CDPP

Australia's Federal Prosecution Service

Sentencing of federal offenders in Australia: a guide for practitioners

Seventh edition, July 2024

About this guide

This guide is published by the Office of the Director of Public Prosecutions (Cth) (**CDPP**), a statutory authority of the Commonwealth of Australia established under the *Director of Public Prosecutions Act 1983* (Cth).

The guide outlines the law relating to the sentencing of federal offenders in Australia (that is, persons being dealt with for offences against the laws of the Commonwealth). It is intended to be a resource for CDPP lawyers, other legal practitioners, judicial officers, court staff, and others who deal with the sentencing of federal offenders throughout Australia. It may also be of assistance to academics, researchers and students. It is intended that the guide will be updated at least annually.

Publication

First edition June 2018
Second edition February 2020
Third edition July 2020
Fourth edition February 2021
Fifth edition April 2022
Sixth edition April 2023
Seventh edition July 2024

The guide is available electronically from the CDPP website: www.cdpp.gov.au.

Acknowledgements

This guide was written by Desmond Lane of the Victorian Bar and settled by the CDPP. Grace Devereaux of the Queensland Bar and Bonnie Russell of the CDPP provided research assistance for this seventh edition.

A number of CDPP lawyers also provided suggestions and comments and their contributions are also gratefully acknowledged.

In the early 1990s then Deputy Director Mark Pedley wrote the CDPP publication: *Federal Sentencing in Victoria*. That publication was revised and updated and provided a basis for this guide. The CDPP also acknowledges the invaluable contribution of Andrea Pavleka, former Solicitor for Public Prosecutions, to the creation and development of the guide.

Foreword to the Seventh edition by the Director

I am very pleased to introduce this seventh edition of the ***Sentencing of Federal Offenders in Australia: a Guide for practitioners***.

Since its first publication in 2018, the Guide has been an indispensable resource for all federal criminal law practitioners, and practitioners required to consider the interaction between state or territory sentences and federal sentences.

The Guide assists us all in navigating the particular complexities of federal sentencing law.

This seventh edition includes updates of relevant case law and statutory amendments. It also contains a number of new and substantially revised sections, including about the application of state and territory sentences and orders under s 20AB of the *Crimes Act 1914* (section 4.7 of the guide and related updates to Appendix 4), and about mandatory sentencing requirements for certain Commonwealth child sex and child sexual abuse offences (section 4.85).

I sincerely thank Des Lane of the Victorian Bar for his extensive work authoring the Guide over the years since its first release. His invaluable work on both the Guide and in relation to individual cases continues to provide significant support to me and to the important work of the Office in ensuring the Commonwealth criminal justice system functions as intended.

The CDPP is committed to updating the Guide annually to ensure it remains a valuable resource available to everyone who practices or works in and around federal sentencing law.

Raelene Sharp KC

Director of Public Prosecutions

SENTENCING OF FEDERAL OFFENDERS IN AUSTRALIA: A GUIDE FOR PRACTITIONERS

Seventh edition, July 2024

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PREFACE

Scope of the guide

1. This guide summarises the major Commonwealth legislative provisions and leading authorities relating to the sentencing of federal offenders in Australia.

2. "*Federal offender*" is defined in the *Crimes Act 1914* (Cth) as a person convicted of a federal offence, that is, an offence against a law of the Commonwealth.[1] The term is generally used in this guide in a wider sense, to include a person who has pleaded guilty to, or has been found guilty of, an offence against a law of the Commonwealth, whether or not the court has proceeded to conviction. The wider usage is necessary because of the availability of sentencing options and ancillary orders which do not involve a conviction. Where conviction (rather than merely a finding of guilt) is a precondition of a sentence or order, specific reference is made in this guide to that requirement.

3. This guide also describes some circumstances in which a court trying an offence against a law of the Commonwealth may deal with a person otherwise than by sentencing – for example, following a finding that the person is unfit to be tried.

4. The guide focuses on the law applicable throughout Australia. That body of law is complemented by particular State or Territory laws which are applied by Commonwealth statutes to the sentencing of a federal offender in that State or Territory. For example, s 20AB of the *Crimes Act 1914* makes specified State and Territory sentencing options available to a court sentencing a federal offender in the relevant State or Territory. Some references are made (often by way of examples) to aspects of applied State or Territory laws, including their interaction with Commonwealth law, but such references do not purport to be comprehensive. When dealing with a particular case, practitioners need to consider the relevant and applicable laws of both the Commonwealth and of the particular State or Territory.

5. This guide does not deal with punishments for contempt of court (other than where the contempt constitutes an offence against a law of the Commonwealth), in relation to either a federal court[2] or a State or Territory court exercising federal jurisdiction.[3] Nor does it deal with civil penalty regimes, such as those under the *Corporations Act 2001* (Cth) or the *Competition and Consumer Act 2010* (Cth).

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1 *Crimes Act 1914* (Cth), s 16(1).

2 A person who is punished for contempt of a federal court is not thereby a "*federal offender*" and such a contempt is not a "*federal offence*" within the meaning of the *Crimes Act 1914* (Cth): *Hannaford v HH (No 2)* (2012) 203 FCR 501; cf. *Zamir & Zamir* [2022] FedCFamC1A 193, [59].

3 A conviction for contempt of a court of a State or Territory is not (usually) a conviction for an offence against a law of the Commonwealth, even when the contempt arises from the court's exercise of federal jurisdiction. There are two reasons for this. First, in punishing for contempt, a State court is exercising State jurisdiction, even if the contempt arises in relation to the exercise of federal jurisdiction: see *R v B* [1972] WAR 129; *Re Colina*; *Ex parte Torney* (1999) 200 CLR 386; *DPP (Cth) v Haunga* (2001) 4 VR 285 (special leave to appeal to the High Court was granted on 13 September 2002 but the appeal was not pursued); *Pattison (Trustees) in the matter of Bell (Bankrupt) v Bell* [2007] FCA 137. Second, although contempt of court is, historically, a common law misdemeanour capable of being punished upon indictment or presentment, it has long been the custom of superior courts to invoke the Court's power to punish contempts by use of a summary procedure civil in character: *Rich v Attorney-General* [1999] VSCA 14, [4]. A person punished under such a procedure is not thereby found guilty of, or convicted of, "an offence".

Other resources

6. Other valuable resources in relation to the sentencing of federal offenders include:
    - the 2006 report by the Australian Law Reform Commission on the sentencing of federal offenders[4]
    - the Commonwealth Sentencing Database[5]
    - Judicial Commission of New South Wales, Sentencing Bench Book[6]
    - Judicial College of Victoria, Victorian Sentencing Manual[7]
    - Fox & Freiberg's Sentencing: State and Federal Law in Victoria (published by Thomson Reuters)

Some of these resources deal with sentencing principles applicable to individual Commonwealth offences, which are beyond the scope of this guide.

Case citations

7. Case citations are given in the following order of precedence:
    - Authorised report: e.g. *Hili v R* (2010) 242 CLR 520
    - For High Court decisions, ALJR report: e.g. *Johnson v R* (2004) 78 ALJR 616
    - Unauthorised report (before media-neutral citations): e.g. *R v Dodd* (1991) 57 A Crim R 349
    - Unreported decision (before media-neutral citations): e.g. *DPP v Meyers* (Vic SC (Balmford J), 26 April 1996, unreported)
    - Media-neutral citation: e.g. *Larkin v R* [2012] WASCA 238
8. References are given to paragraph numbers, if available: e.g. *Bui v DPP (Cth)* (2012) 244 CLR 638, [26]-[27]. If not, references are to pages: e.g. *Mill v R* (1988) 166 CLR 59, 62–63.
9. For the sake of brevity, case names refer only to the first-named party on each side. "The Queen" ("Regina") or "The King" ("Rex") is abbreviated to "R": e.g. "*R v Pham*" rather than "*The Queen v Pham*". "Director of Public Prosecutions" is abbreviated to "DPP" or, in the case of the Commonwealth DPP, "DPP (Cth)".
10. The great majority of the cases cited in this guide are available online for free at Austlii (http://www.austlii.edu.au) or at BarNet Jade (https://jade.io/).

What's new in this edition

11. In this seventh edition, in addition to updates throughout the guide, the following sections have been added or significantly revised:
    - 1.1 The Constitutional basis of Commonwealth sentencing
    - 1.7.2 The conferral of jurisdiction and the application of laws
    - 1.7.7 "Applicable" laws
    - 1.8 Penalties

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4 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006).

5 A collaboration between the National Judicial College, the NSW Judicial Commission and the CDPP (which provides the sentencing data).

6 https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/sentencing_commonwealth_offenders.html

7 https://resources.judicialcollege.vic.edu.au/article/669236

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12. Significant developments in federal sentencing since the publication of the sixth edition include the following:
    - The decision of the High Court in *Hurt v R; Delzotto v R* (2024) 98 ALJR 485, which concerned the proper approach to sentencing where a mandatory minimum period of imprisonment applies (see "4.8.5 Mandatory imprisonment").
    - Decisions of intermediate appellate courts about the operation of the regime for sentencing for Commonwealth child sexual abuse offences (see "7.3.3 Mandatory terms of imprisonment for high-level Commonwealth child sex offences and for repeat child sexual abuse offences").
    - The decision of the High Court in *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899, that a provision of the *Australian Citizenship Act 2007* (Cth) which purported to permit the Minister to cancel the citizenship of a person convicted of a specified serious offence was invalid. That decision led to the enactment of amendments to that Act which conferred on a court sentencing a federal offender the power to make a citizenship cessation order as part of the sentence for a specified federal offence (see "5.1 Citizenship cessation order – Australian Citizenship Act 2007 (Cth), s 36C").
    - The introduction of new offences relating to bridging visas and community safety supervision orders (as part of a series of measures in response to the decision of the High Court in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005) (see "7.2.2 Bridging visa offences" and "7.2.3 Offences relating to community safety supervision order").
    - The decision of the High Court in *R v Hatahet* [2024] HCA 23, which held that neither the likelihood or unlikelihood of the offender being released on parole nor the restrictions on parole under s 19ALB of the *Crimes Act 1914* (Cth) is a relevant consideration in sentencing a federal offender (see "4.8.8 Period or minimum period to be served is not a consideration in fixing a head sentence").

Currency of this edition

13. This seventh edition of the guide reflects the law as at 14 June 2024.

1 FEDERAL SENTENCING SCHEME – AN OUTLINE

1.1 The Constitutional basis of Commonwealth sentencing

1.1.1 Commonwealth offences under the Constitution

14. The Constitution of the Commonwealth of Australia contemplated the creation of Commonwealth offences, including indictable offences, and their punishment by imprisonment.

15. The Constitution contains three provisions (ss 44, 80 and 120) which refer to offences against, or punishable under, the law of the Commonwealth:
    - Section 44 provides that conviction for an offence punishable under the law of the Commonwealth by imprisonment for one year or longer is one of the circumstances which disqualifies a person from being chosen or sitting as a senator or a member of the House of Representatives.
    - Section 80 provides that the trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.
    - Section 120 requires the States to make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth, and for the punishment of persons convicted of such offences, and empowers the Parliament of the Commonwealth to make laws to give effect to this provision.

16. Section 80 empowers the Parliament to prescribe the place of trial on indictment for an offence against the laws of the Commonwealth if the offence was not committed within any State.[8] Section 120 empowers the Parliament to make laws to give effect to that section.[9]

17. However the Constitution confers no other specific power on the federal Parliament to make laws with respect to crimes or the sentencing of offenders. The power of the Commonwealth Parliament to make such laws derives principally from the incidental power (s 51(xxxix)), from other heads of legislative power (for example, the powers with respect to international and interstate trade and commerce (s 51(i)), taxation (s 51(ii)), postal and telecommunications services (s 51(v)) and external affairs (s 51(xxix))) and from powers which may be deduced from the Commonwealth's establishment and nature as a polity.[10]

18. There is no prohibition in the Constitution (as there is, for example, in the Constitution of the United States of America) on laws which impose criminal liability retrospectively or which retrospectively increase the penalties for an offence, provided such laws fall within a relevant head of power.[11] However

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8 Provision to give effect to this power is made in the *Judiciary Act 1903* (Cth); see particularly ss 70 and 70A.

9 In *R v Turnbull; Ex parte Taylor* (1968) 123 CLR 28, 37, Barwick CJ said that s 120 "*contemplates that the Parliament will make the necessary detailed provision at least for all these matters, authority to remove, authority to hold and the legality of the detention, not merely as between the Commonwealth and the State but vis-a-vis the person presented for detention by the State gaoler, and the persons concerned in the removal and in that detention.*"

10 *Davis v Commonwealth* (1988) 166 CLR 79, 93-95 (Mason CJ, Deane and Gaudron JJ). See the summary of principles and authorities in *Ng v Commissioner of the Australian Federal Police* [2022] WASCA 48, [162]-[182].

11 *R v Kidman* (1915) 20 CLR 425; *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

there are both statutory and common law presumptions that a law is not intended to have such an effect.[12]

19. Although the Commonwealth has responsibility for Australia's internal and external territories, the law of a self-governing territory is not a "law of the Commonwealth" within the meaning of the Constitution.[13]

1.1.2 The judicial power of the Commonwealth and its effect on punishment for an offence

20. The Constitution embodies the separation of the judicial power of the Commonwealth from legislative and executive powers. The judicial power of the Commonwealth is governed by Chapter III (ss 71-80) of the Constitution.

21. Section 71 of the Constitution vests the judicial power of the Commonwealth in the High Court of Australia, other federal courts and other courts that the Parliament of the Commonwealth vests with federal jurisdiction.

22. One implication from this provision is that the judicial power cannot be vested in a body which is not a "court" within the meaning of Chapter III. That is, the separation of the judicial power of the Commonwealth from legislative or executive power which is implicit in Chapter III means that:
    - only a "court" can exercise the judicial power;[14] and
    - a court cannot be invested with a non-judicial power or function except to the extent that it is auxiliary or incidental to the exercise of the judicial power of the Commonwealth.[15]

23. The function of adjudging and punishing criminal guilt under a law of the Commonwealth is exclusively judicial; therefore Chapter III precludes the enactment of any law purporting to vest any part of that function in any person or body that is not a "court".[16] Punishment of criminal conduct is exclusively judicial even if the punishment is separated from the adjudication of that criminal guilt; therefore the Parliament cannot vest in any officer of the Commonwealth executive any power to impose additional or further punishment on persons convicted of offences against Commonwealth laws.[17]

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12 E.g. *Acts Interpretation Act 1901* (Cth), s 7; *Crimes Act 1914* (Cth), s 4F; *Moss v Donohoe* (1915) 20 CLR 615, 621 (Griffith CJ); *Samuels v Songaila* (1977) 16 SASR 397; *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ); *Stephens v R* (2022) 273 CLR 635.

13 *Vunilagi v R* (2023) 97 ALJR 627.

14 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

15 *British Medical Association v Commonwealth* (1949) 79 CLR 201, 236; *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144, 151-152; *Hilton v Wells* (1985) 157 CLR 57, 68; *R v Murphy* (1985) 158 CLR 596, 614-5; *Grollo v Bates* (1994) 53 FCR 218; *Kable v DPP (NSW)* (1996) 189 CLR 51, 66, 103, 115, 135; *Application of Pearson* (1999) 46 NSWLR 148*; Re Grinter; Ex parte Hall* (2004) 28 WAR 427; *Huynh v Attorney General (NSW)* (2021) 107 NSWLR 75, [84]-[98], [160] (although this decision was reversed in *Attorney-General (Cth) v Huynh* (2023) 97 ALJR 298, it contains a helpful analysis of the authorities).

16 *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ). This principle can be traced to the observations of Griffith CJ in *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 442-3.

17 *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899, [41]. Provisions for disqualification of persons from the management of a corporation following conviction do not infringe this prohibition, because they are not punitive: *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350; *Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381.

24. In *Falzon*,[18] the High Court held that the exercise of a power of cancellation of a visa by reference to the fact of previous criminal offending does not involve the imposition of a punishment for an offence and does not involve an exercise of judicial power; nor does the deportation of an alien, on the same basis, constitute punishment.

25. In *Jones*,[19] the Court held that a law which allowed a Minister to revoke the Australian citizenship of a person who had been convicted of, and sentenced to a term of imprisonment of at least 12 months for, an offence committed *before the person became an Australian citizen* was not a power to punish criminal guilt and not otherwise exclusively judicial, and therefore was not contrary to Chapter III.

26. However in *Benbrika (No 2)*,[20] the Court held that a law which purported to allow a Minister to remove the Australian citizenship of a person who had been convicted of, and sentenced to a term of imprisonment for, a specified Commonwealth offence was invalid, as it reposed in the Minister "*the exclusively judicial function of punishing criminal guilt*".

27. The Chapter III limitation has been held to prevent a State law which provided for a child to be dealt with for an offence by a non-judicial panel from being picked up and applied by federal law to the sentencing of a federal offender.[21]

1.1.3 Defining and investing federal jurisdiction

28. Sections 75 and 76 of the Constitution provide for the jurisdiction of the High Court. Section 75 confers original jurisdiction on the Court in certain matters. Section 76 provides that the Parliament may make laws conferring original jurisdiction on the High Court in specified classes of matters; they include "*any matter … [a]rising under any laws made by the Parliament*" (s 76(ii)). This includes the trial and punishment of offences against Commonwealth statutes.[22]

29. Section 77 empowers the Parliament to make laws, with respect to any matter mentioned in s 75 or s 76, investing or defining the jurisdiction of other courts. Such laws may define the jurisdiction of any federal court other than the High Court (s 77(i)), define the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States (s 77(ii)) or invest any court of a State with federal jurisdiction (s 77(iii)).

18 *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333.

19 *Jones v Commonwealth of Australia* (2023) 97 ALJR 936.

20 *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899. In response to this decision, in 2023 amendments were enacted to empower a court sentencing an offender for a specified Commonwealth offence to make a "citizenship cessation order" which has the same effect: see "5.1 Citizenship cessation order – Australian Citizenship Act 2007 (Cth), s 36C".

21 *Newman v A (a child)* (1992) 9 WAR 14.

22 *Ah Yick v Lehmert* (1905) 2 CLR 593; *R v Bull* (1974) 131 CLR 203*; R v Murphy* (1985) 158 CLR 596, 617; *Solomons v District Court (NSW)* (2002) 211 CLR 119, [130] (Kirby J); *Macleod v ASIC* (2002) 211 CLR 287, [8]-[9].

30. The term "federal jurisdiction" is used to refer to the authority to exercise, within the limits permitted by or under s 75, s 76 or s 77 of the Constitution, the judicial power of the Commonwealth,[23] including the authority to decide matters arising under federal laws.[24]

31. The power of the Parliament, under s 77(iii) of the Constitution, to make laws investing a State court with federal jurisdiction with respect to any of the matters mentioned in s 75 or s 76 is (like other powers vested in the Parliament by Chapter III) exclusive of the powers of State legislatures; that is, a State legislature has no power to confer, define or invest federal jurisdiction,[25] whether in relation to a federal court[26] or a court of that State.[27] Any State law which purported to confer, define or invest federal jurisdiction would be invalid.[28] The invalidity results from the absence of legislative power, not from inconsistency with a law of the Commonwealth.[29]

32. The Commonwealth Parliament has, however, made comprehensive provision in relation to conferring and defining the jurisdiction of federal courts and investing federal jurisdiction in State courts, including in relation to the sentencing of federal offenders (see "1.2 Federal jurisdiction and the sentencing of federal offenders"). The Commonwealth legislative scheme includes provisions which apply relevant State laws as "*surrogate federal law*" (see "1.6 Commonwealth provisions which apply relevant State and Territory laws").

33. The Constitution confers a separate legislative power in relation to the territories (s 122). Controversy remains about the extent to which a court of a territory is a "federal court" for the purposes of Chapter III of the Constitution, but territory courts have been treated as capable of being vested with federal jurisdiction.[30]

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23 *Rizeq v Western Australia* (2017) 262 CLR 1, [52]. *Rizeq* itself concerned the trial for an offence against State law of a person who was ordinarily resident in another State. The trial of such a matter involves the exercise of the "federal diversity jurisdiction" under s 75(iv) of the Constitution; the court hearing the proceeding is exercising federal jurisdiction, vested in a State court by s 39(2) of the *Judiciary Act 1903* (Cth). The decision in *Rizeq* established that the exercise of federal diversity jurisdiction does not affect the character of the offence; the offence is not thereby converted into an "offence against any law of the Commonwealth" within the meaning of s 80 of the Constitution.

24 *Ah Yick v Lehmert* (1905) 2 CLR 593; *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087, 1142 (Isaacs J); *Gould v Brown* (1998) 193 CLR 346, 379; *Solomons v District Court (NSW)* (2002) 211 CLR 119, [53] (McHugh J).

25 *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, [20].

26 *Pedersen v Young* (1964) 110 CLR 162, 165 (Kitto J), 167 (Menzies J); *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65, 79, 84, 87, 93; *Kruger v Commonwealth* (1997) 190 CLR 1, 135 (Gaudron J); *Commonwealth v Mewett* (1997) 191 CLR 471, 552-3 (Gummow and Kirby JJ); *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, [35]; *Solomons v District Court (NSW)* (2002) 211 CLR 119, [21].

27 *Solomons v District Court (NSW)* (2002) 211 CLR 119, [21]; *R v Gee* (2003) 212 CLR 230, [100]; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, [230]; *Hili* v *R* (2010) 242 CLR 520, [21]; *Rizeq v Western Australia* (2017) 262 CLR 1, [15], [21], [23] (Kiefel CJ), [57]-[63], [103] (Bell, Gageler, Keane, Nettle and Gordon JJ).

28 *Pedersen v Young* (1964) 110 CLR 162, 167 (Menzies J); *Rizeq v Western Australia* (2017) 262 CLR 1, [60]-[61] (Bell, Gageler, Keane, Nettle and Gordon JJ).

29 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, [58]; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, [230]; *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, [20]; *Rizeq v Western Australia* (2017) 262 CLR 1, [60].

30 See P Hanks, F Gordon and G Hill, *Constitutional Law in Australia* (4th edition, 2018), [9.125]-[9.128].

1.2 Federal jurisdiction and the sentencing of federal offenders

34. Under s 77 of the Constitution, the Commonwealth Parliament may confer jurisdiction on either a federal court or a State court with respect to any matter mentioned in s 75 or s 76 of the Constitution. This includes jurisdiction in relation to the sentencing of federal offenders.

35. The power of the Parliament to define or invest federal jurisdiction in relation to federal offences was first exercised by the enactment of the *Punishment of Offences Act 1901* (Cth). That Act was a temporary measure pending the establishment of the High Court of Australia. The Act conferred federal jurisdiction in criminal matters on State courts and applied State laws of a procedural character to the trial on indictment of persons charged with offences against the laws of the Commonwealth. Although only a temporary measure, the Act provided an enduring legislative model for the trial and punishment of Commonwealth offences in State courts.

36. In 1903, the Parliament enacted the *Judiciary Act,* which replaced the *Punishment of Offences Act 1901*. Like its temporary precursor, the *Judiciary Act* vested in State courts jurisdiction to try persons for, and to sentence offenders for, offences against laws of the Commonwealth.[31] The Act also applied State laws (including laws relating to evidence and procedure) to courts exercising federal jurisdiction and applied State laws relating to criminal proceedings to proceedings against persons for Commonwealth offences.[32] The *Judiciary Act* also vested wide general jurisdiction on State courts in relation to federal matters.[33]

37. As Gleeson CJ said in *Gee*,[34] the *Judiciary Act 1903* (Cth) reflected a legislative choice between distinct alternatives: having a procedure for the administration of criminal justice in relation to federal offences that is uniform throughout the Commonwealth; or relying on State courts to administer criminal justice in relation to federal offences and having uniformity within each State as to the procedure for dealing with State and federal offences. The choice was for the latter. The effect was that the laws and practices which governed the sentencing of federal offenders in a State or Territory were assimilated more closely to the sentencing of other offenders in that jurisdiction than to the sentencing of Commonwealth offenders in other jurisdictions. (This is sometimes referred to as vertical or intra-jurisdictional assimilation, in contrast to horizontal or inter-jurisdictional assimilation.)

38. An inevitable result was that considerable disparity applied to the sentencing of federal offenders across Australia. However the High Court has held that such disparity did not inherently offend against constitutional principle.[35]

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31 *Judiciary Act 1903* (Cth), s 68(2).

32 *Judiciary Act 1903* (Cth), s 68(1), 79. See "1.7 The application of State and Territory laws by Judiciary Act 1903, ss 68 and 79".

33 *Judiciary Act 1903* (Cth), s 39(2). The relationship between the vesting of jurisdiction by s 39(2) and by s 68(2) is yet to be authoritatively determined: see, e.g., *Ah Yick v Lehmert* (1905) 2 CLR 593, 607-608; *Adams v Cleeve* (1935) 53 CLR 185; *R v Bull* (1974) 131 CLR 203; *Brown v R* (1986) 160 CLR 171, 197; *R v Luscombe* (1999) 48 NSWLR 282; *Solomons v District Court (NSW)* (2002) 211 CLR 119, [16], [92]; *R v Gee* (2003) 212 CLR 230, [66]-[67], [119]; *Huynh v R* (2021) 105 NSWLR 384, [14], [36], [41]-[42]; *Attorney-General (Cth) v Huynh* (2023) 97 ALJR 298, [46], [64], [211]-[213].

34 *R v Gee* (2003) 212 CLR 230, [7].

35 *Leeth v Commonwealth* (1992) 174 CLR 455 (concerning the *Commonwealth Prisoners Act 1967* (Cth), s 4, which adopted State and Territory laws relating to the fixing of non-parole periods); *Putland v R* (2004) 218 CLR 174, [25] (Gleeson CJ), [59] (Gummow and Heydon JJ).

39. An offender may be sentenced for an offence against State or Territory law and a federal offence in the same proceeding. That is, a court can exercise both State and federal jurisdiction in the same case. This is convenient but increases the complexity of sentencing. As McCallum JA wryly observed in *Ilic*,[36] "*Offenders in New South Wales can be undiscriminating as to whether they commit State or federal offences. Sometimes they do both, which complicates the sentencing task.*"

40. Parliament has also conferred limited jurisdiction on federal courts to deal with federal offences. In particular, since 2009, the Federal Court of Australia has been invested with jurisdiction with respect to the trial on indictment of cartel offences.[37]

1.3 The development of Commonwealth sentencing law

41. Offences under Commonwealth law were created by the first Parliament.[38] The most significant were those in the *Customs Act 1901* (Cth).

42. It was not until the passage of the *Crimes Act 1914* (Cth) that a federal statute made provision of a general nature for the prosecution or sentencing of federal offenders. Even then, provision relating to federal sentencing was sparse.

43. For more than 70 years following the enactment of the *Crimes Act*, relatively few changes were made to federal sentencing law. By amendments in 1960, additional non-conviction sentencing options were made available (*Crimes Act 1914*, s 19B), and State or Territory options were made available for the sentencing of young offenders (*Crimes Act 1914*, s 20C). In 1973, the death penalty (previously provided for treason and some other serious offences, although never imposed) was abolished. Amendments in 1982 empowered courts sentencing federal offenders to impose certain State or Territory non-custodial sentences, such as community service orders and periodic detention (*Crimes Act 1914*, s 20AB). However, the essential features of the legislative scheme remained constant.

44. The position has changed considerably since the late 1980s. Major amendments to the *Crimes Act* were enacted in 1989.[39] Those amendments included extensive provisions relating to the sentencing of Commonwealth offenders.[40] A number of further significant amendments have been made since then.[41]

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36 *Ilic v R* (2020) 103 NSWLR 430, [1].

37 *Federal Court of Australia Amendment (Criminal Jurisdiction) Act 2009* (Cth).

38 The first offences were created by the *Audit Act 1901* (Cth).

39 *Crimes Legislation Amendment Act (No.2) 1989* (Cth), which came into effect on 17 July 1990.

40 In *Putland v R* (2004) 218 CLR 174, [19], Gleeson CJ explained that the impetus for the amendments was "*the difficulty that arose by reason of the truth in sentencing legislation introduced in New South Wales in 1989. ... there was a radical alteration in the system of remissions, and the relationship between minimum terms and head sentences. Parity of sentencing, including parity in relation to State and federal offences, became a major problem.*"

41 The most significant subsequent amendments have been brought about by: *Crimes Legislation Amendment (No.2) Act 1991* (effective 20 September 1991); *Crimes Legislation Amendment Act 1992* (effective 8 January 1993); *Crimes and Other Legislation Amendment Act 1994* (effective 16 January 1995); *Law and Justice Legislation Amendment Act 1999*, Schedule 10 (effective 13 October 1999); *Crimes Amendment (Bail and Sentencing) Act 2006* (effective 12 December 2006); *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015* (effective 27 November 2015); *Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Act 2019* (effective 11 December 2019); *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (some provisions in effect 23 June 2020; others 20 July 2020); *Crimes Amendment (Remissions of Sentences) Act 2021* (effective 9 December 2021).

The result is that Commonwealth law now makes direct provision for a far wider range of matters relating to the sentencing of federal offenders. That trend is unlikely to be reversed.

45. Over the same period, there has been extensive reform of Commonwealth criminal law generally. This has included the enactment of many new offences and the codification of the law by the *Criminal Code* (Cth).[42]

46. The body of case law relating to the sentencing of federal offenders has also expanded considerably, and there is now an extensive (and rapidly expanding) jurisprudence of the High Court and of State and Territory superior courts on the subject. In a series of decisions, the High Court has articulated how national consistency is to be achieved in the sentencing of federal offenders.[43]

47. Although the overwhelming majority of proceedings for federal offences continue to be brought in, and dealt with by, State and Territory courts, there have been some steps towards expanding the jurisdiction of federal courts to deal with federal offences. One such development has been creating the legislative framework and the facilities for cartel offences to be tried on indictment in the Federal Court of Australia. There have also been proposals for the Federal Court to be empowered to try on indictment national security offences.[44]

48. Amongst the factors which have been driving these changes have been: a greater emphasis on the need for consistency in the treatment of federal offenders; the creation of new crimes and an increase in the number and scope of federal offences; a sharp rise in the number of prosecutions for such offences; the growth of internet-related and other cross-border crime; the establishment and development of Commonwealth investigative and prosecution agencies (notably the Australian Federal Police and the CDPP); the emergence of new sentencing options; and an increasing legislative preference for more structured – and sometimes more prescriptive – laws to govern sentencing of federal offenders.

49. As a result of legislative changes, the sentencing of federal offenders is now governed to a much greater extent by federal statutes.

1.4 The major Commonwealth provisions relating to sentencing of federal offenders

50. The most important repository of laws governing the sentencing of federal offenders now is Part IB of the *Crimes Act 1914* (Cth). That Part is of central importance in the sentencing of federal offenders. In seeking to identify the applicable law, Part IB should be the first port of call.[45]

51. Part IB is entitled "Sentencing, imprisonment and release of federal offenders" and comprises the following Divisions:

    Division 1 – Interpretation

    Division 2 – General sentencing principles

    Division 3 – Sentences of imprisonment

    Division 4 – The fixing of non-parole periods and the making of recognizance release orders

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42 *Criminal Code Act 1995* (Cth).

43 *Hili v R* (2010) 242 CLR 520; *Barbaro v R* (2014) 253 CLR 58; *R v Pham* (2015) 256 CLR 550. See "2.5 Reasonable consistency in sentencing".

44 Independent National Security Legislation Monitor, *Report to the Prime Minister: The prosecution and sentencing of children for terrorism* (2018), [8.106]-[8.128].

45 See *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [36].

Division 5 – Conditional release on parole or licence

Division 6 – Unfitness to be tried

Division 7 – Acquittal because of mental illness

Division 8 – Summary disposition of persons suffering from mental illness or intellectual disability

Division 9 – Sentencing alternatives for persons suffering from mental illness

Division 9A – Sharing information relevant to federal offenders

Division 10 –Miscellaneous

52. Part IB deals with such diverse matters as:
    - the applicable principles in sentencing a federal offender (s 16A),
    - mandatory minimum sentences of imprisonment for certain Commonwealth child sexual abuse offences (ss 16AAA, 16AAB and 16AAC),
    - victim impact statements (s 16AB),
    - reductions of sentence for undertaking to cooperate with law enforcement authorities (s 16AC),
    - the principle that imprisonment is a sentence of last resort (s 17A),
    - the commencement of federal sentences (s 16E),
    - cumulation and concurrency of sentences (s 19),
    - the fixing of non-parole periods or recognizance release orders (Division 4),
    - non-conviction dispositions in certain circumstances (s 19B),
    - release on recognizance after conviction (s 20),
    - the availability of particular State sentencing options for sentencing federal offenders generally (s 20AB),
    - reparation (s 21B),
    - disposition of persons who are unfit to be tried (Division 6) or acquitted because of mental illness (Division 7),
    - additional dispositions for offenders suffering from a mental illness or intellectual disability (Divisions 7 and 8), and
    - the availability of State sentencing options for sentencing a child or young person (s 20C).

    A checklist summary of the key provisions is set out in Appendix 1 to this guide.

53. The 1989 amendments, which introduced a number of these provisions, were intended to provide certainty in relation to any term of imprisonment to be served, whilst ensuring that harsher or longer prison terms did not result.[46] Although greater uniformity in the sentencing of federal offenders throughout the Commonwealth was not a stated goal of the legislation,[47] the amendments have also had the effect of producing a greater degree of uniformity.

46 See Second Reading Speech on the *Crimes Legislation Amendment Bill (No.2) 1989* (Cth): *Commonwealth Parliamentary Debates*, Senate, 21 November 1989, 2895.

47 *Putland v R* (2004) 218 CLR 174, [21]-[22] (Gleeson CJ).

54. Both the policy and the drafting of Part IB have been the subject of considerable judicial comment since the 1989 amendments and the provisions continue to be a fertile source of contention in criminal proceedings.[48]

55. Examples of other Commonwealth laws which may affect sentencing of federal offenders in particular circumstances include:
    - the *Proceeds of Crime Act 2002* (Cth);
    - provisions in the *Criminal Code* (Cth) which specify matters which must be taken into account in sentencing for particular offences[49] and which impose a mandatory minimum term of imprisonment for offences relating to community safety supervision orders;[50]
    - provisions in various Acts for forfeiture[51] or disqualification[52] following conviction for an offence;
    - provisions in the *Migration Act 1958* (Cth) for the deportation of offenders in certain circumstances[53] and for mandatory minimum sentences for certain offences against that Act;[54] and
    - provisions in the *Australian Citizenship Act 2007* (Cth) which empower a court to cancel the Australian citizenship of an offender upon sentencing an offender to a term or terms of imprisonment for a specified federal offence.[55]

56. Commonwealth laws dealing with matters relating to the sentencing of federal offenders are complemented by:
    - common law principles, which fill gaps where provisions in federal statutes are not complete (see "1.5 Applicability of the common law"); and
    - State and Territory laws which are applied by Commonwealth statutory provisions as "*surrogate federal law*" (see "1.6 Commonwealth provisions which apply relevant State and Territory laws").

1.5 Applicability of the common law

57. Section 80 of the *Judiciary Act 1903* (Cth) provides for the application of the common law to all courts exercising federal jurisdiction, in the exercise of their jurisdiction.

58. The provision makes applicable "*the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held*".

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48 See Justice Mark Weinberg, "The Labyrinthine Nature of Federal Sentencing" [2012] VicJSchol 1.

49 For example, the provisions described in "3.4.4 Circumstances of any victim – s 16A(2)(d)".

50 See "7.2.3 Offences relating to community safety supervision order".

51 For example, s 101 of the *Fisheries Management Act* 1991 (Cth) permits a court, upon convicting a person of a specified offence against the Act, to order forfeiture of a boat or other specified item which was connected with the commission of the offence.

52 For example, s 206B of the *Corporations Act* 2001 (Cth) provides for disqualification from managing a corporation if a person is convicted of an offence described in the section.

53 See *Migration Act* 1958 (Cth), ss 200-206, 501-501HA. As to the relevance (if any) of these provisions to the sentencing of federal offenders, see "3.5.14 Prospect of cancellation of a visa and deportation".

54 See "7.2.1 People-smuggling offences" and "7.2.2 Bridging visa offences".

55 See "5.1 Citizenship cessation order – Australian Citizenship Act 2007 (Cth), s 36C".

59. The common law is so applied only "*[s]o far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment*".

60. Section 80 thus gives the common law a residual application, to fill gaps in Commonwealth law.[56]

61. Commonwealth law does leave room for the application of general principles of common law to the sentencing of federal offenders. In particular, s 16A of the *Crimes Act 1914* (Cth), which sets out principles governing the sentencing of federal offenders, and specifies matters to which a court must have regard, does not purport to be exhaustive. The essential requirement in s 16A(1) is merely that a court "*must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence*". Moreover s 16A(2), which specifies matters to which a court must have regard, is prefaced with the words, "*In addition to any other matters …*"; this too makes clear that the considerations listed in s 16A(2) are not exhaustive.

62. The generality of the requirement in s 16A(1) and the non-exhaustive nature of the list in s 16A(2) leaves room for the application of general principles of common law (such as proportionality, totality and parity) in sentencing a federal offender.[57] Section 16A is able to accommodate judicially-developed sentencing principles where such principles give relevant content to the statutory expression in s 16A(1) "*of a severity appropriate in all the circumstances of the offence*", as well as expressions such as "*the need to ensure that the person is adequately punished for the offence*", which appears in s 16A(2)(k).[58]

63. Conversely, to the extent that s 16A or other provisions of Part IB of the *Crimes Act 1914* (Cth) specifically or impliedly provide for sentencing considerations which are different from otherwise applicable State and Territory sentencing considerations, the *Crimes Act* is exclusive.[59]

64. In *Bui*,[60] the High Court held that s 16A left no room for the application of what the appellant contended was the common law doctrine of double jeopardy; that is, a common law requirement that a court resentencing an offender following a successful prosecution appeal mitigate the sentence to allow for the presumed distress and anxiety suffered by a respondent as a result of such an appeal. The Court held that there was no gap in s 16A of the *Crimes Act 1914* for the common law doctrine of double jeopardy to fill.[61] The High Court in *Bui* also observed that application of an automatic sentence discount (pursuant to a judge-made principle of law) would not be consistent with the requirement of s 16A(1) that a sentence be appropriate in its severity in all the circumstances of the case.[62]

65. In *Atanackovic*,[63] the Victorian Court of Appeal observed that, following *Bui*, in order for a State common law sentencing principle to apply to sentencing for federal offences, it must be "*accommodated*" by s 16A of the *Crimes Act 1914* (Cth) or be "*picked up*" by s 80 of the *Judiciary Act* 1903 (Cth). The Court of Appeal

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56 *Bui v DPP (Cth)* (2012) 244 CLR 638, [26]-[27] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

57 *Johnson v R* (2004) 78 ALJR 616, [15] (Gummow, Callinan and Heydon JJ); *Hili v R* (2010) 242 CLR 520, [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Bui v DPP (Cth)* (2012) 244 CLR 638, [18] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

58 *Hili v R* (2010) 242 CLR 520, [25]; *Bui v DPP (Cth)* (2012) 244 CLR 638, [18].

59 *R v Pham* (2015) 256 CLR 550, [22]. See "3.1.3 Limited scope for applying sentencing principles under State/Territory legislation".

60 *Bui v DPP (Cth)* (2012) 244 CLR 638.

61 *Bui v DPP (Cth)* (2012) 244 CLR 638, [27]-[28].

62 *Bui v DPP (Cth)* (2012) 244 CLR 638, [19].

63 *Atanackovic v R* (2015) 45 VR 179, [47].

in *Atanackovic* held that neither s 16A nor s 80 provided a legal foundation for the application to the sentencing of Commonwealth offenders of an earlier guideline judgment given by the Court[64] on the use of community correction orders in sentencing.

66. If a common law principle is applied by s 80 (to fill a gap in Commonwealth law), it would appear that the application of that principle could have the effect of excluding the application of a State or Territory law pursuant to s 68 or s 79 of the *Judiciary Act*.[65] Therefore it is necessary to consider whether common law principles apply before considering the application of any relevant State or Territory statute.

