agreement relating to a plea on a lesser charge, it is still impermissible and if it is not possible to adduce material relevant to the sentencing without also adducing irrelevant material the matter should be adjourned in order to be dealt with properly. The adducing of such material has become a common occurrence which is to be deprecated.

[50-060] Assault occasioning actual bodily harm: s 59

Assault occasioning actual bodily harm attracts a maximum penalty of 5 years imprisonment, or 7 years if committed in company: s 59.

Extent of the injury and degree of violence

Section 59 does not define actual bodily harm. Typical examples of injuries that are capable of amounting to actual bodily harm include scratches and bruises: *McIntyre v R* (2009) 198 A Crim R 549 at [44]. Actual bodily harm will likely have been occasioned

where a victim has been injured psychologically in a very serious way, going beyond merely transient emotions, feelings and states of mind: *Li v R* [2005] NSWCCA 442 at [45]. The degree of violence involved in an assault is a material consideration in sentencing: *R v Bloomfield* (1988) 44 NSWLR 734 at 740. In that case, a single punch led to very severe injuries occasioned by the victim falling on his head. The sentencing judge properly gave considerable weight to the serious injuries occasioned by the assault, but erred in not considering the limited degree of violence involved. Likewise, an offence may be objectively serious due to the nature of the assault notwithstanding minor injuries: see *R v Burke* [2001] NSWCCA 47 at [17].

De Simoni considerations

The phrase "bodily harm" is to be given its ordinary meaning. It includes "any hurt or injury calculated to interfere with the health or comfort of the victim": *R v Lardner* (unrep, 10/9/98, NSWCCA) per Dunford J at 4. In *McIntyre v R* at [44], Johnson J held:

> It need not be permanent, but must be more than merely transient or trifling — it is something less than *"grievous bodily harm*", which requires really serious physical injury, and "*wounding"*, which requires breaking of the skin …

There is no need to prove a specific intent to cause actual bodily harm for an offence under s 59: *Coulter v The Queen* (1988) 164 CLR 350. The prosecution need only prove that the accused intentionally or recklessly assaulted the victim and that actual bodily harm was occasioned as a result: *R v Bloomfield* (1998) 44 NSWLR 734 at 737.

An act forming the basis of an offence under s 59 may result in serious injuries. Care must be taken not to infringe the principle in *De Simoni* by taking into account injuries and a state of mind which would justify a more serious offence: *R v Overall* (1993) 71 A Crim R 170 at 175; *R v Baugh* [1999] NSWCCA 131 at [35].

An offence under s 59 does not require that the Crown prove the offender intended, or was reckless as to, causing actual bodily harm, whereas an offence under s 35 requires proof that the accused realised the possibility that grievous bodily harm or wounding (as the case may be) may possibly be inflicted upon the victim and yet went ahead and acted as he or she did: *Blackwell v R* [2011] NSWCCA 93 at [82], [120], [170].

[50-070] Recklessly causing grievous bodily harm or wounding: s 35

Section 35 sets out the following offences and maximum penalties:

(1) recklessly causing grievous bodily harm in company: 14 yrs (SNPP 5 yrs),

(2) recklessly causing grievous bodily harm: 10 yrs (SNPP 4 yrs),

(3) reckless wounding in company: 10 yrs (SNPP 4 yrs),

(4) reckless wounding: 7 yrs (SNPP 3 yrs).

There are two categories of offence depending upon the type of injury inflicted with corresponding higher maximum penalties. The Crown must prove the accused caused grievous bodily harm to (s 35(1), (2)) or wounded (s 35(3), (4)) a person and was reckless as to causing actual bodily harm: see *Chen v R* [2013] NSWCCA 116 at [66] and the *Criminal Trial Courts Bench Book* at [4-080] **Recklessness (Malice)**.

Standard non-parole periods

The standard non-parole periods are indicated above and apply to offences "whenever committed": *Crimes (Sentencing Procedure) Act* 1999, Sch 2, Pt 17.

For detailed discussion of the sentencing considerations applicable to standard non-parole periods, see **Standard non-parole period offences — Pt 4 Div 1A** at [7-890]ff.

Extent and nature of injuries

Generally speaking, the seriousness of the offence will significantly depend upon the seriousness of the wounding: *McCullough v R* [2009] NSWCCA 94 at [37]. The injury inflicted is not the only factor in determining the seriousness of an offence under s 35. The nature of the attack and surrounding circumstances are highly relevant: *R v Channells* (unrep, 30/9/97, NSWCCA); *McCullough v R* at [37]. In *R v Douglas* [2007] NSWCCA 31 at [12], it was held that the number of blows and the circumstances in which they were delivered were relevant to the objective seriousness of the offence.

Grievous bodily harm

Section 4(1) defines "grievous bodily harm" to include any permanent or serious disfiguring of the person, the destruction of a foetus, and any grievous bodily disease. At common law, the words "grievous bodily harm" are given their ordinary and natural meaning. "Bodily harm" needs no explanation and "grievous" simply means "really serious": *DPP v Smith* [1961] AC 290; *Haoui v R* (2008) 188 A Crim R 331 at [137], [160]; *Swan v R* [2016] NSWCCA 79 at [54]–[63].

The way in which grievous bodily harm may be inflicted varies substantially: *R v Kama* [2000] NSWCCA 23 at [16]. The seriousness of an offence under s 35 may be assessed by reference to the viciousness of the attack and severity of the consequences: *R v Kama* at [17].

In *R v Esho* [2001] NSWCCA 415 at [160], the court held the offence was properly characterised as a "worst case" having regard to the number of participants and the ferocity of an attack upon the victim. It is not necessary for the injuries caused to the victim to be of the "worst type" for an offence to fall into the "worst case" category (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256); the nature of the offender's conduct may bring it within that category: *R v Westerman* [2004] NSWCCA 161 at [17].

In *Kanengele-Yondjo v R* [2006] NSWCCA 354, the offender was sentenced for two offences of maliciously inflicting grievous bodily harm. The offender infected two victims with HIV, knowing he was carrying the virus. The court agreed with the sentencing judge's assessment of the offences as "heinous crimes which showed a contemptible and callous disregard" for the lives of the victims: *Kanengele-Yondjo v R* at [15]–[16], [50]. The offences were rightly described as falling within the worst case category: *Kanengele-Yondjo v R* at [17]. The expression "worst case category" should now be avoided: see *The Queen v Kilic* at [18].

Wounding

"Wounding" is not defined in the *Crimes Act*. It was been defined at common law to involve the breaking of the skin: *R v Shepherd* [2003] NSWCCA 351 at [31]; *Vallance v The Queen* (1961) 108 CLR 56 at 77; *R v Hatch* [2006] NSWCCA 330 at [16]; *R v Devine* (1982) 8 A Crim R 45 at 47, 52, 56.

The consequences of a wounding can vary widely: *R v Hatch*, above, at [17]; and may be quite minor: *R v Hooper* [2004] NSWCCA 10 at [36]. It need not involve the

use of a weapon: *R v Shepherd*, above at [32]. A case involving significant wounding does not by virtue of that factor alone mean the offence attracts the maximum penalty. The offender's mental state is a relevant factor, particularly if there is a degree of cognitive disturbance and an absence of premeditation: *R v Aala* (unrep, 30/5/96, NSWCCA).

De Simoni considerations

Although the same penalty applied for the separate offences under (now repealed) s 35(a), malicious wounding, and s 35(b), malicious wounding with intent to inflict grievous bodily harm, it was not permissible to sentence an offender for injuries not charged where those injuries were more serious: *McCullough v R* (2009) 194 A Crim R 439. Howie J said at [39]: "To sentence for the infliction of grievous bodily harm on a charge of wounding, seems to me to eradicate the difference between the two offences". Similar logic must apply to the offences created in s 35(2) and (4).

A sentencer must be careful to differentiate between an offence under s 35 and an offence under s 33 which involves specific intent. That does not mean there is no "room for a 'worst case' under s 35 without crossing the boundary of s 33": *R v Esho* [2001] NSWCCA 415 at [160].

As the more serious offence under s 33 requires proof of an intention to inflict grievous bodily harm, there is no breach of *De Simoni* by taking into account in sentencing for an offence under s 35 that the offender intended to inflict actual bodily harm: *R v Channells* (unrep, 20/9/97, NSWCCA); *R v Driscoll* (unrep, 15/11/90, NSWCCA).

Offences under s 35 carry higher maximum penalties where the offence is committed in company: s 35(1), (3). It is a breach of the *De Simoni* principle to treat the circumstance of being in company as an aggravating feature when sentencing an offender for the basic offence: *R v Tran* [2005] NSWCCA 35 at [17].

[50-080] Wound or inflict grievous bodily harm with intent to do grievous bodily harm or resist arrest: s 33

Section 33 sets out the offences of wounding or inflicting grievous bodily harm with intent to cause grievous bodily harm (s 33(1)(a)–(b)) and wounding or inflicting grievous bodily harm with intent to resist or prevent lawful arrest or detention (s 33(2)(a)–(b)). The maximum penalty is 25 years imprisonment for each offence.

For definitions of "grievous bodily harm" and "wounding" see [50-070], above.

Standard non-parole periods

A standard non-parole period of seven years applies to s 33 offences committed on or after 1 February 2003: *Crimes (Sentencing Procedure) Act* 1999, ss 54A–54D.

For discussion of the sentencing considerations applicable to standard non-parole periods, see **Standard non-parole period offences — Pt 4 Div 1A** at [7-890]ff.

General sentencing principles

For a useful summary of the relevant sentencing principles see *AM v R* [2012] NSWCCA 203 at [67]–[74].

The maximum sentence of 25 years imprisonment indicates the seriousness with which an offence under s 33 is regarded: *R v Zhang* [2004] NSWCCA 358 at [28]; *R v Watt* (unrep, 2/4/97, NSWCCA); *R v Zamagias* [2002] NSWCCA 17 at [11]. It is the longest determinate sentence available for an offence in the *Crimes Act* 1900: *R v Hookey* [2018] NSWCCA 147 at [57].

A breadth of conduct and consequences is comprehended by s 33: *R v Williams* [2004] NSWCCA 246 at [51]; *Heron v R* [2006] NSWCCA 215 at [54]. It is important for the sentencer to analyse the facts of each case. Notwithstanding the circumstances giving rise to the offence vary widely and the range of culpability is vast, some assistance may be gained from considering the sentences imposed in other cases to achieve consistency: *Newman v R* [2015] NSWCCA 270 at [19].

In *Kennedy v R* [2008] NSWCCA 21 it was held that the offender's psychological condition — not just the physical act — is relevant in determining the objective seriousness of an offence under s 33: at [41]. However, in *Muldrock v The Queen* (2011) 244 CLR 120, the High Court appear to exclude an offender's mental condition from an assessment of objective seriousness: at [54]–[55].

Extent and nature of the injuries

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Intention

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

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

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

Degree of violence

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

Cases that attract the maximum

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

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

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

De Simoni considerations

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

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

Double counting

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

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

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

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

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

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

The maximum penalty for the offence is 20 years imprisonment.

Assault causing death while intoxicated

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

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

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

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

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

Last reviewed: March 2024

Section 33B provides it is an offence to use, attempt to use, threaten to use, or possess an offensive weapon or instrument, or threaten injury to any person or property with any of the following states of mind:

- intent to commit an indictable offence
- intent to prevent or hinder lawful apprehension or detention
- intent to prevent or hinder investigation.

The maximum penalty is 12 years, or 15 years if committed in company.

General sentencing principles

In *R v Hamilton* (1993) 66 A Crim R 575, Gleeson CJ said 581:

> … offences against s 33B, which make it unlawful to use an offensive weapon or instrument with intent to prevent lawful apprehension, are regarded by the Court extremely seriously. It is incumbent upon the Court in dealing with offences of this nature to show an appropriate measure of support for police officers who undertake a difficult, dangerous and usually thankless task.

Remarks to similar effect were made in *R v Barton* [2001] NSWCCA 63 at [33].

General deterrence must play a significant role in the sentencing of offenders for offences contrary to s 33B: *Sharpe v R* [2006] NSWCCA 255 at [72]. In *R v Perez* (unrep, 11/12/91, NSWCCA), a case involving the driving of a vehicle towards police officers, Kirby P (with whom Gleeson CJ and Campbell J agreed) said at pp 20–21:

> The provision of the specific offence found in s 33B of the *Crimes Act* was obviously intended by Parliament to keep our community free of just the kind of conduct of which the jury convicted the appellant in this case … If in such circumstances, persons defy the instructions of police officers to halt and use motor vehicles or other weapons in an attempt [to] prevent detention, they must expect heavy punishment. Nothing else will mark society's disapproval of the objective features of such offences … Only by imposing severe punishment will courts reflect the seriousness which Parliament has attached to such offences by the specific provisions of s 33B of the *Crimes Act*. Only in that way may the message of deterrence be sent from the courts to people who are tempted to act as the appellant did.

The threat of violence constituted by an offender using an offensive weapon to prevent lawful apprehension cannot be considered an aggravating factor of an offence under s 33B(1)(a) as this is an essential element of that offence: *R v Franks* [2005] NSWCCA 196 at [26]–[27]; s 21A(2) *Crimes (Sentencing Procedure) Act* 1999. By contrast, that the victim is a police officer may be taken into account as an aggravating factor as s 33B was not enacted to specifically protect police and the offence contemplates a broad range of victims: *Courtney v R* [2022] NSWCCA 223 at [51]–[53].

Harm

In *R v Mostyn* [2004] NSWCCA 97, it was an aggravating factor that, as a result of the offence, the victim (a police officer) suffered from a Post Trauma Distress Disorder that left him permanently disabled so far as his police duties were concerned: *R v Mostyn* at [186].

Use of particular weapons

The brandishing of a firearm constitutes a serious form of the offence, even if the firearm is incapable of being discharged: *R v Mostyn* [2004] NSWCCA 97 at [187]. In *Curtis v R* [2007] NSWCCA 11, it was noted that the brandishing of knives was sufficient to constitute the offence. The offender's use of a knife to kill a police dog aggravated the offence and took it into the higher levels of objective seriousness: *Curtis v R* at [66]–[67].

Using a syringe to threaten a store's employees attempting to apprehend a shoplifter was characterised as "serious criminal responsibility" in *R v Carter* (unrep, 29/10/97, NSWCCA).

In *R v Sharpe* [2006] NSWCCA 255, it was held that it would be impermissible to have additional regard to the threatened use of a weapon as an aggravating factor given that the threat to use an offensive weapon is an element of an offence under s 33B: *R v Sharpe* at [49]–[50].

De Simoni considerations

It is a breach of the principle in *De Simoni* to take into account that grievous bodily harm was occasioned for an offence under s 33B: *R v Kumar* [2003] NSWCCA 254 at [11].

[50-100] Choking, suffocating and strangulation: s 37

Section 37 provides for three separate choking offences. It is an offence under s 37(1A) *Crimes Act* 1900 to intentionally choke, suffocate or strangle a person without consent. The maximum penalty is 5 years imprisonment.

Under s 37(1) it is an offence if a person:

- intentionally chokes, suffocates or strangles another person so as to render them unconscious, insensible or incapable of resistance; and
- is reckless as to rendering the other person unconscious, insensible or incapable of resistance.

The maximum penalty is 10 years imprisonment.

Under s 37(2), an offence is aggravated by the fact that the choking, suffocating or strangling is done by the offender with the intention of enabling themselves to commit, or assisting another person to commit, another indictable offence (meaning an indictable offence other than an offence against s 37: s 37(3)).

The maximum penalty is 25 years imprisonment.

[50-110] Administer intoxicating substance: s 38

Section 38 *Crimes Act* 1900 sets out an offence of administering an intoxicating substance with intent to commit an indictable offence. Before 28 March 2008, the offence was expressed in terms of administering "any chloroform, laudanum or other stupefying or over-powering drug or thing". The substitution of "intoxicating substance" (defined in s 4(1) to include alcohol, a narcotic drug or any other substance that affects a person's senses or understanding) is not expected to significantly affect the sentencing principles applicable to this offence. The maximum penalty remains at 25 years imprisonment.

In *R v Reyes* [2005] NSWCCA 218 Grove J said at [81] that "a gauge to the seriousness with which Parliament has regarded offences of this type can be found in the prescription of a maximum term of twenty five years imprisonment" and emphasised the importance of general deterrence in sentences for offences under s 38. Beazley JA said in *Samadi v R* (2008) 192 A Crim R 251 at [160] that the legislature and the courts do not think drink or food spiking is a "soft crime" and "[t]hose who are convicted of such offence should expect to be dealt with by the courts on the basis that it is a very serious crime."

A conviction for an offence under s 38 is often accompanied by a conviction for the indictable offence which motivated the commission of the s 38 offence. However, courts have emphasised the need to impose a salutary penalty for an offence under s 38 in its own right: *R v Lawson* [2005] NSWCCA 346 at [31]; *R v Dawson* [2000] NSWCCA 399 at [54]; *Samadi v R* at [160]. In *R v TA* (2003) 57 NSWLR 444 at [34], the court rejected the submission that there should be only slight accumulation of sentences:

> … committing sexual offences whilst the victim has been drugged adds a significant degree of culpability to the administration of the drug intending to commit the offence. … Furthermore, the deterrent effect of a slight accumulation, as proposed by the applicant, would be significantly eroded. Having administered the stupefying drug, the offender would then suffer little more punishment by moving to the next step and actually committing the intended or other sexual assaults. I consider that the distinction between the offences is real and punishment for both should reflect the considerable additional criminality involved in fulfilling the intention with which the drug is given.

An offence under s 38 is aggravated if the administration of the substance was "potentially injurious of itself": *R v TA* at [34]; see also *R v Bulut* [2004] NSWCCA 325 at [15].

[50-120] Assaults etc against law enforcement officers and frontline emergency and health workers

Pt 3 Div 8A *Crimes Act* 1900 sets out offences for actions against law enforcement officers and frontline emergency and health workers.

Offence	Victim	Penalty (Max)
Hinder/resist, or incite another to hinder/resist, in execution/course of duty:	• police officer (s 60(1AA)); • law enforcement officer (s 60A(1AA); • frontline emergency worker (s 60AD(1)); • frontline health worker (s 60AE(1)).	20 pu and/or 1 yr
Assault, throw missile at, stalk, harass or intimidate, in execution/course of duty:	• police officer (s 60(1)); • law enforcement officer (s 60A(1)); • frontline emergency worker (s 60AD(2)); • frontline health worker (s 60AE(2)).	5 yrs
Assault, throw missile at, stalk, harass or intimidate, in execution/course of duty *during public disorder*:*	• police officer (s 60(1A)); • law enforcement officer (s 60A(1A)); • frontline emergency worker (s 60AD(3)); • frontline health worker (s 60AE(3)).	7 yrs
Assault causing actual bodily harm in execution/course of duty:	• police officer (s 60(2)); • law enforcement officer (s 60A(2)); • frontline emergency worker (s 60AD(4)); • frontline health worker (s 60AE(4)).	7 yrs
Assault causing actual bodily harm in execution/course of duty *during public disorder*:*	• police officer (s 60(2A)); • law enforcement officer (s 60A(2A)); • frontline emergency worker (s 60AD(5)); • frontline health worker (s 60AE(5)).	9 yrs
Recklessly wound/cause grievous bodily harm in execution/course of duty:	• police officer (s 60(3)); • law enforcement officer (s 60A(3)); • frontline emergency worker (s 60AD(6)); • frontline health worker (s 60AE(6)).	12 yrs
Recklessly wound/cause grievous bodily harm in execution/course of duty *during public disorder*:*	• police officer (s 60(3A)); • law enforcement officer (s 60A(3A)); • frontline emergency worker (s 60AD(7)); • frontline health worker (s 60AE(7)).	14 yrs

For these offences, an action is taken to be carried out against the specified victim in the execution/course of their duty, even if they are not on duty at the time, if it is carried out—

- as a consequence of, or in retaliation for, actions undertaken by the victim in the execution/course of their duty, or
- because the victim is a police officer, law enforcement officer or frontline emergency/health worker: see ss 60(4), 60A(4), 60AD(8), 60AE(8), respectively.

Assaults against police officers have long been treated as serious offences requiring condign punishment: *R v Crump* (unrep, 7/2/1975, NSWCCA). General and specific deterrence are important considerations in sentencing for such offences: *R v Myers* (unrep, 13/2/90, NSWCCA); *R v Edigarov* [2001] NSWCCA 436 at [42].