1.6 Commonwealth provisions which apply relevant State and Territory laws

67. State and Territory laws relating to the sentencing of offenders can have no application of their own force to the sentencing of a federal offender.[66] However such laws may be applied as "*surrogate federal law*"[67] to the sentencing of a federal offender if a law of the Commonwealth so provides.[68] A number of Commonwealth laws do so; those laws take various forms.[69]

68. In relation to the sentencing of federal offenders, the most important Commonwealth provisions which apply State and Territory laws are ss 68 and 79 of the *Judiciary Act 1903* (Cth). These provisions are discussed in "1.7 The application of State and Territory laws by Judiciary Act 1903, ss 68 and 79").

69. Other important Commonwealth provisions which apply State/Territory laws in particular circumstances include:
    - s 15A of the *Crimes Act 1914*, which applies State/Territory laws relating to the enforcement of fines to a fine imposed on a federal offender (see "4.6.10 Enforcement of fines – Crimes Act 1914, s 15A");

64 *Boulton v R* (2014) 46 VR 308.

65 The relationship between the application of the common law under s 80 of the *Judiciary Act* 1903 (Cth) and the application of State or Territory law as surrogate federal law under ss 68 and 79 of the Act has not been the subject of extensive judicial consideration. However it is clear from the judgments in *Blunden v Commonwealth* (2003) 218 CLR 330, [18], [91], that s 80 is one of the laws of the Commonwealth to which s 79 is expressly excepted. It must follow that s 80 may also be a law of the Commonwealth which renders State or Territory law inapplicable under s 68 of the Act. That is, a State or Territory law of a kind described in s 68(1) may be rendered inapplicable because, as a result of the application of a common law principle by s 80, Commonwealth law made contrary provision to the State or Territory law, or was complete on its face, or left no room for the operation of the State or Territory law. A State or Territory law of a kind described in s 79(1) could similarly be excluded from applying on the basis that the laws of the Commonwealth (that is, including s 80) "*otherwise provided*". This reasoning may underlie the observation in *Johnson v R* (2004) 78 ALJR 616, [15], that, except to the extent stated in ss 16A and 16B of the *Crimes Act 1914* (Cth), "*general common law and not peculiarly local or state statutory principles of sentencing are applicable*" to the sentencing of federal offenders.

66 *Solomons v District Court (NSW)* (2002) 211 CLR 119, [21]; R *v* Gee (2003) 212 CLR 230, [100]; *Hili v R* (2010) 242 CLR 520, [21]; *Rizeq v Western Australia* (2017) 262 CLR 1, [15], [21], [57], [60]-[61], [103].

67 The first recorded use of the term "*surrogate Commonwealth law*", to describe the way State or Territory laws are applied by provisions of the *Judiciary Act 1903* (Cth), appears to be by Murphy J in *Maguire v Simpson* (1977) 139 CLR 362, 408. The term "*surrogate Commonwealth law*" or "*surrogate federal law*" has since been used in a number of decisions of the High Court. In *Rizeq v Western Australia* (2017) 262 CLR 1, [81], the plurality pointed out that "*the adjective "surrogate" adds nothing to the analysis*". (Cf *Pedersen v Young* (1964) 110 CLR 162, 165, where Kitto J referred to State laws binding a federal court "*as federal law*".) Nevertheless the term "surrogate federal law" has gained wide currency and for that reason continues to be used throughout this guide.

68 *Hili v R* (2010) 242 CLR 520, [21].

69 *Mok v DPP (NSW)* (2016) 257 CLR 402, [84].

- s 20AB of the *Crimes Act 1914*, which makes available certain State/Territory sentencing options (see "4.7 Sentences and orders made available by Crimes Act 1914, s 20AB") and (under s 20AB(3)) applies State or Territory law with respect to relevant sentences and orders where such a sentence or order is made (see "4.7.19 Application of State/Territory laws with respect to a sentence passed or order made under s 20AB(1)");
- s 16E of the *Crimes Act 1914*, which applies State or Territory law relating to the credit to be given for pre-sentence custody for the offence (see "4.8.10 Allowance for pre-sentence custody for the offence");
- s 20C of the *Crimes Act 1914*, which allows for a child or young person charged with or convicted of a Commonwealth offence to be "tried, punished or otherwise dealt with as if the offence were an offence against a law of the State or Territory" (see "7.4 Children and young persons").

1.7 The application of State and Territory laws by *Judiciary Act 1903*, ss 68 and 79

70. The most important provisions for the application of State and Territory law as surrogate federal law in relation to the sentencing of federal offenders are ss 68 and 79 of the *Judiciary Act 1903* (Cth).

71. The purpose of these provisions is "*to place the administration of the criminal law of the Commonwealth in each State upon the same footing as that of the State, and to avoid the establishment of two independent systems of criminal justice.*"[70]

1.7.1 The terms of s 68(1) and (2) and s 79(1)

72. Section 68(1) of the *Judiciary Act 1903* (Cth) provides:

> *The laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences, and the procedure for:*
>
> *(a) their summary conviction; and*
>
> *(b) their examination and commitment for trial on indictment; and*
>
> *(c) their trial and conviction on indictment; and*
>
> *(d) the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith;*
>
> *and for holding accused persons to bail, shall, subject to this section, apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the several courts of that State or Territory by this section.*

73. Section 68(2) provides:

> *The several Courts of a State or Territory exercising jurisdiction with respect to:*
>
> *(a) the summary conviction; or*
>
> *(b) the examination and commitment for trial on indictment; or*
>
> *(c) the trial and conviction on indictment;*

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70 *Williams v R [No 2]* (1934) 50 CLR 551, 560 (Dixon J).

of offenders or persons charged with offences against the laws of the State or Territory, and with respect to the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith, shall, subject to this section and to section 80 of the Constitution, have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth.

74. Section 68(7) is also relevant to the construction of s 68(1) and (2). It provides:

The procedure referred to in subsection (1) and the jurisdiction referred to in subsection (2) shall be deemed to include procedure and jurisdiction in accordance with provisions of a law of a State or Territory under which a person who, in proceedings before a court of summary jurisdiction, pleads guilty to a charge for which he or she could be prosecuted on indictment may be committed to a court having jurisdiction to try offences on indictment to be sentenced or otherwise dealt with without being tried in that court, and the reference in subsections (1) and (2) to any such trial or conviction shall be read as including any conviction or sentencing in accordance with any such provisions.

75. Section 79(1) provides:

The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

1.7.2 The conferral of jurisdiction and the application of laws

76. Sections 68(1) and (2) and s 79(1) have two distinct effects. The effect of s 68(2) is to *confer jurisdiction* on State and Territory courts; that is, s 68(2) is concerned with the ambit of the jurisdiction rather than the content of the powers to be exercised under it.[71] The effect of s 68(1) and s 79(1) is to *apply State and Territory laws* to courts exercising federal jurisdiction.

77. There is an important link between the application of laws under s 68(1) and the conferral of jurisdiction under s 68(2). Section 68(1) applies laws of the kind specified (that is, broadly speaking, State and Territory criminal procedure laws) to persons charged with Commonwealth offences, "*in respect of whom jurisdiction is conferred on the several courts of that State or Territory by this section*". That is, the laws are applied by reference to the jurisdiction conferred on State or Territory courts by s 68.

78. Section 68(2) confers jurisdiction by analogy with the jurisdiction of the State or Territory court at the relevant time.[72] The section operates on State and Territory courts exercising jurisdiction with respect to the various kinds of criminal proceedings referred to. The criminal proceedings referred to are those with respect to State or Territory offences. Section 68(2) confers on those courts "*the like jurisdiction"* with respect to persons who are charged with offences against the laws of the Commonwealth, subject to s 68 itself and to section 80 of the Constitution. The ambulatory nature of s 68(2) enables it to pick up procedural changes and developments as they occur in the particular State or Territory from time to time.[73]

71 *Solomons v District Court (NSW)* (2002) 211 CLR 119, [19].
72 *Williams v R [No 2]* (1934) 50 CLR 551, 560 (Dixon J).
73 *R v Gee* (2003) 212 CLR 230, [6]-[7] (Gleeson CJ).

79. The federal jurisdiction conferred by s 68(2) extends to a State or Territory court exercising jurisdiction "*with respect to … the summary conviction … or … the trial and conviction on indictment*" of a person charged with an offence. This includes a court sentencing an offender.[74] Thus s 68(2) confers "*the like jurisdiction*" on the court with respect to sentencing for a federal offence. For example, if a State court exercises jurisdiction with respect to the sentencing of State offenders on indictment, s 68(2) confers "*the like jurisdiction*" on the court with respect to the sentencing of federal offenders on indictment (subject to s 68 itself and to section 80 of the Constitution).

80. "Like jurisdiction" is the authority to decide "matters" arising under federal laws in a manner similar to the authority of the court to decide matters arising under State or Territory law after allowance is made for the fact that the State or Territory jurisdiction arises under State or Territory law and federal jurisdiction arises under federal law.[75]

81. Like s 68(1), s 79(1) does not itself confer jurisdiction. It renders State or Territory laws binding on a court "*exercising federal jurisdiction in that State or Territory*". That is, s 79(1) applies only if the court is exercising jurisdiction vested by the Constitution or by a law of the Commonwealth. The jurisdiction may be that exercised by a federal court or by a State or Territory court. It includes jurisdiction conferred on a State or Territory court by s 68(2), or on a federal court by or under the Constitution.

82. Since proceedings for a federal offence, including sentencing, always involve the exercise of federal jurisdiction, one of the effects of s 79(1) is to make State or Territory laws binding on a court sentencing a federal offender, subject to the limitations in s 79(1) itself.

83. At face value, therefore, there is a substantial overlap between the application of State or Territory laws under s 68(1) and their application under s 79(1), although it may be that s 68(1), as the more specific provision, would prevail if there were any conflict between them.[76]

1.7.3 Which laws are picked up and applied?

84. Section 68(1) applies "*[t]he laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences, and the procedure for … their summary conviction … their examination and commitment for trial on indictment … their trial and conviction on indictment … the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith … and for holding accused persons to bail*".

85. This description embraces a wide range of aspects of criminal procedure. It includes laws relating to the sentencing of offenders.[77] The prior and continuing reference in each of s 68(1) and (2) to "*persons who are charged with offences against the laws of the Commonwealth*" must be read without temporal restriction so as to extend to persons who, having been charged, have gone on to be tried and convicted of offences against laws of the Commonwealth.[78]

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74 *Williams v R [No 2]* (1934) 50 CLR 551, 560; *Putland v R* (2004) 218 CLR 174; *Hili v R* (2010) 242 CLR 520.

75 *Solomons v District Court (NSW)* (2002) 211 CLR 119, [41] (McHugh J).

76 In *Attorney-General (Cth) v Huynh* (2023) 97 ALJR 298, [64], Kiefel CJ, Gageler and Gleeson JJ said, "*s 68(1) must displace s 79(1) to the extent of any inconsistency in the translation of State laws. Section 68(1) is the more specific of the two provisions, and giving priority to s 68(1) is harmonious with the purposes of both provisions*". This question was not addressed by the other judges in that case.

77 *Williams v R [No 2]* (1934) 50 CLR 551, 560; *Putland v R* (2004) 218 CLR 174; *Hili v R* (2010) 242 CLR 520.

78 *Attorney-General (Cth) v Huynh* (2023) 97 ALJR 298, [52] (Kiefel CJ, Gageler and Gleeson JJ).

86. Section 79(1) renders "*[t]he laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, … binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable*".

87. Although s 79(1) refers specifically to "*laws relating to procedure, evidence, and the competency of witnesses*", it is not confined to those laws. But since s 79(1) is directed to courts exercising federal jurisdiction the laws must be of a kind which are capable of being binding on them; the section is not, for example, directed to the rights and liabilities of those engaged in non-curial procedures under State laws.[79] Nor does it have any application to officers of the executive governments of the States or Territories.[80]

1.7.4 Qualifications on the application of State and Territory laws

88. Sections 68(1) and 79(1) pick up and apply State and Territory laws described in those subsections, subject to the stated qualifications. The qualifications are:
    - the laws of a State or Territory to which s 68(1) refers apply ''so far as they are applicable''; and
    - the operation of s 79(1) is qualified by the use of the words ''except as otherwise provided by the Constitution or the laws of the Commonwealth''.

89. In *Putland*,[81] Gleeson CJ said that there was "*little, if any, functional difference between the two forms of qualification*".

90. Therefore, in determining whether a State or Territory law is picked up and applied by s 68(1) or s 79(1) of the *Judiciary Act*, it is necessary to consider whether the Constitution or any Commonwealth law has the effect of excluding the application of the State or Territory law.

91. A State or Territory law of the kind described in s 68(1) or s 79(1) would not be picked up and applied if "*a Commonwealth law expressly or by implication made contrary provision, or if there were a Commonwealth legislative scheme ... which was ''complete upon its face'' and can ''be seen to have left no room'' for the operation of*" the State or Territory law.[82]

1.7.5 Legislative schemes which leave no room for the operation of State/Territory laws

92. Whether, for the purposes of s 68(1) or s 79(1) of the *Judiciary Act 1903* (Cth), a Commonwealth law makes contrary provision, or whether a Commonwealth legislative scheme is complete on its face or leaves no room for the operation of a State or Territory law, often raises difficult issues of statutory interpretation.

93. In relation to the fixing of non-parole periods for federal offences, it has been held that the scheme in Division 4 of Part IB of the *Crimes Act 1914* (Cth) was complete upon its face and left no room for the application of State law.[83]

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79 *Solomons v District Court (NSW)* (2002) 211 CLR 119, [23] (Gleeson CJ, Gaudron, Gummow, Hayne & Callinan JJ).

80 *Solomons v District Court (NSW)* (2002) 211 CLR 119, [25] (Gleeson CJ, Gaudron, Gummow, Hayne & Callinan JJ), [57] (McHugh J).

81 *Putland v R* (2004) 218 CLR 174, [7] (Gleeson CJ).

82 *Putland v R* (2004) 218 CLR 174, [7] (Gleeson CJ); see also *Solomons v District Court (NSW)* (2002) 211 CLR 119; *Bui v DPP (Cth)* (2012) 244 CLR 638, [25].

83 *Hili v R* (2010) 242 CLR 520.

94. Similarly, the sentencing options set out in the *Crimes Act 1914* (together with any other options provided by other Commonwealth laws) constitute a code; neither s 68 nor s 79(1) has the effect of making State or Territory sentencing options or alternatives available in the sentencing of federal offenders.[84] (However some State or Territory sentencing options are made available in the sentencing of federal offenders by other Commonwealth provisions, notably s 20AB and s 20C of the *Crimes Act 1914*, each of which is in Part IB.)

95. The extensive nature of the provisions of Part IB of the *Crimes Act 1914*, and particularly s 16A, generally leaves limited scope for State or Territory laws which specify relevant or irrelevant considerations in sentencing, or which otherwise affect the exercise of sentencing discretion, to be applied by the provisions of the *Judiciary Act 1903* (Cth) to the sentencing of federal offenders. See "3.1.3 Limited scope for applying sentencing principles under State/Territory legislation".

96. Part IB will more often leave scope for the application of State and Territory laws which relate to procedural matters. For example, in relation to the imposition of an aggregate sentence on a federal offender, the High Court has held that provision in s 4K of the *Crimes Act 1914* for the imposition of an aggregate sentence by a court of summary jurisdiction did not prevent a Territory law which allowed for an aggregate sentence to be imposed on indictment from being applied as surrogate federal law to the sentencing of a federal offender.[85] Similarly, a limited power in s 19AH of the *Crimes Act 1914* to correct a failure to properly fix a non-parole period or to make a recognizance release order has been held not to prevent the application of a general provision under State law allowing for an erroneous sentence to be recalled and corrected.[86]

97. On the other hand, Commonwealth legislative provisions for dealing with federal offences have been held to preclude a State law for taking offences into account in the sentencing of a State offender from being applied so as to allow a federal offence to be taken into account (in the sentencing of a State offender). It has been held that such an application of State law would be inconsistent with three aspects of the Commonwealth legislative scheme relating to federal offences: (1) s 16BA of the *Crimes Act 1914* (which provides for federal offences to be taken into account in sentencing a federal offender); (2) s 19AJ and other provisions of Part IB of the Act which implicitly preclude the intermixing of Commonwealth and State sentences of imprisonment; and (3) implicit requirements in the *Crimes Act 1914* and the *Director of Public Prosecutions Act 1983* (Cth) that a Commonwealth offence should not be disposed of contrary to the determination of a Commonwealth prosecutor.[87]

1.7.6 State or Territory laws not applied if the Constitution provides otherwise

98. An express exception in s 79(1) of the *Judiciary Act 1903* (Cth) to the application of State or Territory laws arises where the Constitution otherwise provides. A similar limitation is implicit in s 68(1) of the Act.[88]

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84 *All Cars Ltd v McCann* (1945) 19 ALJR 129; *R v Mirkovic* [1966] VR 371; *Harrex v Fraser* [2011] ACTSC 172, [38]-[39]. See also *R v Tran* [2019] SASCFC 5, [50].

85 *Putland v R* (2004) 218 CLR 174. See "6.10.7 Aggregate penalty for charges on indictment".

86 *DPP (Cth) v Wallace* (2011) 43 WAR 61, [25]-[34]. See "6.12 Power of sentencing court to correct error in sentence".

87 *Ilic v R* (2020) 103 NSWLR 430, [37]-[44] (McCallum JA, Wright J agreeing); see also [59]-[60] (Garling J). See "6.5.3 Can a federal offence be taken into account in sentencing for a State or Territory offence?".

88 *Putland v R* (2004) 218 CLR 174, [7] (Gleeson CJ).

99. One significant consequence is that a State or Territory law cannot be applied by s 68(1) or s 79(1) if its operation as surrogate federal law would be contrary to Chapter III of the Constitution.[89] That could arise if, for example, the State or Territory law invested judicial power in a body other than a court[90] or if it invested in a court a non-judicial power or function which is not auxiliary or incidental to the exercise of judicial power.[91]

1.7.7 "Applicable" laws

100. The specification in s 68(1) of the *Judiciary Act 1903* (Cth) that relevant State or Territory laws apply "*so far as they are applicable*" has an echo in the provision in s 79(1) of the Act that State or Territory laws are binding on courts exercising federal jurisdiction in that State or Territory "*in all cases to which they are applicable*".

101. The mere fact that a State or Territory law in its own terms is directed to the sentencing of a State or Territory offender does not necessarily prevent it from being "applicable" as surrogate federal law under s 68(1) or s 79(1). For example, a State procedural law may refer to proceedings for an "offence". On ordinary principles of construction, and under State or Territory interpretation laws, such a reference will usually mean only an offence against the law of that State or Territory.[92] State or Territory laws must not be regarded as inapplicable for that reason alone; otherwise many laws relating to criminal procedure would be rendered incapable of being picked up and applied to a court dealing with proceedings for a Commonwealth offence and the efficacy of s 68(1) and s 79(1) would be severely impaired.[93]

102. It is well established that, except to the extent necessary to give the law federal application, s 79 picks up State or Territory laws with their meaning unchanged.[94] The same is true of s 68(1).[95] The extent of such modification is limited to that which is necessary to give effect to the application of the law as surrogate federal law: for example, by reading a reference to an "offence" as if it included a federal offence.

103. Section 79 does not operate to give a State law a new or extended meaning when it is made applicable in federal jurisdiction.[96] There may be statutory provisions couched in terms which make it

89 *Solomons v District Court (NSW)* (2002) 211 CLR 119, [24], [28].
90 E.g. *Newman v A (a child)* (1992) 9 WAR 14.
91 See the authorities cited in fn 15.
92 *Seaegg v R* (1932) 48 CLR 251, 255; *Grollo v Bates* (1994) 53 FCR 218; *Wallace v Debs* [2009] VSC 355; *Ilic v R* (2020) 103 NSWLR 430, [21]-[22]. The usual construction may be excluded if a contrary intention appears: e.g. *D151 v New South Wales Crime Commission* (2017) 94 NSWLR 738.
93 *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65, 88 (Gibbs J), 95 (Mason J); *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, [141] (McHugh J); *Solomons v District Court (NSW)* (2002) 211 CLR 119, [58]-[59] (McHugh J); cf [81], [115] (Kirby J); *DPP (Cth) v Wallace* (2011) 43 WAR 61, [31]; *Ilic v R* (2020) 103 NSWLR 430, [25]-[32]. The Northern Territory statute which was held in *Putland v R* (2004) 218 CLR 174 to apply to the sentencing of a Commonwealth offender conferred power to impose an aggregate sentence on an offender for two or more "offences" (that is against the law of the NT); there was no suggestion that the statute was thereby rendered inapplicable for the purposes of s 68(1).
94 *Solomons v District Court (NSW)* (2002) 211 CLR 119, [60] (McHugh J).
95 *Putland v R* (2004) 218 CLR 174, [36]-[38]; *Attorney-General (Cth) v Huynh* (2023) 97 ALJR 298, [57] (Kiefel CJ, Gageler and Gleeson JJ), [150] (Gordon and Steward JJ), [269] (Jagot J). Cf *Thomas v Ducret* (1984) 153 CLR 506 (concerning what is now s 15A of the *Crimes Act 1914* (Cth)).
96 *Solomons v District Court (NSW)* (2002) 211 CLR 119, [60] (McHugh J).

impossible for them to be 'picked up' because the degree of translation required is too great.[97] So, for example, it has been held that a State statute which empowered a court, on an appeal against sentence, to set aside a conviction to enable the court to impose a non-conviction bond under State law was not capable of being applied, as surrogate federal law, to an appeal against sentence for a Commonwealth offence as if the State law extended to permitting a conviction to be set aside to enable the imposition of a non-conviction bond under s 19B of the *Crimes Act 1914* (Cth).[98] To do so would have been to alter the language of the State statute and apply it in that altered form.

104. It is well-established that s 68(1) and s 79(1) do not operate to apply only part, but not the whole, of an integrated legislative regime so as to give an altered meaning or effect to that severed part of State or Territory legislation.[99] But this does not mean that the operation of s 68(1) is limited to the application of State or Territory laws which stand alone or which are components of State or Territory legislative schemes capable of application as Commonwealth laws in their entirety; it means that s 68(1) does not apply the text of a State or Territory law where to apply the text divorced from its State or Territory context would give that text a substantively different legal operation.[100] The provisions of the *Judiciary Act* can operate to apply some provisions of a State or Territory law but not others.[101] For example, while provisions of a State or Territory law relating to sentencing procedure may be generally applicable, particular provisions may be rendered inapplicable because Part IB of the *Crimes Act 1914* makes contrary provision or leaves no room for their operation.[102]

1.8 Penalties

1.8.1 Maximum penalties for Commonwealth offences

105. The maximum penalty for a Commonwealth offence is usually specified in the provision which creates the offence, or sometimes in another provision of the legislation which creates the offence. If a penalty is set out at the foot of a provision, it indicates (unless the contrary intention appears) that contravention of the provision is an offence, punishable on conviction by a penalty not exceeding the penalty set out.[103]

106. The penalty specified is typically a period of imprisonment, or a fine, or both. In the absence of contrary provision, these represent the maximum penalty, not a fixed penalty.[104]

107. An offence is not punishable by imprisonment unless a penalty of imprisonment is applicable to the offence.

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97 *Attorney-General (Cth) v Huynh* (2023) 97 ALJR 298, [152] (Gordon and Steward JJ), quoting *Kruger v Commonwealth* (1997) 190 CLR 1, 140.

98 *Huynh v R* (2021) 105 NSWLR 384, [57]. As the Court noted, the position might have been different if the State law had been expressed in more general terms that were capable of including an order under s 19B.

99 *Putland v R* (2004) 218 CLR 174, [38]; *Solomons v District Court (NSW)* (2002) 211 CLR 119, [24].

100 *Attorney-General (Cth) v Huynh* (2023) 97 ALJR 298, [65]-[66] (Kiefel CJ, Gageler and Gleeson JJ); cf [154] (Gordon and Steward JJ), [271]-[272] (Jagot J).

101 *Re Grinter; Ex parte Hall* (2004) 28 WAR 427, [70].

102 For example, s 19 of the *Crimes Act 1914* (Cth), which deals with the means by which cumulation or concurrency of federal sentences is to be achieved, leaves no room for the application of State or Territory laws on the subject: see "4.9.1 The mechanism for cumulation or concurrency of sentences on a federal offender: Crimes Act 1914, s 19".

103 *Crimes Act 1914* (Cth), s 4D.

104 *Crimes Act 1914* (Cth), s 4D; *Sillery v R* (1981) 180 CLR 353.

108. Different penalties are often provided depending on whether the offence is committed by a natural person or by a body corporate.

109. The maximum fine is usually specified by reference to "penalty units": see "4.6.3 Penalty unit value".

110. Other penalties may also be provided for in the Act which creates the offence or by another Act. An example is a citizenship cessation order under s 36C of the *Australian Citizenship Act 2007* (Cth), which may be imposed where an offender is convicted of a specified serious offence: see "5.1 Citizenship cessation order – *Australian Citizenship Act 2007* (Cth), s 36C".

111. If the offence is an indictable offence, lesser penalties will apply if it is determined summarily: see "1.8.3 Limits on penalties on summary disposition of an indictable offence – *Crimes Act 1914*, ss 4J and 4JA".

112. As to the significance of the applicable maximum penalties in the exercise of the sentencing discretion, see "3.2.4 Assessing the seriousness of the offence by reference to the maximum penalty".

1.8.2 Alteration of maximum penalties

113. Section 4F of the *Crimes Act 1914* (Cth) provides:

> ***4F Effect of alterations in penalties***
>
> *(1) Where a provision of a law of the Commonwealth increases the penalty or maximum penalty for an offence, the penalty or maximum penalty as increased applies only to offences committed after the commencement of that provision.*
>
> *(2) Where a provision of a law of the Commonwealth reduces the penalty or maximum penalty for an offence, the penalty or maximum penalty as reduced extends to offences committed before the commencement of that provision, but the reduction does not affect any penalty imposed before that commencement.*

114. This provision, which was first introduced as s 45A of the *Acts Interpretation Act 1901* (Cth) in 1984[105] and moved (with minor changes) to the *Crimes Act* in 1987,[106] was "*in accordance with the requirements of Article 15 of the International Covenant on Civil and Political Rights*".[107] Section 4F(1) also instantiated the common law presumption against retrospective increases in penalties for offences. Courts have held that such provisions "*apply a notion of fairness*"[108] and should be interpreted broadly,[109] as they embody important principles recognised by the common law and by international human rights instruments.

115. Whether a penalty is increased, for the purposes of s 4F(1), is to be determined as a matter of substance rather than form.[110]

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105 The amendment was made by the s.18 of the *Acts Interpretation Amendment Act 1984* (Cth) and commenced operation on 12 June 1984.

106 The amendments were made by *Crimes Legislation Amendment Act 1987* (Cth), ss.11 and 74, and commenced operation on 1 March 1989.

107 Second reading speech of the Attorney-General, Senator Gareth Evans QC, on the *Acts Interpretation Amendment Bill 1984*, *Hansard (Senate)*, 8 March 1984, 584. The Covenant came into force generally on 23 March 1976. Australia signed it on 18 December 1972 and ratified it on 13 August 1980. In ratifying the Covenant, Australia made a number of reservations, but none of them related to Art.15.

108 *R v MJR* (2002) 54 NSWLR 368, [19] (Spigelman CJ).

109 E.g. *R v Mason* [1998] 2 Qd R 186, 207*; R v Ware (a pseudonym)* (2022) 17 ACTLR 273, [85]-[88].

110 See *R v Ware (a pseudonym)* (2022) 17 ACTLR 273, [85]-[93] and the authorities cited there.

116. An offence may continue to exist, for the purposes of s 4F(1), if a provision creating an offence is repealed and re-enacted, transferred to another statute, or amended,[111] but if the offence as re-enacted is different from the old so as to be a new offence it will not apply.[112] Similarly, s 4F(2) does not apply where the offence has been repealed and a different offence with a lesser penalty enacted.[113]

117. In *Hurt*,[114] Gageler CJ and Jagot J described s 4F as "*a general transitional provision regulating when an increased or decreased penalty operates*". Although not expressed to be subject to a contrary intention,[115] s 4F may be displaced by a specific transitional provision.[116] The displacement must, however, be clear, and to be fully effective must displace the presumption not only as it applies generally, but also as it applies to proceedings which have been commenced.[117]

1.8.3 Limits on penalties on summary disposition of an indictable offence – *Crimes Act 1914*, ss 4J and 4JA

118. Section 4J sets out the limits on the fine, and term of imprisonment, that may be imposed when **an indictable offence against a law of the Commonwealth which is punishable by imprisonment[118] is determined summarily**.[119] If the offence relates to property whose value does not exceed $5,000, the offence may be dealt with summarily on the request of the prosecutor, if the court thinks fit (s 4J(4)); in such a case, the penalty which may be imposed on summary conviction is 12 months' imprisonment or a fine of 60 penalty units or both (s 4J(5)). In any other case, the limit on the penalty on summary conviction for an indictable offence is determined by the maximum penalty for the offence generally, as follows:

- *If the maximum penalty for the offence is a term of imprisonment not exceeding 5 years*, the limit on the penalty which may be imposed on summary conviction is imprisonment for 12 months and/or a fine not exceeding 60 penalty units; and

111 *Xerri v R* (2024) 98 ALJR 461, [14] (Gageler CJ and Jagot J), referring to a cognate provision in s 19 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

112 *Xerri v R* (2024) 98 ALJR 461, [41] (Gordon, Steward and Gleeson JJ), also referring to the corresponding provision in NSW.

113 *R v Ronen* [2006] NSWCCA 123, [30]-[35].

114 *Hurt v R; Delzotto v R* (2024) 98 ALJR 485.

115 When first enacted as s 45A of the *Acts Interpretation Act 1901* (Cth), the provision was expressly subject to a contrary intention under s 2 of that Act. Although s 4F is not expressed to be subject to a contrary intention, as a definitional or interpretive provision, such a limitation is implied: *Re Fourth South Melbourne Building Society* (1883) 9 VLR (Eq) 54; *Knightsbridge Estates Trust Ltd v Byrne* [1940] AC 613, 621; *Hall v Jones* (1942) 42 SR (NSW) 203, 207-8; *Transport Accident Commission v Treloar* [1992] 1 VR 447, 449; *Buresti v Beveridge* (1998) 88 FCR 399, 401; *Betella v O'Leary* [2001] WASCA 266, [13].

116 E.g. *Chief Executive Officer of Customs v Derbas* [2002] NSWCCA 132.

117 *Acts Interpretation Act 1901* (Cth) s 7 (a penalty is "*incurred in respect of any offence*", for the purpose of this section, at the time of the offence: *Commissioner of Taxation v Price* [2006] 2 Qd R 316, [58]-[59]); *Lodhi v R* [2006[NSWCCA 121, [23]-[29] (Spigelman CJ, McClellan CJ at CL and Sully J agreeing); *Stephens v R* (2022) 273 CLR 635, [33]-[36] (Keane, Gordon, Edelman and Gleeson JJ).

118 Note that s 4G of the *Crimes Act 1914* provides that an offence punishable by imprisonment for a period exceeding 12 months is an indictable offence, unless the contrary intention appears.

119 Section 4J(7) provides that the section does not apply to certain national security offences: an offence against s 79(2) or s 79(5) (official secrets etc) of the *Crimes Act 1914* (Cth), or to an offence against Division 80 (other than Subdivision CA) (treason etc), Division 82 (sabotage), Division 91 (espionage) or Division 92 (foreign interference) of the *Criminal Code* (Cth).

- *If the maximum penalty for the offence is a term of imprisonment exceeding 5 years but not exceeding 10 years*, the limit on the penalty which may be imposed on summary conviction is 2 years imprisonment and/or a fine not exceeding 120 penalty units.

(No provision is made in relation to an offence punishable by a term of imprisonment exceeding 10 years because generally speaking such an offence cannot be determined summarily.)

119. Section 4JA, sets out the limits on the fine that may be imposed when **an indictable offence against a law of the Commonwealth which is not punishable by imprisonment is determined summarily** (subject to the power in s 4J(4) and to any contrary intention indicated by the law creating the offence). The maximum fine on summary conviction is determined by the maximum fine for the offence generally, as follows:

- *if the offence would be punishable on indictment by a pecuniary penalty of not more than 300 penalty units for an individual*, the maximum pecuniary penalty which may be imposed on an individual on summary conviction is 60 penalty units;
- *if the offence would be punishable on indictment by a pecuniary penalty of not more than 600 penalty units for an individual*, the maximum pecuniary penalty which may be imposed on an individual on summary conviction is 120 penalty units;
- *if the offence would be punishable on indictment by a pecuniary penalty of not more than 1500 penalty units for a body corporate*, the maximum pecuniary penalty which may be imposed on a body corporate on summary conviction is 300 penalty units;
- *if the offence would be punishable on indictment by a pecuniary penalty of not more than 3000 penalty units for a body corporate*, the maximum pecuniary penalty which may be imposed on a body corporate on summary conviction is 600 penalty units.

(No provision is made in relation to an offence punishable by a pecuniary penalty exceeding 600 penalty units for an individual or 3000 penalty units for a body corporate because generally speaking such an offence cannot be determined summarily.)

120. None of these provisions permits a court of summary jurisdiction to impose a sentence of imprisonment or a fine which is greater than that which could have been imposed on indictment (ss 4J(6), 4JA(2)), or to impose both a sentence of imprisonment and a fine if the offence is not punishable by both on indictment (s 4J(6)).

121. The limits on penalties which may be imposed on summary disposition of an indictable offence are not to be treated, for sentencing purposes, as the equivalent of maximum penalties. It is an error for a court to treat such a limit as reserved for the worst category of case, or as fixing one end of the "yardstick" against which to assess the seriousness of the offence it is considering. See "3.2.4 Assessing the seriousness of the offence by reference to the maximum penalty".

1.9 Federal sentencing options

122. In sentencing a federal offender for an offence which is punishable by imprisonment, there are generally **six federal sentencing options** available following a finding of guilt:

- **Dismiss the charge** (*Crimes Act 1914* (Cth), s 19B)
- **Bond without conviction** (*Crimes Act 1914* (Cth), s 19B)
- **Bond with conviction** (*Crimes Act 1914* (Cth), s 20(1)(a))
- **Fine with conviction** (either as specified in the law which creates the offence or under *Crimes Act 1914* (Cth), s 4B)
- **Particular State/Territory options,** with conviction (*Crimes Act 1914* (Cth), s 20AB)

- **Imprisonment,** by way of a straight sentence (that is, a sentence with no provision for release before its expiry) or subject to release either pursuant to a recognizance release order (either immediately or after service of a specified period) or on parole

123. Each of these options is discussed in detail in Chapter 4.

124. For some offences, particular options may be excluded. Examples are:

- For some national security offences (such as terrorism, treason and espionage), certain federal sentencing options, including release under a recognizance release order, are not available where a federal offender is sentenced to imprisonment.[120]
- For certain people-smuggling offences, a term of imprisonment and a period to be served of specified minimum durations are mandatory.[121]
- For certain offences relating to conditions of bridging visas and for certain offences relating to community safety supervision orders, a sentence of imprisonment of at least one year must be imposed.[122]
- In sentencing a person convicted of a Commonwealth child sex offence or child sexual abuse offence, a sentence of imprisonment of at least a specified length is mandatory in specified circumstances.[123]

125. On the other hand, in particular circumstances, **additional dispositions are available** in dealing with a federal offender or a person charged with a federal offence:

- Section 20C of the *Crimes Act 1914* (Cth) allows for a federal offender who is a **child or young person** to be punished or otherwise dealt with as if the offence were an offence against a law of the relevant State or Territory.
- Divisions 6, 7, 8 and 9 of Part IB of the Act provide for disposition options in relation to persons who are **unfit to be tried**, or **acquitted by reason of mental illness**, or who otherwise have a **mental illness or intellectual disability**.

These provisions are described in more detail below in Chapter 7 ("Specific sentencing situations").

120 See "4.10.8 The three-quarters rule in fixing a NPP for certain national security offences".
121 See "7.2.1 People-smuggling offences".
122 See "7.2.2 Bridging visa offences" and "7.2.3 Offences relating to community safety supervision order".
123 See "7.3 Child sex offences and child sexual abuse offences".

2 SENTENCING METHODOLOGY

126. This Chapter addresses the following topics relating to the methodology of sentencing a federal offender:

- fact-finding for sentencing;
- the appropriate method for synthesising factors relevant to sentencing;
- whether the failure of a sentencing court to refer, in its reasons, to a relevant sentencing consideration necessarily evinces a failure to take that consideration into account; and
- how sentencing courts are to ensure reasonable consistency in the sentencing of federal offenders.

2.1 Fact-finding in federal sentencing

2.1.1 The statutory regime

127. Commonwealth statutes are not generally prescriptive about the evidentiary rules or procedures for fact-finding by a court sentencing a federal offender. Procedures and evidentiary rules in the relevant State or Territory for fact-finding by a sentencing court, whether pursuant to common law or local statutes, are generally applied by the provisions of the *Judiciary Act 1903* (Cth) to the sentencing of federal offenders.

128. Section 16A(2) of the *Crimes Act 1914* (Cth) requires a court sentencing a federal offender to take into account such of a number of listed matters "*as are relevant and known to the court*". This requirement is not prescriptive of the ways in which such matters may become "*known to the court*", but in some circumstances precludes a sentencing court from acting upon a mere presumption: see "2.1.3 Relevant matters "known to the court": *Crimes Act 1914,* s 16A(2)".

2.1.2 Fact-finding following a jury trial

129. The constitutional guarantee that the trial on indictment of any offence against any law of the Commonwealth shall be by jury (*Constitution*, s 80) does not require more than that, on a trial, the jury must determine whether *the elements of the offence* are made out. Matters of aggravation may be made elements of the offence (for example, as in the offence of aggravated robbery in s 132.3 of the *Criminal Code* (Cth)), or may instead go only to penalty (for example, as in s 141.1(6) of the *Criminal Code* (Cth)). Facts which are not elements of the offence – including matters which may substantially affect the applicable penalty – may be determined by a sentencing judge alone.

130. *Kingswell*[124] provides an illustration. The provisions of the *Customs Act 1901* (Cth) there under consideration provided higher penalties for the offence of conspiring to import prohibited imports which are narcotic goods, if "the Court" was satisfied that the narcotic goods consisted of a trafficable quantity or a commercial quantity. The majority of the High Court in *Kingswell* held that the statute did not create separate offences depending on the quantity; it construed the reference to "the Court" as a reference to the sentencing judge alone, and held that reposing in the judge alone the determination of the relevant quantity did not contravene s 80 of the Constitution.

124 *Kingswell v R* (1985) 159 CLR 264. In *Cheng v R* (2000) 203 CLR 248, the High Court (by majority) declined to re-consider the decision in *Kingswell*.

131. If the offence is one which requires satisfaction of more than one discrete underlying offence, and more than the minimum required number of underlying offences are alleged, the judge should ascertain from the jury which discrete underlying offences they are satisfied of, and should base the sentence on those findings.[125] But such a case is exceptional. In other circumstances, there is no requirement to ask a jury the basis for its verdict and it is ordinarily better not to do so.[126] In *Isaacs*,[127] the court deprecated a previous practice of asking a jury in manslaughter cases on which of several alternative bases (e.g. unlawful and dangerous act or provocation) the verdict was founded.