* "Public disorder" is defined in s 4 as a riot or other civil disturbance that gives rise to a serious risk to public safety, whether at a single location or resulting from a series of incidents in the same or different locations, including at a correctional centre or juvenile detention centre.

Standard non-parole periods

Under ss 54A–54D *Crimes (Sentencing Procedure) Act* 1999, the standard non-parole period of three years for s 60(2) offences and five years for s 60(3) apply to offences committed on or after 1 February 2003: see *Winn v R* [2007] NSWCCA 44; and *Kafovalu v R* [2007] NSWCCA 141. In *Kafovalu* it was held that the sentencing judge did not err in treating an offence under s 60(2) involving a single but heavy blow to the officer's head as one falling within the mid-range of objective seriousness.

For detailed discussion of the sentencing considerations applicable to standard non-parole periods, see **Standard non-parole period offences — Pt 4 Div 1A** at [7-890]ff.

Application for guideline judgment

In 2002, the Attorney General unsuccessfully sought a guideline judgment in relation to offences under s 60(1): *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (No 2 of 2002)* [2002] NSWCCA 515 at [64]. However, Spigelman CJ emphasised the importance of deterrence as a consideration in sentencing offenders for assault against police officers at [22] and [26]:

> Offences involving assault of police officers in the execution of their duty are serious offences requiring a significant element of deterrence in the sentences to be imposed. The community is dependent to a substantial extent upon the courage of police officers for protection of lives, personal security and property. The Courts must support the police in the proper execution of their duties and must be seen to be supporting the police, and their authority in maintaining law and order, by the imposition of appropriate sentences in cases where assaults are committed against police.
>
> …
>
> … significant risks are run by police officers throughout the State in the normal execution of their duties. The authority of the police, in the performance of their duties, must be supported by the courts. In cases involving assaults against police there is a need to give full weight to the objective of general deterrence and, accordingly, sentences at the high end of the scale, pertinent in the light of all the circumstances, are generally appropriate in such cases.

The court pointed out that these principles applied to sentencing in both the Local and District Courts: at [27]. The court also recognised that offences under s 60(1) encompass a wide range of behaviour, and that whether a custodial sentence is required will depend on the nature of the assault: at [38]–[39].

Serious cases under s 60(2)

In *Bolamatu v R* [2003] NSWCCA 58, the offender ran over a police officer while leaving the scene in a car. The police officer had stood in front of the car holding out her arm to signify "stop". The officer suffered grave injuries. It was held that this was "as reprehensible as [an offence under s 60(2)] can be, and therefore could be seen as demanding something like the maximum possible sentence": *Bolamatu v R* at [10].

De Simoni considerations

In *R v Pickett* [2004] NSWCCA 389, the offender pleaded guilty to assault occasioning actual bodily harm to a police officer (s 60(2)) after being originally charged with using an offensive weapon, namely a motor vehicle, with intent to avoid lawful apprehension (s 33B(1)). So long as the sentencing judge did not find that the motor vehicle was used

with the intention of avoiding lawful apprehension there would be no infringement of the *De Simoni* principle: at [14]. A finding that the offender had acted intentionally or deliberately did not necessarily entail a conclusion that he was guilty of the more serious offence under s 33B. There was no infringement of *De Simoni*. It was open to find there was an intention to commit the assault without taking the further step of concluding that there was also an intention in doing so to avoid lawful apprehension: *R v Pickett* at [16].

In *R v Newton* [2004] NSWCCA 47, the offender was charged with various offences including use of an offensive weapon to avoid lawful apprehension (s 33B) and assault police in execution of duty (s 58). The fact the offender was, around the time of the assault, armed with and brandishing knives was relevant to the objective gravity of the offence and did not infringe the *De Simoni* principle: *R v Newton* at [22]–[23]; cf *R v Simpson* [2001] NSWCCA 239 at [15]–[18].

[50-125] Assaults etc against persons who aid law enforcement officers, and other offences

A person who assaults a person who comes to the aid of a law enforcement officer who is being assaulted in the course of their duty is liable to 5 years imprisonment: s 60AB. It is also an offence to hinder or obstruct a person who comes to the aid of a law enforcement officer who is being hindered or obstructed in the course of their duty, punishable by 1 year imprisonment and/or 20pu: s 60AC.

Section 60B(1) sets out offences for assault etc against a person in a domestic relationship with a law enforcement officer. It is also an offence under s 60C to obtain personal information about law enforcement officers in certain circumstances. A maximum penalty of 5 years imprisonment applies to offences under these provisions.

[50-130] Particular types of personal violence

Domestic violence

For a discussion of the general sentencing approach to domestic violence, see **Domestic violence offences** at [63-500]ff.

The High Court has recognised that current sentencing practices for offences involving domestic violence have departed from past practices due to changes in societal attitudes to domestic relations: *The Queen v Kilic* (2016) 259 CLR 256 at [21]. Rigorous and demanding consequences for the perpetrators of domestic violence are necessary to protect partners, family members and the wider community: *Cherry v R* [2017] NSWCCA 150 at [78].

General deterrence, personal deterrence and denunciation are particularly important in cases of domestic violence: *DPP v Darcy-Shillingsworth* [2017] NSWCCA 224 at [82]–[84]; *Hurst v R* [2017] NSWCCA 114 at [166]; *Vragovic v R* [2007] NSWCCA 46 at [33]; *R v Hamid* (2006) 164 A Crim R 179 at [68]. The importance of these principles was reiterated in *R v JD* [2018] NSWCCA 233, where the offending was committed by the respondent against his wife and daughter over a six year period: at [80]–[81], [102].

The imposition of suspended sentences for three assault and wounding offences was found in *DPP v Darcy-Shillingsworth* at [85] not to reflect the community's interest in general deterrence in domestic violence cases. The criminal law must "play its part

in the endeavour to quell and redress violence of this nature … even when committed by a man with much to be said for his otherwise good character": *DPP v Darcy-Shillingsworth* at [108].

A prior relationship between the offender and the victim does not mitigate an offence of personal violence: *Raczkowski v R* [2008] NSWCCA 152 at [46]. An offence committed during a domestic relationship necessarily entails the abuse of a relationship of trust: *The Queen v Kilic* at [28]. A sentencing judge should not enter into a determination of the merits of matrimonial disputes: *R v Kotevski* (unrep, 3/4/98, NSWCCA). Distress at the breakdown of a relationship is no excuse for violence: *Walker v R* [2006] NSWCCA 347 at [7]. Nor should an indication of forgiveness on the victim's part be used to reduce an otherwise appropriate penalty, given that victims of domestic violence "may be actively pressured to forgive their assailants or compelled for other reasons to show a preparedness to forgive them": *Shaw v R* [2008] NSWCCA 58 at [27]; *R v Quach* [2002] NSWCCA 173 at [28]: *R v Rowe* (1996) 89 A Crim R 467 at 472–473; *R v Fahda* [1999] NSWCCA 267 at [26]; *R v Berry* [2000] NSWCCA 451 at [32]. However, in *Shaw v R*, the victim's forgiveness and expression of ongoing support was given some weight on re-sentence because, in the particular circumstances of that case, it was an indication of the offender's favourable prospects of rehabilitation: *Shaw v R* at [45].

In *Hurst v R*, the underlying themes of the violent attacks on the victim, which included gratuitous cruelty, control, and an intention to humiliate and demean her, were said to demonstrate the very worst aspects of domestic violence and to indicate a very high level of moral culpability: *Hurst v R* at [162]–[164].

It is an aggravating factor if an offence is committed in breach of an Apprehended Domestic Violence Order (ADVO): *Kennedy v R* [2008] NSWCCA 21 at [8]; *R v Macadam-Kellie* [2001] NSWCCA 170 at [37]–[38]; *R v Rumbel* (unrep, 15/12/94, NSWCCA). Breaching an ADVO is distinct from a breach of conditional liberty simpliciter because it involves breaching an order specifically designed to protect the victim from further attacks: *Cherry v R*, above, at [80].

Section 12 *Crimes (Domestic and Personal Violence) Act* 2007 provides for the recording of "domestic violence offences" on a person's criminal record when a person pleads guilty to or is found guilty of such an offence: s 12(2). If the court directs that an offence be recorded as a domestic violence offence, the prosecution may apply for further offences on the person's record to be so classified: s 12(3). In the Second Reading Speech to the Bill, it was said that having a conviction for domestic violence "would leave a permanent stain on a person's record and would be readily identifiable by a sentencing court or a court making a bail determination".

A domestic violence offence is committed against a person with whom the offender has a domestic relationship. It is either a personal violence offence or an offence that arises substantially from the same circumstances as those from which a personal violence offence has arisen or is committed with the intention to coerce or control the victim or to cause that person to be intimidated or fearful (or both): s 11. A "domestic relationship" is defined in s 5. The definition of "personal violence offence" in s 4 includes all assault and wounding offences referred to in the list at [50-000] **Introduction and statutory framework**, except for the offences against s 25A *Crimes Act* 1900.

In addition, on convicting an offender of a domestic violence offence, a court must make an ADVO for the victim's protection unless satisfied an order is "not required": s 39 *Crimes (Domestic and Personal Violence) Act* 2007.

Child abuse

In *R v Smith* [2005] NSWCCA 286 Latham J said at [54]:

> Even when offences against children are committed as a result of momentary lapses of control (which was not the case here) this Court has stressed that appropriately severe sentences have an important deterrent function:
>
> > "Young children cannot protect themselves from the acts of adults. They cannot lodge complaints about criminal behaviour perpetrated upon them. They are entirely reliant upon their parents … to care for them and protect them. [Where] that protective trust [is] abused … the only protection which society can give to young children is the protection afforded by the courts: *R v Pitcher* 19/2/96 NSWCCA unreported."

Similar comments were made in *R v O'Kane* (unrep, 9/3/95, NSWCCA), a case involving seven counts of maliciously inflicting grievous bodily harm by the offender on his infant son:

> It is important that all in the community understand that children cannot be ill-treated, let alone be the victims of the malicious infliction of serious bodily harm. Personal problems on the part of adults do not excuse such conduct.

Prison officers

Personal and general deterrence are important considerations in sentencing for offences of violence against prison officers: *R v Davis* (unrep, 4/2/94, NSWCCA).