132. If a person is found guilty of a federal offence by a jury, the verdict determines only that the elements of the offence (and any circumstances of aggravation pleaded in the indictment which have been presented as a condition of a guilty verdict) have been proven beyond reasonable doubt. The judge's factual findings must not be inconsistent with the verdict of the jury (or with its answers to questions as to the basis of the verdict, in the exceptional case in which such questions are asked), or with any findings of fact which are necessarily implicit in the verdict (including verdicts on other charges in the same trial). Subject to these parameters, it is for the sentencing judge to find the relevant facts of the offending, beyond reasonable doubt, for the purposes of sentencing;[128] the judge is not required to sentence on the basis of a view of the facts most favourable to the offender.[129] The judge cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence than that charged,[130] but is otherwise entitled to consider all the conduct of the accused, including that which would aggravate the offence of which the person has been found guilty. For example, in a conspiracy case, the sentencing judge is entitled not only to make findings about the formation of the agreement, but also about what was done in furtherance of the agreement, even if that includes the commission of the substantive offence which was the object of the conspiracy.[131]

2.1.3 Relevant matters "known to the court": *Crimes Act 1914*, s 16A(2)

133. All the matters listed in s 16A(2) must be taken into account where "*relevant and known*" to the court. The subsection does not require the sentencing court to refer to each of the matters specified; it requires only that the *"relevant and known"* matters be taken into account.[132]

134. In *Weininger*[133] the majority (Gleeson CJ, McHugh, Gummow and Hayne JJ) observed that the phrase "*known to the court*" rather than "*proved in evidence*" or some equivalent expression suggests strongly that s 16A was not intended to require formal proof of matters before they could be taken into account in sentencing. Put another way, the majority said that the phrase "*known to the court*" should not be

125 *Chiro v R* (2017) 260 CLR 425; *KMC v DPP (SA)* (2020) 267 CLR 480. This requirement does not extend to other circumstances in which the jury must be directed that they must be unanimous about particular findings or particular reasoning: *Gould v R* [2021] NSWCCA 92, [241]-[247] (Adamson J; Davies J agreeing); cf [6]-[25] (Bathurst CJ).

126 *R v Isaacs* (1997) 41 NSWLR 374; *Cheung v R* (2001) 209 CLR 1, [18]. See the discussion of relevant authorities in *Gould v R* [2021] NSWCCA 92, [6]-[25] (Bathurst CJ), [193]-[247] (Adamson J; Davies J agreeing).

127 *R v Isaacs* (1997) 41 NSWLR 374, 378-380.

128 *Cheung v R* (2001) 209 CLR 1, [4]-[17] (Gleeson CJ, Gummow and Hayne JJ), [99] (Kirby J), [161]-[166] (Callinan J); see also [75]-[77] (Gaudron J).

129 *R v Isaacs* (1997) 41 NSWLR 374; *Cheung v R* (2001) 209 CLR 1; *Agius v R* [2015] NSWCCA 200, [1100].

130 *R v De Simoni* (1981) 147 CLR 383, 389. See "2.1.5 Finding of other uncharged offences".

131 *Savvas v R* (1995) 183 CLR 1.

132 *Johnson v R* (2004) 78 ALJR 616, [24] (Gummow, Callinan and Heydon JJ); *R v Ferrer-Esis* (1991) 55 A Crim R 231, 237.

133 *Weininger v R* (2003) 212 CLR 629.

construed as imposing a universal requirement that matters urged in sentencing hearings be either formally "proved" or "admitted".

135. So, for example, a court may properly act on the basis that, as a matter of human behaviour, a person who is prepared to risk a long prison sentence by engaging in large-scale drug offending will only do so in the expectation of substantial profit or reward.[134]

136. However one significant limiting effect of the requirement in s 16A(2) that a listed matter be "*known to the court*" has been identified in the authorities. In *Bui*,[135] the High Court dealt with a contention that the presumed stress and anxiety of a respondent to a successful Crown appeal against sentence should be taken into account in resentencing. In rejecting the contention, the Court held that the requirement in s 16A(2) that a sentencing court must have regard to the "*mental condition*" of an offender if "*known to the court*" referred only to the actual mental condition of the offender, not a presumed condition, and that such actual condition "*must be demonstrated before the provision applies*".[136] In *Pratten (No 2)*[137] the New South Wales Court of Criminal Appeal held that, in accordance with *Bui*, a court sentencing a federal offender should not act on a presumption that undue delay had caused or exacerbated stress, anxiety or depression in the offender. Not only should these "*be established as actual, not presumed, conditions*",[138] but the Court proceeded on the basis that a relevant causal link must also be established.[139] Similarly, in *Besim and MHK (No 3)*,[140] the Victorian Court of Appeal held (applying *Bui*) that, "*absent specific evidence*", it was "*not necessarily evident*" that the prospect of being subject to a continuing detention order at the completion of the respondents' sentences would make imprisonment more burdensome for them. To like effect, in *Hatahet*,[141] the plurality "*doubted whether there was a sufficient evidentiary basis*" for a finding that the offender's reduced prospect of parole "*would be likely to adversely affect the mental condition of an offender*".

137. By parity of reasoning, the same approach should be adopted whenever it is suggested that an offender's physical or mental condition should be treated as a factor in mitigation: for example, where it is said that anxiety about the prospect of deportation will make imprisonment more burdensome for an offender (assuming that such a prospect may ever be treated as potentially mitigating: see "3.5.14 Prospect of cancellation of a visa and deportation").

2.1.4 Findings of fact relating to aggravating or mitigating circumstances

138. In *Olbrich*,[142] the majority endorsed the following statement of principle by the Victorian Court of Appeal in *Storey*[143] about fact-finding for sentencing:

> *[T]he judge may not take facts into account in a way that is adverse to the interests of the accused unless those facts have been established beyond reasonable doubt. On the other hand, if there are*

134 *R v Ruzehaji* (2018) 132 SASR 302.
135 *Bui v DPP (Cth)* (2012) 244 CLR 638.
136 See *Bui v DPP (Cth)* (2012) 244 CLR 638, [21]-[23],[25],[28], endorsing the view of Simpson J in *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1, [279]-[280].
137 *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194.
138 *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [96].
139 *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [97]-[113].
140 *DPP (Cth) v Besim; DPP (Cth) v MHK (No 3)* (2017) 52 VR 303, [60].
141 *R v Hatahet* [2024] HCA 23, [35] (Gordon A-CJ, Gleeson and Steward JJ).
142 *R v Olbrich* (1999) 199 CLR 270, [27].
143 *R v Storey* [1998] 1 VR 359, 369.

circumstances which the judge proposes to take into account in favour of the accused, it is enough if those circumstances are proved on the balance of probabilities. [Emphasis in original]

139. In *Storey*, the Court emphasised that the test was not whether the tag "aggravating" or "mitigating" should be applied to any particular fact but *what use the judge proposed to make of the fact in relation to the offender*.[144]

140. Although the quoted passage from *Storey* refers to "*facts*" relevant to sentencing, the principles stated are not confined to "*facts*" in a narrow sense; the principles apply to assessment of such matters as the risk of re-offending and the prospects of rehabilitation.[145]

141. Care is required in the application of the principles in *Storey* and *Olbrich*, for a number of reasons.

142. First, it is crucial to characterise accurately the use which is to be made of a disputed fact in order to assign the onus of proof correctly. *Besim*[146] illustrates the danger of failing to do so. The offender pleaded guilty to an offence of doing acts in preparation for, or planning, a terrorist act. A crucial question of fact in sentencing was whether the offender had since renounced the commitment to the violent jihadist ideology which was inherent in the offending (as this went to questions of remorse, the prospects of rehabilitation, the need for specific deterrence and the need for community protection). The offender did not give evidence on the plea hearing. In purported application of the principles in *Storey*, the judge found that he was neither persuaded by the offender on the balance of probabilities that the offender had renounced the ideology, nor persuaded by the prosecution beyond reasonable doubt that he had not. On appeal by the CDPP, the Director contended that the judge's reasoning was erroneous. The Court of Appeal agreed.[147] The Crown bore no onus of proving that the offender's adherence to jihadist ideology continued; it was wrong to approach the matter as if it were, in the classic sense, an aggravating factor.[148] It was for the offender to make good a submission that he no longer held jihadist views; his failure to discharge that onus left the sentencing judge with nothing but the proven fact of the offender's state of mind at the time of the commission of the offence.

143. Second, as was pointed out by the High Court in *Weininger*,[149] not all disputed issues of fact related to sentencing must be resolved for or against the offender. Some disputed issues of fact cannot be resolved in a way that goes either to increase or to decrease the sentence that is to be imposed. There may be issues which the material available to the sentencing judge will not permit the judge to resolve in that way.

144 *R v Storey* [1998] 1 VR 359, 369.

145 *R v Pickard* [1998] VSCA 50, [3]-[5].

146 *DPP (Cth) v Besim* [2017] VSCA 158.

147 *DPP (Cth) v Besim* [2017] VSCA 158, [108]-[109].

148 *DPP (Cth) v Besim* [2017] VSCA 158, [108]-[109]. The failure of a terrorism offender to give evidence on the plea hearing (*Said v R* [2019] NSWCCA 239, [72]-[73]) or to participate in deradicalization programs (*Alou v R* (2019) 101 NSWLR 319, [102]-[104]) may be a relevant factor in assessing whether the offender has demonstrated remorse or acceptance of responsibility or in assessing the offender's prospects of rehabilitation. This circumstance is to be distinguished from the general principle that where there is a dispute *as to the facts constituting the offence*, a sentencing court should not (except in the rare and exceptional circumstances explained in *Azzopardi v R* (2001) 205 CLR 50) draw an adverse inference by reason of the offender's failure to give evidence: see *Strbak v R* (2020) 267 CLR 494, [13]; *Jung v R* [2022] VSCA 68, [9].

149 *Weininger v R* (2003) 212 CLR 629, [19].

144. *Olbrich*[150] itself provides an illustration. In that case, the sentencing judge had rejected evidence given by an offender that his role in a heroin importation was that of a mere courier, but on the evidence presented was unable to be satisfied of what the offender's role in the enterprise was, other than being the person who imported the drugs. On appeal, it was contended that as the prosecution was unable to prove beyond reasonable doubt that the role of the offender extended beyond that of a mere courier, the judge was required to sentence the offender on a view of the facts most favourable to the offender. The majority of the High Court rejected that contention. It would have been incongruous to require the sentencing judge to sentence the offender on the basis that he was a mere courier when the judge had disbelieved his evidence to that effect.[151] The majority held that the offender was to be sentenced for what he had done;[152] the offender had properly been sentenced on the basis that nothing further was known of his role.[153]

145. Third, there is no clear dichotomy between aggravating and mitigating matters. The majority in *Weininger*[154] made this crucial point as follows:

> *Many matters that must be taken into account in fixing a sentence are matters whose proper characterisation may lie somewhere along a line between two extremes. That is inevitably so. The matters that must be taken into account in sentencing an offender include many matters of and concerning human behaviour. It is, therefore, to invite error to present every question for a sentencer who is assessing a matter which is to be taken into account as a choice between extremes, one classified as aggravating and the opposite extreme classified as mitigating. Neither human behaviour, nor fixing of sentences is so simple.*

146. A sentencing hearing is not an inquisition into all that may bear upon the circumstances of the offence or matters personal to the offender.[155]

147. Fourth, findings about such matters as the offender's prospects of rehabilitation or the risk of re-offending do not always need to be articulated in terms of a standard of proof; for example, *"assessment by the judge of the risk of a prisoner re-offending is not a feat which requires any refinement of thought process."*[156]

2.1.5 Finding of other uncharged offences

148. A central principle of sentencing is that an offender may not be punished for other criminal conduct for which they are not then being sentenced.[157]

149. However, in considering the circumstances or context of the instant offence, or in making factual findings about a matter relied upon in mitigation of sentence, a sentencing court is often presented with evidence of other offending. Such other offending may be relevant in various ways. The following are examples:

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150 *R v Olbrich* (1999) 199 CLR 270.
151 *R v Olbrich* (1999) 199 CLR 270, [24].
152 *R v Olbrich* (1999) 199 CLR 270, [19]-[21]; cf *R v Roberts* [2020] QCA 129, [14].
153 *R v Olbrich* (1999) 199 CLR 270, [22]. If the offender sought to mitigate the sentence on the basis that his role was merely that of courier, the onus was on him to establish that fact ([26]).
154 *Weininger v R* (2003) 212 CLR 629, [22]. See also *Xiao v R* (2018) 96 NSWLR 1, [131]-[136].
155 *Weininger v R* (2003) 212 CLR 629, [23].
156 *R v Pickard* [1998] VSCA 50, [4].
157 *R v Olbrich* (1999) 199 CLR 270, [18].

- The occurrence of other offending may be relevant to determining whether the offending was an isolated incident or was committed as part of an ongoing criminal enterprise.[158]
- In a conspiracy case, it may be necessary to make findings about what was done in furtherance of the agreement, even if that includes the commission of other offences, because it is necessary for a sentencing court to have regard to "*considerations which advert to the content and duration and reality of the conspiracy*".[159]
- The occurrence of other offending may also be relevant in ascertaining the "character" or "antecedents" of the offender (*Crimes Act 1914*, s 16A(2)(m)),[160] or in rebuttal of a submission that that the offender has good prospects of rehabilitation ((*Crimes Act 1914*, s 16A(2)(n)) or that there is little need for specific deterrence of the offender (*Crimes Act 1914*, s 16A(2)(j)).

150. In *De Simoni*,[161] Gibbs CJ (with whom Mason and Murphy JJ concurred) reconciled the requirement for a sentencing court to consider relevant matters and the requirement not to punish for other offending for which the offender was not then to be sentenced as follows:

> *[T]he general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted … The combined effect of the two principles, so far as it is relevant for present purposes, is that a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence.*

151. That is, *De Simoni* recognises that a sentencing court may properly have regard to other offending if it is relevant to sentencing. But the court must not "*take into account circumstances of aggravation which would have warranted a conviction for a more serious offence*". "A more serious offence", for this purpose, may include an offence which is subject to the same maximum penalty as the instant offence,[162] at least where there is a legislative indication that it is more serious or where the moral culpability is greater.[163]

152. As Gibbs CJ acknowledged in *De Simoni*, this may require the sentencing court "*to take an artificially restricted view of the facts*".[164] So, for example, a court sentencing an offender for an offence of

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158 E.g. *R v Jackson* (1998) 72 SASR 490, [112]; *R v Ceissman* [2001] NSWCCA 73, [24]-[28]; *R v Tran* [2011] SASCFC 153. Note that under s 16A(2)(c) of the *Crimes Act 1914* (Cth), a court sentencing a federal offender is required to take into account (if relevant and known to the court) "*if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character*". In *Weininger v R* (2003) 212 CLR 629, Kirby J (at [57]) expressed the view that s 16A(2)(c) did not allow regard to be had to uncharged offences, whereas Callinan J (at [122]) implied that the paragraph did allow for consideration of uncharged offences.

159 *Savvas v R* (1995) 183 CLR 1, quoting with approval from *R v Kane* [1975] VR 658, 661. Note also s 16A(2)(a) of the *Crimes Act 1914* (Cth), which requires a court sentencing a federal offender to have regard to "*the nature and circumstances of the offence*", if "*relevant and known to the court*".

160 *Weininger v R* (2003) 212 CLR 629.

161 *R v De Simoni* (1981) 147 CLR 383, 389. See also *R v D* [1996] 1 Qd R 363, where relevant authorities are comprehensively reviewed.

162 *R v Guiu* [2002] NSWCCA 181, [30]-[38]; *R v Tranter (No 2)* (2014) 119 SASR 480, [43]-[44]; *Garcia v R* [2022] NSWCCA 172, [80].

163 *Cassidy v R* [2012] NSWCCA 68, [6]-[7], [21]-[26].

164 *R v De Simoni* (1981) 147 CLR 383, 392.

attempted possession of prohibited drugs must not sentence the offender as if the offender were also party to the importation of the drugs (even though that is indicated by the facts), if the offender is not also charged with and being sentenced for that offence.[165]

153. The *De Simoni* principle does not prevent a sentencing court from treating as an aggravating circumstance facts that constitute a lesser offence than the instant offence.[166]

154. Nor does the *De Simoni* principle preclude a court sentencing a federal offender from doing no more than taking other criminal conduct into account in negativing matters relied upon by the offender in mitigation[167] (for example, as showing an absence of remorse[168]) or in determining the duration and nature of the offender's involvement in the instant offence.[169]

155. The crucial point is that the sentencing court must not lose the focus on the precise offence charged.[170]

156. A statutory procedure by which one or more federal offences may be taken into account in sentencing a federal offender (on the basis of an admission by the offender) is provided for by s 16BA of the *Crimes Act 1914* (Cth).[171] Taking into account other offences is also specifically contemplated by s 16A(2)(b) of the *Crimes Act 1914* (Cth).[172] The imposition of a more severe sentence as a result of taking another offence into account pursuant to statutory authority does not inherently infringe the *De Simoni* principle.[173] The *De Simoni* principle does not apply at all when a sentencing court is assessing the seriousness of an offence taken into account under s 16BA, so that the court may, for that purpose, have regard to circumstances of aggravation which would (had the offender been charged with that offence) have warranted conviction for a more serious offence than the offence specified.[174]

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165 E.g. *Tu v R* [2011] NSWCCA 31; *Balloey v R* [2014] NSWCCA 165; *El Jamal v R* [2021] NSWCCA 105. In *Tu*, the fact that the sentencing judge had treated the uncharged importation offence as aggravating the instant attempted possession offence could be inferred from the fact that the judge had imposed the maximum penalty and had made some findings that the offender had participated in the 'China end' of the operation. Such a case is to be distinguished from a case in which the sentencing court does no more than assess the nature and duration of the offender's involvement in the charged offence or the context in which the charged offence occurred: see *Savvas v R* (1995) 183 CLR 1; *El-Ghourani v R* [2009] NSWCCA 140, [15]-[37]; *Schanker v R* [2018] VSCA 94, [188]-[210].

166 *DPP v McMaster* (2008) 19 VR 191, [41] and the cases cited there; *R v Cook* [2018] TASCCA 20, [46]-[47].

167 *Weininger v R* (2003) 212 CLR 629, [33], [117], [122]; *R v Bukvic* (2010) 107 SASR 405; *R v Tran* [2011] SASCFC 153; *Sabel v R* [2014] NSWCCA 101, [227]-[229]. But note the contrary view expressed (in relation to a State offender) in *DPP v McMaster* (2008) 19 VR 191, [35]-[58].

168 *Cassidy v R* [2012] NSWCCA 68, [6], [21].

169 E.g. *El-Ghourani v R* [2009] NSWCCA 140, [15]-[37]; *Ly v R* (2014) 227 FCR 304, [89]-[100]; *Schanker v R* [2018] VSCA 94, [181]-[210].

170 *El-Ghourani v R* [2009] NSWCCA 140, [15]-[37]; *R v Tranter (No 2)* (2014) 119 SASR 480.

171 See "6.5 Taking other offences into account".

172 See "3.4.2 Other offences taken into account – s 16A(2)(b)".

173 *Abbas v R* (2013) 231 A Crim R 413.

174 *Huang v R* (2018) 96 NSWLR 743, [8], [54], [98].

2.1.6 Hearsay assertions and untested statements about an offender's state of mind

157. Although sentencing courts are usually not bound by the rules of evidence,[175] the practice of offenders relying on a hearsay account (such as statements recounted in a report of a psychologist or psychiatrist) of their state of mind on important matters (such as the existence of remorse, or the renunciation of a terrorist ideology) has frequently been deprecated.[176]

158. Similarly, assertions in statements and letters by an offender, where the offender is not subject to cross-examination, are often treated with considerable circumspection and may be accorded little or no weight.[177]

159. The same criticisms have been made of these practices in relation to the sentencing of federal offenders, and it has been held that a sentencing judge may decline to act on such evidence in the absence of sworn evidence from the offender which is subject to cross-examination.[178]

160. However the weight and cogency of the evidence is always a matter for the individual assessment of the sentencing judge and cannot be pre-empted as a matter of principle.[179]

2.2 "Instinctive synthesis" not the "two-stage approach"

161. The weight of authority is that the preferable approach to sentencing in Australia, including the sentencing of a federal offender, is to consider all the relevant matters and to arrive at an "*instinctive synthesis*" of them in determining the appropriate sentence.[180]

162. A corollary is that neither the sentence nor the relevant range of sentences can helpfully be determined by singling out one factor as presumptively dictating the starting point.

163. The "instinctive synthesis" approach is contrasted with the approach that aims to reduce the sentencing method into stages or component parts or quantifiable elements that can be specified and which go to make up the sentence. This contrasting approach is often referred to as the "two-stage

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175 Under s 4 of the uniform *Evidence Acts* (which apply to federal courts and to courts in NSW, Victoria, Tasmania, the ACT, the NT and Norfolk Island), the Acts do not apply to a proceeding which relates to sentencing, unless the court so directs. In other jurisdictions, statutes also provide that the rules of evidence (at least presumptively) do not apply to sentencing proceedings: see, e.g., *Sentencing Act 2017* (SA), s 12.

176 For example, *R v Qutami* [2001] NSWCCA 353, [58]-[59], [79]; *Mun v R* [2015] NSWCCA 234; *Halac v R* [2015] NSWCCA 121, [106]; *R v Roe* (2017) 40 NTLR 187, [107]; *Apulu v R* [2022] NSWCCA 244, [141]-[142]; *Blakeney v R* [2022] NSWCCA 277, [74].

177 *R v Palu* [2002] NSWCCA 381, [40]–[41]; *R v Elfar* [2003] NSWCCA 358, [25]; *R v McGourty* [2002] NSWCCA 335, [24]-[25]; *Newman v R* [2018] NSWCCA 208, [25]; *IM v R* (2019) 100 NSWLR 110, [20]; *Weber v R* [2020] NSWCCA 103, [63]; *CR v R* [2020] NSWCCA 289, [76]. See the summary in *Imbornone v R* [2017] NSWCCA 144, [57].

178 For example, *R v Benbrika* [2009] VSC 21, [148]-[151] (endorsed on appeal: *Benbrika v R* (2010) 29 VR 593, [586]); *Alvares v R* [2011] NSWCCA 33, [31]-[69]; *Barbaro v R* [2012] VSCA 288, [38]; *Elomar v R* [2014] NSWCCA 303, [815]-[818]; *Islam v R* [2016] NSWCCA 233, [95]-[103]; *Obiekwe v R* [2018] NSWCCA 55, [38]-[40], [55]-[58]; *Singh v R* [2018] NSWCCA 60, [31]; *Baladjam v R* [2018] NSWCCA 304, [275]-[277]; *Turnbull v R* [2019] NSWCCA 97, [140]-[144]; *Weber v R* [2020] NSWCCA 103, [63]; *Lai v R* [2021] NSWCCA 217, [79]; *Elzein v R* [2021] NSWCCA 246, [252], [288]; *Issac v R* [2024] NSWCCA 2, [61]-[63]. See also *DPP (Cth) v Besim* [2017] VSCA 158, [73]-[78], [83], [108]-[109], [113].

179 *Lloyd v R* [2022] NSWCCA 18, [45] McCallum JA (Hamill and Cavanagh JJ agreeing).

180 *R v Williscroft* [1975] VR 292; *R v Young* [1990] VR 951, *R v Ngui* [2000] 1 VR 579, 584; *AB v R* (1999) 198 CLR 111; *Johnson v R* (2004) 78 ALJR 616; *Markarian v R* (2005) 228 CLR 357. In *Markarian*, McHugh J (at [51]) described instinctive synthesis as the method of sentencing in which the judge identifies all the relevant factors to sentencing, discusses their significance and then makes a value judgment as to what the appropriate sentence is in light of all the facts of the case.

approach". An example of a "two-stage approach" would be to consider the "objective" elements to arrive at a sentence and after that modify it by reason of "subjective" elements.

164. In *Wong*,[181] the High Court held that a guideline judgment of the New South Wales Court of Criminal Appeal relating to drug importation offences, which guideline was declared by reference to the quantity of the drug imported, was contrary to s 16A of the *Crimes Act 1914* (Cth). In their joint judgment, Gaudron, Gummow and Hayne JJ criticised the "two-stage approach" to sentencing as a departure from principle and apt to give rise to error.[182] Subsequent decisions provide examples of ways in which a sequential approach to sentencing may be productive of error.[183] Therefore identifying a sentence in stages should usually be undertaken only when a statute so requires.[184] For relevant statutory requirements, see "2.3 Where a two-stage approach is required by statute".

165. Nevertheless, it is common practice in some jurisdictions for a court sentencing a federal offender to specify the extent to which the sentence has been reduced as a result of a plea of guilty, even in the absence of a statutory requirement to do so. See "6.8 Specifying a discount for a guilty plea".

166. In *Markarian*,[185] the majority held that making a specific quantifiable allowance for a particular factor (e.g. for a plea of guilty, when such quantification was not required by statute) did not of itself reveal error. Gleeson CJ, Gummow, Hayne and Callinan JJ said that there was no universal rule rejecting "sequential" or "two-tiered" sentencing in favour of "instinctive synthesis", and acknowledged that there may be some occasions when an articulated arithmetical approach may better serve the ends of transparency and accessibility.

2.3 Where a two-stage approach is required by statute

167. Specification of the sentence that would have been imposed but for a particular factor has been described as antithetical to the "instinctive synthesis" approach to sentencing,[186] which is generally preferred over a "two-stage" or sequenced approach in sentencing of a federal offender. Nevertheless it must be done if, and to the extent that, it is required by statute.[187] There are two significant examples of statutory requirements to specify a "but for" sentence.

2.3.1 *Crimes Act 1914*, s 16AC – future cooperation

168. The first example of a statutory requirement for two-stage sentencing is where a federal offender has undertaken to cooperate with law enforcement agencies in future proceedings (including confiscation proceedings). In that situation, if the sentence is reduced by that undertaking, the court

181 *Wong v R* (2001) 207 CLR 584.

182 *Wong v R* (2001) 207 CLR 584, [74]-[78]. In *AB v R* (1999) 198 CLR 111 (161 A Crim R 45) McHugh J expressed a similar view to the plurality in *Wong*. See also *Markarian v R* (2005) 228 CLR 357; *Muldrock v R* (2011) 244 CLR 120, [54].

183 E.g. *R v Baldock* [2010] WASCA 170, [14]-[21]; *DPP (Cth) v Gregory* (2011) 34 VR 1, [32]-[36]; *R v Hatahet* [2024] HCA 23, [68]-[71] (Beech-Jones J).

184 *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [24].

185 *Markarian v R* (2005) 228 CLR 357.

186 See, e.g., *Saab v R* [2012] VSCA 165, [59]; *Cummins (a pseudonym) v R* (2013) 40 VR 319, [41]-[48]; *Zogheib v R* [2015] VSCA 334, [62]-[64]. But see *Markarian v R* (2005) 228 CLR 357, [74]; *Xiao v R* (2018) 96 NSWLR 1, [279]-[280]; *Mason (a pseudonym) v R* [2023] VSCA 75, [43].

187 *Markarian v R* (2005) 228 CLR 357; *R v Baldock* [2010] WASCA 170, [14]-[21]; *Nguyen v R* [2011] VSCA 32, [100].

sentencing the offender is required by s 16AC of the *Crimes Act 1914* (Cth)[188] to specify the sentence (and non-parole period where imposed) that would have been imposed but for that reduction. The operation of this provision is described below: see "6.7 Specifying a reduction for undertaking to cooperate in future - Crimes Act 1914 s 16AC".

169. The specification of a "but for" sentence under s 16AC(2) is hypothetical; there is no occasion to ask whether the figure under s 16AC is manifestly excessive, nor is it useful as a basis for contending that the sentence that was imposed is excessive.[189]

2.3.2 Statutory requirements to specify a sentence reduction for a plea of guilty

170. The second example of a statutory requirement for two-stage sentencing is where the court is required by statute to specify any sentence reduction for a guilty plea. Although the *Crimes Act 1914* (Cth) makes no such provision,[190] some State or Territory laws do so.[191]

171. As procedural laws, these State and Territory laws apply as surrogate federal laws to the sentencing of federal offenders, pursuant to ss 68 and 79 of the *Judiciary Act 1903* (Cth), if there is no Commonwealth law which *"expressly or by implication made contrary provision",* and no Commonwealth legislative scheme which is *''complete upon its face''* and could be *''be seen to have left no room''* for the operation of the State or Territory law.[192]

172. In Victoria,[193] a sentencing court must specify the sentence it would have imposed but for the guilty plea. Although it has not been authoritatively determined whether this requirement applies to the sentencing of a federal offender, in a number of cases the Victorian Court of Appeal has proceeded on the assumption that it does.[194]

173. Like the relevant provision in Victoria, the *Sentencing Act 1995* (WA), s 9AA(5), requires a court to state the extent of a reduction of sentence for a guilty plea. However, the Western Australian provision is significantly different from that in Victoria. Section 9AA(5) applies only if the court reduces a head sentence *under s 9AA(2) of the Act*. That subsection permits a court to reduce the head sentence for the offence in order to recognise the benefits to the State, and to any victim of or witness to the offence. Subsection 9AA(4) of the Act imposes a limit (in percentage terms) on the permissible extent of the

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188 Section 16AC of the *Crimes Act 1914* (Cth) came into effect on 27 November 2015. It replaced s 21E of the Act, which was in similar terms. Section 21E was described by Chernov JA in *R v Li* [1998] 1 VR 637, [18], as imposing "*an artificial process … upon the sentencing judge which runs counter to the fact that the sentencing involves the judge's intuitive and instinctive synthesis of all facets of the sentencing process*".

189 *Mason (a pseudonym) v R* [2023] VSCA 75, [48]-[49].

190 *Charkawi v R* [2008] NSWCCA 159. In 2006, the Australian Law Reform Commission recommended that Commonwealth law require a sentencing court to specify the discount given for a plea of guilty: *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006), recommendation 11-1. That recommendation has not been acted upon.

191 *Sentencing Act 1991 (Vic),* s 6AAA; *Sentencing Act 1995* (WA), s 9AA; *Crimes (Sentencing) Act 2005* (ACT), ss 35 and 37.

192 *Putland v R* (2004) 218 CLR 174, [7] (Gleeson CJ); see also *Solomons v District Court (NSW)* (2002) 211 CLR 119; *Bui v DPP (Cth)* (2012) 244 CLR 638, [25]. See "1.7 The application of State and Territory laws by Judiciary Act 1903, ss 68 and 79".

193 *Sentencing Act 1991* (Vic), s 6AAA.

194 E.g. *Scerri v R* [2010] VSCA 287, [58]; *DPP (Cth) v Bui* (2011) 32 VR 149, ; *Cooper v R* [2012] VSCA 32, [38]; *DPP (Cth) v Cornish* [2012] VSCA 45, [56]; *Saab v R* [2012] VSCA 165, [29]-[62]; *DPP (Cth) v Couper* (2013) 41 VR 128; *DPP (Cth) v MHK* (2017) 52 VR 272, [76]; *DPP (Cth) v Besim* [2017] VSCA 158, [122]; *DPP (Cth) v Wang* [2019] VSCA 250, [95]; *Nipoe v R* [2020] VSCA 137, [28]-[31].

reduction if the head sentence for an offence is or includes a fixed term. In *Ngo*,[195] the Western Australian Court of Appeal held that s 9AA(5) did not apply to the sentencing of a federal offender, because the detailed and exhaustive provision in s 9AA relating to the reduction of sentence for a guilty plea was inconsistent with the general and unqualified provision in s 16A(2)(g) of the *Crimes Act 1914* (Cth). That is, there was no room in the Commonwealth legislative scheme embodied in Part IB of the *Crimes Act* for the operation of s 9AA.

174. The decision in *Ngo* did not suggest that a requirement under State or Territory law to specify the sentence reduction for a guilty plea is itself necessarily inconsistent with s 16A of the *Crimes Act 1914*. The inconsistency identified in that case arose from the prescriptive nature of the legislation under consideration as to the reduction of sentence for a plea of guilty, not merely from the existence of a requirement to specify the extent of the reduction.

175. The position in the ACT is uncertain. Section 35 of the *Crimes (Sentencing) Act 2005* (ACT) provides for reduction of sentences for an offender who has pleaded guilty. Section 37 of that Act requires a court which has (amongst other circumstances) imposed a lesser penalty for an offence under s 35 to state the penalty it would otherwise have imposed. Like the provision in Western Australia, s 35 is to some extent prescriptive of the circumstances in which, and the extent to which, a court may reduce a sentence for a plea of guilty. For example, s 35(4) provides that the court must not make any significant reduction for the fact that the offender pleaded guilty if, based on established facts, the court considers that the prosecution's case for the offence was overwhelmingly strong. It is at least arguable that the conclusion reached in *Ngo* would be equally applicable to the ACT provision.

176. Procedural issues relating to these provisions, to the extent that they are applicable to the sentencing of a federal offender, are discussed below: see "6.8 Specifying a discount for a guilty plea" and "6.9 Interaction between sentencing discount for guilty plea and discount for undertaking to cooperate".

2.4 Whether failure to refer to a sentencing consideration necessarily evinces error

177. While a sentencing court has a common law duty to give adequate reasons for sentence,[196] appellate courts have generally proceeded on the basis that the mere failure of a sentencing judge to mention a factor bearing on sentence is not sufficient to establish a failure to take that factor into account[197] (in the absence of a statutory obligation to state that the factor has been taken into account[198]). This approach is based upon a presumption of regularity.[199] So, for example, in a long line of cases, the

195 *Ngo v R* [2017] WASCA 3.

196 See *R v Thomson* (2000) 49 NSWLR 383, [42]-[44], and the authorities cited there. The adequacy of reasons depends upon all the circumstances. Considerable latitude is given to *ex tempore* reasons given by a court of summary jurisdiction: e.g. *Oatley v DPP (Cth)* [2021] SASCA 108, [30]-[31].

197 *Lowell (a pseudonym) v R* [2022] VSCA 134, [35], citing *R v Giakas* [1988] VR 973, 977; *R v Gray* [1977] VR 225, 233; *Cuthbertson v R* [2019] VSCA 104, [57]–[59]. See also *R v Dole* [1975] VR 754, 767; *R v Fox* [2003] VSCA 138, [31]; *Bick v R* [2006] NSWCCA 408, [21]; *McNamara v Western Australia* [2013] WASCA 63, [42]; *Barnes v Lodding* [2020] ACTCA 23, [32]; and the authorities cited in fn 200. Note also the *Sentencing Act 1991* (Vic), s 103(1), which provides, "*The failure of a court to give reasons … in sentencing an offender does not invalidate any sentence imposed by it.*"

198 *R v Brooks* [2000] VSCA 188, [12].

199 *R v Arnold* [1999] 1 VR 179, [14]-[15]. Cf. *R v Seagrim* (SA SC (Full Court), 9 December 1994, unreported); *Bienke v Minister of Primary Industries and Energy* (1996) 63 FCR 567, 576-7.

Victorian Court of Appeal has declined to infer that a sentencing judge overlooked the offender's plea of guilty merely because it was not referred to in the sentencing remarks.[200]

178. A similar approach was taken in New South Wales in relation to pleas of guilty,[201] prior to a statutory amendment in 1990 which required that a court sentencing a State offender which does not reduce the sentence on account of the offender's guilty plea must "*state that fact and its reasons for not reducing the sentence*".[202] A guideline issued by the Court of Criminal Appeal in *Thomson*[203] specified that failure to state that the plea had been taken into account would "*generally be taken to indicate that the plea was not given weight*". Explaining the reasoning behind this guideline, Spigelman CJ (with whom Wood CJ at CL, Foster AJA, Grove and James JJ agreed) said,[204]

> *This conclusion is significantly influenced by the express statutory obligations. The position may not be the same with respect to other matters which are required to be taken into account, either at common law or by reason of a general scheme listing relevant considerations, such as that found in s16A of the Crimes Act (Cth) 1914.*

That is, the guideline was "influenced by" the State statutory obligation to give reasons; a different position may apply to a regime such as s 16A of the *Crimes Act 1914*, which is subject to no corresponding statutory requirement. It is also implicit that the guideline – including the assumption that failure to state that the plea had been taken into account would generally lead to an adverse inference – did not purport to apply to the sentencing of federal offenders.[205]

179. Although recent instances can be found in which the New South Wales Court of Criminal Appeal has declined to treat the mere failure of a judge, in sentencing a federal offender on indictment, to refer to a relevant consideration (in the absence of a statutory requirement to do so) as itself evincing error,[206] more commonly the Court has applied a strict approach. Examples are failures to refer to:

- a plea of guilty as a sentencing consideration;[207]
- the character and antecedents of the offender as a mitigating factor;[208]

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200 E.g. *R v Brooks* [2000] VSCA 188, [12]-[13]; *R v Lim* [2001] VSCA 60, [11]; *R v Roy* [2001] VSCA 61, [6]; *R v Gillick* [2001] VSCA 201, [12]-[18], [22]-[24], [27]; *R v James* [2003] VSCA 13, [21]-[25]; *R v Berry* [2007] VSCA 60, [18]; *Cuthbertson v R* [2019] VSCA 104, [40]-[59]. In all of these cases, the sentencing court was obliged by statute to have regard to the plea of guilty, either under s 5(2) of the *Sentencing Act 1991* (Vic) or under s 16A(2)(g) of the *Crimes Act 1914* (Cth). (*Berry* and *Cutherbertson* concerned federal offenders.)

201 *R v Holder* [1983] 3 NSWLR 245, 268-9.

202 *Crimes Act 1900* (NSW), s 439(2) (inserted by the *Crimes Legislation (Amendment) Act 1990*, s 3); subsequently re-enacted as s 22(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). See *R v Thomson* (2000) 49 NSWLR 383, [48].

203 *R v Thomson* (2000) 49 NSWLR 383, guideline (i).

204 *R v Thomson* (2000) 49 NSWLR 383, [52].

205 In *R v Bugeja* [2001] NSWCCA 196, [24], the Court acknowledged that the *Thomson* guidelines did not apply to the sentencing of federal offenders. It is doubtful whether such a guideline judgment could so apply: see "3.1.4 Guideline judgments on the exercise of sentencing discretion".

206 E.g. *Zahab v R* [2021] NSWCCA 7, [52] (*"[T]he fact that a judge may not have expressly referred to the conditions of custody should not necessarily give rise to an inference that he or she has not taken them into account*"); *Kahler v R* [2021] NSWCCA 40, [29]-[39].

207 *Noble v R* [2018] NSWCCA 253, [10], [41].

208 *He v R (Cth)* [2022] NSWCCA 205, [55]-[56] (although the error did not warrant any lesser sentence: [57]-[60]); *AH v R* [2023] NSWCCA 230, [70]. By contrast, in *Kahler v R* [2021] NSWCCA 40, [29]-[39], [61], the Court held that the failure of the sentencing judge to refer to the offender's otherwise good character did not mean that it has been overlooked as a sentencing factor.

- whether the youth and mental illness of the offender reduced their moral culpability;[209]
- whether the need for general deterrence was tempered by the offender's mental health condition;[210]
- the offender's prospects of rehabilitation;[211] and
- s 16A(2AAA) of the *Crimes Act 1914* (Cth).[212]

180. The Court has readily drawn an adverse inference where the sentencing judge fails to refer to a matter which is the subject of particular submissions. In *Blanch*,[213] the Court held that a material argument specifically put must be addressed one way or another. In *Elzein*,[214] Bellew J (with whom Bell P and Walton J agreed) held that where an offender's prospects of rehabilitation are the subject of a specific submission made to a sentencing judge in terms which call for reasoned consideration of it, that issue must be addressed in the reasons for sentence, and a definitive conclusion expressed. Consistent with the common law duty to give reasons for a decision, his Honour said, what is required on the part of a sentencing judge is a "*succinct statement as to the approach adopted on sentence*" in relation to that factor; the same principle is "*equally applicable to any relevant factor which arises under s 16A of the [Crimes] Act when sentencing a Federal offender*".[215]

181. In *Elzein*,[216] the Court also found that the failure of the sentencing judge, in reasons for sentence, to engage with a submission by defence counsel that consideration should be given to making an intensive correction order (and consequent failure to consider the requirements of s 66 of the *Crimes (Sentencing Procedure) Act 1999* (NSW)) was an appellable error.[217] In *Stanley*,[218] a majority of the High Court held that the failure of a District Court judge, on an appeal from the Local Court, to make the assessment the required by s 66(2) of the Act (evidenced by failure to refer expressly to the consideration required by that sub-section in oral remarks on sentencing) not only constituted an error, but a jurisdictional error.

2.5 Reasonable consistency in sentencing

2.5.1 Achieving consistency in federal sentencing

182. Sentencing is a discretionary judgment; generally there is no single correct sentence.[219] Some variation in sentencing is therefore inevitable. The variation may be magnified by the vesting of federal criminal jurisdiction in State and Territory courts, rather than in a single federal court.

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209 *AH v R* [2023] NSWCCA 230, [78]. The Court was unpersuaded that consideration of those matters and prior good character could be implied and was "*strengthened in that conclusion by the sentence in fact imposed*" ([79]).

210 *Lazarus v R* [2023] NSWCCA 214, [41]-[47]; *Garaty v R* [2024] NSWCCA 53, [54]-[56].

211 *Elzein v R* [2021] NSWCCA 246.

212 *Darke v R* [2022] NSWCCA 52.

213 *Blanch v R* [2019] NSWCCA 304, [69]; cited with approval by Jagot J (dissenting) in *Stanley v DPP (NSW)* (2023) 97 ALJR 107, [214].

214 *Elzein v R* [2021] NSWCCA 246, [230]-[233].

215 *Elzein v R* [2021] NSWCCA 246, [233]. Cf *Patel v R* [2022] NSWCCA 93, [52].

216 *Elzein v R* [2021] NSWCCA 246, [325]-[328].

217 Similar errors were found in the sentencing of co-offenders: *Al Am Ali v R* [2021] NSWCCA 281, [22]-[27]; *Khalil v R* [2022] NSWCCA 36, [133]-[137].

218 *Stanley v DPP (NSW)* (2023) 97 ALJR 107 (Gordon, Edelman, Steward and Gleeson JJ; Kiefel CJ, Gageler and Jagot JJ dissenting).

219 *Markarian v R* (2005) 228 CLR 357, [27].

183. In recent years, however, courts have emphasised the need to ensure greater consistency in the sentencing of federal offenders, while preserving the scope for discretionary judgment. In *Wong*,[220] Gleeson CJ said,

> *All discretionary decision-making carries with it the probability of some degree of inconsistency. But there are limits beyond which such inconsistency itself constitutes a form of injustice. The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency.*
>
> *Most sentencing of offenders is dealt with as a matter of discretionary judgment. Within whatever tolerance is required by the necessary scope for individual discretion, reasonable consistency in sentencing is a requirement of justice.*

184. In sentencing federal offenders, courts must take into account sentencing practice throughout Australia. It is an error for a court sentencing a federal offender to give priority to achieving reasonable consistency with sentencing for offences against the laws of that State or Territory over achieving reasonable consistency with sentencing for Commonwealth offences.[221]

185. Greater consistency in sentencing, both within and between jurisdictions, requires that sentencing courts are better informed about sentences imposed in comparable federal cases. The need for such information has imposed greater demands and responsibilities, not only on sentencing courts, but also on the parties, and particularly on the prosecution.

186. The CDPP is in a unique position, as it is the major prosecution authority for federal offences, and therefore has access to a large body of information about sentences imposed for such offences. Expectations of the assistance to be provided to a sentencing court by the CDPP have increased accordingly. See "6.1 Role of the prosecution in a sentence hearing".

187. In *Hili,*[222] the High Court set out six principles on consistency in federal sentencing. In *Pham*,[223] those principles were reiterated, with slight modifications, by the plurality as follows (citations omitted):[224]

> *(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.*

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220 *Wong v R* (2001) 207 CLR 584, [6]-[7].
221 *R v Pham* (2015) 256 CLR 550.
222 *Hili v R* (2010) 242 CLR 520, [46]-[57].
223 *R v Pham* (2015) 256 CLR 550.
224 *R v Pham* (2015) 256 CLR 550, [28]. See also the compendious summary of the applicable principles in *Lieu v R* [2016] VSCA 277, [46].

> *(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.*

188. Reasonable consistency in the application of relevant legal principles does not require adherence to a range of sentences that is demonstrably contrary to principle.[225]

189. The plurality in *Pham* said 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 … unless there is a compelling reason not to do so*."[226] A fortiori, a sentencing court must also have regard to relevant decisions of intermediate appellate courts in other jurisdictions in relation to the sentencing of federal offenders.

190. Moreover in their joint judgment in *Pham*,[227] Bell and Gageler JJ accepted the Director's submission that–

> *comparable cases decided by the intermediate courts of appeal provide the most useful guidance to a sentencing judge. An appellate court's reasons reveal the mix of factors that were taken into account and will usually involve consideration of the appropriateness of the sentence imposed at first instance.*

191. Accordingly, while reference to first instance sentences may be of some value to sentencing courts and to appellate courts (for example, when few sentences have been imposed for the relevant offence), particular attention should be paid to the decisions of intermediate appellate courts, not only as to the principles which those decisions reveal, but also as a "yardstick" to illustrate the possible range of sentences available.

2.5.2 Categorising the objective seriousness

192. The assessment of the objective seriousness of an offence has been said to be an essential element of the process of instinctive synthesis, a purpose of which is the imposition of a proportionate sentence.[228]

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225 *DPP v Dalgliesh (a pseudonym)* (2017) 349 CLR 37, [50] (Kiefel CJ, Bell and Keane JJ); see also at [83] (Gageler and Gordon JJ). *Dalgleish* was concerned with a State statutory requirement to have regard to "current sentencing practices" in sentencing a State offender, but the principle would seem equally applicable to the sentencing of a federal offender.

226 *R v Pham* (2015) 256 CLR 550, [29].

227 *R v Pham* (2015) 256 CLR 550, [50].

228 *Bresnahan v R* [2022] NSWCCA 288, [8]; cf *Baydoun v R* [2024] NSWCCA 65, [32]. A court is not required to express that assessment by reference to a formula, or a percentage, or by classifying the objective seriousness of an offence; what is important is to fully identify the "*facts, matters and circumstances*" which bear on the

193. As part of the assessment of the severity of a sentence, or in considering the application of parity principles, courts in some jurisdictions commonly seek to categorise the objective seriousness of offending by reference to a range, such as low, mid or high range.

194. In New South Wales, the use of this practice has been said to have been 'encouraged' by the introduction of standard non-parole periods in sentencing for State offences,[229] although it is not required for that purpose,[230] let alone in sentencing for a federal offence to which those State laws have no application.[231] Nevertheless, the same practice has been commonly used in New South Wales (both at first instance and on appeal) in connection with the sentencing of federal offenders.

195. A recognised shortcoming of this practice is that, because a range (such as "mid-range") is not a point on a scale, its meaning is uncertain.[232] "Mid-range"[233] and "low range"[234] have no fixed meaning. This has led to very fine nuances of categorisation being adopted.[235] But even such fine nuances do not remove ambiguities.[236] Precision is illusory in any verbal scale of objective seriousness.[237]

196. Although the Victorian Court of Appeal has not always deprecated such characterisations,[238] it has recently doubted "*the utility of resorting to descriptions such as 'mid-range' when endeavouring to assess where particular offending sits on a scale that extends from the least serious instances of an offence to the worst category*".[239] The concern is more fundamental than the problem of ambiguity in the categorisation. In *Weybury*,[240] the Court warned that such categorisation "*may lead to sentencing judges unconsciously limiting their instinctive synthesis of a particular case by sentences in other cases classified*

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assessment of the gravity of the crime: *FL v R* [2020] NSWCCA 114, [59]-[60]. The assessment may be made by implication rather than expressly: *Delaney v R* [2013} NSWCCA 150, [56].

229 *Cargnello v DPP (Cth)* [2012] NSWCCA 162, [88] (Basten JA).

230 *Sharma v R* [2017] NSWCCA 85, [63].

231 *Qiu v R* [2022] NSWCCA 247, [25].

232 *Cargnello v DPP (Cth)* [2012] NSWCCA 162, [88].

233 In *Martellotta v R* [2021] NSWCCA 168, [65], Adamson J (with whom Basten JA and Walton J agreed) said, "*For example, for an offence with a maximum penalty of 10 years' imprisonment, one judge's mid-range will be from 4-6 years, while another's might be from 3-7 years. … [T]here is no lexicon or style guide which obliges different judges to adopt the conventions of their peers.*"

234 *AH v R* [2023] NSWCCA 230, [57]. "*More specific characterisation, including any distinction between possible expressions such as 'the low end' or 'at the lowest end' are unedifying. These are not terms of art*": *ZZ v R* [2024] NSWCCA 25, [38].

235 E.g. *R v Hutchinson* [2018] NSWCCA 152, [58]-[63], [87], where the Crown's characterisation of the objective seriousness of the offending as "*around about the middle of the range*" was said to represent a departure from its submission on the plea hearing that it was "*above the low range*". See *Lee v R* [2023] NSWCCA 70, [37], as to the difficulty of distinguishing between "*the lower end of the mid-range*" and "*the upper end of the low-range*".

236 In *Martellotta v R* [2021] NSWCCA 168, the sentencing judge had assessed the objective seriousness of the offending as "*well below the mid-range but not at the lowest end for offences of this type*"; another judge had assessed the objective seriousness of a co-offender's offending as "*somewhere just below the medium range*". In rejecting a complaint of unjustified disparity, Adamson J (with whom Basten JA and Walton J agreed) said ([66]) that all that could sensibly be concluded by the respective descriptions as to objective seriousness was that the objective seriousness of the co-offender's offending was greater because his role in the offending conduct was greater. The degree of difference in the assessment which the offender relied upon to show disparity could not be established.

237 *AH v R* [2023] NSWCCA 230, [57].

238 E.g. *Trajkovski v R* (2011) 32 VR 587, [68] (Weinberg JA, Ashley JA and Hargrave AJA agreeing); *Nguyen v R* [2016] VSCA 198, [51], [73], (Redlich JA, Tate and Whelan JJA agreeing).

239 *Jones v R* [2021] VSCA 114, [32]; see also *Polos v R* [2022] VSCA 258, [63].

240 *DPP v Weybury* [2018] VSCA 120, [33] (Maxwell P and Hargrave JA); see also [54] (Priest JA, dissenting in the result).

within a particular range, rather than considering the individual facts of comparable cases." Although *Weybury* concerned a State offender, the Court drew support from the decision of the High Court in *Pham*[241] (concerning a federal offender). The Court considered that it is more consistent with the principles in *Pham* "*to avoid categorising cases as falling within a particular 'range' and, instead, for sentencing judges to have regard to relevantly comparable, and current, cases as 'yardsticks'*."[242]

197. The New South Wales Court of Criminal Appeal has recently made clear that, in sentencing a federal offender, it is preferable that a judge not assess the objective seriousness by reference to points on a notional range. In *Su*,[243] which concerned a federal offender, the sentencing judge – in remarks described on appeal as "comprehensive" and "nuanced" – did not fix the seriousness on a scale of "low", "mid-range" or "high". On appeal, Ierace J (Sweeney J agreeing) said, "*while error does not arise from fixing objective seriousness on a scale in respect of an offence that does not have a standard non parole period, it is neither necessary nor desirable*"; the correct approach is for the sentencing judge to identify and assess the factors that are relevant to objective seriousness and take them into account as an essential element of the process of instinctive synthesis.[244]

198. See also "2.2 "Instinctive synthesis" not the "two-stage approach"", "3.2.1 Appropriate severity (s 16A(1)) and the consideration of factors listed in s 16A(2)" and "3.2.4 Assessing the seriousness of the offence by reference to the maximum penalty".

241 *R v Pham* (2015) 256 CLR 550.

242 *DPP v Weybury* [2018] VSCA 120, [34] (Maxwell P and Hargrave JA). See also *Dirbass v R* [2018] VSCA 272, [60]; *Woldesilassie v R* [2018] VSCA 285, [30]-[32]; *Jones v R* [2021] VSCA 114, [29]-[35]; *Higgins v R* [2020] NSWCCA 169, [81]-[82].

243 *Su v R* [2023] NSWCCA 207.

244 *Su v R* [2023] NSWCCA 207, [69]; see also [6]-[8] (Adamson JA).

3 SENTENCING FACTORS

3.1 The sources of sentencing principles

3.1.1 Part IB of the *Crimes Act 1914*

199. Sentencing of any federal offender must begin with a consideration of the applicable legislation.[245] The central sentencing principles in respect of federal offenders are set out in Part IB of the *Crimes Act 1914* (Cth), and particularly in s 16A of the Act.

3.1.2 The interaction between Part IB and common law sentencing principles

200. Where the provisions of Part IB leave a gap in the law, common law principles will apply, pursuant to s 80 of the *Judiciary Act 1903* (Cth).[246] Thus, except to the extent stated in ss 16A and 16B of the *Crimes Act 1914* (Cth), "*general common law and not peculiarly local or state statutory principles of sentencing are applicable*" to the sentencing of federal offenders.[247] Those general common law principles may give content to the central requirement imposed by s 16A(1) of the *Crimes Act 1914* (Cth), that a court sentencing a federal offender must impose a sentence or make an order that is of a *"severity appropriate in all the circumstances"*.[248]

3.1.3 Limited scope for applying sentencing principles under State/Territory legislation

201. Of their own force the laws of the States or Territories with respect to the sentencing of offenders could have no operation with respect to the sentencing of federal offenders; any relevant operation is by reason of a federal law (such as s 68 or s 79 of the *Judiciary Act 1903* (Cth)) which "picks up" State or Territory law and applies it to the sentencing of a federal offender.[249]

202. The regime in s 16A, supplemented by common law principles, generally leaves little room for general sentencing principles set down in State or Territory legislation to be applied as surrogate federal law to the sentencing of federal offenders.[250]

203. In *Pham*,[251] the plurality observed, "*To the extent that Pt IB of the Crimes Act 1914 (Cth) specifically or impliedly provides for sentencing considerations which are different from otherwise applicable State and Territory sentencing considerations, the Crimes Act is exclusive*."[252]

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245 *Weininger v R* (2003) 212 CLR 629, [16].
246 *Bui v DPP (Cth)* (2012) 244 CLR 638, [26]-[27].
247 *Johnson v R* (2004) 78 ALJR 616, [15].
248 *Johnson v R* (2004) 78 ALJR 616, [15].
249 *Hili v R* (2010) 242 CLR 520, [21]. See "1.5 Applicability of the common law" and "1.7 The application of State and Territory laws by Judiciary Act 1903, ss 68 and 79".
250 *Johnson v R* (2004) 78 ALJR 616, [15]. See also *Lodhi v R* [2007] NSWCCA 360, [81].
251 *R v Pham* (2015) 256 CLR 550.
252 *R v Pham* (2015) 256 CLR 550, [22] (French CJ, Keane and Nettle JJ; Bell and Gageler JJ agreeing on this ground). The plurality went on to say ([23]) that a law of Victoria which provided for a sentencing judge to take current sentencing practices into account was "*to some extent … capable of operating consistently with Pt IB of the Crimes Act*". The plurality added, however, that the State law necessarily directed attention to current sentencing practices in Victoria, whereas it was "*implicit in Pt IB of the Crimes Act that a sentencing judge must have regard to current sentencing practices throughout the Commonwealth.*" Although the plurality did not say so explicitly, the implication appears to be that the State provision was not made applicable to the sentencing of federal offenders by s 68(1) or s 79 of the *Judiciary Act 1903* (Cth) because it was inconsistent with the requirements of s 16A of the *Crimes Act*.

204. An example of the way in which sentencing considerations set out in s 16A of the *Crimes Act 1914* (Cth) preclude the application of State law to the sentencing of a federal offender is provided by *Ngo.*[253] In that case, the Western Australian Court of Appeal held that a State law which made detailed and exhaustive provision as to the circumstances in which, and the extent to which, a court could give a sentence discount for a plea of guilty was incapable of applying to the sentencing of a federal offender, because it was inconsistent with s 16A(2)(g) of the *Crimes Act 1914* (Cth), which made general and unqualified provision to the effect that, if an offender has pleaded guilty, the sentencing court must take the guilty plea into account in determining the sentence to be passed.

205. In general, scope will only arise for a specific State or Territory law relating to the exercise of sentencing discretion to be picked up and applied to the sentencing of federal offenders where Part IB (supplemented by the common law) makes no provision in relation to the matter dealt with by the State or Territory law. A (rare) example of such a case is *ONA*.[254] That case concerned a State law which provided that in sentencing an offender a court must not have regard to any consequences that may arise from the registration of the offender as a sexual offender. The State law was held not to be inconsistent with the provisions of s 16A of the *Crimes Act 1914* (Cth), and was held to apply to the sentencing of a federal offender by (at least) s 79 of the *Judiciary Act 1903* (Cth).

3.1.4 Guideline judgments on the exercise of sentencing discretion

206. In some States, an appellate court is empowered under State law to issue guideline judgments on matters relating to sentencing.[255] It is at least doubtful whether such a guideline judgment can be given specifically in relation to the sentencing of federal offenders, or whether a guideline judgment in general terms is or could be rendered applicable by federal law to the sentencing of federal offenders.

207. In *Wong*,[256] a majority (Gaudron, Gummow, Kirby and Hayne JJ) doubted whether the power of the New South Wales Court of Criminal Appeal to issue guidelines extended to guidelines relating to the sentencing of federal offenders. In any event, the High Court held that guidelines which had been issued by the Court (which gave primacy to the quantity of the drug in question in sentencing for Commonwealth drug offences) were inconsistent with the scheme of s 16A of the *Crimes Act 1914* (Cth).

208. In *Atanackovic*,[257] the Victorian Court of Appeal considered whether a previous guideline judgment of the Court relating to the use of community correction orders in sentencing was applicable to the sentencing of federal offenders. The Court held that it was not: the guideline judgment could not be accommodated by s 16A of the *Crimes Act 1914* (Cth), did not satisfy the requirements of s 80 of the *Judiciary Act 1903 (Cth)* and, accordingly, did not apply to the sentencing of federal offenders.

253 *Ngo v R* [2017] WASCA 3.
254 *R v ONA* (2009) 24 VR 197. Cf *Sabel v R* [2014] NSWCCA 101, [206]-[209].
255 **NSW:** *Crimes (Sentencing Procedure) Act 1999* (NSW), Part 3, Div 4. **Vic:** *Sentencing Act 1991* (Vic), Part 2AA. **Qld:** *Penalties and Sentences Act 1992* (Qld). **WA:** Part 2A; *Sentencing Act 1995* (WA), s 143.
256 *Wong v R* (2001) 207 CLR 584.
257 *Atanackovic v R* (2015) 45 VR 179.

3.2 Severity appropriate in all the circumstances – s 16A(1)

3.2.1 Appropriate severity (s 16A(1)) and the consideration of factors listed in s 16A(2)

209. The overarching requirement for a court in sentencing a federal offender is set out in s 16A(1) of the *Crimes Act 1914* (Cth), which provides:

> *(1) In determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.*
>
> *Note: Minimum penalties apply for certain offences—see sections 16AAA, 16AAB and 16AAC.*

210. Under s 16A(2) (set out at [240] below), the court is required to take into account, in addition to any other matters, such of the matters listed in that subsection as are relevant and known to the court.

211. In a series of decisions, the High Court has explained the effect of the requirement in s 16A(1) for a sentencing court to impose a sentence or make an order of a *"severity appropriate in all the circumstances of the offence"* and its interaction with the requirement in s 16A(2) to have regard to such of the matters listed as are "*relevant and known to the court*".

212. In *Wong*,[258] the majority held that it was impermissible, in a drug importation case, to single out the quantity of the drug as the chief determinant of the seriousness of an offence and a starting point for assessing the sentence; such an approach was contrary to s 16A. Gaudron, Gummow and Hayne JJ observed that s 16A provides no guidance about the accommodation that is to be made between the general requirement in s 16A(1) that the sentence be of a severity appropriate in all the circumstances of the offence and the very diverse list of matters in s 16A(2). The sentencing court must have regard to *all* the matters listed in s 16A(2), to the extent that they are relevant and known to the court. To fasten upon only some of the factors that are mentioned would depart from the legislative command.[259]

213. In *Johnson*,[260] the Court held that, except to the extent stated in s 16A or s 16B of the Act, general common law principles, such as the principle of totality, apply to the sentencing of a federal offender. In *Hili*,[261] after referring to *Johnson*, the plurality added that s 16A accommodates the application of some judicially developed general sentencing principles because those principles give relevant content to the statutory expression "*of a severity appropriate in all the circumstances of the offence*" used in s 16A(1), as well as some of the expressions used in s 16A(2), such as "*the need to ensure that the person is adequately punished for the offence*" (s 16A(2)(k)).

214. In *Bui*,[262] the Court emphasised that common law sentencing principles could only be accommodated, in accordance with s 80 of the *Judiciary Act 1903* (Cth), where s 16A left a gap for such principles to fill. See "1.5 Applicability of the common law".

215. In rejecting a contention that an offender was entitled to a reduction of sentence upon a successful Crown appeal against sentence because of presumed stress or anxiety, the Court in *Bui* said, "*Application*

258 *Wong v R* (2001) 207 CLR 584.
259 *Wong v R* (2001) 207 CLR 584, [71]-[72].
260 *Johnson v R* (2004) 78 ALJR 616.
261 *Hili v R* (2010) 242 CLR 520, [25].
262 *Bui v DPP (Cth)* (2012) 244 CLR 638.

of an automatic discount would not be consistent with the requirement of s 16A(1) [of the *Crimes Act 1914*] *that a sentence be appropriate in its severity in all the circumstances of the case*".[263]

216. In *Pham*,[264] the plurality said that, to the extent that Part IB of the *Crimes Act 1914* (Cth) (which includes s 16A) specifically or impliedly provides for sentencing considerations which are different from otherwise applicable State and Territory sentencing considerations, the *Crimes Act* is exclusive.[265]

217. In *Hili*,[266] the Court held that giving effect to the principle that the severity of the sentence be appropriate in all the circumstances meant that, when a sentence of imprisonment is imposed, there is no judicially determined norm or starting point (whether expressed as a percentage of the head sentence, or otherwise) for the period, or minimum period, a federal offender should serve in prison before being released.

218. In *Hatahet*,[267] the plurality noted that the probability of parole being granted, and any consequences arising from a grant of parole being probable or not, were not factors listed in s 16A(2) of the *Crimes Act* and said that they did not form part of the "*circumstances of the offence*" so as to engage s 16A(1).[268] Jagot J said that the likelihood or unlikelihood of the offender being granted parole cannot be a 'circumstance of the offence' within the meaning of s 16A(1) *"as that potential cannot be known at the time of sentencing and is outside the control of the sentencing court*".[269] The Court held that the common law principle that a sentencing judge, in fixing a sentence of imprisonment, should not take into account the likelihood of release on parole applied to the sentencing of a federal offender.[270]

219. In *Weininger*,[271] the Court considered the implications of the requirement in s 16A(2) that the sentencing court must take into account such of the listed matters "as are relevant and known to the court". See "2.1.3 Relevant matters "known to the court": Crimes Act 1914, s 16A(2)".

220. A common theme of a number of decisions of the High Court, in relation to the sentencing of both federal offenders and State or Territory offenders, has been that the outcome of the sentencing task cannot be pre-empted or circumscribed by normative rules or prescriptive constraints as to the kind of sentence that should ordinarily be imposed in any particular kind of case or the regard that should ordinarily be had to any particular kind of consideration.[272]

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263 *Bui v DPP (Cth)* (2012) 244 CLR 638, [19].

264 *R v Pham* (2015) 256 CLR 550.

265 *R v Pham* (2015) 256 CLR 550, [22] (French CJ, Keane and Nettle JJ; Bell and Gageler JJ agreeing on this ground).

266 *Hili v R* (2010) 242 CLR 520, [44].

267 *R v Hatahet* [2024] HCA 23.

268 *R v Hatahet* [2024] HCA 23, [14] (Gordon A-CJ, Gleeson and Steward JJ; Beech-Jones J agreeing generally). See "4.8.8 Period or minimum period to be served is not a consideration in fixing a head sentence".

269 *R v Hatahet* [2024] HCA 23, [57]. The same may be said of other possible future executive actions which may affect the offender: for example, changed conditions of custody ("3.5.12 Conditions of custody"), visa cancellation and deportation ("3.5.14 Prospect of cancellation of a visa and deportation"), the imposition of penalty taxes, and cancellation of an occupational licence or the right to practice a profession (see "3.5.13 "Extra-curial punishment" generally").

270 *R v Hatahet* [2024] HCA 23, [26]-[28], [36]-[37] (Gordon A-CJ, Gleeson and Steward JJ; Beech-Jones J agreeing generally), [55] (Jagot J).

271 *Weininger v R* (2003) 212 CLR 629.

272 *Sabbah v R* [2020] NSWCCA 89, [8]-[9] (McCallum JA, Coghlan J agreeing), citing *Hoare v R* (1989) 167 CLR 348, [22] (error in treating a statutory directive to "have regard" to the fact that a prisoner may earn remissions on sentence by good behaviour as being of itself a basis for increasing what would otherwise be seen as the appropriate or proportionate head sentence); *Wong v R* (2001) 207 CLR 584, [74]-[76] (error in identifying a

3.2.2 Requirements of s 16A also apply to fixing period of imprisonment to be served

221. If a custodial sentence is to be imposed, the requirement in s 16A(1) for a sentence or order to be of a *"severity appropriate in all the circumstances"* (as well as the requirement to take into account the matters listed in s 16A(2) to the extent that they are relevant and known to the court) governs the determination not only of the appropriate head sentence but also of the pre-release period of a recognizance release order[273] (that is, an order under which an offender is to be conditionally released after serving a specified period of a sentence or sentences of imprisonment). Section 16A governs the passing of a sentence or the making of an order; a recognizance release order is defined in s 16(1) to mean "*an order made under paragraph 20(1)(b)*" of the Act. Such an order must be "*of a severity appropriate in all the circumstances of the offence*" (s 16A(1)). The same is true of the fixing of a non-parole period[274] (that is, the minimum period of a term or terms of imprisonment before the offender is eligible for release on parole).

222. See "4.10.1 Determining the length of the period of incarceration".

3.2.3 No scope for presumption of imprisonment for an offence

223. In *Kovacevic*,[275] a five-member bench of the Full Court of the Supreme Court of South Australia considered the proper approach to the sentencing of an offender for sustained and deliberate fraud on the Commonwealth. The plurality (Doyle CJ, Mullighan, Bleby and Martin JJ) affirmed that it is part of the function of an appellate court to set standards for sentencing and that in performing that function, the court may indicate that a certain type of offending is likely to attract a certain type of punishment (in particular imprisonment) and indicate an appropriate sentence range for particular types of offending.[276] But a sentencing standard cannot dictate a result in every case, or remove the need for consideration of the facts of each case and the application of the relevant considerations to those facts.[277] While it was

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predetermined range of sentences attributing a particular weight to some factors while leaving the significance of all other factors substantially unaltered); *Markarian v R* (2005) 228 CLR 357, [33] (error in proceeding on the assumption that any offence of supply involving more than 250 grams of heroin is likely to be a worse case than any offence involving only 250 grams or less), [39], [75] (error in taking a starting point giving notional quantification to objective factors and making adjustments around that point); *Hili v R* (2010) 242 CLR 520, [37]-[38] (error in applying a judge-made "norm" for the setting of a non-parole period in sentencing for federal offences); *Muldrock v R* (2011) 244 CLR 120 (error in taking the statutory standard non-parole period as a mandatory starting point for a two-stage sentencing process). To that list might be added references to *Bui v DPP (Cth)* (2012) 244 CLR 638, [19] (the discretion under s 16A is inconsistent with an automatic discount for presumed stress and anxiety from a successful prosecution appeal against sentence); *DPP v Dalgliesh (a pseudonym)* (2017) 349 CLR 37 (error to adhere to a range of sentences that is demonstrably contrary to principle in considering current sentencing practices); *R v Hatahet* [2024] HCA 23 (error to reduce an otherwise appropriate sentence because of the perceived unlikelihood of the offender being released on parole).

273 *R v Ruha; Ex parte DPP (Cth)* [2011] 2 Qd R 456, [45]; *Hili v R* (2010) 242 CLR 520, [40]-[42].

274 The obligation in s 16A(1) to "*impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence*" applies to the determination of a non-parole period: *R v Hatahet* [2024] HCA 23, [28]. The reasoning in *Hili v R* (2010) 242 CLR 520, [39]-[44], which was concerned with the fixing of the pre-release period of a recognizance release order, applies equally to the fixing of a non-parole period; see also *R v Ruha; Ex parte DPP (Cth)* [2011] 2 Qd R 456, [46]; *De Hollander v R* [2012] WASCA 127, [77]-[83]. For this purpose a non-parole period is properly to be regarded as part of the sentence to be imposed: *R v Rajacic* [1973] VR 636, 641.

275 *Kovacevic v Mills* (2000) 76 SASR 404.

276 *Kovacevic v Mills* (2000) 76 SASR 404, [30]-[31], [35].

277 *Kovacevic v Mills* (2000) 76 SASR 404, [32]. Compare *Wong v R* (2001) 207 CLR 584; *Hili v R* (2010) 242 CLR 520; *Barbaro v R* (2014) 253 CLR 58, [41]; *R v Pham* (2015) 256 CLR 550.

proper to say, for example, that for a particular type of offence an immediate term of imprisonment is ordinarily likely to be required (in order to give effect to the relevant sentencing principles), it was not appropriate to say that such a sentence is required absent truly exceptional circumstances.[278]

224. A similar approach was taken by the New South Wales Court of Criminal Appeal, in relation to the sentencing of State offenders, in *Parente*.[279] An appellate court must not cross the boundary between (properly) identifying the 'unifying principles' to be applied in any sentencing decision and (impermissibly) imposing an unlegislated judicially-created constraint on the sentencing discretion.[280]

225. In *Sabbah*,[281] which concerned the sentencing of a federal offender, McCallum JA (with whom Coghlan J agreed) disapproved two pre-*Parente* decisions in which the New South Wales Court of Criminal Appeal had endorsed a proposition that the offence under consideration "*should attract, in the absence of cogent and compelling circumstances, some form of full-time custodial penalty.*"[282] The sentencing judge in one of those cases had purported to draw support for such a proposition from ss 16A and 17A of the *Crimes Act 1914* (Cth). McCallum JA observed that an examination of ss 16A and 17 "*rebuts any pre-emptive conclusion as to the appropriate sentence for any particular offence*":[283]

- The requirement of proportionality in s 16A(1) "*is inherently inconsistent with the statement of any proleptic norm*".[284]
- To say that the process of instinctive synthesis of relevant factors required by s 16A(2)[285] should ordinarily lead to the conclusion that a sentence of imprisonment must be imposed for a particular kind of offence, without knowing the content of any of the mandatory relevant considerations, "*is to subvert the discretion*".[286]
- The requirement of s 17A that a sentence of imprisonment should not be imposed unless "*no other sentence is appropriate in all the circumstances of the case*" was inconsistent with any principle that offenders should ordinarily expect to go to gaol for an offence of a particular kind.[287]

Accordingly, her Honour concluded, judicial statements "*to the effect that particular classes of offenders should or must ordinarily "go to gaol" cannot be treated as statements of binding principle*".[288]

3.2.4 Assessing the seriousness of the offence by reference to the maximum penalty

226. The maximum penalty is one of many factors that bear upon the ultimate discretionary determination of the sentence for the offence. 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

278 *Kovacevic v Mills* (2000) 76 SASR 404, [39]-[45]. See also *Moore v R* [1999] FCA 448, [40]-[45].
279 *Parente v R* (2017) 96 NSWLR 633. See also *R v Stamatov* [2018] 2 Qd R 1, [93]-[100].
280 *Robertson v R* [2017] NSWCCA 205, [89] (Simpson JA); approved in *Parente v R* (2017) 96 NSWLR 633, [105].
281 *Sabbah v R* [2020] NSWCCA 89, [2]-[10].
282 *R v Gittani* [2002] NSWCCA 139, [17]; *R v Institoris* [2002] NSWCCA 8.
283 *Sabbah v R* [2020] NSWCCA 89, [4].
284 *Sabbah v R* [2020] NSWCCA 89, [4].
285 *Markarian v R* (2005) 228 CLR 357, [51] (McHugh J).
286 *Sabbah v R* [2020] NSWCCA 89, [4].
287 *Sabbah v R* [2020] NSWCCA 89, [5]-[6].
288 *Sabbah v R* [2020] NSWCCA 89, [10]. See also *DPP (Cth) v Garside* (2016) 50 VR 800, [61]-[62].

yardstick.[289] The maximum penalty signifies to sentencing judges (and to the community and to offenders) the seriousness with which the legislature regards offences of the kind in question.[290]

227. The maximum sentence available for the offence can underscore the relevance of general deterrence[291] and serves as a basis of comparison between the case before the Court and the worst category of case.[292]

228. An offence may fall into the worst category of case, and therefore warrant the imposition of the maximum prescribed penalty, notwithstanding that it is possible to imagine an even worse instance of the offence.[293] However sentencing judges should avoid referring to an offence as being, or not being, within the "worst category", as the term may be confusing, may be misunderstood and may lead to error; where relevant, the judge should state in full whether the offence is or is not so grave as to warrant the maximum prescribed penalty.[294]

229. The maximum penalty must be taken into account in determining the appropriate sentence, even if that penalty exceeds a jurisdictional limit applicable to the court; a jurisdictional limit relates to the sentencing court, not to the task of identifying and synthesising the relevant factors that are weighed to determine the appropriate sentence.[295] Accordingly, if an indictable offence is determined summarily, the court must have regard to the maximum penalty applicable to the offence – not the limit applicable to the court – as the relevant yardstick in assessing the seriousness of the offence.[296] The 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.[297] It is an error for a court of summary jurisdiction to treat the jurisdictional limit, rather than the maximum penalty, as reserved for the worst category of case.[298]

230. Because of the importance of the maximum penalty to the sentencing task, a misapprehension of the applicable maximum penalty by the sentencing court will vitiate the exercise of the sentencing discretion unless the error was immaterial.[299]

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289 *Markarian v R* (2005) 228 CLR 357, [30]-[31]; *Elias v R* (2013) 248 CLR 483, [27].

290 *R v Taylor* [2022] NSWCCA 256, [60] (citing *Muldrock v R* (2011) 244 CLR 120, [31]).

291 *R v Lambert* (1990) 51 A Crim R 160.

292 *Markarian v R* (2005) 228 CLR 357, [39]; *Lodhi v R* [2007] NSWCCA 360.

293 *R v Kilic* (2016) 259 CLR 256, [18].

294 *R v Kilic* (2016) 259 CLR 256, [19]-[20].

295 *Park v R* (2021) 273 CLR 303, [19].

296 *R v Doan* (2000) 50 NSWLR 115, [27]-[36]. This principle has been applied in the sentencing of a federal offender: see, e.g., *Agora v Cobern* [2015] WASC 440, [80]-[81]; *Millard v Pomeroy* [2022] ACTSC 319, [29].

297 *R v Doan* (2000) 50 NSWLR 115, [35]; *R v Duncan* [2007] VSCA 137, [17]-[20] (both cited with approval in *Park v R* (2021) 273 CLR 303, [19]).

298 *R v Doan* (2000) 50 NSWLR 115, [35]; *Attorney-General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) (No 2 of 2002)* [2002] NSWCCA 515, [27] (both cited with approval in *Park v R* (2021) 273 CLR 303, [19], [23]).

299 E.g. *R v Beary* (2004) 11 VR 151, [20]-[21]; *R v Carbone* [2012] SASCFC 34, [46]-[53]; *O'Hara v R* [2021] WASCA 123, [40]. On an appeal, the hurdle for the prosecution to satisfy the court that the error is immaterial is quite high, since the error consists of making a mistake as to the maximum penalty of a nature that *could* have made a material difference to the sentence in the instinctive synthesis: *Davies (a pseudonym) v R* [2023] VSCA 225, [66]-[68]. Although error was established in that case, leave to appeal was refused, as there was no reasonable prospect that the Court would impose a lesser sentence ([96]).

3.2.5 The availability of another offence with a lesser maximum penalty

231. In *Liang*,[300] the Victorian Court of Appeal held that a sentencing judge must take into account in mitigation of sentence that there was a 'less punitive offence' on which the prosecution could have proceeded and which was 'as appropriate or even more appropriate' to the facts than the charge for which the offender fell to be sentenced.

232. In *Elias*,[301] the High Court disapproved the decision in *Liang*, and held that "*There is no warrant under the common law of sentencing for a judge to take into account the lesser maximum penalty for an offence for which the offender could have been, but had not been, convicted*".[302]

233. Accordingly, a sentence to be imposed on a federal offender should not be mitigated on the basis that the offender could have been charged with a less serious offence (whether against a law of the Commonwealth or a law of a State or Territory).

3.3 Other sentences not yet served – s 16B (totality principle)

234. Section 16B of the *Crimes Act 1914* (Cth) requires a court in sentencing a federal offender to have regard to any sentence (federal, State or Territory) that the offender has not served, or any sentence liable to be served through the revocation of a parole order or licence granted.

235. The Act accommodates the application of the common law principle of totality:[303] that is, the requirement that the sentencing judge impose an appropriate sentence for each offence and structure the sentences such that the overall sentence is just and appropriate to the totality of the offending behaviour.[304] (See "4.9.2 Whether sentences should be concurrent or cumulative".)

236. The common law principle requires consideration not only of all sentences imposed on the same occasion, but also of sentences imposed previously to which the offender is still subject. That includes sentences imposed in another State or Territory[305] or even in another country. Section 16B embodies the same principle.[306]

237. The totality principle is not enlivened, and s 16B does not apply, if the offender has completed the other sentence by the time of sentencing,[307] even if the earlier sentence was completed only while the

300 *R v Liang* (1995) 82 A Crim R 39.
301 *Elias v R* (2013) 248 CLR 483.
302 *Elias v R* (2013) 248 CLR 483, [37].
303 *Johnson v R* (2004) 78 ALJR 616; *Hili v R* (2010) 242 CLR 520, [25]. The principle of totality is implicit not only in s 16B but also in some provisions of s 16A of the *Crimes Act 1914*, such as s 16A(2)(c): see "3.4.3 Course of conduct – s 16A(2)(c)".
304 *Mill v R* (1988) 166 CLR 59, 62–63; *Atai v R* [2020] NSWCCA 302, [131]; *Haak v R* [2022] NSWCCA 28, [15]-[20].
305 *Mill v R* (1988) 166 CLR 59.
306 *Postiglione v R* (1997) 189 CLR 295, 307-9.
307 At common law, the principle of totality applies when a custodial sentence is to be imposed which will be cumulative upon, or which will overlap with, *an existing custodial sentence*: *R v Gordon* (1994) 71 A Crim R 459, 466; *Kerr v R* [2008] NSWCCA 201, [29]-[32]; *Tiba v R* [2013] VSCA 302, [3], [35]; *Vincent v R* [2022] NSWCCA 210, [70]-[72] (Fagan J; Ward P agreeing). In *Vincent*, Davies J (*obiter dicta*) ([45]) doubted this as a general proposition, but made no reference to *Gordon* or to the cases which have followed it.

defendant was being held on remand for the federal offence for which the defendant then falls to be sentenced.[308]

238. As to whether any other period of custody (that is, a period which is not custody for the offence and is not to be taken into account under the totality principle and s 16B) may be taken into account in fixing a term of imprisonment to be imposed on a federal offender, see "4.8.12 Taking into account other pre-sentence custody".

239. It has been said in some cases that there is a "second limb" of the principle of totality, that the total of all the sentences must not be "crushing"[309] (that is, it must not be such as to induce a feeling of hopelessness or destroy any expectation of a useful life after release[310]). While it is widely acknowledged that whether a total sentence is "crushing" may be relevant in determining whether it is appropriate,[311] the proposition that a crushing sentence is necessarily contrary to the principle of totality, or is a separate principle of sentencing, is contentious.[312] In *Azzopardi*,[313] Redlich JA (Coghlan JA and Macaulay AJA agreeing) said:

> *Whether a sentence offends the principle of totality is directed to the broader question whether the total sentence is proportionate to the offender's overall criminality. It is not dependent upon the subjective views of the offender. Thus a sentence may offend the totality principle without being 'crushing'. … On the other hand, a crushing sentence may not necessarily offend the totality principle though it may provide an indicator that it has infringed the principle. The subjective effect of a total effective sentence upon the offender must be put in perspective. While relevant, it cannot be regarded as of paramount importance.*

3.4 Non-exhaustive list of matters – s 16A(2)

240. Section 16A(2) of the *Crimes Act 1914* (Cth) sets out a non-exhaustive list of matters to which the court must have regard when passing sentence. It provides:

> *(2) In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court:*
>
> *(a) the nature and circumstances of the offence;*
>
> *(b) other offences (if any) that are required or permitted to be taken into account;*

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308 *Visser v R* [2015] VSCA 168, [160]-[168]. The Court in *Visser* also said ([165]) that the fact that the offender had finished a term of imprisonment for different offending shortly before the imposition of a sentence may be a relevant factor for the sentencing judge to take into account.