The vast power differential arising when a prison officer assaults an inmate is relevant to assessing the objective seriousness of the offence, particularly as it relates to matters of aggravation. Prison officers have authority over inmates who are entitled to assume such officers will not abuse that position of authority: *Waterfall v R* [2019] NSWCCA 281 at [34]–[37]. In that case, an appeal against a sentence of 5 years, 9 months imprisonment with a non-parole period of 3 years, 9 months was dismissed. The court concluded that while the sentence was substantial, it appropriately reflected the gravity of the offence: at [52]–[53].

Inmates

General deterrence is also important in cases of very serious violence in a prison and sentences for such offences must demonstrate that violence and disorder between prisoners is not tolerated. Prisoners are sentenced to be deprived of their liberty, not suffer brutality at the hands of other prisoners. It is material to the seriousness of an offence that an inmate is vulnerable because their movements are restricted: *Tohifalou v R* [2018] NSWCCA 283 at [40]–[41].

"Gang" assaults

In *R v Duncan* [2004] NSWCCA 431, Wood CJ at CL said at [218]:

> Young offenders who elect to respond to any form of confrontation between different groups, need to understand, with crystal clarity, that sentences of imprisonment await those who cause the confrontation to be elevated to one involving extreme violence. Particularly is that so if they band together, in a brutal and cowardly pack attack with weapons, on a single unarmed and defenceless victim.

[50-140] Common aggravating factors under s 21A and the common law

Certain objective aggravating factors frequently arise in the context of personal violence offences. These factors — which arise either at common law and/or under s 21A *Crimes (Sentencing Procedure) Act* 1999 — are discussed here. For a further discussion of aggravating and mitigating factors, see **Objective factors** at [10-000] and **Section 21A factors** at **[11-000]**.

Weapons

The actual or threatened use of a weapon will generally aggravate a personal violence offence: s 21A(2)(c) *Crimes (Sentencing Procedure) Act* 1999 — provided it does not constitute an inherent element of the offence.

While it is rare for an offence under s 33 not to involve the use of a weapon, the use of a weapon is not an essential element of that offence. Where a weapon has been used in the commission of an offence under s 33 it should be taken into account as an aggravating factor: *R v Chisari* [2006] NSWCCA 19 at [31]; *R v Deng* [2007] NSWCCA 216 at [7], [63]; *R v Dickinson* [2004] NSWCCA 457 at [23]–[24]; *Nowak v R* [2008] NSWCCA 89 at [17].

In *R v Sharpe* [2006] NSWCCA 255 (threaten use of weapon to resist arrest, s 33B(2)), it was held that it would be impermissible to have additional regard to the threatened use of a weapon as an aggravating factor given that the threat to use an offensive weapon is an element of the s 33B(2) offence: *R v Sharpe* at [49].

Many objects not inherently answering the description "weapon" (for example, motor vehicles: *R v Barton* [2001] NSWCCA 63; *R v Kumar* [2003] NSWCCA 254), are nonetheless capable of being so regarded by virtue of their use as a weapon: *R v Smith* [2005] NSWCCA 286 at [38].

Knives etc

The Court of Criminal Appeal has frequently observed that the use of a knife is a feature which specially aggravates the seriousness of an offence: *R v Dickinson* [2004] NSWCCA 457 at [23]; *R v Reid* [2005] NSWCCA 309 at [25]. The presence of a knife in an emotionally charged situation increases the danger of the situation and the penalty which is liable to be imposed: *R v Hampton* [1999] NSWCCA 341 at [10]. Any assault involving the use of a knife must be regarded as calling for a significant sentence, for the purposes of both specific and general deterrence: *R v Watt* (unrep, 2/4/97, NSWCCA). The degree of seriousness in the use of a knife is not proportionate to its size: *R v Doorey* [2000] NSWCCA 456 at [27].

In the case of a machete or meat cleaver, the abhorrence which the community holds in relation to the use of knives is compounded, having regard to the terrible wounds which can be inflicted with such weapons: *R v Zhang* [2004] NSWCCA 358 at [29]. A machete is to be considered a very dangerous weapon: *R v Drew* [2000] NSWCCA 384 at [15]. The use of a weapon such as a screwdriver is on par with the use of a knife: *R v Greiss* [1999] NSWCCA 230 at [13].

Firearms

In an offence under s 33, it is difficult to contemplate a more serious aggravating feature than the use of a handgun: *R v Baquayee* [2003] NSWCCA 401 at [12]. Where a firearm is used to inflict grievous injury, the sentence imposed should involve a substantial

component to reflect general deterrence: *R v Zoef* [2005] NSWCCA 268 at [124]. The courts must give a clear message to persons who are minded to use firearms to resolve disputes that they will be dealt with severely: *R v Micallef* (unrep, 14/9/93, NSWCCA). An offence that involves pointing a loaded firearm at anyone is particularly serious when done in circumstances of aggression or as an exercise of domination: *R v Do* [2005] NSWCCA 183 at [25].

Syringes

Sentences for offences involving the use of syringes should deter anyone from adopting this "easy and terrifying method of imposing their will on others": *R v Hodge* (unrep, 2/11/93, NSWCCA); cited in the s 33B case of *R v Ston*e (1995) 85 A Crim R 436 at 438. Sentences should also recognise the fear instilled in victims by an offender who produces a syringe apparently filled with blood: *R v Carter* (unrep, 29/10/97, NSWCCA).

Glassing, broken bottles etc

An attack using a glass is serious: *R v Bradford* (unrep, NSWCCA, 14/2/95). So too, is the use of broken glass, which is a weapon capable of inflicting a life-threatening injury: *R v Zamagias* [2002] NSWCCA 17 at [14]. In a case where the victim was struck in the face with a glass during a hotel fight, and the victim's injuries were not long-term, it was doubted that the use of a glass should be equated in seriousness with the use of a knife or revolver: *R v Heron* [2006] NSWCCA 215 at [54]. In *Sayin v R* [2008] NSWCCA 307, cited with approval in *R v Miria* [2009] NSWCCA 68 at [17], Howie J stated at [47]:

> … "glassing", is becoming so prevalent in licensed premises that there are moves on foot to stem the opportunity for the offence to be committed by earlier closing times and the use of plastic containers. The courts clearly must impose very severe penalties for such offenders, but of course within the limits afforded by the prescribed maximum penalty.

Premeditated or planned offence/contract violence

The degree of premeditation or planning is a relevant factor when assessing the objective seriousness of an offence: *R v King* [2004] NSWCCA 444 at [174]; *Vragovic v R* [2007] NSWCCA 46 at [32] (both s 33 cases). Section 21A(2)(n) provides as an aggravating factor the fact that the "offence was part of a planned or organised criminal activity". The converse is a mitigating factor: s 21A(3)(b).

Unprovoked offence

The fact that an offence is unprovoked and unjustified is a matter to be taken into account when assessing its objective seriousness: *R v Matzick* [2007] NSWCCA 92 at [23]; *R v Reid* [2005] NSWCCA 309 at [25]; *R v Mackey* [2006] NSWCCA 254 at [14] (all s 33 cases). Members of the public have a fundamental right to go about their business without fear of being attacked: *R v Woods* (unrep, 9/10/1990, NSWCCA); *Vaeila v R* [2010] NSWCCA 113 at [22]; *Mansour v R; Hughes v R* [2013] NSWCCA 35 at [43]; *R v Tuuta* [2014] NSWCCA 40 at [52]; *Kocyigit v R* [2018] NSWCCA 279 at [36].

Offence committed in company

It is an aggravating factor where the offence is committed in company: *R v Maher* [2005] NSWCCA 16 at [34]; s 21A(2)(e) *Crimes (Sentencing Procedure) Act* 1999.

The exception is where this factor is an element of the offence, for example, offences under ss 59(2), 35(1), 35(3) and 33B(2). Furthermore, it would be erroneous to take into account as an aggravating factor the commission of an offence in company where that factor would warrant a conviction for a more serious offence: *R v Tran* [2005] NSWCCA 35 at [17].

Vulnerable victim

Section 21A(2)(l) provides as an aggravating factor the fact "that the victim was vulnerable, for example, because the victim was very young or very old or had a disability, or because of the victim's occupation (such as a taxi driver, bus driver or other public transport worker, bank teller or service station attendant)". The fact that the victim was a security officer is an aggravating factor pursuant to s 21A(2)(l): *R v Do* [2005] NSWCCA 183.

In *Nowak v R* [2008] NSWCCA 89, the judge erred in finding that it was an aggravating factor that the victim was "vulnerable in the extreme" on the basis that the victim was unarmed when struck by a man wielding a bottle. It was observed, "All victims are, to some extent at least, vulnerable. But that is not the sense in which the expression is to be understood in the present context": at [28]. Reference was made in that case to *R v Tadrosse* (2005) 65 NSWLR 740, where it was said that s 21A(2)(l) "is concerned with the weakness of a particular class of victim and not with the threat posed by a particular class of offender": at [26].

The fact that the victim was unarmed would not generally constitute an aggravating factor under s 21A(2)(l), although such vulnerability may arise from defencelessness or helplessness: *Morris v R* [2007] NSWCCA 127 at [15]. However, there may be greater scope for a finding of vulnerability at common law on the basis that the common law survives the introduction of s 21A (s 21A(1)(c)); see *R v Porter* [2008] NSWCCA 145 at [87]. In *R v Esho* [2001] NSWCCA 415 the court held that the fact that the applicant, who was armed with a knife, knew that the victim was defenceless, was a factor that aggravated the offence: *R v Esho* at [142].

Commission of offence in victim's home

The commission of the offence in the security of the victim's home aggravates an offence: *R v Pearson* [2002] NSWCCA 429 at [90]; *R v Achurch* [2004] NSWCCA 180 at [33]; *R v Brett* [2004] NSWCCA 372 at [46]; *R v Hookey* [2004] NSWCCA 223 at [18]; s 21A(2)(eb) *Crimes (Sentencing Procedure) Act* 1999. See further the discussion in **Section 21A factors "in addition to" any Act or rule of law** at [11-105].

Gratuitous cruelty

Section 21A(2)(f) provides that an offence is aggravated if it involves gratuitous cruelty. Gratuitous cruelty requires more than an offence being committed without justification and causing great pain: *McCullough v R* [2009] NSWCCA 94 at [30]. For offences that are by their nature violent, there needs to be something more than the offender merely having no justification for causing the victim pain: *McCullough v R* at [30]. For instance, the factor may be present in a case of malicious wounding due to the nature and purpose of the wounding, for example, it involved torture: *McCullough v R* at [31].