309 E.g. *Roffey v Western Australia* [2007] WASCA 246, [25]; *DPP v Alsop* [2010] VSCA 325, [30]. In *R v Schmidt* [2013] 1 Qd R 572, Fryberg J traced the origin of the proposition to a statement in Thomas, *Principles of Sentencing*, which cites as authority for it an unreported English decision from 1970 which (as Fryberg J noted at [41]) has not been discovered despite diligent research.

310 *R v Yates* [1985] VR 41, 48; *R v MAK* [2006] NSWCCA 381, [97].

311 See the summary of authorities in *R v Schmidt* [2013] 1 Qd R 572, [21]-[42] (Fryberg J); *Hall v R* [2021] NSWCCA 220, [77]-[91], [137]; *Davidson v R* [2022] NSWCCA 153, [302]-[322]. Whether a sentence is "crushing" may be relevant in considering the significance of the offender's age (see "3.4.13 Character, antecedents, age, means, physical/mental condition – s 16A(2)(m)") and may be relevant to the principle of rehabilitation (see "3.4.15 Prospects of rehabilitation – s 16A(2)(n)").

312 Compare the judgments in *JTR v Western Australia* [2023] WASCA 131 of Buss P ([11]-[34]) on the one hand and of Mitchell and Vandongen JJA ([181]-[196]) on the other.

313 *Azzopardi v R* (2011) 35 VR 43, [69]. See also *Mohamed v R* [2022] VSCA 136, [76] (whether a sentence is "crushing" is not a separate sentencing principle).

(c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character—that course of conduct;

(d) the personal circumstances of any victim of the offence;

(e) any injury, loss or damage resulting from the offence;

(ea) if an individual who is a victim of the offence has suffered harm as a result of the offence—any victim impact statement for the victim;

(f) the degree to which the person has shown contrition for the offence:

(i) by taking action to make reparation for any injury, loss or damage resulting from the offence; or

(ii) in any other manner;

(fa) the extent to which the person has failed to comply with:

(i) any order under subsection 23CD(1) of the Federal Court of Australia Act 1976; or

(ii) any obligation under a law of the Commonwealth; or

(iii) any obligation under a law of the State or Territory applying under subsection 68(1) of the Judiciary Act 1903;

about pre-trial disclosure, or ongoing disclosure, in proceedings relating to the offence;

(g) if the person has pleaded guilty to the charge in respect of the offence:

(i) that fact; and

(ii) the timing of the plea; and

(iii) the degree to which that fact and the timing of the plea resulted in any benefit to the community, or any victim of, or witness to, the offence;[314]

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

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

(ja) the deterrent effect that any sentence or order under consideration may have on other persons; [315]

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

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

(ma) if the person's standing in the community was used by the person to aid in the commission of the offence—that fact as a reason for aggravating the seriousness of the criminal behaviour to which the offence relates;[316]

(n) the prospect of rehabilitation of the person;

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314 This paragraph in its current form was introduced by the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), s 3 and Schedule 8, item 1; it applies in relation to determining, on or after 20 July 2020, a sentence to be passed, or an order to be made, in respect of a person for a federal offence that the person was charged with, or convicted of, on or after that date: see s 2(1) and Schedule 8, item 7 of the amending Act. Prior to this amendment, s 16A(2)(g) provided, "*if the person has pleaded guilty to the charge in respect of the offence—that fact;*".

315 This paragraph was inserted by the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015* (Cth) and commenced operation on 27 November 2015.

316 This paragraph was inserted by the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), s 3 and Schedule 8, item 2; it applies in relation to determining, on or after 20 July 2020, a sentence to be passed, or an order to be made, in respect of a person for a federal offence that the person was charged with, or convicted of, on or after that date: see s 2(1) and Schedule 8, item 7 of the amending Act.

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

241. Section 16A(2), as originally enacted, was based on s 10 of the *Criminal Law (Sentencing) Act 1988* (SA). That section had been described as having declared what had always been the position at common law.[317]

242. As is plain from the opening words of the subsection ("*In addition to any other matters* ..."), the list does not purport to be exhaustive.[318] Section 16A, on its proper construction, accommodates the application of common law principles of sentencing, such as the principle of "totality" and some other judicially developed general sentencing principles, because those principles give relevant content to the statutory expression "*of a severity appropriate in all the circumstances of the offence*" used in s 16A(1), as well as some of the expressions used in s 16A(2), such as "*the need to ensure that the person is adequately punished for the offence*" (s 16A(2)(k)).[319]

243. As the chapeau to s 16A(2) makes clear, a sentencing court is required to have regard to the factors listed in s 16A(2) only if they are "*relevant and known to the court*". For further discussion of this requirement, see "2.1.3 Relevant matters "known to the court": *Crimes Act 1914,* s 16A(2)".

3.4.1 Nature and circumstances of offence – s 16A(2)(a)

244. Ascertaining and assessing the nature and circumstances of the offence is a fundamental part of sentencing. It is critical to the assessment of the objective seriousness of the offending, which in turn is essential to determining the weight to be given to sentencing purposes such as denunciation, community protection, adequate punishment (s 16A(2)(k)), general deterrence (s 16A(2)(ja)), specific deterrence (s 16A(2)(j)) and rehabilitation (s 16A(2)(n)). It also reflects the principle of proportionality,[320] that is, that the sentence should never exceed "*that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances*".[321] The nature and circumstances of the offence may also shed light on other considerations, including (to mention just a few) the circumstances of any victim (s 16A(2)(d)), injury, loss or damage resulting from the offence (s 16A(2)(e)), the mental condition of the offender (s 16A(2)(m)) and parity with co-offenders.

245. The nature and circumstances of the offence may encompass a wide range of matters. These may include (to mention only some examples): the extent of any planning or premeditation; the degree of sophistication; the danger posed or harm caused to others; whether it involved a breach of trust or abuse of position; whether it was of a kind that was difficult to detect or prosecute; any steps taken to avoid detection or to destroy or conceal evidence; the offender's state of mind; the role played by the offender (and, if applicable, its relation to the roles played by others); the duration of the offending; and whether it ceased voluntarily or ceased only because of investigation or detection. Relevant matters will vary according to the type of offence committed: for example, for drug offences, the quantity, type, form, purity and value of the drug (if known) will generally be relevant.

317 *R v Adami* (1989) 51 SASR 229, 233. Compare *R v Sinclair* (1990) 51 A Crim R 418, 430.
318 *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370; *Hili v R* (2010) 242 CLR 520, [24].
319 *Hili v R* (2010) 242 CLR 520, [25].
320 *Bahar v R* (2011) 45 WAR 100, [44]-[45]; *Doig v R* [2023] NSWCCA 76, [8].
321 *Hoare v R* (1989) 167 CLR 348, 354 (emphasis in original).

246. The motive or intention with which an offence is committed is relevant to the assessment of objective seriousness, whether or not it is an element of the offence: for example the desire to profit from drug trafficking would be relevant to the assessment of the objective seriousness of that crime.[322]

247. The nature and circumstances of the offence are required to be taken into account pursuant to s 16A(2)(a), *to the extent that they are "relevant and known to the court"*. The implications of this requirement are described above: "2.1.3 Relevant matters "known to the court": Crimes Act 1914, s 16A(2)".

248. In *Olbrich*[323] the High Court considered s 16A(2)(a) in the context of a federal offender who had imported 1.1 kg of heroin in his luggage and who pleaded guilty to importing the heroin contrary to s 233B of the *Customs Act 1901* (Cth). It was unclear to the sentencing judge what precise role or position the offender held in the criminal hierarchy relating to the importation of the drug.

249. A majority of the court (Gleeson CJ, Gaudron, Hayne and Callinan JJ) did not accept that the identification of the precise nature of the offender's involvement in an act of importation of prohibited imports was an essential aspect of the sentencing process.[324] The sentencing judge was required by s 16A(2)(a) to take into account the nature and circumstances of the offence only to the extent that these were "known to the court".[325] While an offender's role in the criminal enterprise was relevant, the task of sentencing was often required to be undertaken when it was not possible to establish the precise role or position of the offender in the criminal hierarchy. In those circumstances, the sentencing judge should concentrate on who the offender was and what the offender had done.[326]

250. It follows that a sentencing judge is entitled to treat proven offences of possession and attempting to obtain possession of illicit drugs as very serious offences, even in the absence of precise evidence as to the nature of the offender's participation.[327]

251. Careful attention must be paid to the terms of the charge and how the prosecution case is put. For example, if a person is charged with possession of child abuse material on a single day, it is an error to take into account, as an aggravating circumstance, that they were in possession of the material over a longer period of time.[328] However it not an error for a sentencing court to have regard to the longer period of possession "*to neutralise any suggestion that possession for a single day only counted in favour of a claim in mitigation*."[329]

252. If the charge is a rolled-up charge (that is, a charge that would be objectionable for duplicity, as it alleges more than one offence),[330] the nature and circumstances of the offence for which the offender is to be sentenced will include more than one criminal act; the sentencing court must assess the criminality of the conduct as particularised.[331] The more contraventions or episodes of criminality that

322 *Elmir v R* [2021] NSWCCA 19, [55].
323 *R v Olbrich* (1999) 199 CLR 270.
324 *R v Olbrich* (1999) 199 CLR 270, [13].
325 *R v Olbrich* (1999) 199 CLR 270, [17].
326 *R v Olbrich* (1999) 199 CLR 270, [19]-[22]. See also "2.1 Fact-finding in federal sentencing".
327 *R v Nicholas* (2000) 1 VR 356; *De La Espriella-Velasco v R* (2006) 31 WAR 291.
328 *Henderson v R* [2024] ACTCA 3, [35]-[37].
329 *Brierley v R* [2022] NSWCCA 26, [17]-[19].
330 *R v Jones* [2004] VSCA 68, [12]-[13].
331 *R v Knight* [2004] NSWCCA 145, [25]–[26].

form part of the rolled-up charge, the more objectively serious the offence is likely to be.[332] However the offender is exposed only to the maximum penalty applicable to a single offence.[333]

3.4.2 Other offences taken into account – s 16A(2)(b)

253. Section 16BA of the *Crimes Act 1914* (formerly s 21AA) provides a procedure by which one or more federal offences may be taken into account in sentencing an offender for another federal offence. For a description of s 16BA, see "6.5 Taking other offences into account". The power to take an offence into account in sentencing a federal offender is discretionary (s 16BA(2)). Taking an offence into account does not affect the applicable maximum penalty (s 16BA(4)).

254. The principles applicable to sentencing an offender when another offence is taken into account have been authoritatively stated by the New South Wales Court of Criminal Appeal.[334] Those principles apply to the sentencing of a federal offender.[335] Although an offender is not to be punished for the admitted offence which is taken into account, offences taken into account may increase the penalty otherwise appropriate, by giving greater weight to the need for specific deterrence and to the community's entitlement to extract retribution for serious offences.[336] Therefore the practical effect of taking an offence into account is that a more severe sentence, or a sentence of a more severe type, will usually result.

255. There is no requirement to quantify the effect (even approximately) or to specify the sentence that would otherwise have been imposed.[337] Taking the other offence into account is merely a relevant factor to be considered in the instinctive synthesis.[338]

256. Apart from the procedure in s 16BA for taking other offences into account, another way in which a sentencing court may have regard to other offending (for which the offender does not fall to be sentenced) is by the practice of treating a charge as a representative charge[339] (that is, as representative of other admitted offending of the same type). See "3.4.3 Course of conduct – s 16A(2)(c)".

3.4.3 Course of conduct – s 16A(2)(c)

257. Where an offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character, regard must be had to that course of conduct.[340] A course of conduct within

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332 *R v Richard* [2011] NSWSC 866, [65](f); *R v Glynatsis* [2013] NSWCCA 131, [66]; *R v De Leeuw* [2015] NSWCCA 183, [116]; *DPP (Cth) v Phan* [2016] VSCA 170, [60]; *DPP (Cth) v CCQ* [2021] QCA 4, [176].

333 *R v Jones* [2004] VSCA 68, [13]; *R v Donald* [2013] NSWCCA 238, [85].

334 *Attorney General's Application Under s37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146; *Abbas v R* [2013] NSWCCA 115; *Ilic v R* (2020) 103 NSWLR 430, [11]-[13].

335 *R v Lamella* [2014] NSWCCA 122, [48]; *DPP (Cth) v KMD* [2015] VSCA 255, [82]-[88]; *Soyke v R* [2016] NSWCCA 112, [67]; *Le v R* [2017] NSWCCA 26; *Atai v R* [2020] NSWCCA 302, [123]; *Elzein v R* [2021] NSWCCA 246, [253].

336 *Attorney General's Application Under s37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, [42].

337 *Martellotta v R* [2021] NSWCCA 168, [72].

338 *Abbas v R* [2013] NSWCCA 115, [22].

339 As to the differences between a rolled-up charge and a representative charge, see *R v Jones* [2004] VSCA 68, [12]-[13].

340 This paragraph does not apply merely because a single offence under consideration itself consists of a course of conduct: *R v Jousif* [2017] NSWSC 1299, [258]. (Although this sentence was overturned on appeal in *Elomar v R* [2018] NSWCCA 224, the appeal decision does not affect the validity of this observation.) However the fact that a single offence is committed over a period of time and involves a number of discrete acts is relevant to assessing the seriousness of the offence: see "3.4.1 Nature and circumstances of offence – s 16A(2)(a)".

paragraph 16A(2)(c) may consist of conduct within one hour[341] or over a number of years.[342] Whether the conduct is sufficiently connected to constitute a course of conduct is a question of fact and degree.[343]

258. The fact that offending forms part of such a course of criminal conduct may be relevant in more than one way.[344]

259. First, it may be relevant to the application of the principle of totality.[345] If the offender is to be sentenced for offences which form part of a course of conduct, and is being sentenced or has been sentenced for other offences committed as part of the same course of conduct, the sentencing court must have regard to the totality of the offending conduct in fixing sentence.[346] The principle acts as a check on the sentence to be imposed. It is an error to have regard to the 'totality' of the offending as an aggravating factor in fixing sentences for each individual offence.[347]

260. Second, while the existence of a course of conduct does not permit double punishment of the offender,[348] the fact that the instant offending formed part of a course of criminal conduct may be relevant in putting the offending in context. Such a course of conduct may show that the offending for which the offender is to be sentenced was not an isolated incident, or was planned and premeditated and not spontaneous or opportunistic,[349] or it may cast light on the motivation, commitment or role of the offender or the scale of the offending[350] – matters which are relevant to considering the nature and circumstances of the offence (s 16A(2)(a)), ensuring that the offender is adequately punished for the offence (s 16A(2)(k)), and determining the need for specific deterrence (s 16A(2)(j)).

261. Third, offending as part of a course of criminal conduct may also reduce or negate mitigating factors that would otherwise have applied. For example, it may undermine a claim that the offending was out of character[351] or was prompted by temporarily impaired mental functioning (see s 16A(2)(m)) or that

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341 E.g. *R v Copeland (No 2)* (2010) 108 SASR 398.

342 E.g. *Fitzgerald v R* [2015] NSWCCA 266.

343 In *R v Kruezi* (2020) 6 QR 119, [100]-[111], Williams J considered that it was open to the sentencing judge to conclude that the commission of two offences of a different character, committed more than five months apart, constituted a course of conduct within s 16A(2)(c) on the basis that they were "*motivated by the same ideology and the same religious beliefs and the same extremism which led to each of those being the rationale for the offence*" ([109]). (McMurdo and Mullins JJA expressed no view on the question as they considered that it was not apparent that the judge had characterised the offending as a course of conduct ([11]).)

344 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006), [6.59]-[6.66].

345 *Putland v R* (2004) 218 CLR 174, [91] (Kirby J, dissenting); *Weininger v R* (2003) 212 CLR 629, [57] (Kirby J, dissenting); Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006), [6.65].

346 See, e.g., *Mill v R* (1988) 166 CLR 59, 63; *Postiglione v R* (1997) 189 CLR 295, 308; *Pearce v R* (1998) 194 CLR 610, [45]. Although the totality principle is not explicitly referred to in s 16A of the *Crimes Act 1914*, common law totality principles are applicable to the sentencing of a federal offender: *Johnson v R* (2004) 78 ALJR 616. The principle is also reflected in the requirement in s 16B to take into account other sentences not yet served: see "3.3 Other sentences not yet served – s 16B (totality principle)".

347 E.g. *Sigalla v R* [2021] NSWCCA 22, [113]-[127].

348 See, e.g., *Baumer v R* (1988) 166 CLR 51.

349 E.g. *Kovacevic v Mills* (2000) 76 SASR 404, [37]; *R v Host* [2015] WASCA 23, [145](c); *Ngo v R* [2017] WASCA 3, [63](c); *Elzein v R* [2021] NSWCCA 246, [252].

350 E.g. *Ngo v R* [2017] WASCA 3, [63](a).

351 *Weininger v R* (2003) 212 CLR 629, [25]-[29]. It is sometimes said that over the course of a period of offending, the offender ceased to be a person of good character, but was merely a criminal who had not yet been caught:

the offender was contrite (s 16A(2)(f)), or had good prospects of rehabilitation (s 16A(2)(n)). A course of conduct may be relevant to assessing the weight to be given to specific deterrence (s 16A(2)(j)), or to a guilty plea (s 16A(2)(g)) or to cooperation (s 16A(2)(h)). Any of these examples (which are by no means exhaustive) ultimately go to ensuring that the sentence is appropriate (s 16A(1)).

262. There is controversy over whether the course of conduct referred to in s 16A(2)(c) may include offences of which the offender has not been found guilty. In *Weininger*,[352] Callinan J expressed the view, *obiter dicta*, that it could; his Honour considered that the difference in the language used in s 16A(2)(b) and s 16A(2)(c) implied that the reference to "*a series of criminal acts of the same or a similar character*" in the latter was not confined to offences of which the offender had been found guilty. Kirby J in the same case, in dissent, expressed a contrary view.[353]

263. The view of the CDPP is that, at the least, other criminal conduct which the offender has admitted, or which has been proven beyond reasonable doubt, could constitute "*criminal acts of the same or a similar character*" within 16A(2)(c). In this way, a sentencing judge may properly deal with charges which are treated, by agreement, as representative charges, that is, as examples of a series of criminal acts constituting a course of conduct rather than merely as single instances.[354] Courts in sentencing federal offenders have often dealt with charges as representative counts;[355] s 16A(2)(c) provides a sound foundation for doing so.[356]

3.4.4 Circumstances of any victim – s 16A(2)(d)

264. The personal circumstances of a victim must be taken into account.

265. Whether a person should be considered a "victim" requires consideration of the particular offence for which sentence is being passed.[357] The term "victim" is to be construed broadly: it may include, for example, a person who witnesses an offence of violence, or an unwitting acquaintance or friend who is recruited and manipulated in the commission of a dishonesty offence.[358] The victims of firearms trafficking potentially include police and others who may be adversely affected by unlawful use of the unrecovered trafficked firearms.[359] For insider trading and customs offences, the categories of victims may be large or diffuse groups.[360] However, in the context of a grooming offence, the term "victim" has been confined to the primary victim, not family members.[361]

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cf *R v Ruggiero* [1998] SASC 6989, [37]; *R v Schneider* (1988) 37 A Crim R 395, 397; *R v Smith* [2000] NSWCCA 140, [20]-[22].

352 *Weininger v R* (2003) 212 CLR 629, [112], [122].

353 *Weininger v R* (2003) 212 CLR 629, [57].

354 The conceptual basis for representative charges is described by Batt JA in *R v SBL* [1999] 1 VR 706, 725-6.

355 An example is *DPP v Chatterton* [2014] VSCA 1.

356 See Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006), [6.66].

357 *R v Nahlous* [2013] NSWCCA 90, [102]-[103].

358 *Kabir v R* [2020] NSWCCA 139, [61]-[65].

359 *R v Manuel* [2020] WASCA 189, [84].

360 *R v Nahlous* [2013] NSWCCA 90, [103].

361 *R v Nahlous* [2013] NSWCCA 90, [104]. Where the offender is also a family member, the paradoxical consequence of this approach is that proven suffering caused to a family member (for example, a parent of the primary victim) *by reason of the offending* does not fall for consideration as an aggravating factor, but probable hardship to that person *by reason of the sentence or order* must be taken into account as a mitigating factor (s 16A(2)(p)). *Nahlous* may require reconsideration given the increasing understanding of the far-reaching effects of sexual offending, especially against children.

266. The circumstances of any victim will often be relevant as part of the nature and circumstances of the offence (s 16A(2)(a)). A court sentencing a federal offender is also required to have regard to any injury loss or damage resulting from the offence (s 16A(2)(e)) and any victim impact statement (s 16A(2)(ea)).

267. Additional requirements to take into account the circumstances of a victim apply in relation to certain Commonwealth child sex offences.

268. Since 1994, a court sentencing an offender for a sexual offence against a child which was committed outside Australia (originally in Division 2 of Part IIIA of the *Crimes Act 1914* and then the successor offences in Subdivision B of Division 272 of the *Criminal Code* (Cth)) has been required to take into account the age and maturity of the person in relation to whom the offence was committed, so far as these matters are "*relevant and known*" to the court.[362] These requirements continue to apply to sentencing for such offences if they were *committed before 23 June 2020*.

269. These requirements were expanded in their application and their scope by amendments to the *Criminal Code* (Cth) in 2020.[363] The legislation as amended applies in sentencing an offender for any of the following sexual offences under the *Code*, if the offence was *committed on or after 23 June 2020*:[364]

- Offences against Subdivision B of Division 272 of the *Code* (ss 272.8–272.15A: sexual offences against children outside Australia) – sentencing requirement imposed by s 272.30 of the *Code*;
- Offences against Subdivision C of Division 471 of Part 10.5 of the *Code* (ss 471.24–471.26: offences relating to use of postal or similar service involving sexual activity with person under 16) – sentencing requirement imposed by s 471.29A of the *Code*;
- Offences against Subdivision F of Division 474 of Part 10.6 of the *Code* (ss 474.25A–474.27A: offences relating to use of carriage service involving sexual activity with, or causing harm to, person under 16) – sentencing requirement imposed by s 474.29AA of the *Code*.

Under each of these provisions, in determining the sentence to be passed on an offender for an offence to which the requirement applies, the court must take into account, so far as the matter is relevant and known to the court:

- the age and maturity of the person in relation to whom the offence was committed;
- if that person was under 10 when the offence was committed, that fact as a reason for aggravating the seriousness of the criminal behaviour to which the offence relates; and
- the number of people involved in the commission of the offence.

So, for example, when the offence consists of online grooming of a child, the age and maturity of the child would plainly be relevant in assessing the seriousness of the offence.

270. The relevant offences also apply where the offence was committed in relation to a fictitious person:[365] for example, an offence consisting of the online grooming of a child under the age of 16 years, in which the part of the child is played by a police officer. In the view of the CDPP, the references to "*the person in relation to whom the offence was committed*" include such a case.

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362 *Crimes Act 1914* (Cth), s 50FD; *Criminal Code* (Cth), s 272.30.

363 *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), s 3 and Sch 9.

364 *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), Sch 9, Item 5.

365 *Criminal Code* (Cth), ss 272.14(4), 272.15(4), 272.15A(4), 471.28(2), (2A), 474.28(9), (9A).

3.4.5 Injury, loss or damage resulting from the offence – s 16A(2)(e)

271. A wide range of matters may be taken into account under this heading. They include:

- injury, loss or damage caused to individual victims,[366] even if the individual victims or their individual losses cannot be identified;[367]
- financial or other property loss to the Commonwealth or a public authority, including public revenue foregone;[368]
- damage to the Australian economy caused by cartel activities;[369]
- damage to the integrity of markets caused by insider trading or market manipulation,[370] or by the bribery of foreign officials (even if no bribe is ultimately paid);[371] or
- damage to the reputation or integrity of an important public institution.[372]

272. Injury, loss or damage to property or financial interests must be assessed in a realistic way.[373] If voluntary reparation has been made, it should be taken into account in assessing the loss to the victim; the position may be different where the payment is made under compulsion.[374]

273. In the case of joint offenders, each offender may be regarded as severally responsible for the whole of any resulting loss or damage.[375]

274. "Injury, loss or damage resulting from the offence" does not encompass injury, loss or damage to the offender, such as expenditure incurred (and not recovered) in connection with the commission of the offence.[376]

3.4.6 Victim impact statements – s 16A(2)(ea)

275. This paragraph requires a court to have regard to any victim impact statement (VIS) for an individual who has suffered harm as a result of the offence.[377] "Victim" must be taken to have the same meaning as in s 16A(2)(d), as to which see "3.4.4 Circumstances of any victim – s 16A(2)(d)".

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366 E.g. *DPP (Cth) v Boyles (a pseudonym)* [2016] VSCA 267, [55], [94].

367 *Kamay v R* (2015) 47 VR 475, [46]-[52].

368 E.g. *R v Alimic* [2006] VSCA 273, [10]; *R v Host* [2015] WASCA 23, [145](e). Offences against the revenue are not victimless crimes; everybody suffers: *DPP (Cth) v Milne* [2001] VSCA 93, [12]; *Aitchison v R* [2015] VSCA 348, [79].

369 E.g. *DPP (Cth) v Nippon Yusen Kabushiki Kaisha* (2017) 254 FCR 235, [250]-[252], [298], [300].

370 E.g. *R v Curtis (No 3)* [2016] NSWSC 866, [24].

371 E.g. *Elomar v R* [2018] NSWCCA 224, [72]-[87].

372 E.g. *Kamay v R* (2015) 47 VR 475, [50].

373 For example, in *Billis v R* (WA SC (Full Court), 24 February 1997, unreported), the conduct of the offender led to a considerable fall in the market price of shares held by the victim. Had the victim then sold the shares, there would have been a considerable loss. But by the time the victim sold the shares, the market price had recovered, and the victim sold them for a profit. In those circumstances, the Court held that the sentencing judge had erred in treating as a serious aggravating factor the fact that the offending had damaged the victim by causing a reduction in the value of the shares.

374 *R v Host* [2015] WASCA 23, [24]-[25].

375 *R v Boughen* [2012] NSWCCA 17, [55]-[56]; *R v Melrose* [2016] QCA 202, [16]-[17].

376 *Whisson v Mead* (2006) 95 SASR 124.

377 The paragraph was inserted in 2013. It applies to offences committed, or alleged to have been committed, on or after 29 June 2013. Previously any use of victim impact statements in sentencing of federal offenders was based on State and Territory procedural laws applied as surrogate federal law, together with s 16A(2)(d) and (e) of the *Crimes Act 1914*.

276. The definition of who can provide a VIS and what it can contain are set out in s 16AAAA(1) of the *Crimes Act 1914* (Cth). In contrast to some State provisions, a Commonwealth VIS may be oral or in writing, but must be signed or otherwise acknowledged by the maker of the statement.

277. Under s 16AB of the *Crimes Act 1914* (Cth):

- only one VIS can be given per victim, unless the court grants leave;
- no implication is to be drawn from the absence of a VIS; and
- the accused may test the facts in a VIS by cross examining the maker only if leave is granted by the court.

278. There is no prescribed form of VIS but a pro forma Commonwealth VIS has been developed by the CDPP.

3.4.7 Degree to which contrition is shown – s 16A(2)(f)

279. This paragraph requires consideration of "*the degree to which the person has shown contrition for the offence … by taking action … or in any other manner*". That is, contrition must be "*shown*" by the offender. Actions will often speak louder than words.[378]

280. There is a significant difference between regret for the consequences of conduct and contrition for the conduct. Remorse is contrition or shame at the commission of an offence, not regret as to its consequences to the offender.[379]

281. A plea of guilty or the making of reparation is usually accepted as a demonstration of contrition; if so, it must be taken into account under s 16A(2)(f).[380] Genuine contrition also enhances the offender's prospects of rehabilitation (s 16A(2)(n)) and reduces the need for specific deterrence (s 16A(2)(j)).[381]

282. A court is not obliged to treat the making of reparation or a guilty plea as demonstrating contrition.[382] Contrition, if relied upon and not conceded by the prosecution, must be established by the offender.[383] A judge is not bound to accept hearsay evidence of what the offender said to a psychologist or psychiatrist, let alone testimonials or assertions from the Bar table.[384] Nothing in s 16A(2)(f) requires a

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378 *Cf Patel v R* [2022] NSWCCA 93, [51] ("*The most powerful evidence of the applicant's contrition is not his expressions of remorse which after all are mere words, but the steps he has actually taken, and the influence those steps have had on others"*).

379 *Lin v R* [2023] NSWCCA 304, [53].

380 *Wangsaimas v R* (1996) 6 NTLR 14; *R v Lovel* [2007] QCA 281.

381 *Barbaro v R* [2012] VSCA 288, [39].

382 *Issac v R* [2024] NSWCCA 2, [84]. Relevant factors in that case ([85]) were that there was no sworn evidence from the offender, no evidence of any financial hardship in repaying the money, and it was inevitable that the offender would be required to pay the full outstanding amount.

383 Cf *Newman v R* [2018] NSWCCA 208, [29]-[31].

384 *Barbaro v R* [2012] VSCA 288, [38]. See also "2.1.6 Hearsay assertions and untested statements about an offender's state of mind". If received at all, untested self-serving assertions by an offender in the form of a letter, statement or affidavit will generally be treated with considerable circumspection and scepticism, and may be deserving of little or no weight: see the summary of relevant principles in *Imbornone v R* [2017] NSWCCA 144, [57]. In *Diaz v R* [2019] NSWCCA 216, [48], Button J (with whom Gleeson JA and Lonergan J agreed) observed that "*such untested documents are often unpersuasive; indeed, they can sometimes do more harm than good in proceedings on sentence*".

sentencing judge to place any particular weight on untested statements made by an offender to a psychologist or other third party.[385]

283. Payments made pursuant to a pecuniary penalty order under the *Proceeds of Crime Act* 2002 (Cth) cannot be taken into account as showing contrition.[386] In *Host*,[387] two reasons were given for this conclusion. First, s 16A(2)(f) of the *Crimes Act 1914* (Cth) only refers to voluntary action on the part of the offender (and not to payments made pursuant to a legal obligation).[388] Second, s 320(d) of the *Proceeds of Crime Act* 2002 (Cth) precludes a sentencing court from having regard to a pecuniary penalty order under the Act. On its proper construction, s 320(d) not only precludes a court from having regard to the mere fact of a pecuniary penalty order but also to any action taken in consequence of it.[389] Paragraph 16A(2)(f) of the *Crimes Act 1914* (Cth) is to be read subject to s 320(d) of the *Proceeds of Crime Act*.[390]

284. A sentencing judge is entitled to have regard to a plea of not guilty as relevant to an assessment of contrition or lack of contrition; to do so does not offend the principle that an offender is not to be penalised by reason of pleading not guilty.[391]

285. Where contrition is a significant issue and is addressed in submissions, the failure of the sentencing court to refer to it in the reasons for sentence may support a conclusion that it was not duly considered.[392]

3.4.8 Guilty plea to the charge – s 16A(2)(g)

286. If the offender has pleaded guilty, that fact must be taken into account: *Crimes Act 1914* (Cth), s 16A(2)(g). With effect from 20 July 2020,[393] the court must also take into account, under that paragraph, *"the timing of the plea"* and the degree to which the fact and the timing of the plea *"resulted in any benefit to the community, or any victim of, or witness to, the offence*".

287. Although s 16A(2) does not refer to the converse circumstance, where the offender pleads not guilty, it is well-established that a plea of not guilty is not to be treated as an aggravating factor.[394]

288. **Failure to state that a plea has been taken into account:** If a sentencing court has taken into account a plea of guilty as a mitigating factor, it should make clear that it has done so. However the long-standing

385 *Baladjam v R* [2018] NSWCCA 304, [277]; cf. *Singh v R* [2018] NSWCCA 60, [31]; *Alameddine v R* [2020] NSWCCA 232, [193].
386 *R v Host* [2015] WASCA 23.
387 *R v Host* [2015] WASCA 23.
388 *R v Host* [2015] WASCA 23, [115](c), [190]-[191].
389 *R v Host* [2015] WASCA 23, [2]-[19], [103]-[110], [194]-[196].
390 *R v Host* [2015] WASCA 23, [22]-[23], [197]; see also the construction adopted by Buss JA, [111]-[115].
391 *R v Shatku* [2018] SASCFC 77, [10], [36]-[41].
392 *Patel v R* [2022] NSWCCA 93, [52]. See "2.4 Whether failure to refer to a sentencing consideration necessarily evinces error".
393 *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), s 3 and Schedule 8, item 1. The amendment applies in relation to determining, on or after 20 July 2020, a sentence to be passed, or an order to be made, in respect of a person for a federal offence that the person was charged with, or convicted of, on or after that date: see s 2(1) and Schedule 8, item 7 of the amending Act. In *Hayward v R (Cth)* [2021] NSWCCA 63, [96], the CCA applied s 16A(2)(g) in its amended form to the resentencing of an offender following a successful appeal against a sentence which had been imposed before the amendment came into effect.
394 *Siganto v R* (1998) 194 CLR 656; *Cameron v R* (2002) 209 CLR 339, [12], [41], [65](3).

practice is that an appellate court will not generally infer merely from the failure of a sentencing court to refer to a plea of guilty, without more, that it has been overlooked.[395] On the other hand, in *Noble*[396] the New South Wales Court of Criminal Appeal held that the failure of a court sentencing a federal offender to refer at all to a plea of guilty as a material consideration necessarily constitutes error. It remains to be determined whether such a strict approach will be applied by appellate courts in other jurisdictions.[397]

289. **Subjective value of a plea:** A guilty plea may be an indication of contrition or remorse, and may be mitigating in that way: see "3.4.7 Degree to which contrition is shown – s 16A(2)(f)".

290. A plea will usually be taken as evidence of contrition, but the circumstances of the case (including the timing of the plea and the strength of the prosecution case) may support an inference that the plea has resulted from the recognition of the inevitable and so qualifies the extent of genuine contrition.[398]

291. A plea may also be taken into account as evincing a willingness on the part of the offender *"to facilitate the course of justice"*,[399] for example by bringing an early end to criminal proceedings, by sparing witnesses the strain of giving evidence, and by saving the community the cost of a trial. Willingness to facilitate the course of justice does not necessarily manifest contrition but has long been treated as capable of being taken into account under s 16A(2)(g).

292. These *subjective factors* – focusing on the state of mind of the offender – are often considered by a sentencing court in assessing the offender's prospects of rehabilitation (s 16A(2)(n)) and the need for specific deterrence (s 16A(2)(j)).

293. In *Thomas*,[400] the Victorian Court of Appeal said, "*a 'willingness' to co-operate in the administration of justice will almost always be inferred from the fact of the plea*". However the New South Wales Court of Criminal Appeal has held that if willingness to facilitate the course of justice is relied upon as a mitigating factor, it should be established on the balance of probabilities and the court should state if it is satisfied that the plea was motivated partly or largely by the inevitability of conviction, or that no finding can be made.[401]

294. Although an offender's willingness to facilitate the course of justice is closely related to the concepts of remorse and contrition, there will be cases where it will be necessary for a sentencing judge to address each consideration, especially where discrete submissions have been made in support of separate

395 See "2.4 Whether failure to refer to a sentencing consideration necessarily evinces error".

396 *Noble v R* [2018] NSWCCA 253, [10]. [41]. The Court applied the approach taken in *Edwards v R* [2017] NSWCCA 160, even though that approach was based on the requirements of State legislation in NSW, which have no counterpart in the *Crimes Act 1914* (Cth) (see *R v Thomson* (2000) 49 NSWLR 383, [52]). In contrast to the position applicable to sentencing for State offences, in sentencing a federal offender in NSW there is no requirement to specify the extent of any reduction for a plea of guilty: see "6.8 Specifying a discount for a guilty plea".

397 In *Jones v Commissioner of Taxation* [2019] WASC 325, [44], and in *Schulz v Coyne* [2019] WASC 329, [30], Hill J, citing *Noble*, held that the failure of a magistrate to refer in sentencing remarks to the fact of a guilty plea was sufficient to show error.

398 *Phillips v R* (2012) 37 VR 594, [15]-[18], [36], [61], [64], [68]-[74]; *DPP (Cth) v Thomas* (2016) 53 VR 546, [5].

399 *Cameron v R* (2002) 209 CLR 339.

400 *DPP (Cth) v Thomas* (2016) 53 VR 546, [139].

401 *Chuang v R* [2020] NSWCCA 60, [18]. If the surrounding circumstance do not support an inference that a plea was motivated by willingness to facilitate the course of justice, the court may be reluctant to draw such an inference if the offender has not given evidence on the plea hearing: e.g. *Elzein v R* [2021] NSWCCA 246, [262].

findings with respect to the utilitarian value of the plea of guilty, remorse, and facilitation of the course of justice.[402] However double counting must be avoided.[403]

295. **Utilitarian value of a plea:** The issue about the relevance of a guilty plea which has proven more controversial is whether it is also mitigating purely for its *utilitarian (or objective) value.* A guilty plea usually has beneficial effects, such as avoiding the cost and delay of a trial, bringing finality to criminal proceedings and sparing witnesses the ordeal of giving evidence. A plea may have such utilitarian value even if the offender lacks any contrition or remorse, and pleads guilty only in the face of a strong prosecution case and in the hope of receiving a lesser sentence.[404] The strength of the prosecution case is irrelevant to an assessment of the utilitarian value of the plea.[405]

296. In *Cameron*,[406] a majority of the High Court held that, apart from remorse or acceptance of responsibility, the only rationale for a plea of guilty being taken into account in mitigation was if the plea is seen, subjectively, as the willingness of the offender to facilitate the course of justice, and not on the basis that the plea has saved the community the expense of a contested hearing.[407]

297. The position regarding sentencing of federal offenders was somewhat uncertain following *Cameron*.

298. In *Tyler*,[408] the New South Wales Court of Criminal Appeal held that (in the absence of contrary statutory provision), *Cameron* specifically precluded a court from taking into account the utilitarian value of a plea of guilty; accordingly arguments that the sentence imposed on a federal offender should be reduced purely for its utilitarian benefits could not be sustained. *Tyler* was applied in a number of subsequent decisions in New South Wales,[409] until 2018, when the decision in *Xiao*[410] was handed down.

299. In *Harrington*,[411] a majority of the Australian Capital Territory Court of Criminal Appeal followed and applied *Tyler* in relation to the sentencing of a federal offender.

300. In *Thomas*,[412] the Victorian Court of Appeal held that, contrary to *Tyler*, the utilitarian benefit of a plea of guilty must be taken into account in sentencing a federal offender. The Court held that the decision in *Cameron* did not mandate a contrary conclusion.

301. In *Xiao*,[413] a five-member bench of the New South Wales Court of Criminal Appeal declined to follow *Tyler* and instead followed the decision in *Thomas*.

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402 *Giles-Adams v R* [2023] NSWCCA 122, [79]. In that case, the Court held ([83]) that the absence of any reference to the offender's facilitation of the course of justice, where that factor had been discreetly addressed and conceded by the Crown, and had been alluded to in sentencing a co-offender, constituted error.

403 *Chuang v R* [2020] NSWCCA 60, [19].

404 *Phillips v R* (2012) 37 VR 594.

405 *Phillips v R* (2012) 37 VR 594, [64]-[65]; *Nicholls v R* [2016] VSCA 300, [26]; *DGF v R* [2021] WASCA 4, [49]. Cf *R v Nicholas* [2019] ACTCA 36, [55]-[61].

406 *Cameron v R* (2002) 209 CLR 339.