The 3½-year-old victim in *R v Olsen* [2005] NSWCCA 243 was found to have 57 injuries, including intra-retinal haemorrhages and flexion extension injuries to the

neck indicating that he had been severely shaken. The child was also suffering from dehydration. The injuries inflicted included bite marks and indicated that there had been a large number of forcible impacts with the child's body. It was held that the sentencing judge correctly found that the offence involved gratuitous cruelty: at [17].

Punching and kicking a pregnant woman in the abdomen causing her foetus to miscarry constitutes gratuitous cruelty: *R v King* [2004] NSWCCA 444 at [139].

In *R v Smith* [2005] NSWCCA 286 it was held that the throwing of hot water onto a child did not constitute gratuitous cruelty. Latham J said at [37] that gratuitous cruelty:

> … is less likely to be present where an intentional act gives rise to injuries which were contemplated by the offender as possible, but no more, as opposed to offences involving deliberate, calculated torture or where the type and degree of harm inflicted is part of the offender's desire to degrade and humiliate the victim. Of course, it is not possible to neatly define the categories of offences in which gratuitous cruelty will feature. However, it was open to his Honour to regard this offence as lacking that factor, particularly where his Honour had found the Respondent reckless as to the harm caused by his actions.

Substantial harm

Section 21A(2)(g) *Crimes (Sentencing Procedure) Act* 1999 provides as an aggravating factor that "the injury, emotional harm, loss or damage caused by the offence was substantial." The converse is a mitigating factor under s 21A(3)(a).

Since inflicting of grievous bodily harm is an element of offences under both s 35(1)–(2) and s 33(1)(b) and (2)(b), the bare fact that grievous bodily harm was caused cannot be treated as an aggravating factor of itself: *R v Zoef* [2005] NSWCCA 268 at [123]; *R v Cramp* [2004] NSWCCA 264 at [65] (s 33 cases); *R v Heron* [2006] NSWCCA 215 at [49]; *Nowak v R* [2008] NSWCCA 89 at [19]–[26] (s 35). However, where the extent of the victim's injury significantly exceeds the minimum necessary to qualify as grievous bodily harm, the injury may constitute an aggravating factor: *R v Zoef*, above, at [123] (where the victim suffered permanent paralysis); *R v Chisari* [2006] NSWCCA 19 at [22] (where the victim was required to undergo surgery, had ongoing medical problems and was unable to work).

In *R v Heron* [2006] NSWCCA 215, it was held that the sentencing judge also erred in having regard to the potential effect of the injury by speculating as to what might have happened had first aid not been provided. The potential of the injury was not a matter which could be properly taken into account for the purposes of s 21A(2)(g). What might have occurred had timely first aid not been provided is an irrelevant consideration when applying s 21A(2)(g): at [49].

[50-150] Intoxication

Last reviewed: March 2024

Personal violence offences are on occasion accompanied by some level of intoxication on the part of the offender. An offender's intoxication may constitute an aggravating factor, or it may have no impact on the sentencing exercise.

Before the introduction of s 21A(5AA) *Crimes (Sentencing Procedure) Act* 1999, an offender's intoxication, whether by alcohol or drugs, could explain an offence but ordinarily did not mitigate the penalty. Section 21A(5AA) confirms and extends the

common law principles as to the relevance of an offender's intoxication at the time of the offence; the self-induced intoxication of the offender at the time the offence was committed is not to be taken into account as a mitigating factor. Section 21A(6) provides that self-induced intoxication has the same meaning as it has in Pt 11A *Crimes Act* 1900. See further discussion at **[10-480] Self-induced intoxication**.

Intoxication may be an aggravating factor because of the recklessness with which the offender became intoxicated or if it involves the voluntary ingestion of alcohol by a person with a history of alcohol-related violence: *R v Fletcher-Jones* (1994) 75 A Crim R 381 at 387; *Gordon*, above, at 467; *Coleman*, above at 327; *R v Hawkins* (1993) 67 A Crim R 64 at 67; *R v Jerrard* (1991) 56 A Crim R 297 at 301. The commission of an offence while intoxicated may also warrant greater emphasis being placed on general deterrence: *R v Mitchell* [2007] NSWCCA 296 at [29].

[50-160] Common mitigating factors

Certain objective mitigating factors which may arise with relative frequency in the context of personal violence offences are discussed here. For detailed discussion of mitigating factors, see **Objective factors** at **[10-000]** and **Section 21A factors** at **[11-000]**.

Injury or harm not substantial

The fact that the victim's injuries healed or were not substantial may be taken into account in the offender's favour: *R v Shauer* [2000] NSWCCA 91 at [13]; s 21A(3)(a) *Crimes (Sentencing Procedure) Act* 1999.

Provocation

Section 21A(3)(c) *Crimes (Sentencing Procedure) Act* 1999 provides that it is a mitigating factor where the offender was provoked by the victim into committing the offence. In *R v Ferguson* [1999] NSWCCA 214 at [29], Smart AJ stated: "It is of the essence of provocation that the acts of others cause offenders to lose their self control and embark upon criminal conduct often of the utmost gravity".

Provocation can reduce the objective criminality appreciably: *R v Ferguson*, above, at [29]; see for example, *R v Fragoso* (unrep, 24/2/94, NSWCCA). In *R v Ryan* [2006] NSWCCA 394, the fact that the offence of maliciously inflict grievous bodily harm (s 35) was triggered by what both offenders reasonably thought had been a sexual assault on one of their partners was held to be a mitigating factor under s 21A(3)(c): at [28]. On the other hand, it was held in *R v Mitchell* [2007] NSWCCA 296 at [30] that a vicious attack in retribution for alleged prior sexual abuse was "of limited mitigating value".

The extent to which provocation constitutes a mitigating factor depends on the relationship and proportion between the provocative conduct and the offence. In *R v Buddle* [2005] NSWCCA 82, Wood CJ at CL said at [11]:

> While the presence of provocation was an important aspect in assessing the applicant's objective criminality, and while it provided a motive for what might otherwise have been an incident of unexplained or random violence, it did not excuse his conduct. It is not the case that the victim of a crime can take the law into his own hands and exact physical revenge. Both personal and general deterrence therefore had a role to play in sentencing the applicant.

In some cases the offender's conduct will be so disproportionate to the provocation that it will be open to find that there was no mitigation: *R v Mendez* [2002] NSWCCA 415 at [16]. In *Shaw v R* [2008] NSWCCA 58 at [26], it was held that "relationship tension and general tension" in the context of domestic violence offences did not constitute provocative conduct such as to amount to mitigation.

[The next page is 30001]

Domestic violence offences

[63-500] Introduction

Domestic violence is accepted to be a blight on civil society. A court sentencing an offender for an offence committed in what is loosely described as a "domestic context" must apply specifically developed sentencing principles.

The High Court in *The Queen v Kilic* (2016) 259 CLR 256 at [21] recognised a societal shift in relation to domestic violence:

> … current sentencing practices for offences involving domestic violence depart from past sentencing practices for this category of offence because of changes in societal attitudes to domestic relations.

The community's concern at the level of domestic violence, generally inflicted by men against women, is given effect in sentencing by recognising the importance of general and specific deterrence. In that context, in *Yaman v R* [2020] NSWCCA 239 at [135] Wilson J (Fullerton and Ierace JJ agreeing) said:

> The right of all women to determine their own path in life must be protected and upheld by the courts. Where a woman's right is ignored or disregarded by an offender, that right must be vindicated, including by punitive and strongly deterrent sentences where necessary.

[63-505] Statutory framework

Last reviewed: March 2024

Definitions of "personal violence offence" and "domestic violence offence" are found in ss 4, 5, 5A, 11 *Crimes (Domestic and Personal Violence) Act* 2007. These definitions are used as a basis for applying provisions in the *Crimes (Sentencing Procedure) Act* 1999 such as those discussed below.

A "domestic violence offence" is defined in s 11 *Crimes (Domestic and Personal Violence) Act* as an offence committed against a person with whom the offender has (or has had) a domestic relationship, being:

(a) a personal violence offence, or

(b) an offence (other than a personal violence offence) that arises from substantially the same circumstances as those from which a personal violence offence has arisen, or

(b1) an offence under the *Crimes Act* 1900, s 54D(1) [see below at **[63-540] Abusive behaviour towards intimate partners**, an offence expected to commence between 1 February and 1 July 2024], or

(c) an offence, other than a personal violence offence, in which the conduct that constitutes the offence is domestic abuse.

Section 6A of the *Crimes (Domestic and Personal Violence) Act* provides the definition of "domestic abuse", and what may constitute domestic abuse. Section 6A was

introduced, and s 11(1)(c) replaced, by the *Crimes Legislation Amendment (Coercive Control) Act* 2022, and apply to behaviour (or alleged behaviour) that occurred, or an offence (or an alleged offence) that was committed, on or after 1 February 2024: *Crimes Legislation Amendment (Coercive Control) Act*, s 2; Sch 2[6].

"Domestic relationship" is broadly defined in s 5. The definition of "personal violence offence" in s 4 includes most of the assault and wounding offences referred to in the list in **Assault, wounding and related offences** at **[50-000]**. Section 12(2) provides that if a person pleads guilty to, or is found guilty of, an offence and the court is satisfied the offence was a domestic violence offence, the court must direct that the offence be recorded on the person's criminal record as a domestic violence offence.

Section 5A provides that a personal violence offence by a paid carer against a dependant is a domestic violence offence and an ADVO may be made for the dependant's protection. However, a personal violence offence committed by a dependant against a paid carer is not a domestic violence offence, although the paid carer may still apply for an APVO against the dependant.

The *Crimes (Sentencing Procedure) Act* 1999 imposes several requirements on a court sentencing an offender for a domestic violence offence.

When a court finds a person guilty of a domestic violence offence, it must impose, under s 4A(1), either:

- a sentence of full-time detention, or
- a supervised order (being an intensive correction order (ICO), community correction order (CCO) or conditional release order (CRO) that includes a supervision condition).

However, the court may impose a different sentence if satisfied that it is more appropriate in the circumstances, and gives reasons for reaching that view: s 4A(2).

Additional requirements designed for the protection and safety of victims are set out in s 4B:

- an ICO cannot be imposed unless the court is satisfied the victim of the domestic violence offence, and any other person with whom the offender is likely to reside, will be adequately protected (whether by ICO conditions or otherwise): s 4B(1)
- a home detention condition cannot be imposed if the court reasonably believes the offender will reside with the victim of the domestic violence offence: s 4B(2)
- the court must consider the victim's safety before making either a CCO or CRO for a domestic violence offence: s 4B(3).

See also **Intensive Correction Orders (ICOs) (alternative to full-time imprisonment)** at **[3-600]**ff, **Community Correction Orders (CCOs)** at **[4-400]**ff and **Conditional Release Orders (CROs)** at **[4-700]**ff.

In addition, ss 39(1) and 39(1A) *Crimes (Domestic and Personal Violence) Act* 2007 relevantly provide that following a guilty plea being entered by, or a finding of guilt being made in respect of, an offender who has committed a serious offence (defined in s 40(5)), a court must make a final apprehended violence order (AVO) for the victim's protection, regardless of whether an interim AVO has been made or

whether an application for an AVO has been made, unless satisfied that an order is "not required". For adult offenders sentenced to full-time imprisonment the ADVO must be for the period of imprisonment and an additional two years, unless there is good reason to impose a different period: ss 39(2A)–(2C). In terms of when an ADVO comes into force, s 39(2D) states:

> The date on which the apprehended domestic violence order comes into force may be a day before the day the person starts serving [their] term of imprisonment.

Domestic violence orders made in one State or Territory are now recognised in all other Australian jurisdictions as a consequence of the national recognition scheme given statutory effect in Pt 13B *Crimes (Domestic and Personal Violence) Act* 2007 which enables the enforcement of the prohibitions and restrictions contained in interstate and foreign domestic violence orders.

[63-510] Sentencing approach to domestic violence

Last reviewed: August 2023

A comprehensive examination of the cases and legislation can be found in A Gombru, G Brignell and H Donnelly, "Sentencing for domestic violence*", Sentencing Trends & Issues*, No 45, Judicial Commission of NSW, June 2016. See also M Zaki, B Baylock, P Poletti, "Sentencing for domestic violence in the Local Court", *Sentencing Trends & issues*, No 48, Judicial Commission of NSW, July 2022.

The High Court in *Munda v Western Australia* (2013) 249 CLR 600 at [54]–[55] referred to the role of the criminal law in the context of domestic violence as including:

> the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence.
> …
>
> … A just sentence must accord due recognition to the human dignity of the victim of domestic violence and the legitimate interest of the general community in the denunciation and punishment of a brutal, alcohol-fuelled destruction of a woman by her partner. A failure on the part of the state to mete out a just punishment of violent offending may be seen as a failure by the state to vindicate the human dignity of the victim; and to impose a lesser punishment by reason of the identity of the victim is to create a group of second-class citizens, a state of affairs entirely at odds with the fundamental idea of equality before the law.

In assessing the crime before it, the court in *The Queen v Kilic* (2016) 259 CLR 256 treated the fact the respondent's offence involved domestic violence as a distinguishing aggravating circumstance of significance and, at [28], referred to: "… the abuse of a relationship of trust which such an offence necessarily entails and which ... must be deterred".

In *Cherry v R* [2017] NSWCCA 150, Johnson J at [78] (Macfarlane JA and Harrison J agreeing) said:

> It is undoubtedly the case that the criminal law, in the area of domestic violence, requires rigorous and demanding consequences for perpetrators for the purpose of protecting partners, family members and the wider community.

The importance of general deterrence in condemning such conduct was clearly explained by Wilson J (Fullerton and Ierace JJ agreeing) in *Yaman v R* [2020] NSWCCA 239 at [131] as follows:

> Offences committed by (mostly) men who … refuse to accept that a partner or former partner is entitled to a life of her own choosing, must be dealt with sternly by the courts, to mark society's strong disapprobation of such conduct, and to reinforce the right of women to live unmolested by a former partner. Offences involving domestic violence are frequently committed, and the criminal justice system must play a part in protecting those who have been or may be victims of it.

The denunciation of, and punishment for, "brutal" and "alcohol-fuelled" conduct in the context of a domestic relationship was considered to be particularly apt in *Ngatamariki v R* [2016] NSWCCA 155 at [73]. Serious domestic violence offences, such as the sustained offending over 6 years in *R v JD* [2018] NSWCCA 233, should attract appropriate sentences to maintain public confidence in the administration of justice: at [102]. Indeed, in sentencing a domestic violence offender, particularly a repeat domestic violence offender, specific and general deterrence are important factors, together with the requirement of powerful denunciation and the need for protection of the community: *R v Hamid* (2006) 164 A Crim R 179 at [86]. See also *Turnbull v R* [2019] NSWCCA 97 at [153].

While a background of childhood deprivation may reduce moral culpability making an offender unsuitable for general deterrence (see **[10-470] Deprived background of an offender**), in dealing with domestic violence offenders, victims are not to be treated as less worthy of protection, nor that the crimes against them found warranting less denunciation, because of factors personal to the offender: *Kennedy v R* [2022] NSWCCA 215 at [43].

The appropriate imposition of a conviction with no further penalty under s 10A for a domestic violence offence must be rare: *R v Sharrouf* [2023] NSWCCA 137 at [188]. See also *DPP v Darcy-Shillingsworth* [2017] NSWCCA 224 at [84]–[85], [107]–[108] where the court held that the sentences imposed for offences committed in a domestic violence context did not reflect the community interest in general deterrence.

The courts have recognised the special dynamics of domestic violence. A victim of a domestic violence offence is personally targeted by the offender and the offence is usually part of a larger picture of physical and mental violence in which the offender exercises power and control over the victim: *R v Burton* [2008] NSWCCA 128 at [97]; see also *R v JD* [2018] NSWCCA 233 at [92]. In most instances, the conduct typically involves aggression by men who are physically stronger than their victims, and there is no real prospect of spontaneous physical retaliation because of the disparity between their respective strengths: *Patsan v R* [2018] NSWCCA 129 at [39]–[40]; *Diaz v R* [2018] NSWCCA 33 at [5]; *R v Edigarov* [2001] NSWCCA 436 at [41].

Another common feature is that there may be a considerable delay between the offences and the victim making a complaint. However, such delay should not be held against a victim as it is a direct product of the nature of the offending. It would be incongruous for the offender to benefit from such delay: *Hurst v R* [2017] NSWCCA 114 at [132], see also [138].

The offender often has a genuine, albeit irrational, belief of being wronged by the victim and also believes the violence is justified: *Xue v R* [2017] NSWCCA 137 at [53];

Ahmu v R [2014] NSWCCA 312 at [83]. But a resort to violence is not justified even if the belief turns out to be correct: *Xue v R* at [53]; see also *Efthimiadis v R (No 2)* [2016] NSWCCA 9 at [86].

There is a continuing threat to the victim's safety even where the victim becomes estranged from the offender: *R v Dunn* [2004] NSWCCA 41 at [47]. The victim may forgive the offender against their own interests: *R v Glen* (unrep, 19/12/94, NSWCCA); *R v Rowe* (1996) 89 A Crim R 467; *R v Burton* at [105]. Sentencing courts must treat such forgiveness with caution and attribute weight to general and specific deterrence, denunciation and protection of the community: *R v Hamid* at [86]; *Simpson v R* [2014] NSWCCA 23 at [35]; *R v Eckermann* [2013] NSWCCA 188 at [55]; *Ahmu v R* at [83]. The attitude of the victim cannot interfere with the exercise of the sentencing discretion: *R v Palu* [2002] NSWCCA 381 at [37].

Particular care is required on the part of a court when it makes findings of fact concerning the aggravating factor that the victim was vulnerable. The judge erred in *Drew v R* [2016] 264 NSWCCA 310 by observing that the victim was vulnerable using generalisations about a culture of silence and ostracism within Aboriginal communities in relation to domestic violence: *Drew v R* per Fagan J at [8], Gleeson JA agreeing at [1], N Adams J at [84]. Such a finding was not open on the evidence in the case: *Drew v R* at [3]–[4]. Further, the aggravating factor of vulnerability under s 21A(2)(l) *Crimes (Sentencing Procedure) Act* 1999 is only engaged where the victim is one of a class that is vulnerable by reason of some common characteristic: *Drew v R* at [8]. See N Adams J's discussion of the cases in *Drew v R* at [75]–[78].

However, a finding that the victim was vulnerable in the more general sense of being under an impaired ability to avoid physical conflict with the offender or defend herself in the event of such conflict was well open on the evidence: *Drew v R* at [5], [8]. It was a circumstance of the offence, relevant to determining the appropriate sentence, that because of the victim's emotional and intimate attachment to the offender she was less likely than any other potential victim to avoid him or put herself out of harm's way: *Drew v R* at [7]. That individual vulnerability had, in practical terms, the same consequence for assessment of the objective seriousness of the offence: *Drew v R* at [8].

Domestic violence is addressed elsewhere in the publication as follows:

- **Purposes of sentencing** at **[2-240]** To prevent crime by deterring the offender and other persons from committing similar offences: s 3A(b)
- **Victims and victim impact statements** at **[12-850]** The relevance of the attitude of the victim — vengeance or forgiveness (Domestic violence)
- **Section 21A factors "in addition to" any Act or rule of law** at **[11-090]** Section 21A(2)(d) — the offender has a record of previous convictions (particularly if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences)
- **Particular offences**
  - **Break and enter offences** at **[17-050]** The standard non-parole period provisions (Domestic violence)
  - **Detain for advantage/kidnapping** at **[18-715]** Factors relevant to the seriousness of an offence (Detaining for advantage and domestic violence)

– **Sexual assault** at **[20-775]** Factors which are *not* mitigating at sentence (The relevance of a prior relationship)

– **Murder** at **[30-047]** Murders committed in the context of domestic violence

– **Assault, wounding and related offences** at **[50-130]** Particular types of personal violence (Domestic violence)

[63-515] Apprehended violence orders

In *Browning v R* [2015] NSWCCA 147 at [5], the court affirmed Spigelman CJ's observations in *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512 at [20] concerning the objectives of the statutory scheme at the time which made provision for apprehended violence orders:

> The legislative scheme is directed to the protection of the community in a direct and immediate sense, rather than through mechanisms such as deterrence. Individuals can obtain protection against actual or threatened acts of personal violence, stalking intimidation and harassment. Apprehended Violence Orders constitute the primary means in this State of asserting the fundamental right to freedom from fear. The objects served by such orders are quite distinct from those that are served by civil adversarial proceedings or proceedings in which an arm of the State seeks to enforce the criminal law.