407 *Cameron v R* (2002) 209 CLR 339, [11]-[15] (Gaudron, Gummow and Callinan JJ).

408 *Tyler v R* [2007] NSWCCA 247, [110]-[114].

409 E.g. *Danial v R* [2008] NSWCCA 15, [27]-[29]; *Isaac v R* [2012] NSWCCA 195, [24]-[27]; *C v R* [2013] NSWCCA 81, [33]. See also *R v Saleh* [2015] NSWCCA 299, [5].

410 *Xiao v R* (2018) 96 NSWLR 1.

411 *R v Harrington* (2016) 11 ACTLR 215.

412 *DPP (Cth) v Thomas* (2016) 53 VR 546.

413 *Xiao v R* (2018) 96 NSWLR 1.

302. The decisions in *Thomas* and *Xiao* have been followed and applied by appellate courts in Queensland,[414] Western Australia[415] and Tasmania[416] in relation to the sentencing of federal offenders.

303. There appeared to be no decision of an appellate court in South Australia or the Northern Territory which would bind a sentencing court in that jurisdiction to decline to have regard to the utilitarian benefit of a guilty plea in sentencing a federal offender.[417]

304. By an amendment to s 16A(2)(g) which applies from 20 July 2020,[418] a court sentencing a federal offender is required to take into account not only the fact of the plea but also its timing and the degree to which the fact and the timing of the plea *"resulted in any benefit to the community, or any victim of, or witness to, the offence*". In its present form, s 16A(2)(g) gives effect to aspects of the utilitarian value of a guilty plea as described in *Xiao*.[419] The amendment to s 16A(2)(g) reverses the effect of *Harrington* (and any other like decision) and puts beyond doubt that the utilitarian value of a guilty plea, as well as its subjective significance (if any), must be taken into account in sentencing a federal offender.

305. **Assessing the weight to be given to a plea:** Although a guilty plea cannot automatically attract a sentence reduction,[420] only in exceptional cases will no reduction be warranted.[421]

306. The weight to be attached to a guilty plea as a mitigating factor will always depend upon the circumstances of the case. A significant consideration is whether the plea was entered at the first reasonable opportunity.[422] This consideration is given a statutory foundation by the insertion of

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414 *R v KAT* [2018] QCA 306, [61].

415 *DGF v R* [2021] WASCA 4, [44]-[45].

416 *Dunning v Tasmania* [2018] TASCCA 21, [22]-[25].

417 See the comprehensive review of the authorities in *DPP (Cth) v Thomas* (2016) 53 VR 546 and in *Xiao v R* (2018) 96 NSWLR 1, [223]–[280]. Most of the cases referred to did not concern federal offenders. In those which did (in jurisdictions other than NSW, Victoria or the ACT), observations which might be taken to suggest a similar approach to that in *Tyler* were *obiter dicta*: e.g. *Wangsaimas v R* (1996) 6 NTLR 14; *Bahar v R* (2011) 45 WAR 100, [41]. In *R v Place* (2002) 81 SASR 395, [74]-[78], the Full Court of the Supreme Court of South Australia expressed a tentative view that cognate South Australian legislation (upon which s 16A was largely based) permitted a sentence reduction on purely utilitarian grounds.

418 *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), s 3 and Schedule 8, item 1. The amendment applies in relation to determining, on or after 20 July 2020, a sentence to be passed, or an order to be made, in respect of a person for a federal offence that the person was charged with, or convicted of, on or after that date: see s 2(1) and Schedule 8, item 7 of the amending Act.

419 *Small v R* [2020] NSWCCA 216, [73].

420 An automatic discount would be inconsistent with the requirement of s 16A(1) of the *Crimes Act 1914* that a sentence be appropriate in its severity in all the circumstances of the case: cf *Bui v DPP (Cth)* (2012) 244 CLR 638, [19]; *Holt v R* [2021] NSWCCA 14, [58]-[66].

421 There may be cases in which the maximum penalty is warranted notwithstanding a plea of guilty: see *Moody v French* (2008) 36 WAR 393, [29]-[38]. This is but one example of a circumstance in which there may be no reduction of sentence for a plea of guilty: *Royer v Western Australia* [2009] WASCA 139, [57]-[58]. See *Phillips v R* (2012) 37 VR 594, [24], [36], [55], [59], [67], [93]; *Holt v R* [2021] NSWCCA 14, [58]-[66]. A mandatory minimum penalty may also have the effect of preventing a reduction of sentence for a plea of guilty: *Atherden v Western Australia* [2010] WASCA 33, [42]-[43], approved in *Bahar v R* (2011) 45 WAR 100, [56]-[57] (concerning mandatory minimum sentences for certain people smuggling offences: see "7.2.1 People-smuggling offences"). Specific provision has been made, in relation to sentencing for a Commonwealth child sexual abuse offence to which a mandatory minimum applies, for reduction below the mandatory minimum for a plea of guilty: see "7.3.3 Mandatory terms of imprisonment for high-level Commonwealth child sex offences and for repeat child sexual abuse offences".

422 *R v Donnelly* [1998] 1 VR 645; *R v Duncan* [1998] 3 VR 208; *Wangsaimas v R* (1996) 6 NTLR 14, 171; *R v Pajic* (2009) 23 VR 527; *Graziosi v DPP (Cth)* [2011] VSCA 418, [15]. As to what constitutes the first reasonable opportunity, see *Cameron v R* (2002) 209 CLR 339; *R v Freeman* [2019] QCA 150, [43]-[61].

s 16A(2)(g)(ii), which (from 20 July 2020) requires a court sentencing a federal offender to take into account "the timing of the plea". In New South Wales, the timing of the plea has been said to be "*largely determinative"* of its objective or utilitarian value and therefore the extent of the discount.[423]

307. The Victorian Court of Appeal has held, in relation to a federal offender, that greater weight should be given to the utilitarian value of a guilty plea while courts face a large backlog of criminal cases as a result of the COVID-19 pandemic, even in a case in which the plea of guilty was inevitable.[424]

308. Ordinarily, there will be no material difference between the discount to be allowed for a plea of guilty by reference to subjective or objective considerations, but it is important that the utilitarian benefit be adequately reflected.[425] If a court is required to have regard to the utilitarian benefits of a plea, failure to do so may constitute an appellable error.[426] Following the decision in *Xiao*, appeals have been upheld in relation to many pre-*Xiao* sentences in New South Wales, on the basis that the sentencing judge (in accordance with previous authority) made no allowance for the utilitarian value of the plea.[427]

309. Courts in Victoria and Western Australia have held that a sentencing court will not necessarily err in failing to differentiate between a reduction in sentence which reflects the willingness of the offender to facilitate the course of justice, and a reduction which reflects that willingness together with the utilitarian benefit derived from the plea, because there will generally be no difference in the reduction.[428]

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423 *Bae v R* [2020] NSWCCA 35, [54]; *Betka v R* [2020] NSWCCA 191, [59], [62]; *Kaurasi v R* [2020] NSWCCA 253, [3], [39]-[40].

424 *Chenhall v R* [2021] VSCA 175. Ultimately this factor appears to have been given little, if any, weight by the Court of Appeal in resentencing in that case. The Court imposed a total effective head sentence which was 31% less, and a total non-parole period that was 26.3% less, than the notional sentence declared under s 6AAA of the *Sentencing Act 1991* (Vic) as the sentence which would have been imposed but for the plea of guilty. The corresponding difference in the original sentence was 31.25% in the total effective head sentence and 33.3% in the non-parole period.

425 *DPP (Cth) v Thomas* (2016) 53 VR 546, [5], [7], [29]–[30], [144]–[149]; *Nicholls v R* [2016] VSCA 300, [24]; *Huang v R* (2018) 96 NSWLR 743, [15]; cf *Betka v R* [2020] NSWCCA 191, [62].

426 NSW courts have taken a strict approach to this question. In *Huang v R* (2018) 96 NSWLR 743, [9], Bathurst CJ said that to fail to take into account the utilitarian value of a plea in sentencing a federal offender constitutes error. In *Diaz v R* [2019] NSWCCA 216, the Court held that the error vitiated the sentencing discretion even if there was no error in the quantification of the discount for a guilty plea (but see the contrary view of Simpson JA in *Garcia-Godos v R* [2021] NSWCCA 229).

427 *Obiekwe v R* [2018] NSWCCA 55; *Huang v R* (2018) 96 NSWLR 743; *Peters v R* [2018] NSWCCA 126; *Kristensen v R* [2018] NSWCCA 189; *Musa v R* [2018] NSWCCA 192; *IM v R* (2019) 100 NSWLR 110; *Diaz v R* [2019] NSWCCA 216; *Said v R* [2019] NSWCCA 239; *Gershuny v R* [2020] NSWCCA 14; *Bae v R* [2020] NSWCCA 35; *Kao v R* [2020] NSWCCA 38; *Zaugg v R* [2020] NSWCCA 53; *Chuang v R* [2020] NSWCCA 60; *Khalid v R* (2020) 102 NSWLR 160; *Weber v R* [2020] NSWCCA 103; *Walsh v R* [2020] NSWCCA 182; *Estevez v R* [2020] NSWCCA 184; *Betka v R* [2020] NSWCCA 191; *Taumoepeau v R* [2020] NSWCCA 200; *Small v R* [2020] NSWCCA 216; *Hong v R* [2020] NSWCCA 225; *Kaurasi v R* [2020] NSWCCA 253; *Abreu v R* [2020] NSWCCA 286; *Kwan v R* [2020] NSWCCA 313; *Cressel v R* [2021] NSWCCA 26; *Hayward v R* [2021] NSWCCA 63; *Ghazzawy v R* [2021] NSWCCA 70; *Nicolas v R* [2021] NSWCCA 89; *Olivares v R* [2021] NSWCCA 126; *Almaouie v R* [2021] NSWCCA 274; *Choy v R* [2023] NSWCCA 23; *Al-Kutobi v R* [2023] NSWCCA 155. Even if such an error is made out, an appeal may be dismissed on the basis that no lesser sentence is warranted: see, e.g., *Naizmand v R* [2018] NSWCCA 25; *Noble v R* [2018] NSWCCA 253; *Obiekwe v R* [2018] NSWCCA 55; *Gwardys v R* [2019] NSWCCA 62; *Hijazi v R* [2020] NSWCCA 97; *Green (a pseudonym) v R* [2020] NSWCCA 358; *Lu v R* [2021] NSWCCA 68; *Aboud v R* [2021] NSWCCA 77; *Garcia-Godos v R* [2021] NSWCCA 229; *Lam v R* [2021] NSWCCA 242. However, as a general rule, where all other relevant facts, matters and circumstances are undisturbed in resentencing, the appropriate explicit discount for the utilitarian value of the plea should be applied by the appeal court so that justice may be both done and seen to be done: *Abreu v R* [2020] NSWCCA 286, [51].

428 *Nicholls v R* [2016] VSCA 300, [29]; cf *DGF v R* [2021] WASCA 4, [44]-[45].

However, some distinction between the subjective and objective criteria will usually be desirable if the strength of the prosecution case has been taken into account in assessing the weight to be given to the guilty plea, to demonstrate that it has only been taken into account in relation to the subjective criteria.[429]

310. A State or Territory law which provides for a sentence reduction of, or up to, a particular extent upon a plea of guilty is inconsistent with s 16A(2)(g) of the *Crimes Act 1914* (Cth) and is incapable of being applied as surrogate federal law to the sentencing of a federal offender.[430]

311. **Quantifying the sentence reduction:** There is no requirement in the *Crimes Act 1914* (Cth) that a sentencing court quantify any sentence reduction for a plea of guilty.[431] However some State or Territory laws permit or require a sentencing court to state the extent of the discount given for the plea of guilty. Such laws may be picked up and applied as surrogate federal laws in sentencing federal offenders, pursuant to ss 68 and 79 of the *Judiciary Act 1903* (Cth): see "2.3.2 Statutory requirements to specify a sentence reduction for a plea of guilty".

312. As to the appropriate approach where a court is required to specify the reduction of a sentence for a guilty plea and is also required to specify the reduction of a sentence for an undertaking to cooperate under s 16AC of the *Crimes Act 1914*, see "6.9 Interaction between sentencing discount for guilty plea and discount for undertaking to cooperate".

313. In the absence of a statutory requirement to do so, quantification of a discount for a plea of guilty was traditionally regarded as a departure from the preferred process of instinctive synthesis in sentencing. Nevertheless appellate courts have held that to do so is not necessarily erroneous, and is often desirable. It has become standard practice in a number of jurisdictions. See "6.8 Specifying a discount for a guilty plea".

3.4.9 Cooperation with law enforcement agencies (cooperation prior to sentencing) – s 16A(2)(h)

314. Under s 16A(2)(h), the degree to which the offender has cooperated with law enforcement agencies in the investigation of the offence or other offences must be taken into account.

315. The word "*offence*" is defined in s 16 of the *Crimes Act 1914* (Cth) to mean a federal, State or Territory offence.[432]

316. The provision of information under compulsion (for example, pursuant to a subpoena to give evidence or to produce documents) does not constitute cooperation for the purposes of s 16A(2)(h).[433]

317. Neither a court nor the CDPP is a 'law enforcement agency' for the purposes of s 16A(2)(h).[434]

318. The *Crimes Act 1914* distinguishes between two types of cooperation by the offender that can be relevant to sentencing:

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429 *Phillips v R* (2012) 37 VR 594, [73]; *Nicholls v R* [2016] VSCA 300, [29].

430 *Ngo v R* [2017] WASCA 3, [15]-[33].

431 *Charkawi v R* [2008] NSWCCA 159, [14]; *Xiao v R* (2018) 96 NSWLR 1, [280]; *Heng v R* [2019] NSWCCA 317, [39]; *DGF v R* [2021] WASCA 4, [46].

432 Cooperation in relation to the investigation or prosecution of an offence in another country may also be a mitigating factor: e.g. *ZZ v R* [2019] NSWCCA 286.

433 *Ungureanu v R* [2012] WASCA 11, [3], [69]-[71]; *R v Ocampo Alvarez* [2018] QCA 162, [56]; *Will v R (No 2)* (2021) 16 ACTLR 50, [71]-[81].

434 *Ungureanu v R* [2012] WASCA 11, [81], [84]; cf *Will v R (No 2)* (2021) 16 ACTLR 50, [44], [47].

- cooperation with law enforcement agencies in respect of relevant *assistance already rendered* prior to the imposition of sentence (i.e. cooperation prior to sentencing); and
- *an undertaking by the offender to cooperate in future,* including in confiscation proceedings (future cooperation).

319. Section 16A(2)(h) deals with *cooperation prior to sentencing* whereas promised *future cooperation* is dealt with in s 16AC[435] of the *Crimes Act 1914* (Cth). For more detail about s 16AC, see "6.7 Specifying a reduction for undertaking to cooperate in future - Crimes Act 1914 s 16AC".

320. The distinction between the two types of cooperation is important. *Cooperation prior to sentencing* is a matter to be considered as part of the "instinctive synthesis" of all relevant matters. Therefore the court is not required to identify the extent of the reduction of the sentence for cooperation provided to date.[436] By contrast, *where the offender has given an undertaking to cooperate in future*, the sentencing court is required by s 16AC of the *Crimes Act* to specify the sentence that would have been imposed but for the undertaking.[437] By this means, the extent of the sentence reduction provided by reason of the undertaking is made explicit.

321. The obligation to take into account cooperation prior to sentencing applies even if the sentencing court specifies a reduction for future cooperation, in accordance with s 16AC. The sentencing court must have regard to both matters (if applicable) in determining the sentence, although the extent of the reduction for cooperation prior to sentencing need not be specified.[438]

322. If an offence is subject to a mandatory minimum term of imprisonment, a mandatory minimum period to be served or a mandatory minimum ratio between the head sentence and the non-parole period, a sentencing court may be precluded from giving full weight to cooperation. To deal with this limitation, the provisions for mandatory minimum periods of imprisonment for certain Commonwealth child sexual abuse offences allow a court to reduce the sentence to take into account cooperation under s 16A(2)(h) (*Crimes Act 1914* (Cth), s 16AAC) in some circumstances: see "7.3.3 Mandatory terms of imprisonment for high-level Commonwealth child sex offences and for repeat child sexual abuse offences".

323. The following general principles in relation to the sentencing discount to be given for assistance provided to law enforcement authorities can be gleaned from the decision of the New South Wales Court of Criminal Appeal in *Cartwright*[439] and from other cases:

(a) It is in the public interest that criminals with information about the activities of other criminals with whom they are associated should be encouraged to give information to the police.[440]

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435 Section 16AC was inserted by *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015*, with effect from 27 November 2015. It replaced s 21E of the *Crimes Act 1914* (Cth) which was materially identical.

436 *R v Sahari* (2007) 17 VR 269; *Lee v R* [2020] NSWCCA 307, [83]-[87], [104]-[106]; *DGF v R* [2021] WASCA 4, [55]. However in New South Wales, it is the usual practice to do so, as this accords with the practice in sentencing offenders for State offences.

437 *R v Tae* [2005] NSWCCA 29.

438 *R v Gladkowski* [2000] QCA 352.

439 *R v Cartwright* (1989) 17 NSWLR 243, 252-253 (Hunt and Badgery-Parker JJ). *Cartwright* has been followed in *R v Su* [1997] 1 VR 1, 79; *R v Carey* [1998] 4 VR 13. See also the summary of principles in *Isaac v R* [2012] NSWCCA 195, [44]-[49], [52].

440 *R v Lowe* (1977) 66 Cr App R 122; *R v Perez-Vargas* (1986) 6 NSWLR 559, 562.

(b) It is in the public interest that criminals should be persuaded not to trust one another; discounting the sentence of a person who provides such assistance facilitates such distrust.[441]

(c) Leniency through a discount for assistance to police marks, or rewards, the good inherent in the conduct of the provider of the assistance.[442]

(d) There is no standard discount; the assessment of an appropriate discount cannot be approached in a mechanical or mathematical way.[443]

(e) The weight to be given to the cooperation must be determined by having regard to all the circumstances of the case.[444]

(f) Assistance to authorities may overlap with other mitigating factors, including a plea of guilty and an expression of remorse or contrition, as these matters are often part of a complex of inter-related considerations.[445] Where cooperation is also taken into account as evidence of remorse or contrition, a sentencing judge must be astute to avoid double counting.[446] The practice in NSW is to specify the discount for past cooperation and for a plea of guilty; where both apply, a single, combined discount should be given for both a plea of guilty and assistance.[447]

(g) The application of a discount for assistance should not result in the imposition of a sentence which is so lenient that it would be disproportionate to the objective gravity of a particular offence and the circumstances of a particular offender.[448] The risk to personal safety should not result in a sentence which is "*an affront to community standards*".[449] The overriding obligation is always to impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence (*Crimes Act 1914* (Cth), s 16A(1)).

(h) The discount to be given to a "true informer" may be considerable,[450] but the weight to be given depends on the facts and must be balanced against other considerations including the seriousness of the offending and any circumstances of aggravation.[451]

(i) The assistance may concern an unrelated offence.[452]

(j) Relevant cooperation includes self-incrimination.[453] If the cooperation consists of the offender's voluntary disclosure of the offending, where it is unlikely that the guilt of the offender would otherwise have been discovered and established, a considerable degree of leniency will apply.[454]

(k) A discount could not be accorded if no cooperation was given, regardless of how much the particular prisoner may have been prepared to cooperate if able to do so.[455]

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441 *R v James* (1913) 9 Cr App R 142; *R v Golding* (1980) 24 SASR 161, 162.
442 *R v Golding* (1980) 24 SASR 161, 172-173.
443 *Rosales (a pseudonym) v R* [2018] VSCA 130, [25]; *Abbas v R* [2020] VSCA 80, [52]-[55]; *DGF v R* [2021] WASCA 4, [78]. Cf *MXP v Western Australia* (2010) 41 WAR 149, [54].
444 *MSO v Western Australia* [2015] WASCA 78.
445 *R v Gallagher* (1991) 23 NSWLR 220, 228; cf *Lee v R* [2020] NSWCCA 307, [106].
446 *DGF v R* [2021] WASCA 4, [62].
447 *Z v R* [2014] NSWCCA 323, [27].
448 *R v Sukkar* [2006] NSWCCA 92, [54].
449 *R v Gallagher* (1991) 23 NSWLR 220, 232; *R v Gladkowski* [2000] QCA 352, [7].
450 *R v McMahon* (1988) 40 A Crim R 95.
451 *R v Nguyen* [2000] VSCA 209, [25].
452 *R v Rostom* [1996] 2 VR 97, 104.
453 *R v Gladkowski* [2000] QCA 352, [11]; *DGF v R* [2021] WASCA 4, [51].
454 *R v Ellis* (1986) 6 NSWLR 603; *Walker v R* [2008] NTCCA 7, [38]; *R v Doran* [2005] VSCA 271, [14]-[15].
455 *R v Ferrer-Esis* (1991) 55 A Crim R 231.

(l) Assistance actually rendered, for example by entrapping co-offenders or giving evidence, has a stronger claim than assistance which an offender was prepared to give but was not called upon to give.[456]

(m) However, if the offender actually provides cooperation, the weight given to the offender's cooperation should not be reduced merely because the offender was not ultimately required to give evidence, for example because the person about whom the information was provided pleaded guilty[457] or because more cogent evidence from another source emerged.[458]

(n) If the offered assistance is genuine, but has little or no practical value, it may still be relevant as an indication of contrition (s 16A(2)(f)).[459]

(o) Where information and cooperation is identifiable, it must be of such a nature that it could significantly assist authorities.[460]

(p) The utility or effectiveness of the information provided is an important factor to be taken into account.[461] The absence of evidence establishing the usefulness of the cooperation does not lead to a conclusion that there should be no discount at all, although in such circumstances the discount may be less than would otherwise be the case.[462]

(q) The fact that the offender could not give evidence against more than one person, or that there are others higher in the criminal enterprise, should not have a significant impact on the discount given for cooperation.[463]

(r) A discount may be given even if the offender has not cooperated fully by disclosing everything they know,[464] but cooperation which is not full and frank will usually be given little or no weight.[465]

(s) A discount may not be awarded where the accused has deliberately delayed providing information or has destroyed evidence with the result that what is supplied is of little effective value or benefit.[466]

(t) An offer of cooperation may be disregarded in sentencing if it is given in the knowledge that it will not be called upon.

(u) The risk of retributive violence in prison needs to be factored into the discount.[467]

(v) A person who has provided assistance will often, but not always, whilst a prisoner, be confined for their own protection in much harsher conditions than the general prison population.[468] But it is

456 *R v Sukkar* [2005] NSWCCA 55, [52]; *Isaac v R* [2012] NSWCCA 195, [52].

457 *R v Freeman* [2001] VSCA 37.

458 *R v Cartwright* (1989) 17 NSWLR 243, 253.

459 *R v Sukkar* [2005] NSWCCA 55, [53].

460 *R v Cartwright* (1989) 17 NSWLR 243, 253; *R v Carmody* (1998) 100 A Crim R 41.

461 *R v Gallagher* (1991) 23 NSWLR 220; *Wangsaimas v R* (1996) 6 NTLR 14; *R v Su* [1997] 1 VR 1; *R v Dinic* (1997) 149 ALR 488 (information provided too late to be of value); *R v El Hani* [2004] NSWCCA 162, [73]; *Assafiri v R* [2007] NSWCCA 159, [23]; *MEG v R* [2017] WASCA 161, [13].

462 *Weber v R* [2020] NSWCCA 103, [67] (Bellew J, Simpson AJA and Rothman J agreeing); see also at [28]-[29] (Rothman J).

463 *R v Scerri* [2010] VSCA 287.

464 *Nannup v Western Australia* [2011] WASCA 257, [34]-[38]; *MXP v Western Australia* (2010) 41 WAR 149; *A Child v Western Australia* [2007] WASCA 285.

465 *R v Tang* [1998] 3 VR 508; *MA v R* [2001] WASCA 325, [62], [112]-[114]; *Ungureanu v R* [2012] WASCA 11, [33]; *Ruiz v R* [2013] VSCA 313; *R v Phelps* [2018] NSWCCA 191, [77].

466 *Assafiri v R* [2007] NSWCCA 159, [20]-[23].

467 *R v Gladkowski* [2000] QCA 352; *R v Pividor* [2002] VSCA 174, [30].

468 *R v Cartwright* (1989) 17 NSWLR 243, 250; *R v Gallagher* (1991) 23 NSWLR 220, 227; *R v Sukkar* [2006] NSWCCA 92, [55].

no longer regarded as axiomatic that a person who has provided assistance to authorities will serve the sentence under harsher and more onerous conditions when compared to an ordinary prisoner.[469]

(w) Hardship may also be occasioned to a prisoner upon their release into the community.[470]

3.4.10 Deterrent effect on the offender – s 16A(2)(j)

324. The court must take into account the deterrent effect that any sentence or order under consideration may have on the person. This is known as specific deterrence. Its purpose is to discourage the offender from committing further offences, by demonstrating to them the adverse consequences of their criminal activity.

325. Assessment of the need for specific deterrence involves an examination of (amongst other things) the nature and circumstances of the offence (s 16A(2)(a)), the offender's character, antecedents and age (s 16A(2)(m)), the offender's current circumstances and prospects of rehabilitation (s 16A(2)(n)), and the likelihood of re-offending.[471] The presence or absence of remorse or contrition (s 16A(2)(f)) is often a significant consideration.[472]

326. While an offender is not to be punished disproportionately merely because of their previous criminal history, such history is 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*."[473] The need for specific deterrence may be greater "*given the failure of more moderate penalties as a deterrent*".[474] Conversely, however, specific deterrence may be a factor deserving weight even if the offender has no previous convictions and has good prospects of rehabilitation.[475]

327. As with general deterrence, where a term of imprisonment is imposed, the need for specific deterrence must be adequately reflected in both the head sentence and in the period of actual custody.[476]

3.4.11 Deterrent effect on other persons – s 16A(2)(ja)

328. At common law, general deterrence (the need to impose punishment sufficient to deter other potential offenders from engaging in similar offending) has long been regarded as one of the principal

469 *R v Sukkar* [2006] NSWCCA 92, [4]-[5]; *FS v R* [2009] NSWCCA 301, [21]; *Isaac v R* [2012] NSWCCA 195, [47].
470 *R v Perez-Vargas* (1986) 6 NSWLR 559; *R v Sukkar* [2006] NSWCCA 92, [55].
471 E.g. *R v Pickard* [1998] VSCA 50.
472 *Barbaro v R* [2012] VSCA 288, [39].
473 *Veen v R (No 2)* (1987) 164 CLR 465, 477.
474 *R v O'Brien* [1997] 2 VR 714, 718. Cf *R v Perrier (No 2)* [1991] 1 VR 717; *R v Latif; Ex parte DPP (Cth)* [2012] QCA 278, [28]; *R v Selu; Ex parte DPP (Cth)* [2012] QCA 345, [30], [43], [47]-[48]; *Dui Kol v R* [2015] NSWCCA 150, [22]; *Ngo v R* [2017] WASCA 3, [63](j); *Small v R* [2020] NSWCCA 216, [60]-[67]. The need for specific deterrence may be particularly great if the offence is committed on parole, or soon after completion of another sentence: e.g. *Chol v R* [2016] VSCA 252, [10].
475 *Alavy v R* [2014] VSCA 25, [7]-[18].
476 E.g. *R v Ruha; Ex parte DPP (Cth)* [2011] 2 Qd R 456, [45]; *R v Latif; Ex parte DPP (Cth)* [2012] QCA 278, [28].

purposes of punishment.[477] Although general deterrence is a quintessentially utilitarian principle, its origins as a sentencing principle of the common law long pre-date Mill or Bentham.[478]

329. Prior to the enactment of s 16A, it was "perfectly clear" that a court sentencing a federal offender was required to have regard to the need for general deterrence.[479]

330. As originally enacted, s 16A did not refer to general deterrence (even though it did refer, in s 16A(2)(j), to specific deterrence). However, despite the omission, s 16A was construed as preserving the requirement for a court sentencing a federal offender to have regard to the need to deter others, through the requirement in s 16A(1) to impose a sentence "*of a severity appropriate in all the circumstances*", and the requirement in s 16A(2)(k) to have regard to "*the need to ensure that the person is adequately punished for the offence*".[480]

331. Following the insertion of paragraph (ja) in s 16A(2) (with effect from 27 November 2015),[481] general deterrence is now expressly listed as a matter to be taken into account. In *Aitchison*,[482] the Victorian Court of Appeal held that the listing of general deterrence in s 16A(2)(ja) effected no change to the law, and did not support any inference that general deterrence was not previously a factor in the sentencing of a federal offender.

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477 In *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370, 378C, the principle of general deterrence was described as "*a fundamental principle of sentencing, inherited from the ages*". In an oft-quoted passage in *R v Radich* [1954] NZLR 86, 87, it was said that "*[i]n all civilised countries, in all ages*", the main purpose of punishment has been "*to protect the public from the commission of … crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment.*"

478 For example, general deterrence was cited as a principal, or the principal, end of punishment by Francis Bacon (*The Use of the Law* (1630), p.4: "*All Punishment is for Examples sake*"), Edward Coke (*The Third Part of the Institutes of the Laws of England* (1644), p.4: "*the principal end of punishment is, That others by his example may fear to offend*"), Matthew Hale (*The History of the Pleas of the Crown* (1736), Volume 1, p.13: "*the true, or at least, the principal end of punishments is to deter men from the breach of laws*") and William Blackstone (*Commentaries on the Laws of England* (1765-1769), Book 4, Chapter 18: "*all punishments inflicted by temporal laws may be classed under three heads; such as tend to the amendment of the offender himself, or to deprive him of any power to do future mischief, or to deter others by his example: all of which conduce to one and the same end, of preventing future crimes, whether that be effected by amendment, disability, or example*").

479 *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370, 377F-378B. Examples of references, in cases before the enactment of s 16A, to the need for general deterrence in sentencing federal offenders are *R v Tait* (1979) 24 ALR 473, 485-6; *R v Van Tung Luu* (NSW CCA, 7 December 1984, unreported); and *Laxton v Justice* (1985) 38 SASR 376.

480 *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370; *R v Paull* (1990) 20 NSWLR 427; *R v Sinclair* (1990) 51 A Crim R 418; *R v Oancea* (1990) 51 A Crim R 141; *R v Carroll* [1991] 2 VR 509, 512; *Tapper v R* (1992) 39 FCR 243; *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332; *R v Phillips* [2008] QCA 284, [4], [68].

481 The amendment was made by the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015* (Cth) and commenced operation on 27 November 2015.

482 *Aitchison v R* [2015] VSCA 348, [57]-[70]. In refusing special leave to appeal to the High Court (which was sought on this issue), Bell and Gageler JJ said that there was no reason to doubt the correctness of the conclusion of the Court of Appeal: *Aitchison v R* [2016] HCASL 75.

332. General deterrence must be given considerable weight where the offending is of a kind which can cause great harm. Examples are terrorism,[483] serious drug offences,[484] serious frauds on the Commonwealth and its agencies,[485] illegal importation of firearms for commercial gain,[486] insider trading and market manipulation,[487] and offences involving the accessing and possession of child abuse material.[488] Statements of principle concerning the weight to be given to general deterrence for a particular type of offending are consistent with s 16A and do not unduly fetter the sentencing discretion,[489] although they should not be applied in an undiscriminating way.[490]

333. General deterrence is often given particular weight in sentencing for offences committed for financial gain and characterised by premeditation and calculation of risk, because the perpetrators of such offences "*are likely to be rational, profit seeking individuals who can weigh the benefits of committing a crime against the costs of being caught and punished*".[491]

334. Where imprisonment is required to give effect to the need for general deterrence, it must be reflected in both the head sentence and in any provision for earlier release from custody; the period that the offender must actually serve in custody is a matter of first importance in ensuring appropriate deterrence and punishment.[492]

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483 *R v Demirian* [1989] VR 97, 129-30, 137; *R v Roche* [2005] WASCA 4; *R v Lodhi* [2006] NSWSC 691, [66], [89]-[92], and on appeal in *Lodhi v R* [2007] NSWCCA 360, [78]-[110], [210]-[214], [215], [263]-[277]; *R v Benbrika* [2009] VSC 21, [149], approved on appeal in *Benbrika v R* (2010) 29 VR 593, [557]; *R v Elomar* [2010] NSWSC 10, [77]-[79], cited with approval by the CCA in *Elomar v R* [2014] NSWCCA 303, [640]-[641]; *R* v *Fattal* [2011] VSC 681, [97] (King J), and on appeal in *DPP (Cth) v Fattal* [2013] VSCA 276, [173]; *DPP (Cth) v MHK* (2017) 52 VR 272, [51]-[53]; *DPP (Cth) v Besim* [2017] VSCA 158, [112]; *IM v R* (2019) 100 NSWLR 110, [50]-[54]; *Alou v R* (2019) 101 NSWLR 319, [130]-[144], [199], [201]; *Khalid v R* (2020) 102 NSWLR 160, [80], [90]; *Abbas v R* [2020] VSCA 80, [58]-[69]; *Atai v R* [2020] NSWCCA 302, [119]; *DPP (Cth) v Shire Ali* [2020] VSCA 330, [74].

484 E.g. *R v Tait* (1979) 24 ALR 473, 485-6; *Wong v R* (2001) 207 CLR 584, [64]; *R v Chen* [2002] NSWCCA 174, [286]; *R v Riddell* [2009] NSWCCA 96, [57]-[58]; *Nguyen v R* (2011) 31 VR 673, [34]; *DPP (Cth) v Bui* (2011) 32 VR 149, [38]-[39].

485 E.g. *R v Rossi* (1988) 4 WAR 463, 467; *Kovacevic v Mills* (2000) 76 SASR 404, [37]-[45]; *R v Howe* [2000] NSWCCA 405, [13]-[14]; *DPP (Cth) v Milne* [2001] VSCA 93, [12]-[13]; *DPP (Cth) v Alateras* [2004] VSCA 214, [26]; *R v Aller* [2004] NSWCCA 378, [7]-[10]; *R v Hurst; Ex parte DPP (Cth)* [2005] QCA 25; *R v Alimic* [2006] VSCA 273, [26]; *DPP (Cth) v Rowson* [2007] VSCA 176, [24]; *McGuiness v R* [2008] NSWCCA 80, [44]; *DPP (Cth) v Gregory* (2011) 34 VR 1, [51]–[57], [66]; *R v Huston; Ex parte DPP (Cth)* [2011] QCA 350, 213-215, 217 [10]–[21], [33]; *Milne v R* [2012] NSWCCA 24, [296]-[297]; *R v Boughen* [2012] NSWCCA 17, 486-495 [59]–[91], [96]–[98]; *De Faria v Western Australia* [2013] WASCA 116, [159]; *Keefe v R* [2014] VSCA 201, [77]; *Zaky v R* [2015] NSWCCA 161, [49].

486 E.g. *DPP (Cth) v Munro* [2019] VSCA 89, [91].

487 *R v Rivkin* (2004) 59 NSWLR 284; *R v Doff* [2005] NSWCCA 119; *R v Glynatsis* [2013] NSWCCA 131; *Khoo v R* [2013] NSWCCA 323; *Kamay v R* (2015) 47 VR 475.

488 *DPP (Cth) v D'Alessandro* (2010) 26 VR 477; *R v De Leeuw* [2015] NSWCCA 183, [70], [72], [97], [125]-[127]; *Fitzgerald v R* [2015] NSWCCA 266; *DPP (Cth) v Watson* [2016] VSCA 73*; DPP (Cth) v Garside* (2016) 50 VR 800, [19]-[25], [62]-[63]; *DPP (*Cth) *v CCQ* [2021] QCA 4, [8], [190], [197]; *Lazarus v R* [2023] NSWCCA 214, [76]-[77].

489 *Lazarus v R* [2023] NSWCCA 214, [2]-[5] (Beech-Jones CJ at CL). Such statements of principle are to be contrasted with a judicial statement of a "proleptic norm" (e.g. that an immediate term of imprisonment must be imposed for particular offending, other than in exceptional circumstances), which imposes "*an unlegislated judicially-created constraint on the sentencing discretion*": see "3.2.3 No scope for presumption of imprisonment for an offence".

490 Cf. *Totaan v R* (2022) 108 NSWLR 17, [98]-[101]; *Elmir v R* [2021] NSWCCA 19, [37]; *AH v R* [2023] NSWCCA 230, [117].

491 *DPP (Cth) v Gregory* (2011) 34 VR 1, [53].

492 *R v Whitnall* (1993) 42 FCR 512, 518-519; *R v Nguyen* [1997] 1 VR 386, 389; *DPP (Cth) v Carter* [1998] 1 VR 601; *R v Ruha; Ex parte DPP (Cth)* [2011] 2 Qd R 456, [45], cited with approval in *Hili v R* (2010) 242 CLR 520, [41]; *DPP (Cth) v Gregory* (2011) 34 VR 1, [66]. Compare *DPP v Bulfin* [1998] 4 VR 114, 131-132.

335. On the other hand, general deterrence will often be given less weight in the case of an offender suffering from mental illness or intellectual handicap.[493] Considerations of general deterrence are also commonly moderated in sentencing a young offender,[494] although less so when the offender has been involved in serious and dangerous offending, particularly where the offending has all the hallmarks of adult offending.[495] In sentencing a young offender, the greater the objective gravity of an offence, the less likely it is that general deterrence (or denunciation or retribution) will cede to the interests of rehabilitation.[496]

3.4.12 Need for adequate punishment – s 16A(2)(k)

336. This paragraph requires the court to take into account "*the need to ensure that the person is adequately punished for the offence*". This embodies the sentencing purpose of "retribution" or "just punishment",[497] which has long been one of the central purposes of sentencing at common law.[498] Together with the over-arching requirement in s 16A(1) that a sentence or order be "*of a severity appropriate in all the circumstances of the offence*", s 16A(2)(k) "accommodates" common law principles such as general deterrence, proportionality and totality.[499]

337. In order to determine what degree of punishment is adequate, a sentencing court must always have due regard to the objective seriousness of the offending.[500] Without a proper assessment of the gravity of the offending, "*the other factors requiring consideration in order to arrive at the proper sentence to be imposed cannot properly be given their place*".[501]

338. Determining what is adequate severity of punishment requires weighing the objective seriousness of the offending with all other factors listed in s 16A(2) that are "*relevant and known to the court*", as well as taking into account, where relevant, other sentencing purposes (such as denunciation and community protection), sentencing principles (such as totality and parity) and considerations (for example, extra-curial punishment) which are not listed in s 16A(2). The weighing of these disparate considerations involves a process of "instinctive synthesis": see "2.2 "Instinctive synthesis" not the "two-stage approach"".

339. The need for adequate punishment is not diminished by the prospect that the duration of an offender's incarceration may be affected by the exercise of executive discretion (such as remissions or

493 *Muldrock v R* (2011) 244 CLR 120, [53]-[54]; *Naysmith v R* [2013] WASCA 32. See also *DPP v Sokaluk* [2013] VSCA 48. See "3.4.13 Character, antecedents, age, means, physical/mental condition – s 16A(2)(m)", "Mental condition".

494 That is, because the offender's youth is recognised as diminishing the offender's moral culpability (*DPP v SJK* [2002] VSCA 131, [61]) and because the rehabilitation of young offenders is of substantial, if not primary, importance, not only in the interests of the offender, but also in the interests of the community (*R v Mills* [1998] 4 VR 235, 241). See "3.4.13 Character, antecedents, age, means, physical/mental condition – s 16A(2)(m)", "Age – young offender".

495 *DPP (Cth) v MHK* (2017) 52 VR 272, [56]-[60], [65]-[67]. [73]; *DPP (Cth) v Besim* [2017] VSCA 158, [115]-[116] ; *Alou v R* (2019) 101 NSWLR 319, [130]-[139], [199] (special leave refused: *Alou v R* [2020] HCATrans 83).

496 *DPP (Cth) v Besim* [2017] VSCA 158, [116]. See also *DPP (Cth) v MHK* (2017) 52 VR 272, [56]-[60], [65]-[67], [73].

497 *Azari v R* [2021] NSWCCA 199, [57].