See the *Local Court Bench Book* for procedures with regard to apprehended violence orders from **[22-000]**ff.

[63-518] Impact of AVO breaches on sentencing

Section 14(1) *Crimes (Domestic and Personal Violence) Act* 2007 provides for the offence of contravening an apprehended violence order (AVO). Section 14(4) provides:

> Unless the court otherwise orders, a person who is convicted of an offence against subsection (1) must be sentenced to a term of imprisonment if the act constituting the offence was an act of violence against a person.

An offence committed in breach of an AVO is a significant source of aggravation: *Kennedy v R* [2008] NSWCCA 21 at [8]; *R v Macadam-Kellie* [2001] NSWCCA 170 at [37]–[38]. Such offences are not offences committed in breach of conditional liberty simpliciter; they breach a form of conditional liberty designed to protect the same victim from further attacks by the offender: *Cherry v R* [2017] NSWCCA 150 at [80]. There is a particular need to show there will be a heavy price to pay for indulging in domestic violence particularly when court orders have been issued to prohibit such violence, lest such orders are seen to be, and become, wholly futile: *Turnbull v R* [2019] NSWCCA 97 at [153].

It is also a significant aggravating factor under s 21A(2)(j) *Crimes (Sentencing Procedure) Act* 1999 if an offender commits offences whilst on conditional liberty for offences arising from breaches of an AVO order: *Jeffries v R* [2008] 185 NSWCCA 144 at [91]; *Browning v R* [2015] NSWCCA 147 at [8].

Offences committed in breach of an AVO and the offence of breaching an AVO, involve separate and distinct criminality. There is no duplicity in imposing distinct

sentences for each offence: *Suksa-Ngacharoen v R* [2018] NSWCCA 142 at [131]. Breaches of an AVO should ordinarily be separately punished from an offence occurring at the same time. In *Suksa-Ngacharoen v R* at [132], when discussing the criminality inherent in a breach of an ADVO, Wilson J (Leeming JA and Bellew J agreeing) said:

> The criminality of breaching an ADVO rests in the complete disregard for an order of a court, conduct which has the practical effect of undermining the authority of the courts, and preventing the courts from extending effective protection to persons at risk of harm from another. The legislative intent of the scheme for apprehended domestic violence orders is to permit a court to restrain the conduct of an individual who poses a risk to a person with whom he or she is or was in a domestic relationship. If the authority of the courts in making these orders is simply ignored … the law and the courts are diminished, and the capacity for the courts to protect vulnerable individuals is impeded. Conduct which involves deliberate disobedience of a court order must be treated as serious, and should ordinarily be separately punished from any offence that occurs at the same time, always having regard to the requirements of the totality principle as set out in *Pearce v The Queen* (1989) 194 CLR 610.

[63-520] Stalking and intimidation

Section 13(1) *Crimes (Domestic and Personal Violence) Act* 2007 contains an offence of stalking or intimidating another person with the intention of causing the other person to fear physical or mental harm. Section 13(3) provides that a person intends to cause fear of physical or mental harm if he or she knows that the conduct is likely to cause fear in the other person. A person who attempts to commit such an offence is liable to the same penalty as if the person had committed the offence itself: s 13(5). The offence of intimidation is one of "specific intent" under s 428B *Crimes Act* 1900 and, therefore, an offender's intoxication can be considered for the purposes of determining criminal liability: *McIlwraith v R* [2017] NSWCCA 13 at [39]–[42]. However, an offender's intoxication at the time of the offence cannot be relied upon as a matter of mitigation at sentence: s 21A(5AA) *Crimes (Sentencing Procedure) Act*; see also *Cherry v R* at [81] in the context of self-induced intoxication because of drug use.

See **[11-335] Special rule for intoxication**.

[63-540] Abusive behaviour towards intimate partners

Last reviewed: March 2024

The *Crimes Legislation Amendment (Coercive Control) Act* 2022 (the Act) relevantly amends the *Crimes Act* 1900 to create a new offence of abusive behaviour towards intimate partners.

The offence involves engaging in a course of conduct consisting of abusive behaviour (violence, threats, intimidation, or coercion or control of a person) against a current or former intimate partner, with the intention of coercing or controlling that person: s 54D(1). Sections 54F and 54G provide definitions for "abusive behaviour" and "course of conduct" respectively. Section 54E provides for a defence to the new offence. A suggested direction and accompanying notes regarding the new offence are provided in the *Criminal Trial Courts Bench Book* at **[5-2010]**, **[5-2020]** respectively.

The new offence provisions are expected to commence between 1 February and 1 July 2024 and will only apply to conduct occurring on or after the commencement of the amendments: the Act, s 2; Sch 1[2].

The maximum penalty for the new offence is 7 years imprisonment: s 54D(1). It is a Table 1 offence and may be dealt with summarily.

For a discussion of the reforms and the new offence, see R Hulme and E Sercombe, "Introducing the NSW coercive control reforms" (2023) 35(10) *JOB* 101. The Judicial Information Research System's Coercive Control resource may be accessed at https://jirs.judcom.nsw.gov.au/menus/coercive_control.php for JIRS subscribers.

A suggested direction and accompanying notes regarding the new offence are provided in the *Criminal Trial Courts Bench Book* at **[5-2010]**ff.

[The next page is 32201]

Money laundering

[65-200] The Commonwealth statutory scheme

The Commonwealth money laundering offences are found in Ch 10, Pt 10.2, Div 400, ss 400.3–400.9 Criminal Code 1995 (Cth). The name of Pt 10.2 is "Money laundering".

When a court is sentencing for any of these offences, the relevant statutory provisions are of particular importance. The statutory scheme has a graduated series of offences varying in gravity depending on the value of money or property and the offender's state of mind: *R v Li* (2010) 202 A Crim R 195 at [17]-[19], [41].

Sections 400.3–400.9 provide for a number of different offences, the seriousness of which is indicated by the maximum penalty, the amount of money involved and the mental (fault) element to be proved for the particular offence. Each offence is concerned with money or property that is the proceeds of crime or money or property that is to become an instrument of crime. The greater the sum of money involved the more serious the offence as indicated by a higher maximum penalty: *R v Ansari* (2007) 70 NSWLR 89 at [122]; *R v Li* at [41]. It is the primary identifier of what is the maximum penalty for an offence: *R v Huang* (2007) 174 A Crim R 370 at [34]; *R v Li* at [41]; *R v Guo* (2010) 201 A Crim R 403 at [87], [89]. The value of money or property and the offender's state of mind are the principal differentiating factors in determining the seriousness of these offences: *R v Guo* at [85]-[91]; *R v Li* at [18], [41]; *R v Ansari* at [122].

The considerations relevant to the seriousness of a Commonwealth money laundering offence were summarised in *R v Ly* (2014) 241 A Crim R 192 at [86] with reference to several cases.

[65-205] Breadth of conduct caught

The money laundering offences are broad with the capacity to apply to a large range of activities relating to money or other property to be used in connection with, or arising from, serious crime. The offences are not only concerned with the source of the money or property dealt with but also its ultimate use. The offences cover money obtained illegally or to be used for illegal purposes or dealt with in a manner that is illegal. At the Commonwealth level, these offences "constitute a 21st century response to antisocial and criminal conduct commonly with international elements": *R (Cth) v Milne (No 1)* [2010] NSWSC 932 at [164], adopted in *Milne v R* (2012) 219 A Crim R 237 at [132]–[135]; *R v Ansari* (2007) 70 NSWLR 89 at [119]–[122]. See also *Thorn v R* (2009) 198 A Crim R 135 at [30], [31].

The breadth of conduct caught by these offences makes it difficult to identify an offence falling within the worst category of its kind (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256): *R v Ansari* at [120]. In *R v Ansari*, Howie J identified possible factual scenarios encompassed by these types of offences: from those situations where the money that was being dealt with was to be used for the purposes of terrorism, to money obtained as a result of drug activity (which he thought the most obvious example), to money legitimately earned but being dealt with in such a way as to disguise its source to, for example, defraud the tax office:the [120].

Examples of conduct that have given rise to a money laundering offence are: making numerous transfers of funds overseas in amounts less than $10,000 using numerous false identities (*Jimmy v R* (2010) 77 NSWLR 540); an elaborate tax avoidance scheme involving the establishment of sham companies and the making of cash payments to workers in a chicken factory (*R v Guo* (2010) 201 A Crim R 403); organising a number of people to make cash deposits totalling $15 million which was directly or indirectly transferred overseas (*R v Nguyen* (2010) 204 A Crim R 246); swapping shares in one company for shares in another without a change in legal ownership which was intended to avoid capital gains tax liability (*Milne v R*); receiving money for the provision of child pornography material to others and the transfer of a significant portion of that money overseas to others involved in the offence (*Dennison v R* [2011] NSWCCA 114); laundering the proceeds of a fraud perpetrated on a superannuation scheme by exchanging funds in a bank account for gambling chips which were later cashed in (*Wang v R* [2013] NSWCCA 2); completing and lodging numerous tax returns using the personal identity details of other people (including their tax file numbers) and claiming, and receiving, tax refunds on the basis of falsely inflated tax payments and deductions (*R v Ly* (2014) 241 A Crim R 192).

The offending in *Dickson v R* [2016] NSWCCA 105 is an example of very serious money laundering. The offender was sentenced to 12 years for that offence (against a maximum penalty 25 years). It involved the offender controlling the movement of over $63 million overseas, of which over $19m was distributed to the offender or entities associated with him. The money was obtained from a complex tax fraud scheme he had devised and in respect of which he was separately charged.