498 *Veen v R (No 2)* (1987) 164 CLR 465, 477.

499 *Hili v R* (2010) 242 CLR 520, [25]; *Bui v DPP (Cth)* (2012) 244 CLR 638, [18].

500 *R v Geddes* (1936) 36 SR (NSW) 554, 556 (Jordan CJ); *DPP (Cth) v Northcote* [2014] NSWCCA 26, [75].

501 *R v Dodd* (1991) 57 A Crim R 349, 354.

the grant or refusal of parole): see "4.8.8 Period or minimum period to be served is not a consideration in fixing a head sentence".

340. The need for adequate punishment affects all aspects of a sentence or order. For example, if a sentence of imprisonment is imposed–

(a) if there are two or more offences, the individual sentence for each offence, and not merely the total of the sentences for all offences, should, so far as possible, accurately reflect the gravity of the offending[502] (except as required to give effect to the principles of totality);

(b) the need for adequate punishment must be reflected not only in the head sentence but also the period or minimum period to be served.[503]

341. It is also relevant to the question whether a sentence can or should be reduced to take into account a period of "dead time" – that is, a period of custody which is neither custody for the instant offence nor custody to be taken into account under statute nor custody to be considered pursuant to the totality principle. There is a conflict of authority on this issue: see "4.8.12 Taking into account other pre-sentence custody".

3.4.13 Character, antecedents, age, means, physical/mental condition – s 16A(2)(m)

342. Paragraph (m) of s 16A(2) requires the sentencing court to have regard to "*the character, antecedents, age, means and physical or mental condition"* of the offender, so far as they are "*relevant and known to the court*". This diverse collection of considerations, which requires "*an overall personal assessment of the offender as part of the sentencing process*",[504] raises a range of issues.

343. **Character – good character:** In *Ryan*,[505] the majority held that the sentencing judge had erred when he stated that the offender's prior good character did not entitle him to "*any leniency whatsoever*" in circumstances where as a priest he had sexually assaulted young boys over an extensive period of time. If an offender is of otherwise good character the sentencing judge must take that fact into account, but the weight to be given to that fact will depend on all the circumstances of the case.[506]

344. Character must be assessed by reference to all the circumstances, not merely the existence or non-existence of previous convictions. So, for example, evidence which establishes that the offender has made a positive contribution to society and has demonstrated a consistent history of philanthropy may carry more weight than a claim to good character based solely upon an absence of previous offending.[507] Conversely the fact that a person is a member of a criminal organisation may itself support a conclusion that they are of bad character with poor prospects for rehabilitation notwithstanding an otherwise moderate or good prior criminal record.[508]

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502 *Nguyen v R* (2016) 256 CLR 656, [64] (Gageler, Nettle and Gordon JJ). In support of this proposition, their Honours cited s 3A(a) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which is in similar terms to s 16A(2)(k) of the *Crimes Act 1914* (Cth).

503 *Hili v R* (2010) 242 CLR 520, [40]-[41]. See "4.10.1 Determining the length of the period of incarceration".

504 *Smith v Elliot* [2007] ACTSC 65, [11].

505 *Ryan v R* (2001) 206 CLR 267.

506 *Ryan v R* (2001) 206 CLR 267 (McHugh, Kirby and Callinan JJ; Gummow and Hayne JJ contra). See also *Wakim v R* [2016] VSCA 301.

507 *Elomar v R* [2018] NSWCCA 224, [116].

508 *R v Pishdari* [2018] SASCFC 94, [23]-[24] (Nicholson J, Kourakis CJ agreeing).

345. If a sentencing judge finds that the offender is otherwise of good character, the judge should indicate what, if any, weight is given to that fact.[509] The weight to be given to good character will depend, amongst other things, on the nature and seriousness of the offending. Previous good character will tend to have less significance for some types of offences; examples are importing drugs,[510] using a carriage service to procure a person under 16 for sexual purposes[511] or offences involving child abuse material.[512] The reduced weight given to previous good character (or other factors personal to the offender) is generally a corollary of the heightened need for general deterrence, denunciation and adequate punishment which generally arises for such offences.

346. Previous good character is often accorded little weight where the offending has consisted of a course of conduct over a long period of time[513] or where it was, directly or indirectly, instrumental in the commission of the offence: for example, if the offence was committed in the course of practice as a solicitor or a tax agent, eligibility for which depended upon good character; or in breach of trust that would not otherwise have been reposed in the offender; or if the offender exploited their standing and reputation to commit the offence.[514] Courts are now specifically required to have regard to the latter circumstance as an aggravating factor: see "3.4.14 Standing in the community – s 16A(2)(ma)".

347. **Antecedents generally:** *"Antecedents"* in s 16A(2)(m) refers to more than just prior convictions; it covers a person's history.[515]

348. The word 'antecedents' is wide enough to include all aspects, favourable and unfavourable, of an offender's background, past life, personal, family, social, employment and vocational circumstances, and of the offender's current way of life and its interaction with the lives and welfare of others.[516] For example, the professional status of an offender or the hardship caused by their bankruptcy may form part of their antecedents.[517]

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509 *Ryan v R* (2001) 206 CLR 267, [23]-[25] (McHugh J); *BG v R* [2020] NSWCCA 295, [4]-[13]; *Kahler v R* [2021] NSWCCA 40, [60]. In *Kahler*, the Court held ([29]-[39], [61]) that the failure of a judge to refer to the offender's otherwise good character as a sentencing consideration did not mean that it had been overlooked as a sentencing factor; by contrast, in *He v R (Cth)* [2022] NSWCCA 205, [55]-[56], the failure to refer to the offender's "*relatively limited criminal history*" or to the effect it might have on sentence was held to constitute error.

510 *R v Leroy* [1984] 2 NSWLR 441, 446 (Street CJ), on the basis that drug couriers are often selected because their past is not likely to attract suspicion. See also *R v Fraser* [2004] VSCA 147, [31]; *R v Ceissman* [2001] NSWCCA 73; *R v Barrientos* [1999] NSWCCA 1; *Sukkar v R (No.2)* [2008] WASCA 2; *Jackson v R* [2020] NSWCCA 230, [68]; *Udunna v R* [2020] NSWCCA 304, [35]; *DGF v R* [2021] WASCA 4, [96].

511 *R v Gajjar* [2008] VSCA 268, [27].

512 *R v Gent* [2005] NSWCCA 370, [65]-[66]; *DPP (*Cth) *v CCQ* [2021] QCA 4, [8].

513 *R v Hermann* (1988) 37 A Crim R 440, 448; *R v Schneider* (1988) 37 A Crim R 395, 397; *R v Ruggiero* [1998] SASC 6989, [37]; *R v Smith* [2000] NSWCCA 140, [20]-[22]; *Ryan v R* (2001) 206 CLR 267; *R v Gent* [2005] NSWCCA 370; *Kabir v R* [2020] NSWCCA 139, [81].

514 See, e.g., *Ryan v R* (2001) 206 CLR 267; *DPP (Cth) v Gregory* (2011) 34 VR 1, [53]-[58]; *Dickson v R* [2016] NSWCCA 105, [169]; *Lee v R* [2020] NSWCCA 307, [126]-[132], [162]; *Eakin v R* [2020] NSWCCA 294, [36]-[38] (Basten JA, with whom Price J ([139]) agreed on this point), disapproving *Merhi v R* [2019] NSWCCA 322.

515 This reflects the common law: *Lacco v R* [1984] WAR 153, 155. It should be contrasted with the narrower approach under some State laws (such as *Sentencing Act 1991* (Vic), s 5(2)(f)) which refer only to prior convictions.

516 *Jones v Morley* (1981) 29 SASR 57, 63–65, quoted with approval in *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332, [27]. Although *Baffsky* was concerned with the term "antecedents" as used in s 19B(1)(b)(i) of the *Crimes Act 1914* (Cth), the Court (at [35]) treated the term as having the same meaning in s 16A(2)(m).

517 *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332, [34]-[35], [60]-[61].

349. The future effects of a conviction, such as limitations on travel, do not form part of the antecedents of the offender.[518]

350. **Character and antecedents – other offending:** Although an offender is not to be punished for offending on other occasions, such other offending may be relevant to sentencing in a number of ways. For example, an offender's criminal history may show persistent disregard for the law and the rights of other citizens and negate matters relied upon in mitigation.[519] It may cast doubt on the offender's remorse or contrition. It may be highly relevant to the assessment of the offender's prospects of rehabilitation and the need for specific deterrence. It may require a focus on community protection. Other offending may be taken into account where relevant on any such basis, subject to the *De Simoni* principle (see "2.1.5 Finding of other uncharged offences").

351. Convictions recorded after the offending (subsequent convictions) form part of the offender's antecedents and where "*relevant and known*" they must be taken into account.[520]

352. A subsequent conviction cannot increase the penalty range to a higher range applicable in respect of a second or subsequent offence (unless a statute so provides, expressly or by necessary implication).

353. **Character and antecedents – diversion:** Where the offender has had the benefit of a charge being diverted rather than adjudicated upon by a court,[521] there will be no finding of guilt. The diverted charge is "unjudged conduct".[522] The conduct which led to the diversion cannot be taken into account in sentencing (as an aspect of character or antecedents) as if it were established criminal conduct. However the existence of a completed diversion may be relevant to ensure the court is not misled if the offender's behaviour is represented to be out of character or an aberration.[523]

354. **Character and antecedents – absence of prior convictions**: In *Weininger,*[524] the appellant had no prior convictions, but there was evidence (including his statements to an undercover police officer before his arrest) that he was involved in a continuing cocaine importation syndicate. The majority of the High Court held that the sentencing judge was not in error to treat what was known of the offender's character and antecedents as neither working in his favour nor against him in those circumstances. The majority also added that in the circumstances of the particular case, if the sentencing judge had found beyond reasonable doubt that the offender had previously been knowingly concerned in the importation of cocaine, even though he had no prior convictions, the judge would have been entitled to take the finding into account as warranting the imposition of a heavier sentence.

355. **Age – young offender:** In sentencing young offenders, courts should generally give more weight to rehabilitation, and less weight to general deterrence and denunciation, principally because more severe punishment may in fact lead to further offending.[525] Also, the law recognises the potential for the cognitive, emotional and/or physiological immaturity of a young person (including impressionability and poor impulse control) to contribute to their breach of the law.[526] Where emotional immaturity or a

518 *R v Barany* [2018] QCA 137, [41].
519 E.g. *Blango v R* [2018] VSCA 210, [54].
520 As to the relevance of such convictions, see *R v McInerney* (1986) 42 SASR 111.
521 See, e.g., *Criminal Procedure Act 2009* (Vic), s 59.
522 *R v Mills* [1998] 4 VR 235.
523 *Lari v Pavlos* (WA SC (Owen J), 17 May 1996, unreported).
524 *Weininger v R* (2003) 212 CLR 629.
525 *R v Mills* [1998] 4 VR 235, 241.
526 *Howard v R* [2019] NSWCCA 109, [13] (see also at [86]-[91]); *Kannis v R* [2020] NSWCCA 79, [279]-[280].

young person's less-than-fully-developed capacity to control impulsive behaviour contributes to the offending, this may be seen as mitigating culpability and thus as reducing what is suggested by considerations of retribution.[527] These principles may apply to an offender who is more than 21 years of age, but their force diminishes as the age in question increases.[528]

356. While courts should not be over-ready to discount the relevance of an offender's youth on the basis that the offender has engaged in adult behaviour or acted as an adult,[529] less weight may be given to the youth of an offender, as a mitigating circumstance, where the offence committed by the offender is serious and bears the hallmarks of adult offending. In such cases, it is recognised that the youth of the offender, while still relevant as a mitigating circumstance, must to a material degree give way to the requirements of general deterrence, specific deterrence and denunciation.[530] The youth of an offender has been accorded less significance in sentencing for serious drug offences,[531] for terrorism offences,[532] and for serious offences which involve sophistication, planning or premeditation, such as insider trading where the offender was operating in the adult sphere of business and commerce.[533]

357. However, even where its weight must be moderated to accommodate other sentencing considerations because of the seriousness of the offence, rehabilitation generally remains a relevant objective in sentencing a young offender. For a young person, an extremely long sentence may be "crushing"; that can both increase the severity of a sentence and destroy such prospects as there may be of an offender's rehabilitation and reform.[534]

358. **Age – mature-aged offender:** Although the age of an offender is never determinative,[535] age may be relevant in sentencing an offender of mature years, in a variety of ways.[536] For example, the need for specific deterrence (s 16A(2)(j)) may be reduced; the offender may have a long period of good character to draw upon; or the offender may suffer from age-related infirmity or ill-health which would make service of the sentence more burdensome. Conversely, age may be given little, if any, weight in mitigating the sentence of a repeat offender who embarks upon a serious crime knowing that it will attract condign punishment if they are convicted.[537]

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527 *BP v R* (2010) 201 A Crim R 379, [4]; *Spinks v R* [2021] NSWCCA 308, [28], [69].

528 *R v Mills* [1998] 4 VR 235; cf *Spinks v R* [2021] NSWCCA 308, [28], [69]. Mitigation may be extended to an offender who is sentenced as an adult for an offence committed as a juvenile, at least where the offender has achieved a significant degree of rehabilitation and there has been no further offending in the meantime, because the assessment of the nature and gravity of the crime, and of the offender's moral culpability, should take into account that what was done was done as a child, or as a person of immature years: *R v Boland* (2007) 17 VR 300, [16].

529 *BP v R* (2010) 201 A Crim R 379, [6]; *Spinks v R* [2021] NSWCCA 308, [28], [69].

530 *DPP (Cth) v MHK* (2017) 52 VR 272, [57]-[60]; *DPP (Cth) v Besim* [2017] VSCA 158, [115]-[116]; *Papachristodoulou v R* [2017] VSCA 284, [37].

531 E.g. *R v Ceissman* [2001] NSWCCA 73, [34]-[35]; *Kao v R* [2019] VSCA 84, [61]-[63].

532 E.g. *DPP (Cth) v MHK* (2017) 52 VR 272; *DPP (Cth) v Besim* [2017] VSCA 158; *IM v R* (2019) 100 NSWLR 110, [53]-[56], [61], [64]; *Khalid v R* (2020) 102 NSWLR 160, [80], [91]; *Abbas v R* [2020] VSCA 80, [63], [67]-[69]; *Atai v R* [2020] NSWCCA 302, [93]-[94].

533 E.g. *Hartman v R* [2011] NSWCCA 261, [93]; *Kamay v R* (2015) 47 VR 475, [53]-[56].

534 *R v Poynton (No 4)* [2018] NSWSC 1693, [87], cited with approval in *Mohamed v R* [2022] VSCA 136, [6], [71]-[76]. See "3.4.15 Prospects of rehabilitation – s 16A(2)(n)".

535 *Barbaro v R* [2012] VSCA 288, [55].

536 See the review of authorities in *Gulyas v Western Australia* [2007] WASCA 263, [33]-[54].

537 *Wheeler v Western Australia* [2007] WASCA 109, [19]; cf. *Geraghty v R* [2023] NSWCCA 47, [115].

359. At common law, the age of the offender (particularly if coupled with ill-health or physical or mental frailty) may be a weighty mitigating consideration if it means that a proportionate sentence would result in the offender serving the whole or a very substantial portion of the remainder of their life in custody; in such a case, moderation of other sentencing considerations on compassionate grounds may be warranted.[538]

360. However old age and ill health do not justify the imposition of an unacceptably lenient sentence; and the proper application of the principles of general deterrence, denunciation and just punishment may require the imposition of a sentence which will have the effect that the offender may well spend the whole of their remaining life in custody.[539] There should be no expectation that an older person can offend with relative impunity; the sentence imposed must be commensurate with the seriousness of the criminality involved and must accord with the general moral sense of the community.[540]

361. The same principles have been applied in the sentencing of federal offenders.[541]

362. **Means:** The means of the offender are particularly relevant to the imposition of a financial penalty. However they may also be relevant to assessing the gravity of the offending generally, for example, in determining whether or not the offending was motivated by financial hardship.

363. Before imposing a fine on a federal offender,[542] a court is required to take into account the "financial circumstances" of the offender, in addition to any other matters that the court is required to take into account: *Crimes Act 1914 (Cth)*, s 16C(1). Therefore, before imposing a fine, the court must take into account not only the "means" of the offender (pursuant to s 16A(2)(m)) but also their "financial circumstances" generally. As to the nature and effect of this requirement, see "4.6.7 Means and financial circumstances of offender".

364. **Physical condition**: The court is required to take into account the physical condition of the offender, to the extent that it is relevant and known to the court.

365. It has long been accepted that the physical ill-health of an offender "*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 state of heath or when there is a serious risk of imprisonment having a gravely adverse effect on the offender's health*".[543] The principle is applicable to any physical condition, including a physical disability.[544] The comparison to be made is not whether the burden of the sentence would be greater

538 *R v Vella* [2001] VSCA 174, [18]; *R v RLP* [2009] VSCA 271, [32]-[39]; *Ljuboja v R* [2011] WASCA 143, [102].

539 *R v RLP* [2009] VSCA 271; *Ljuboja v R* [2011] WASCA 143, [103]; *Geraghty v R* [2023] NSWCCA 47, [87]-[90] [102], [109]-[116].

540 *Jackson v R* [2020] NSWCCA 230, [4]-[5], [71]-[81].

541 E.g. *R v Sopher* (1993) 70 A Crim R 570; *R v Hart* [1999] NSWCCA 204; *Barbaro v R* [2012] VSCA 288, [55]; *De Faria v Western Australia* [2013] WASCA 116, [164]-[168]; *Dickson v R* [2016] NSWCCA 105, [198]; *Bembo v R* [2019] VSCA 308, [154]-[168]; *Jackson v R* [2020] NSWCCA 230, [4]-[6], [71]-[81]; *Geraghty v R* [2023] NSWCCA 47, [109]-[116]; *Thompson v R* [2023] NSWCCA 244, [25]-[26].

542 Section 3(2) of the *Crimes Act 1914 (Cth)* provides that a reference to a "fine" in the Act includes a reference to a pecuniary penalty (other than a pecuniary penalty imposed under Division 3 of Part XIII of the *Customs Act 1901*, or certain orders under confiscation legislation) and to costs or other amounts ordered to be paid by offenders.

543 *R v Smith* (1987) 44 SASR 587, 589; cited with approval in *Muldrock v R* (2011) 244 CLR 120, [19].

544 *R v Van Boxtel* (2005) 11 VR 258, [29]-[34].

for the offender than it would be if the offender were not subject to the sentence, but whether the burden would be greater for the offender than for a person without that condition.[545]

366. In assessing the burden of imprisonment resulting from a physical condition, courts proceed on the basis that "*[i]t is the responsibility of the Correctional Services authorities to provide appropriate care and treatment for sick prisoners.*"[546] A sentencing court is not required to assume or accept that the offender might not receive appropriate treatment in prison.[547]

367. **Mental condition:** The requirement in the opening words of s 16A(2) that the matters listed must be taken into account if "*relevant and known to the court*" leaves no room for acting merely on a *presumption* of the existence of a mental condition; the *actual* mental condition of the offender "*must be demonstrated before the provision applies*".[548]

368. What is meant by "mental condition" in s 16A(2)(m) has not been resolved.[549] In *De La Rosa*,[550] different views were expressed about the meaning of the term, but it proved unnecessary to resolve that conflict. As McClellan CJ at CL (Simpson J and Barr AJ agreeing) concluded,[551]

> *Whether because they are within the meaning of "mental condition" in s 16A(2)(m) or because they are required to be considered by the common law, all aspects of an offender's mental health and mental capacity must be considered when sentencing that person. They form part of the relevant subjective circumstances.*

369. At common law, impaired mental functioning, whether due to acquired brain injury[552] (including Foetal Alcohol Spectrum Disorder[553]), intellectual disability[554] or a mental illness (the extent to which

545 *R v Van Boxtel* (2005) 11 VR 258, [32]-[32], disapproving a contrary view expressed in *R v Boyes* (2004) 8 VR 230.

546 *R v Smith* (1987) 44 SASR 587, 589; *R v Bailey* (1988) 35 A Crim R 458, *R v Eliasen* (1991) 53 A Crim R 391 (Vic CCA).

547 *Boucher v R* [2022] VSCA 3, [117]-[130].

548 *Bui v DPP (Cth)* (2012) 244 CLR 638, [21]-[23],[25],[28]. See also *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194. Under common law principles, it has been said that cogent evidence, normally in the form of an expert opinion, is necessary to establish the existence of the relevant mental impairment (either at the time of the offence, or at sentence, or both) and the nature, extent and effect of the mental impairment experienced by the offender at the relevant time: see *DPP v O'Neill* (2015) 47 VR 395, [77], and the cases cited there.

549 Justice Mark Weinberg, writing extra-judicially, has questioned whether "mental condition" in s 16A(2)(m) includes a personality disorder such as what was once called "psychopathy" (now considered an aspect of Antisocial Personality Disorder): "The Labyrinthine Nature of Federal Sentencing" [2012] VicJSchol 1. Even if it does not (and the question has not been authoritatively resolved), such a disorder, and behaviour associated with it, would appear to fall for assessment under s 16A(2)(m) in any event, as part of the character and antecedents of the offender. It may also be relevant to many other sentencing factors, such as the nature and circumstances of the offence (s 16A(2)(a)), the degree to which contrition is shown (s 16A(2)(f)) and the need for specific deterrence (s 16A(2)(j)), general deterrence (s 16A(2)(ja)) and adequate punishment (s 16A(2)(k)), and the prospects of rehabilitation (s 16A(2)(n)).

550 *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1.

551 *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1, [171].

552 E.g. *R v Scott* [2003] NSWCCA 28; *Kriestorac v Western Australia* [2010] WASCA 35, [20]-[21].

553 *LCM v Western Australia* [2016] WASCA 164.

554 *Ryder v R* [2016] VSCA 3.

this includes personality disorders remains controversial[555]) may be relevant to sentencing in a variety of ways. The main ways were summarised by the Victorian Court of Appeal in *Verdins*[556] as follows:

> *Impaired mental functioning, whether temporary or permanent ("the condition"), is relevant to sentencing in at least the following six ways:*
>
> 1. *The condition may reduce the moral culpability of the offending conduct, as distinct from the offender's legal responsibility. Where that is so, the condition affects the punishment that is just in all the circumstances; and denunciation is less likely to be a relevant sentencing objective.*
> 2. *The condition may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.*
> 3. *Whether general deterrence should be moderated or eliminated as a sentencing consideration depends upon the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of sentence or both.*
> 4. *Whether specific deterrence should be moderated or eliminated as a sentencing consideration likewise depends upon the nature and severity of the symptoms of the condition as exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of the sentence or both.*
> 5. *The existence of the condition at the date of sentencing (or its foreseeable recurrence) may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health.*

555 In *Lawrence v R* [2005] NSWCCA 91, Spigelman CJ (Grove and Bell JJ agreeing) doubted whether Antisocial Personality Disorder and PolySubstance Dependence with Psychological Dependence in a Controlled Environment "*are of the character which justify less weight to be given to general deterrence*" ([22]) and said "*the protection of the public … 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*" ([24]). In *R v Adams; Ex parte A-G (Qld)* [2006] QCA 312, [17], Holmes JA (McMurdo P and Mullins J agreeing) said that a personality disorder (in that case Borderline Personality Disorder) was "*a not uncommon feature of those who commit criminal offences, reflecting more a pattern of functioning than illness. While the respondent's personality problems and unhappy circumstances were relevant in mitigation, they did not bring her within the class of case discussed in Tsiaris.*" In *R v Hayes* [2010] QCA 96, [28], Chesterman JA (Ann Lyons J agreeing) said that personality disorders were irrelevant in sentencing. In *R v Yost* [2010] SASCFC 4, [28], Kelly J (Doyle CJ and Duggan J agreeing) said that references in the report of a psychiatrist to "*an underlying antisocial personality disorder might be understood more as a description of the appellant's personality than a serious mental illness which might have reduced the appellant's moral culpability for the offending.*" However in *Brown v R* (2020) 62 VR 491, the Victorian Court of Appeal held that there is no blanket rule precluding a sentencing court from taking into account impaired mental functioning resulting from a personality disorder (overruling *DPP v O'Neill* (2015) 47 VR 395 on this question). The Court said ([68]-[69]) that if an offender is to rely on a personality disorder in mitigation of penalty, the disorder must be of some severity, involving a clinically significant impairment of mental functioning. *Brown* was followed and applied by the NSW Court of Criminal Appeal in *Wornes v R* [2022] NSWCCA 184. See also *R v Waters; Ex parte DPP (Cth)* [2023] QCA 131, [54]-[60], where Henry J (Bowskill CJ and Morrison JA agreeing) saw no inconsistency between *Adams* and *Brown*; *Bogers v Western Australia* [2020] WASCA 174, [88]-[89], in which the Court found it unnecessary to decide whether *Brown* should be applied in Western Australia, because there was no evidential basis to conclude that the offender's Antisocial Personality Disorder impaired his mental functioning so as to reduce his moral culpability.

556 *R v Verdins* (2007) 16 VR 269, [32], reformulating principles previously summarised in *R v Tsiaris* [1996] 1 VR 398. Cf *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1, [177]-[178].

6. *Where there is a serious risk of imprisonment having a significant adverse effect on the offender's mental health, this will be a factor tending to mitigate punishment.*

370. The principles summarised in *Verdins* have been applied frequently throughout Australia,[557] including in the sentencing of federal offenders, and were adopted as a compendious summary by the majority of the High Court in *Guode*.[558]

371. The principles stated in *Verdins* and like cases are not absolute. It remains necessary for the sentencing court to examine the relevant facts in order to determine whether, in the specific case, the mental condition has the consequence contended for.[559]

372. The question of whether or not *Verdins* principles are engaged is one that needs to be approached with rigour.[560] In order for the first, second, third and fourth principles set out in *Verdins* to have application to the sentencing task, there must be a connection between the impairment to mental functioning and the offender's moral culpability or the need for general and specific deterrence. If the mental impairment relied upon is that which existed at the time of the offending, it must have some 'realistic connection' with the offending; or have 'caused or contributed' to the offending; or be 'causally linked' to the offending.[561] To show such a connection, the offender must establish that the mental impairment affected the offender's ability to appreciate the wrongfulness of the conduct, or obscured the offender's intent to commit the offence, or impaired the offender's ability to make calm and rational choices or to think clearly at the time of the offence.[562] What the sentencing judge needs is not a diagnostic label but a clear, well-founded expert opinion as to the nature and extent of the offender's impairment of mental functioning and, so far as it can be assessed, of its likely impact on the offender at the time of the offending and/or in the foreseeable future.[563]

373. In *Muldrock*,[564] which concerned an intellectually-disabled offender, the High Court observed that the question of a causal relation between the condition and the offending was "*less likely to arise in*

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557 **NSW:** *Leach v R* [2008] NSWCCA 73, [10]-[12]; *Devaney v R* [2012] NSWCCA 285, [74]-[84]; *Bott v R* [2023] NSWCCA 255, [53]-[57]. **Qld:** *R v Yarwood* [2011] QCA 367; *R v CBQ* [2016] QCA 125, [31]-[32]; *R v JAD* [2021] QCA 184; *R v Adam* (2022) 10 QR 343, [41]-[45]; *R v Waters; Ex parte DPP (Cth)* [2023] QCA 131, [54]-[55]. **WA:** *Western Australia v SJH* [2010] WASCA 40, [81]-[82]; *Kriestorac v Western Australia* [2010] WASCA 35, [17]-[19]; *Gok v R* [2010] WASCA 185, [53]-[61]; *Suleiman v Western Australia* [2017] WASCA 26, [59]-[62]; *Vucemillo v Western Australia* [2017] WASCA 37, [36]-[39]. **SA:** *R v Yost* [2010] SASCFC 4, [21]-[22]; *R v Flentjar* [2013] SASCFC 11, [39]-[44]; *R v Monks* (2019) 133 SASR 182, [32]-[59]. **Tas:** *Startup v Tasmania* [2010] TASCCA 5, [6]; *DPP v CBF* (2016) 25 Tas R 395, [36]-[42]; *DPP (Tas) v R* [2018] TASCCA 10, [32]-[33]. **ACT:** *Monfries v R* (2014) 19 ACTLR 99, [63]-[67]; *Millard v R* (2016) 19 ACTLR 270, [30]-[35]; *R v Summerfield* [2018] ACTCA 20, [90]-[104]. **NT:** *R v Benning* [2022] NTCCA 15.

558 *R v Guode* (2020) 267 CLR 141, [8] (Kiefel CJ, Gageler and Nettle JJ), noting also (in fn 6) that the summary in *Verdins* "*has consistently been adopted by intermediate appellate courts elsewhere in Australia.*"

559 *Aslan v R* [2014] NSWCCA 114, [34]. See also *Holt v R* [2021] NSWCCA 14, [86]-[99]; *Boucher v R* [2022] VSCA 3, [132]-[139]; *Apulu v R* [2022] NSWCCA 244, [125].

560 *Tewaka v R* [2022] VSCA 275, [38].

561 *DPP v O'Neill* (2015) 47 VR 395, [74]. In *Brown v R* (2020) 62 VR 491, aspects of *O'Neill* were overruled, but the authority of this aspect of the decision stands. Cf *Thompson v R* [2005] WASCA 223, [53]. Impaired mental functioning need not be the direct or precipitating cause of the offending, but the degree of connection between the nature of the impairment and the nature and circumstances of the offence is a critical factor: *DS v R* (2022) 109 NSWLR 82, [95]-[96].

562 *DPP v O'Neill* (2015) 47 VR 395, [75].

563 *Brown v R* (2020) 62 VR 491, [61]. See *R v Waters; Ex parte DPP (Cth)* [2023] QCA 131, [56]-[65], as an example of the application of this principle.

564 *Muldrock v R* (2011) 244 CLR 120.

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."[565] However, as Beech-Jones J pointed out in *Ngati*, "*[t]he task still remains to consider the evidence of the intellectual retardation and the facts of the particular offence.*"[566]

374. A main reason why general deterrence may carry less weight in sentencing an offender with impaired mental functioning is that "*such an offender is not an appropriate medium for making an example to others*".[567] Similarly, 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 disabled offender and to the needs of the community.[568] However, "[*w]here the mental condition arises as a reaction to the discovery of the offender's crimes or to the prospect of incarceration, little or no moderation of general deterrence should be allowed in the instinctive synthesis.*"[569]

375. Impaired mental functioning resulting from self-induced intoxication (including drug-induced psychosis) will rarely be regarded as a mitigating factor[570] – indeed it may be treated as an aggravating factor[571] – because the offender is generally to be regarded as morally responsible for their condition at the time of the offence[572] and (at least where it results from addiction) because of the risk of re-offending.[573] Mitigation on this basis will therefore, in practice, be warranted only in exceptional cases.[574]

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565 *Muldrock v R* (2011) 244 CLR 120, [54]. See also *Naysmith v R* [2013] WASCA 32; *DPP v Sokaluk* [2013] VSCA 48.

566 *Ngati v R* [2014] NSWCCA 125, [46] (Beech-Jones J; Hoeben CJ at CL and Rothman J agreeing). In that case, the offender, although intellectually-disabled, did not "*lack the capacity to reason, as an ordinary person might, as to the wrongfulness of the conduct*", because the degree of planning and the circumstances surrounding the commission of the offences suggested the contrary, the offender was not acting out an impulse or tendency, and his actions were cruel, deliberate and methodical; it was open to find that he had "*a sufficiently deep understanding of its wrongful nature and consequences*" ([46]-[47], [52]).

567 *R v Mooney* (Vic CCA, 21 June 1978, unreported), 5 (Young CJ), quoted with approval in *Muldrock v R* (2011) 244 CLR 120, [53]-[54]. But reduced mental capacity will not necessarily be such as to preclude the full application of the principles of general deterrence: *Qui v R* [2019] VSCA 147, [76]. Moreover, where an offender acts with knowledge of what they are doing and with knowledge of the gravity of their actions, the moderation of the need for general deterrence need not be great: *R v Wright* (1997) 93 A Crim R 48, 51 (Hunt CJ at CL); *Wang v R* [2021] NSWCCA 282, [98] (R A Hulme J, Meagher JA and Davies J agreeing).

568 *Muldrock v R* (2011) 244 CLR 120, [54] (paraphrasing what Lush J said in *R v Mooney* (Vic CCA, 21 June 1978, unreported).

569 *R v RLP* [2009] VSCA 271, [30].

570 See *Hasan v R* (2010) 31 VR 28, [20]-[34] (summarising the relevant authorities); *R v GWM* [2012] NSWCCA 240, [75]-[88]; *R v Adam* (2022) 10 QR 343, [25]-[40].

571 *R v Martin* (2007) 20 VR 14; *Wood v R* [2019] NSWCCA 309, [126]-[145].

572 *R v Redenbach* (1991) 52 A Crim R 95, 99; *Butler v Western Australia* [2010] WASCA 104, [8], [59]-[62]; cf *R v Henry* (1999) 46 NSWLR 346, [197]-[201].

573 *Munda v Western Australia* (2013) 249 CLR 600, [56]-[57].

574 In *Marks v R* [2019] VSCA 253, [59]-[69] and in *Avan v R* [2019] VSCA 257 (each of which concerned a federal offender), drug-induced psychosis was treated as mitigating the offender's moral culpability, and reducing the suitability of the offender as a vehicle for specific or general deterrence, in the particular circumstances of the case. Such findings are exceptional (*Hasan v R* (2010) 31 VR 28, [33]). For self-induced intoxication to be mitigatory, the offender must establish on the balance of probabilities that they did not know the substance would cause them to behave irrationally or affect their ability to exercise control (*R v Martin* (2007) 20 VR 14, [18]-[30]); in the case of an offence of violence, it is not sufficient to establish that the offender did not know that they might act violently (*R v Gagalowicz* [2005] NSWCCA 452, [36]). This will be a difficult burden to discharge where the offender has had previous episodes of irrational or uncontrolled behaviour following use of

376. The finding of a relevant link between mental impairment and the offending is a necessary but not sufficient basis for mitigation. Sentencing persons suffering from mental disorders is essentially a discretionary exercise requiring consideration of the variable facts and circumstances of individual cases and it is "*erroneous in principle to approach the law of sentencing as though automatic consequences follow*" from a causal relationship in a particular case between a person's mental disorder and the commission of an offence.[575]

377. The mental condition of an offender can be relevant to sentencing in various ways that do not mitigate the sentence, as Brennan J pointed out in an oft-cited passage in *Channon*:[576]

> *Psychiatric abnormality falling short of insanity is frequently found to be a cause of, or a factor contributing to, criminal conduct. The sentencing of an offender in cases of that kind is inevitably difficult. The difficulty arises in part because the factors which affect the sentence give differing significance to an offender's psychiatric abnormality. An abnormality may reduce the moral culpability of the offender and the deliberation which attended his criminal conduct; yet it may mark him as a more intractable subject for reform than one who is not so affected or even as one who is so likely to offend again that he should be removed from society for a lengthy or indeterminate period. The abnormality may seem on one view to lead towards a lenient sentence, and on another to a sentence which is severe. That is not an unusual phenomenon in sentencing, where the court must fashion a sentence which either reconciles or balances the various objectives of sentencing, sometimes giving emphasis to one of the objectives of sentencing, sometimes giving emphasis to another. Although the court necessarily adopts a pragmatic approach, the judicial discretion is not at large, without guidance from principle. That guidance is found in the basic purpose which is to be served by the exercise of the sentencing power.*

378. This point also underlies the fifth principle stated by the McClellan CJ at CL (Simpson J and Barr AJ agreeing) in *De La Rosa*:[577]

> *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 …*

379. The mental condition of a federal offender may, for example, underlie a lack of contrition (s 16A(2)(f)), or contribute to an adverse assessment of the offender's prospects of rehabilitation (s 16A(2)(n)), or heighten the need for specific deterrence (s 16A(2)(j))[578] or affect the determination of a sentence which provides effective protection of the community.[579] While taking the offender's mental condition into account in any of these ways may result in a more severe sentence than would otherwise

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the substance (e.g. *R v Martin* (2007) 20 VR 14, [49]; *DPP v Arvanitidis* [2008] VSCA 189, [34]) or where the effects of intoxication of a particular substance are well-known (*Hasan v R* (2010) 31 VR 28, [34]).

575 *R v Engert* (1995) 84 A Crim R 67, [68] (Gleeson CJ).

576 *Channon v R* (1978) 33 FLR 433, 436–437; cf. *R v Henry* (1999) 46 NSWLR 346, [28]; *Lauritsen v R* (2000) 22 WAR 442, [48].

577 *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1, [177], citing *R v Israil* [2002] NSWCCA 255, [24]; *R v Henry* [2007] NSWCCA 90, [28]; *R v Lawrence* (2005) NSWCCA 91, [23]-[24].

578 *DPP (Cth) v Beattie* [2017] NSWCCA 301, [202]-[205].

579 *Veen v R (No 2)* (1987) 164 CLR 465; *Brown v R* (2020) 62 VR 491, [70]-[76]; *Bogers v Western Australia* [2020] WASCA 174, [82]-[83], [94]-[95]; *Khan v R* [2022] NSWCCA 47, [122]-[129]. See "3.5.1 Community protection".

be the case, it does not permit the imposition of a sentence which is disproportionate to the gravity of the crime considered in the light of its objective circumstances.[580]

380. See also "3.5.8 Drug addiction" and "3.5.9 Gambling".

3.4.14 Standing in the community – s 16A(2)(ma)

381. This paragraph was inserted in 2000 and applies to the sentencing of a federal offender who was charged with, or convicted of, the relevant offence on or after 20 July 2020.[581] The paragraph requires that if the offender's standing in the community was used by them to aid in the commission of the offence, the court must take into account that fact "*as a reason for aggravating the seriousness of the criminal behaviour to which the offence relates*".

382. The Explanatory Memorandum for the relevant bill[582] said of this provision—

> *It is intended that this will capture scenarios where a person's professional or community standing is used as an opportunity for the offender to sexually abuse children. For example, this would cover a medical professional using their professional standing as a medical practitioner, or a person using celebrity status, to create opportunities to sexually abuse children.*

383. Nothing in the provision restricts its application to offences involving the sexual abuse of children. It would also appear to be capable of applying, for example, to an offender who uses their standing in the community to commit an offence involving corruption, fraud, money laundering or market manipulation.

384. The requirement in s 16A(2)(ma) is given primacy over the prohibition in s 16A(2A) on taking into account any form of customary law or cultural practice as a reason for aggravating the seriousness of the offence.

3.4.15 Prospects of rehabilitation – s 16A(2)(n)

385. One of the long-standing aims of sentencing is to promote the rehabilitation of offenders. It is often of particular significance in the sentencing of young offenders. Although assessment of an offender's prospects of rehabilitation is often linked to an assessment of the need for specific deterrence (s 16A(2)(j)), the two factors are distinct.

386. The relevant rehabilitation is not confined to rehabilitation from (for example) a drug addiction; it necessarily extends to rehabilitation from the very criminality of which that offender stands to be sentenced.[583] The court is concerned with the community's interest in minimising the risk of further offending following the completion of the sentence.[584]

387. Assessment of the prospects of rehabilitation is often difficult, especially when there is little evidence independent of the offender on which to base the assessment. Prospects of rehabilitation must be

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580 *Veen v R (No 2)* (1987) 164 CLR 465; *Hoare v R* (1989) 167 CLR 348, 354; *DS v R* (2022) 109 NSWLR 82, [68].

581 *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), s 3 and Schedule 8, item 2. The amendment applies in relation to determining, on or after 20 July 2020, a sentence to be passed, or an order to be made, in respect of a person for a federal offence that the person was charged with, or convicted of, on or after that date: see s 2(1) and Schedule 8, item 7 of the amending Act.

582 *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019* (Cth), *Explanatory Memorandum (House of Representative)*, [254].

583 *Elzein v R* [2021] NSWCCA 246, [236].