[65-210] Sentencing range

At this stage, sentencing decisions for money laundering offences provide assistance as to statements of general principle but do not identify a range of appropriate sentences: *R v Li* (2010) 202 A Crim R 195 at [40]; *R v Guo* (2010) 201 A Crim R 403 at [86]; *Milne v R* (2012) 219 A Crim R 237 at [291]; *Ihemeje v R* [2012] NSWCCA 269 at [86]. The existing cases provide no more than an indication of developing sentence practice: *R v Li* at [40]; *R v Nguyen* (2010) 204 A Crim R 246 at [58]. The offences "comprehend such a wide range of criminality that there is bound … to be an appreciable variation in the length of sentences within and between them": *R v Li* at [41]. This wide range of circumstances means that comparisons with the sentences imposed in other money laundering cases are of limited assistance: *Wang v R* [2013] NSWCCA 2 at [33]. The Victorian Court of Appeal confirmed in *Majeed v R* [2013] VSCA 40 that the sentences for s 400.3 offences in previous decisions "are too few in number to provide anything but the broadest outline of the appropriate range of sentence": at [40].

Notwithstanding the difficulties associated with identifying a sentencing range, the sentences imposed in past matters may assist a court in determining the appropriate sentence. So much is apparent from the court's careful examination of past money laundering cases, its discussion of the relevant sentencing principles and of the interrelationship between the two in light of the particular circumstances of the offence and offender in *R v Ly* (2014) 241 A Crim R 192 at [88]ff. See also *Dickson v R* [2016] NSWCCA 105, where the court undertook a similar exercise to determine a Crown appeal against sentence: *Dickson v R* at [187]–[192].

[65-215] The application of the De Simoni principle to the statutory scheme

As to the general issues which may arise in relation to the application of the principle in *The Queen v De Simoni* (1981) 147 CLR 383 see [1-500]. The *De Simoni* principle will arise because of the way the Div 400 offences have been structured. There is a direct connection between the offender's state of mind (established by proving the relevant fault element) and the maximum penalty. For example, the maximum penalty for an offence against s 400.3(1), where the prescribed fault element is intention, is 25 years whereas when the prescribed fault element is recklessness (as in s 400.3(2)) the maximum penalty is 12 years. Section 5.4(4) Criminal Code provides that proof of intention or knowledge will also satisfy the fault element of recklessness. A failure to maintain the distinction between a less serious offence involving recklessness and a more serious offence involving belief contravenes the *De Simoni* principle: *Chen v R* [2009] NSWCCA 66 at [23]; *R v Ansari* (2007) 70 NSWLR 89 at [131]. In *Chen v R*, while the judge's finding that the applicant knew the funds were illegally obtained influenced his resolution of the dispute concerning the applicant's role it had no other bearing on his assessment of the offender's criminality and, accordingly, did not breach the *De Simoni* principle: at [25]. Although the sentencing judge in *Wang v R* [2013] NSWCCA 2 referred to the offender's knowledge, his Honour specifically recognised the distinction in *Chen v R* between the offence involving recklessness and the more serious offence involving belief: *Wang* at [42]–[43]. A finding that the offender knew the origin of the money involved was drug trafficking would offend the *De Simoni* principle because it amounted to finding the offender had committed a more serious offence: *R v Viana* [2008] NSWCCA 188 at [30]. However, finding the offender was reckless as to the source of the funds being the importation or sale of drugs did not infringe that principle: *R v Viana* at [30] and [31]. In *Shi v R* (2014) 246 A Crim R 273, the sentencing judge was found to have committed a *De Simoni* error by taking into account, for an offence contrary to s 400.9 (which only requires that it may be reasonable to suspect that the money or property is the proceeds of crime), that the offender had known that the money was the proceeds of crime.

[65-220] General deterrence

Any sentence must reflect general deterrence to a very significant degree because, notwithstanding the varying degree of gravity, money laundering is serious criminal activity and justifies severe punishment: *R v Huang* (2007) 174 A Crim R 370 at [36]; *R v Guo* (2010) 201 A Crim R 403 at [91], [103]; *Majeed v R* [2013] VSCA 40 at [39], [44]. General and specific deterrence is of particular importance where there is a pattern of illegal activity by an offender over an extended period using false identities: *R v Guo* at [96]; *Van Haltren v R* (2008) 191 A Crim R 53 at [87].

[65-225] Factual findings as to role and what the offender did

A significant consideration for the court is the role played by the offender where a criminal hierarchy has been discovered. An analogy has been drawn between money laundering offences and drug importation offences. Both usually reveal a hierarchy of persons involved in the conduct with different roles to play and different gains to be made from the commission of the offence: *R v Ansar*i (2007) 70 NSWLR 89 at [119]; *R v Assafiri* [2007] NSWCCA 159 at [17]. Sentences should be higher for offenders

who obtain higher rewards and have a lower risk of detection than persons lower in the hierarchy whose criminality is lesser and who run a higher risk of detection: *Ihemeje v R* [2012] NSWCCA 269 at [63], [87]. The most important consideration when sentencing for a money laundering offence is to consider what the offender did because there may be little evidence concerning the organisation behind the offence, the source of the funds or the ultimate use to be made of them: *R v Ansari* at [119]; *R v Guo* (2010) 201 A Crim R 403 at [88]; *The Queen v Olbrich* (1999) 199 CLR 270 at [19]. Where there is no evidence about the offender's knowledge as to the source of the funds, the purpose of dealing with them, or their ultimate destination, the court must deal with the matter on the basis of objective facts proved by evidence: *R v Ansari* at [124]; *Ungureanu v R* [2012] WASCA 11 at [42].

[65-230] Relevance of offender's belief and fault element

An important consideration is the offender's belief as to the source of the funds regardless of whether the offender is charged with an offence concerned with the proceeds of crime or an offence concerned with property being used as an instrument of crime. Where it is the latter, the belief as to the source of the funds or its nature is less relevant because those offences are directed to the use to be made of the funds: *R v Huang* (2007) 174 A Crim R 370 at [32]–[33]; *R v Guo* (2010) 201 A Crim R 403 at [89]; *Ungureanu v R* [2012] WASCA 11 at [43], [91]. The offender's understanding of the destination of the money or the purposes for which it was to become an instrument of crime is also relevant although this is not decisive of the seriousness of the particular offence or appropriate penalty: *R v Huang* at [33]. In *R v Huang*, the offender's belief that he was actively involved in dealing with the money to evade the payment of tax was a significant aggravating factor.

The offender in *Majeed v R* [2013] VSCA 40 argued that the sentence imposed on him for dealing with more than $1,000,000 and being reckless as to whether that was the proceeds of crime was manifestly excessive given the maximum penalty, his role and his strong subjective case. The submission was rejected on the basis that the offender's mental state was "at the highest end of recklessness". Given the type of criminal activity in which he was involved (the central contact between a drug trafficking syndicate and a money laundering syndicate), a sentence amounting to more than 50% of the maximum penalty of 12 years was not excessive: [42], [43], [51].

[65-235] Other factors

The number of transactions and the period over which the transactions occurred are significant because they indicate the extent of the offender's criminality: *R v Huang* (2007) 174 A Crim R 370 at [35]; *R v Li* (2010) 202 A Crim R 195 at [41]; *R v Guo* (2010) 201 A Crim R 403 at [87], [89]. Generally, a number of transactions involving small amounts of money will be more serious than a single transaction of a larger amount as the latter may be seen as an isolated offence: *R v Huang* at [35]. Whether the money or property belongs to the offender or someone else, the degree of planning involved and the actual loss that resulted are important: *R v Li* at [41]; *R v Guo* at [87].

The use of false identities to facilitate the criminal activity elevates the objective criminality of an offence: *R v Guo* at [96].

[65-240] Character

An offender's prior good character is of less significance than might otherwise be the case when the activity is engaged in for profit, over a significant period of time and involves a large number of transactions: *R v Huang* (2007) 174 A Crim R 370 at [36]; *R v Guo* (2010) 201 A Crim R 403 at [89].

[65-245] Relevance of related offences

Sentences imposed for structuring offences under the *Financial Transaction Reports Act* 1988 (Cth) are not a "helpful guide" to the appropriate sentences for the more serious offences in Div 400. This is not just because of the different maximum penalties prescribed for the different offences but because, depending on the extent of activity engaged in by an offender and their knowledge of the purpose of particular transactions, the criminal activity may be imbued with a completely different complexion": *R v Huang* (2007) 174 A Crim R 370 at [37]; *R v Edwards; Ex parte Director of Public Prosecutions (Cth)* (2008) 183 A Crim R 83 at [21].

[65-250] Anti-Money Laundering and Counter-Terrorism Financing Act 2006

Last reviewed: March 2024

Offences against ss 142–143 *Anti-Money Laundering and Counter-Terrorism Financing Act* 2006 (Cth) (AMLCTF Act) and s 31 *Financial Transaction Reports Act* 1988 (Cth) (FTR Act) involve the transfer of amounts of less than $10,000 to avoid reporting requirements. They are often referred to as "structuring offences" and fall within "money laundering" offences: *R v Guo* (2010) 201 A Crim R 403. Although the offences in each Act address similar criminality, the AMLCTF Act extended the regulatory regime in the FTR Act to address the changing nature of financial transactions: Second Reading Speech. Since the AMLCTF Act's introduction, such criminal conduct is generally prosecuted under ss 142–143 of that Act.

The objects of the AMLCTF Act are listed in s 3(1) and include, generally, the prevention of money laundering and financing of terrorism by imposing obligations on the financial and gambling sectors and other professionals or businesses that provide particular services. Although the decisions referred to below relate to the FTR Act, they may provide guidance in relation to the AMLCTF Act.

Sentencing decisions for financial reporting offences provide assistance by way of stating the general sentencing principle but do not identify a range of sentence: *R v Guo* at [97].

Justice Johnson summarised the relevant sentencing principles for these offences in *R v Guo* at [92]-[97] as follows:

- Such offences are difficult to detect and call for a significant degree of general deterrence: *R v Guo* at [94]; *R v Au* [2001] NSWCCA 468 at [7]; *R v Narayanan* [2002] NSWCCA 200 at [89]; *R v Rule* [2003] NSWCCA 97 at [9]–[10]; *R v Edwards; Ex parte DPP (Cth)* (2008) 183 A Crim R 83 at [2].
- The use of a false identity to facilitate the criminal activity can elevate the level of objective criminality. General and specific deterrence are particularly important

where there is a pattern of illegal activity by an offender over an extended period using a false identity: *R v Guo* at [96]; *Van Haltren v R* (2008) 191 A Crim R 53 at [87].

- The Act is a useful tool against the anti-social practices of organised crime and public corruption, including exploitation of workers in circumstances constituting an offence against the Act: *R v Guo* at [95]; *R v Edwards* at [3].

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