584 *Mohamed v R* [2022] VSCA 136, [66].

assessed on the basis of what is known to the court at the time of sentence, even in the case of an offender who faces a long prison sentence.[585]

388. An acknowledgment of wrongdoing may be a significant element in rehabilitation, but remorse is not a prerequisite to an assessment that an offender has some prospect of rehabilitation, and a plea of not guilty does not disentitle an offender from a finding that they have prospects of rehabilitation.[586]

389. The weight to be given to an offender's prospects of rehabilitation will depend on all the circumstances. If general deterrence and denunciation are primary considerations in sentencing for the particular offence, even good prospects of rehabilitation will not preclude the imposition of a stern sentence. On the other hand, if at the time of sentencing an offender is well advanced on the path to rehabilitation, a sentencing court may be reluctant to impose a sentence which interrupts that progress. That is a factor of particular significance when an appellate court, on a prosecution appeal, is considering whether to impose an immediate custodial sentence on an offender who is not then in custody.[587]

390. Where there are reasonable prospects of rehabilitation, and the requirements of punishment and deterrence otherwise allow, care should be taken not to impose a sentence which leaves the offender in a state of despair in which the offender abandons any inclination to reform (sometimes referred to as a "crushing" sentence).[588] This is of particular significance in sentencing a young offender.[589]

391. In *Elzein*,[590] Bellew J (with whom Bell P and Walton J agreed) said that where an offender's prospects of rehabilitation are the subject of a specific submission made to a sentencing judge in terms which call for reasoned consideration of it, that issue must be addressed in the reasons for sentence, and a definitive conclusion expressed. What is required on the part of a sentencing judge is a "*succinct statement as to the approach adopted on sentence*" in relation to that factor.[591]

392. In determining whether a sentence or order under s 19B(1) (bond without conviction), 20(1) (bond with conviction) or 20AB(1) (particular State or Territory sentence or order) of the *Crimes Act 1914* (Cth) is the appropriate sentence or order to be passed or made in respect of a federal offence, a court sentencing a federal offender must have regard to the nature and severity of the conditions that may be imposed on, or may apply to, the offender, under that sentence or order: *Crimes Act 1914*, s 16A(3). Courts have long had regard to possible rehabilitation or treatment conditions in deciding whether to make such an order.

585 *Alou v R* (2019) 101 NSWLR 319, [105]-[107].
586 *Sigalla v R* [2021] NSWCCA 22, [142]-[148].
587 E.g. *DPP (Cth) v Boyles (a pseudonym)* [2016] VSCA 267, [72]-[73].
588 *R v Cramp* (2010) 106 SASR 304, [51]; *Mohamed v R* [2022] VSCA 136, [71]-[76].
589 *Mohamed v R* [2022] VSCA 136, [75].
590 *Elzein v R* [2021] NSWCCA 246, [230]-[233].
591 *Elzein v R* [2021] NSWCCA 246, [233]; see also *Butler v R* [2023] NSWCCA 100, [40]-[47]. It should be noted, however, that it is not universally accepted that the failure to advert to a particular factor will, without more, found an inference that the sentencing court has failed to take it into account: see "2.4 Whether failure to refer to a sentencing consideration necessarily evinces error".

393. With effect from 20 July 2020, new s 16A(2AAA)[592] of the *Crimes Act 1914* (Cth) requires that a court sentencing an offender for a Commonwealth child sex offence[593] must also have regard to the objective of rehabilitating the person, including by considering:

(a) when making an order, whether it is appropriate to impose any conditions about rehabilitation or treatment options; and

(b) in determining the length of any sentence or non-parole period, whether it is appropriate to include sufficient time for the person to undertake a rehabilitation program.

394. The second aspect is novel. Its purpose is to encourage sentencing courts to fix a sufficient period or minimum period in custody to enable the offender to complete a custodial sex offender treatment program, which typically takes 18 months to 2 years.[594] This does not mean that the court is empowered, for this purpose, to fix a period or minimum period which is longer than would otherwise be appropriate. Subsection 16A(2AAA) is not expressed as displacing or overriding the requirement that the sentence must be of a *"severity appropriate in all the circumstances"* (s 16A(1)). While the requirements of s 16A(2AAA) must be taken into account (where applicable) in the instinctive synthesis of relevant considerations, the subsection does not permit or require a court to impose a sentence which is disproportionately severe in pursuit of the objective of rehabilitating the offender.[595]

395. In *Darke*,[596] the New South Wales Court of Criminal Appeal held that the failure of the sentencing judge to refer to or to give effect to s 16A(2AAA), in a case to which it applied, was an error which required that the offender be resentenced.

3.4.16 Effect on family – s 16A(2)(p)

396. This paragraph requires the court to take into account, if relevant and known to the court, "*the probable effect that any sentence or order under consideration would have on any of the person's family*

592 Inserted by the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), s 3 and Schedule 8, item 3. The amendment applies in relation to determining, on or after 20 July 2020, a sentence to be passed, or an order to be made, in respect of a person for a federal offence that the person was charged with, or convicted of, on or after that date: see s 2(1) and Schedule 8, item 7 of the amending Act.

593 See "7.3.2 Meaning of "Commonwealth child sex offence"".

594 *Crimes Act 1914* (Cth), s 16A(2AAA). The purpose of this subsection is described as follows in the explanatory memorandum for the relevant bill: "*[S]tate and territory correctional facilities advise that typically a non-parole period of 18 months to two years is required for offenders to be able to complete a relevant custodial sex offender treatment program. … Under proposed subsection 16A(2AAA) the court will have to consider if it would be appropriate to make orders imposing conditions about rehabilitation or treatment options. A further consideration is whether the sentence or non-parole period provides sufficient time for the person to undertake rehabilitation. For example, generally a non-parole period of 18 months to two years is necessary for offenders to complete a sex offender rehabilitation program while in prison*" (*Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019* (Cth), *Explanatory Memorandum (House of Representative)*, [256]-[257]).

595 Cf *Boulton v R* (2014) 46 VR 308, [72].

596 *Darke v R* [2022] NSWCCA 52, [31]-[36].

or dependants".[597] The paragraph was included in s 16A(2) when first enacted[598] and has remained unchanged since.

397. Unlike other factors listed in s 16A(2) of the *Crimes Act 1914*, s 16A(2)(p) is concerned with neither the offence nor the offender, but with the probable effect of the sentence or order on a third party.

398. At common law, likely hardship to the offender's family rarely justified a reduction in sentence. Authority is now divided on whether s 16A(2)(p) preserved or supplanted pre-existing common law principles.

Common law principles

399. The common law principles were reviewed and summarised by a five-member bench of the Victorian Court of Appeal (Maxwell P, Nettle, Neave, Redlich and Weinberg JJA) in *Markovic*.[599] In that case the offender was sentenced for both State and federal offences. The Court followed previous authority that the same common law principles applied in relation to both.

400. At common law, hardship to third parties was not regarded as a mitigating factor, properly so called; it was, in substance, an appeal for mercy.[600]

401. It has long been the position at common law that, unless the circumstances are shown to be exceptional, family hardship is to be disregarded as a sentencing consideration.[601] The plea for mercy must be irresistible, so that to refuse it would be inhumane.[602] The occasions for reducing a sentence on this basis will be rare.[603]

402. The considerations which have led to this position include the following:[604]

(a) Adverse consequences for family or dependants are a commonplace incident of sentencing, and an almost inevitable consequence of imprisonment. (Inherent or inevitable consequences of a sentence are not ordinarily mitigating factors.[605])

(b) The primary function of the sentencing court is to impose a sentence commensurate with the gravity of the crime. The course of justice and the application of the criminal law would be distorted and the purposes of punishment would be frustrated if the courts allowed offenders to

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597 The reference to the person's family must be construed in accordance with s 16A(4) of the *Crimes Act 1914* (Cth). By virtue of that subsection, the members of a person's family are taken to include (without limitation): (a) the person's de facto partner; (b) the person's child, or a person of whom the person is the child; and (c) anyone else who would be a member of the person's family if someone mentioned in paragraph (a) or (b) is taken to be a member of the person's family.

598 *Crimes Legislation Amendment Act (No.2) 1989* (Cth), which came into effect on 17 July 1990.

599 *Markovic v R* (2010) 30 VR 589.

600 *Markovic v R* (2010) 30 VR 589; *DPP (Cth) v Bui* (2011) 32 VR 149, [21]-[22].

601 *R v Wirth* (1976) 14 SASR 291; *R v Edwards* (1996) 90 A Crim R 510; *Markovic v R* (2010) 30 VR 589, [3].

602 *R v Wirth* (1976) 14 SASR 291, 295-6; *R v Edwards* (1996) 90 A Crim R 510, 515; *Markovic v R* (2010) 30 VR 589, [6]-[13].

603 *Markovic v R* (2010) 30 VR 589, [77].

604 See *Markovic v R* (2010) 30 VR 589, [6]-[13] and the authorities cited there.

605 For example, every offender sentenced to a term of imprisonment suffers uncertainty about matters such as whether their relationships will remain intact; their prospects of employment; whether they will have somewhere to live upon release and where that might be. These are regarded as matters which are unavoidable consequences of imprisonment and do not constitute mitigating circumstances: *Hickling v Western Australia* [2016] WASCA 124, [60]. Similarly, the fact that a conviction or sentence for a relevant offence will inevitably result in the offender being included in a sex offender register is not a mitigating factor: *DPP v Ellis* (2005) 11 VR 287.

escape the just punishment for their offences by reason of the consequences which that punishment will bring upon innocent people.[606]

(c) To treat family hardship as the basis for the exercise of leniency produces the paradoxical result that a guilty person benefits in order that innocent persons suffer less.

(d) To treat an offender who has needy dependants more leniently than one equally culpable co-offender who has none would 'defeat the appearance of justice' and be 'patently unjust'.[607] As Gleeson CJ said in *Edwards*,[608] "*Justice will not be seen to be administered even-handedly if exceptions are made in cases which are not truly exceptional.*" To distinguish between two offenders whose circumstances are otherwise equal, save one has a family who will be adversely affected by their punishment, is to draw a distinction on arbitrary grounds; the same applies where both have families but the effect on one family is by happenstance less than the other.[609]

The enactment and original construction of s 16A(2)(p)

403. Paragraph 16A(2)(p) was based on s 10(n) of the *Criminal Law (Sentencing) Act 1988* (SA).[610] In 1989, the South Australian provision was interpreted by the Full Court of the Supreme Court of South Australia in *Adami*[611] as preserving the common law position, rather than as removing the requirement for exceptional circumstances. Section 16A(2)(p) was enacted later that year against that background. The Parliamentary materials relating to the Bill which inserted s 16A do not say that s 16A(2)(p) was intended to have a different construction to that which had been ascribed to the South Australian provision on which it was based.[612]

404. Consistently with the decision in *Adami*, other provisions of s 16A have also been construed as preserving the pre-existing position at common law. These included the requirement to have regard to

606 *Watherstone v R* (SA SC (Full Court), 26 April 1985, unreported).

607 *R v Wirth* (1976) 14 SASR 291, 294.

608 *R v Edwards* (1996) 90 A Crim R 510, 515.

609 *R v Constant* (2016) 126 SASR 1, [55].

610 *R v Berlinsky* [2005] SASC 316, [30]. Section 10(n) provided, "*In determining the sentence for an offence, a court must have regard to such of the following factors and principles as may be relevant: … (n) the probable effect any sentence under consideration would have on dependants of the defendant*". In *DPP (Cth) v Thomas* (2016) 53 VR 546, [34], the Victorian Court of Appeal observed that "*when s 16A* [of the *Crimes Act 1914* (Cth)] *was introduced, it adopted, without any material difference, the terms of s 10 of the Criminal Law (Sentencing) Act 1988 (SA)*". The Court ([34]-[37], [44]) construed s 16A(2)(g) (the fact of a guilty plea) as having the same meaning and purpose as the provision on which it was based.

611 *R v Adami* (1989) 51 SASR 229. *Adami* has been followed and applied many times in the construction of the South Australian statute: *R v Ghazaryan* [2016] SASCFC 140, [34]-[39]. The Second Reading speech of the relevant Minister on the Bill for the *Criminal Law (Sentencing) Act 1988* (SA) said that, apart from specified provisions (which did not include s 10(n)), "*Nearly all the remaining provisions of this Bill either merely restate relevant areas of the common law or reproduce verbatim statutory provisions that are to be repealed*": *Parliamentary Debates (South Australia), House of Assembly*, 29 March 1988, 3662.

612 The issue was not mentioned in the Minister's Second Reading speech on the *Crimes Legislation Amendment Bill (No 2) 1989: Commonwealth Parliamentary Debates*, Senate, 21 November 1989, 2895-9. The Explanatory Memorandum for the Bill merely said (p 7) that new s 16A(2) *"in part gives statutory recognition to matters already taken into account by courts when sentencing (e.g. the character, antecedents, age, means and physical or mental condition of the person), but it also highlights certain matters including the circumstances of the victim and the probable effect of the sentence on the offender's family or dependants".* (This sentence was later relied on as evincing an intention to depart from the common law approach: *R v Zerafa* [2013] NSWCCA 222, [124]-[125].)

the fact of a guilty plea (s 16A(2)(g))[613] and the absence of an express requirement to consider general deterrence.[614]

405. In *Sinclair*,[615] Malcolm CJ (Kennedy and Pidgeon JJ agreeing) referred to previous authority[616] that, in sentencing a federal offender, hardship to family members must be disregarded other than in exceptional cases. Following the decision in *Adami* on the cognate provision on which s 16A(2)(p) was based, Malcolm CJ held that s 16A was not intended to change the common law and that the sentencing judge had erred in proceeding on the basis that it had done so.

406. Until the decision of the New South Wales Court of Criminal Appeal in *Totaan*[617] (discussed below), the construction adopted in *Sinclair* was followed and applied by intermediate appellate courts in New South Wales,[618] Victoria,[619] Queensland,[620] Western Australia[621] and South Australia,[622] and by single judges of the Supreme Court of Tasmania,[623] which all construed s 16A(2)(p) as preserving the common law requirement of exceptional circumstances. In *Markovic*,[624] the Court described this construction of s 16A(2)(p) as a "uniform national position".

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613 In *DPP (Cth) v Thomas* (2016) 53 VR 546, [34], the Victorian Court of Appeal observed that "*when s 16A* [of the *Crimes Act 1914* (Cth)] *was introduced, it adopted, without any material difference, the terms of s 10 of the Criminal Law (Sentencing) Act 1988 (SA)*". The Court ([34]-[37], [44]) construed s 16A(2)(g) (the fact of a guilty plea) as having the same meaning and purpose as the South Australian provision on which it was based.

614 See the authorities cited in fn 480.

615 *R v Sinclair* (1990) 51 A Crim R 418 (WA SC (Full Court)).

616 *Scarce v Tampalini* (WA SC (Kennedy J), 21 March 1990, unreported).

617 *Totaan v R* (2022) 108 NSWLR 17.

618 *R v Ceissman* [2001] NSWCCA 73, [36]; *R v Togias* [2001] NSWCCA 522, [8]-[17], [69]-[88], and the cases cited there; *R v Hinton* [2002] NSWCCA 405; *R v Nguyen* [2006] NSWCCA 369; *Le v R* [2006] NSWCCA 136, [25]; *Van Eeden v R* [2012] NSWCCA 18; *R v Zerafa* [2013] NSWCCA 222; *R v Lin* [2014] NSWCCA 254, [71]; *Huynh v R* [2015] NSWCCA 167, [33]-[34]; *Nguyen v R* [2016] NSWCCA 5, [69]; *Heath v R* [2016] NSWCCA 24, [79]; *Jaafar v R* [2017] NSWCCA 223, [2], [107]. This list is not exhaustive.

619 *R v Matthews* (1996) 130 FLR 230; *R v Carmody* (1998) 100 A Crim R 41, 45; *DPP (Cth) v Gaw* [2006] VSCA 51; *Markovic v R* (2010) 30 VR 589; *DPP (Cth) v Bui* (2011) 32 VR 149, [20]-[30]; *Saoud v R* [2019] VSCA 208, [32]-[36]; *Tran v R* [2021] VSCA 292, [47].

620 *R v Huston; Ex parte DPP (Cth)* [2011] QCA 350, [46]-[51]; *R v Ajelara* [2015] QCA 56, [23]; *R v Freeman* [2019] QCA 150, [38]; *R v Ibbetson* [2020] QCA 214, [28]-[29].

621 *Burns v R* (1994) 71 A Crim R 450; *R v Mitchell* (WA CCA, 28 October 1998, unreported); *Jorissen v R* [2017] WASCA 71, [34]; *HJT v Western Australia* [2020] WASCA 120, [59].

622 *R v Berlinsky* [2005] SASC 316, [30]; *R v Constant* (2016) 126 SASR 1, [53]-[67]. In *Constant*, while adhering to the common law test of exceptional circumstances, the Court ([65]-[67]) adopted a test propounded by D A Thomas in *Principles of Sentencing*: *where the circumstances of the particular family are such that the "degree of hardship is exceptional, and considerably more severe than the deprivation suffered by a family in normal circumstances as a result of imprisonment*". The Court concluded ([67]), "*In our view, consistent with Dr Thomas's first exception, both s 16A(2)(p) and s 10(1)(n)* [the materially identical provision in the State Act] *invite sentencing courts to consider whether the community's interest in the imposition of the appropriate sentence, being a sentence formulated having regard to the purposes of punishment and for the promotion of the community welfare through the administration of justice and the enforcement of the criminal law, would, if imposed, pursue those purposes at a cost to the defendant's family or dependants that is, in the community's interests, too high such that the sentence under consideration should be adjusted.*" This represented a less stringent approach than that adopted in *Wirth*, *Adami* and *Berlinsky*. See also *Adams (a pseudonym) v R* (2022) 141 SASR 204 (referring to common law principles generally, rather than the application of s 16A(2)(p) or s 10(1)(n)).

623 *McAree v Barr* [2006] TASSC 37, [21]; *Lewis v Duffin* [2012] TASSC 58, [29]. Common law principles also apply to sentencing for State offences in Tasmania: *McCulloch v Tasmania* [2010] TASCCA 21, [19].

624 *Markovic v R* (2010) 30 VR 589, [11].

407. These cases established the following:

(a) As is the case at common law, reductions of sentence under s 16A(2)(p) will be rare.[625]

(b) Hardship must, on its own rather than in combination with other factors, be judged to be exceptional before it can be taken into account as a sentencing factor under s 16A(2)(p).[626]

(c) Properly understood, the purpose and effect of the "exceptional circumstances" test is to limit the availability of the court's discretion to exercise mercy on that ground. Therefore, where the relevant circumstances are not shown to be exceptional, so that s 16A(2)(p) is not engaged, there can be no 'residual discretion' to exercise mercy on grounds of family hardship.[627]

(d) Where the gravity of the offending requires that the offender serve a term of imprisonment despite a finding of exceptional hardship to a family member, the exceptional hardship may warrant a reduction of the period of imprisonment to be served in some cases.[628]

Departure from the common law position: Australian Capital Territory and New South Wales

408. In *Ip*,[629] the Australian Capital Territory Court of Appeal held that exceptional hardship is not required before a sentence may be reduced due to its effect on the family or dependants of a federal offender. The discussion of the issue was brief. The Court declined to follow the decisions of the New South Wales Court of Criminal Appeal in *Togias*[630] and *Hinton*,[631] but made no reference to other authority or to the history of the provision.

409. For many years, despite minority judgments or *obiter dicta* in some cases favouring a contrary view,[632] the New South Wales Court of Criminal Appeal repeatedly held that hardship to a family member or dependant would warrant mitigation of a federal sentence only in exceptional cases.[633]

410. However in 2022, a decision of a five-member bench of the Court in *Totaan*[634] reversed that position. Bell CJ (with whom Gleeson JA, Harrison, Adamson and Dhanji JJ agreed) said that the case law interpreting s 16A(2)(p) "*took an immediate wrong turn in Sinclair*";[635] s 16A(2)(p) should, his Honour said, be given effect according to its terms. By analogy with the Court's decision in *Parente*,[636] Bell CJ said that the requirement for "exceptional circumstances" or "exceptional hardship" to be shown has no "*statutory root*" and the grafting on of such a requirement imposes "*an unlegislated judicially created constraint on the sentencing discretion*".[637]

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625 *Markovic v R* (2010) 30 VR 589, [77]. The Court there cited many cases of undoubted hardship which had been held by appellate courts to fall short of exceptional circumstances and (at [78]) a much smaller number of cases in which exceptional circumstances were made out. Further examples are *DPP (Cth) v Bui* (2011) 32 VR 149; *El-Hage v R* [2012] VSCA 309; *Elshani v R* [2015] NSWCCA 254; *HJT v Western Australia* [2020] WASCA 120.

626 *Markovic v R* (2010) 30 VR 589, [15]; *DPP (Cth) v Bui* (2011) 32 VR 149, [27]; *TAN v R* (2011) 35 VR 109, [68]-[71].

627 *Markovic v R* (2010) 30 VR 589, [5], [12]-[19].

628 Examples are *R v Pennant* [1998] 2 VR 453 and *Zhou v R* [2014] VSCA 123, [18]-[19], [21].

629 *DPP v Ip* [2005] ACTCA 24, [60]-[61]; see also *Craft v Diebert* [2004] ACTCA 15, [9]-[10].

630 *R v Togias* [2001] NSWCCA 522.

631 *R v Hinton* [2002] NSWCCA 405.

632 *R v Zerafa* [2013] NSWCCA 222, [107]-[149]; *Elshani v R* [2015] NSWCCA 254, [35], [40]-[41]; *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [45]-[64], [162], [164]; *Kaveh v R* [2017] NSWCCA 52, [5]-[6].

633 See the authorities cited in fn 618.

634 *Totaan v R* (2022) 108 NSWLR 17 (Bell CJ, Gleeson JA, Harrison, Adamson and Dhanji JJ).

635 *Totaan v R* (2022) 108 NSWLR 17, [84], referring to *R v Sinclair* (1990) 51 A Crim R 418 (WA SC (Full Court)).

636 *Parente v R* (2017) 96 NSWLR 633, which is discussed above: "3.2.3 No scope for presumption of imprisonment for an offence".

637 *Totaan v R* (2022) 108 NSWLR 17, [90]-[91].

411. The Court in *Totaan* held that decisions which held that a court imposing a sentence for a federal offence may only have regard to hardship to a family member or dependant where the circumstances of hardship satisfy the epithet "exceptional" were *"plainly wrong*" and should not be followed. Similarly, authorities which held that hardship must rise to the level of "exceptional" before being given a specified weight, or resulting in a substantial reduction of sentence, were also wrongly decided and should not be followed.

412. The decisions which the Court considered to be "plainly wrong" included not only previous decisions of the Court itself, but also decisions of intermediate appellate courts in Victoria, Queensland, Western Australia and South Australia.

413. Following the decision in *Totaan*, some offenders who were sentenced in New South Wales in accordance with previous authority have sought leave to appeal against sentence on the basis of that decision. The Crown has conceded that a "*Totaan* error" occurred in these cases.[638] Such a concession (if accepted) will not necessarily result in the imposition of a reduced sentence. For example, in *Rasel*[639] and in *AE*,[640] while the Court accepted the prosecution's concession and found that the error had occurred, the appeal was dismissed on the basis that no lesser sentence was appropriate in the circumstances.

Totaan applied in Victoria

414. As noted above, the original construction of s 16A(2)(p) was applied in a series of appellate decisions in Victoria,[641] including by a five-member bench of the Court of Appeal in *Markovic*.[642] However in *Mohamed,*[643] the Crown conceded, and the Court accepted, that the Court should follow *Totaan*, on the basis that (applying the principles in *Marlborough Gold*[644]) there was nothing in the interpretation of s 16A(2)(p) in *Totaan* to convince the Court (in *Mohamed*) that it was plainly wrong, and that the failure to have regard to family hardship in the instant case was therefore an error. The Court said that its own previous decisions had applied the exceptional circumstances test "*for reasons of comity and national consistency*"; in following *Totaan*, the Court would not be reconsidering the decision in *Markovic*, in which the correctness of the exceptional circumstances test was not in issue.[645] The Court in *Mohamed* found it necessary to resentence the offender on other grounds; in resentencing, the Court took into

638 *Kanbut v R* [2022] NSWCCA 259, [88]-[89] (although the Court did not need to decide the point because a conviction appeal was upheld, Beech-Jones CJ at CL observed that the Crown's concession appeared to have been well-founded); *Rasel v R* [2022] NSWCCA 239, [6]; *Ahmad v R* [2023] NSWCCA 294, [9]-[14]; *AE v R* [2023] NSWCCA 74, [3]; *Fakhreddine v R* [2024] NSWCCA 74, [31]; *Flower v R* [2024] NSWCCA 76, [7]. As to the approach of the Court to, and the evidence which may be adduced on, such an application, see *AE v R* [2023] NSWCCA 74, [57]-[59] (N Adams J)

639 *Rasel v R* [2022] NSWCCA 239.

640 *AE v R* [2023] NSWCCA 74,[52]-[54] (Wilson J, Button and N Adams JJ agreeing), referring to the seriousness of the offending (importation of a commercial quantity of a border-controlled drug), the leniency of the original sentence and the fact that the sentencing judge had taken into account the probable hardship of the sentence to the offender's family.

641 See the authorities cited in fn 619.

642 *Markovic v R* (2010) 30 VR 589.

643 *Mohamed v R* [2022] VSCA 136, [83]-[93].

644 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492 *("U]niformity of decision in the interpretation of uniform national legislation… is a sufficiently important consideration to require that an intermediate appellate court… should not depart from an interpretation placed on such legislation by another Australian intermediate appellate court unless convinced that that interpretation is plainly wrong*").

645 *Mohamed v R* [2022] VSCA 136, [89]-[90].

account family hardship but said that, in the particular circumstances of the case, it was "*an issue of minor significance*".[646]

415. The Court took a similar approach in *Rodgerson [No 2].*[647] In that case, the parties agreed that the Court should follow the approach taken in *Mohamed* and treat *Totaan* as correctly setting out how sentencing courts should apply family hardship in the context of Commonwealth offences; the Court said that it was "*content to proceed on that basis*".[648]

416. In *El Masri*,[649] the Court accepted the CDPP's concession that the sentencing judge had erred in applying the pre-*Totaan* law, but refused leave to appeal on the basis that it was not satisfied that a different sentence should be imposed. The Court observed that the implications of the offender's incarceration for family members "*are not so significant that they should attract a discernible sentencing discount*" and that "*other sentencing considerations arising from the nature and seriousness of the offending weigh much more heavily*".[650]

Sentencing in the Federal Court

417. In sentencing federal offenders in the Federal Court, judges have followed and applied *Totaan*.[651]

The position in other jurisdictions

418. In Queensland, Western Australia and South Australia, courts sentencing federal offenders are bound by appellate decisions in that State[652] regarding the application of s 16A(2)(p), pending resolution of the issue by an appellate court. In the meantime, it would be prudent for a sentencing court in any of these States to consider and to state whether the adoption of the approach in *Totaan* would have resulted in a different sentence being imposed. In the view of the CDPP the approach to s 16A(2)(p) in *Totaan* is the correct approach.

419. In Tasmania, courts of summary jurisdiction would appear to be bound by decisions of single judges of the Supreme Court[653] regarding s 16A(2)(p), until an appellate court decides otherwise. However there does not appear to be any authority in Tasmania which would bind a court sentencing a federal offender on indictment.

420. In the Northern Territory, there does not appear to be any relevant binding appellate decision.

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646 *Mohamed v R* [2022] VSCA 136, [94]. In *Mohamed v R (No 2)* [2023] VSCA 177, the Court refused leave to appeal on a similar ground in relation to separate offending, on the basis that family hardship had been taken into account in the adjustment of the overall sentence (which included the separate offending) in the first appeal.

647 *Rodgerson v R [No 2]* [2022] VSCA 154.

648 *Rodgerson v R [No 2]* [2022] VSCA 154, [73]. The Court found that the sentencing judge had erred in acting on the previous interpretation of s.16A(2)(p), but dismissed the appeal on the basis that it was not satisfied that a different sentence should be imposed ([86]).

649 *El Masri v R* [2023] VSCA 93.

650 *El Masri v R* [2023] VSCA 93, [58].

651 *DPP (Cth) v Vina Money Transfer Pty Ltd* (2022) 294 FCR 449, [179]; *DPP (Cth) v Joyce* [2022] FCA 1423, [158]; *DPP (Cth) v Bingo Industries Pty Ltd* [2024] FCA 121, [237]; *DPP (Cth) v Aussie Skips Bin Services Pty Ltd* [2024] FCA 122, [255].

652 See the authorities cited in fn 620 (Queensland), fn 621 (Western Australia) and fn 622 (South Australia).

653 See the authorities cited in fn 623.

The application of s 16A(2)(p) following Totaan

421. *Ip* and *Totaan* provide little guidance on the weight to be given to hardship to an offender's family or dependants. In *Ip* the Court merely said, "*In many cases, it will not be possible to give a family's suffering much or any weight. But as a matter of the letter and the clear conceptual intendment of the Parliament, it must be anxiously considered in every case where it exists.*"[654] In *Totaan*, the Court in resentencing the offender held that a sentence of imprisonment was required despite the hardship caused to the offender's family, but ordered the immediate release of the offender, having regard to the period she had spent in custody and evidence of the hardship which her incarceration had caused her two children (for whom she was the primary caregiver).

422. Authoritative guidance on how probable hardship to family is to be weighed against other sentencing factors must await further appellate decisions, but some assistance may be gained from the following judgments:

(a) In *Zerafa*,[655] Beech-Jones J expressed the view that *Togias*[656] and *Hinton*[657] were plainly wrong and that exceptional hardship was not required. (In *Totaan*, the Court agreed with the judgment of Beech-Jones J in *Zerafa*.) His Honour said that the primary objects in sentencing – retribution, deterrence and the protection of society – can still be given effect to without requiring sentencing courts to divide the forms of hardship occasioned to an offender's family into those which meet the description "exceptional" and those which do not.[658] While Beech-Jones J considered that the likely harm to the family of the offender in that case upon his incarceration was "*a matter deserving of real weight*", his Honour agreed with the other members of the Court that the sentence imposed on the respondent was manifestly inadequate and that a term of imprisonment to be served should be substituted for an order for the immediate release of the offender.[659]

(b) In *Pratten (No 2)*,[660] Basten JA (whose judgment was also endorsed in *Totaan*) observed that because s 16A(2)(p) focuses not on the nature of the offending, or the effect on the victim, or on the circumstances of the offender, but on third persons, uninvolved in the offending, it makes sense to delimit the circumstances in which such extraneous considerations should properly reduce the sentence which would otherwise be imposed.

(c) In *BC*,[661] the Australian Capital Territory Court of Criminal Appeal, applying a Territory statute in practically identical terms to s 16A(2)(p), accepted a prosecution submission that–

- there is "*a relatively high bar before hardship will result in any significant reduction in sentence*";
- "*the underlying principle is that incarceration of any person will be likely to have an adverse effect on families and their dependents, and may be an inevitable consequence of adequate punishment, such that it cannot be allowed to overwhelm other factors*";

654 *DPP v Ip* [2005] ACTCA 24, [61].
655 *R v Zerafa* [2013] NSWCCA 222.
656 *R v Togias* [2001] NSWCCA 522.
657 *R v Hinton* [2002] NSWCCA 405.
658 *R v Zerafa* [2013] NSWCCA 222, [140].
659 *R v Zerafa* [2013] NSWCCA 222, [104]-[108], [150]-[153].
660 *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [50].
661 *R v BC* [2022] ACTCA 19, [35]-[41].

- hardship "*could only carry limited weight even when such circumstances were compelling for serious offences in which general deterrence is of singular importance*", as in the instant case; and
- hardship "*cannot be allowed to overwhelm the exercise of the sentencing discretion*".

The Court held that the seriousness of the offences in the instant case (child sex offences), the need for a condign sentence to afford meaningful general deterrence and the importance of denunciation left very little room for any substantial reduction on account of third party hardship.[662]

(d) In *Mohamed*,[663] after describing the impacts of the offender's imprisonment (for two separate terrorism offences) on his wife, his son and his mother, the Court said:

> *Impacts of this kind on an offender's family are the inevitable corollary of the offender's having been found guilty of a serious crime and sentenced to a term of imprisonment. Sometimes, of course, the implications of incarceration for family members are so significant that they must weigh heavily in the sentencing calculus. But, as this affidavit material reveals, the present case is not in that category.*

The Court concluded that family hardship was "*an issue of minor significance*" in the circumstances.[664]

(e) In *Rodgerson [No 2],*[665] the Court said that while the hardship suffered by the offender's 7-year-old son (for whom the offender was the primary carer) warranted "*some weight*", the weight to be given was, "*at best, very modest*". In concluding that it was not satisfied that a lesser sentence was required (despite a concession by the Crown that it was), the Court emphasised the seriousness of the offending (drug trafficking and related offences) and the need for general and specific deterrence and protection of the community.

(f) In *Rasel,*[666] Bell CJ (Price and Lonergan JJ agreeing), in concluding that no lesser sentence was required despite the *Totaan* error in sentencing at first instance, emphasised the need for specific and general deterrence, noting that the offending (tax frauds and related offences which involved using the identities of others) was "*systematic, sophisticated and involved extensive planning and premeditation*" and created "*a real sense of violation*" in those affected. While the offender's incarceration caused "*significant hardship*" to his wife and child, less weight would be given to the impact on his parents and siblings (to whom he provided financial support) "*in light of their less direct relationship*". Moreover, "*to the extent that the support that [the offender] had previously provided to his immediate family, his parents and siblings was derived from his ill-gotten gains and generated an expectation of ongoing support, that was a source of support that they were not entitled to receive in the first place*."[667]

(g) In resentencing an offender for a significant role in 12 importations of substantial quantities of cocaine, for which he received massive financial reward, Hamill J (Davies and Sweeney JJ agreeing) said that while the impact on the offender's family had been devastating "*those matters, while very sad and relevant, cannot overwhelm the grave objective seriousness of the offending*".[668]

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662 *R v BC* [2022] ACTCA 19, [42].
663 *Mohamed v R* [2022] VSCA 136, [99].
664 *Mohamed v R* [2022] VSCA 136, [94].
665 *Rodgerson v R [No 2]* [2022] VSCA 154, [84], [86]-[92].
666 *Rasel v R* [2022] NSWCCA 239, [34]-[50].
667 *Rasel v R* [2022] NSWCCA 239, [42]-[43].
668 *Flower v R* [2024] NSWCCA 76, [102].

423. As these decisions indicate, even without a threshold requirement of exceptional circumstances, probable hardship to family or dependants will not necessarily warrant a reduction in sentence. It must remain true, as Callaway JA said in *Gaw*,[669] that–

> *Hardship, even exceptional hardship, to children or other dependants is not a passport to freedom. It is simply a factor to be taken into account. In some cases it is entitled to great weight, in others to hardly any weight at all.*

424. The force of what was said in *HJT*[670] also remains:

> *The more serious the offence, the less the court has the capacity to mitigate punishment having regard to hardship to an offender's family. This is particularly so in a case where the predominant sentencing considerations are personal and general deterrence. The period over which the offences were committed may also be a relevant consideration.*

425. The extent of reduction (if any) will depend on all the circumstances. The court must give due weight to other factors including the need for adequate punishment, denunciation and general and specific deterrence. The practical result of giving due weight to these factors – particularly in cases in which a sentence of imprisonment may be warranted – is that, as was said in *BC*, there is "*a relatively high bar before hardship will result in any significant reduction in sentence*".

"Probable effect" on family or dependants

426. Paragraph 16A(2)(p) refers to "*the probable effect*" of the sentence or order. This is an internal constraint on s 16A(2)(p), unlike other factors to be considered under s 16A.[671] A merely possible effect is not sufficient.[672]

427. It is an error to refer to hardship to family or dependants in terms of risk; such matters are to be assessed on the balance of probabilities.[673] If necessary, the court may defer sentencing to enable assessment of the probable effect;[674] in some cases, it may be an error not to do so.[675]

Probable effect of any sentence or order under consideration

428. The focus of s 16A(2)(p) is on the probable effect of *the sentence or order under consideration.* This should be distinguished from an effect attributable to *the offending itself or its detection or prosecution*, which are not referred to. Effects which have occurred prior to sentencing – such as loss of income resulting from dismissal of the offender from employment, the freezing or seizure of family assets, or public opprobrium – cannot fall within the paragraph; they can be relevant only to the extent that they indicate the probable *other or additional effects* which would result from a particular sentence or order.

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669 *DPP (Cth) v Gaw* [2006] VSCA 51, [21] (Callaway JA, Eames and Ashley JJA agreeing). In that case the hardship was found to be sufficiently exceptional to be taken into account pursuant to s 16A(2)(p) ([20]).

670 *HJT v Western Australia* [2020] WASCA 120, [59].

671 *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [51].

672 *R v Berlinsky* [2005] SASC 316, [41]-[46] (Bleby J); *R v Togias* [2001] NSWCCA 522, [10]-[11]; *DPP (Cth) v Bui* (2011) 32 VR 149, [28].

673 *DPP (Cth) v Bui* (2011) 32 VR 149, [28].

674 *R v Togias* [2001] NSWCCA 522, [6]-[7], [66]-[67].

675 E.g. *Togias* [2001] NSWCCA 522; *Nguyen v R* [2001] WASCA 72, [12], [70]-[72]. *Nguyen* should be understood as based on the overriding duty of a court to prevent a miscarriage of justice, in spite of the failure of defence counsel to provide necessary information and assistance.

Impact on sentence

429. If hardship to family is taken into account, it may affect either the type of sentence imposed or the duration of the head sentence or of any period, or minimum period, of imprisonment to be served.[676] On a Crown appeal against sentence, it may be relevant to the exercise of the residual discretion.[677]

430. Probable hardship to family or dependants may be relevant in determining the conditions to be imposed on a s 20 bond or a recognizance release order, and may require mitigation of the severity of such conditions.[678]

No requirement to specify reduction

431. There is no requirement to specify the extent of any reduction; the probable effect on family or dependants is, like other factors in s 16A(2), a matter to be taken into account as part of the instinctive synthesis of relevant considerations.

Effect on the offender

432. *The effect on the offender* of the hardship which their imprisonment will cause to their family raises different considerations and may fall for consideration even if exceptional hardship is required under s 16A(2)(p) and is not shown.[679] The effect on the offender may be relevant to matters under s 16A(2)(j), s 16A(2)(m) or s 16A(2)(n), to mention a few examples.[680]

3.5 Other matters not referred to in s 16A(2)

433. The list of factors in s 16A(2) is not exhaustive of the matters which must be taken into account in sentencing a federal offender. As noted earlier, s 16A(2) accommodates the application of some judicially-developed principles of sentencing. Such principles will not apply, however, if they are inconsistent with the requirements of s 16A on its proper construction, or with other Commonwealth laws, or if Commonwealth law leaves no gap to be filled by common law principles.[681]

434. The following are some matters which are not referred to in s 16A(2), and which have been argued to be applicable in the sentencing of federal offenders.

3.5.1 Community protection

435. All the main purposes of punishment tend ultimately towards protection of the community from crime. However references to the need to protect the community as a purpose of sentencing usually advert more specifically to the purpose of preventing the offender from committing a further offence, or reducing the risk that the offender will do so – not indirectly, by seeking to deter or to rehabilitate the offender, but directly, by incarceration or other measures to make commission of further offences impossible, or at least more difficult. In appropriate cases, the need to protect the community by such direct means (often referred to as incapacitation) is a legitimate purpose of sentencing, independent of

676 Cf *Dipangkear v R* [2010] NSWCCA 156, [34].
677 *R v Omari* [2022] ACTCA 4, [116]-[121].
678 *R v Theodossio* [2000] 1 Qd R 299, [6]-[7].
679 *Markovic v R* (2010) 30 VR 589, [5], [20]; *R v Constant* (2016) 126 SASR 1, [68]-[69].
680 If the offender has come to Australia for the purpose of committing an offence, hardship to the offender resulting from separation from their family will carry little weight: *R v Adams* [2007] VSCA 37, [24]; *Lau v R* [2011] VSCA 324, [43]; *Pham v R* [2012] VSCA 101, [8], [41].
681 *Bui v DPP (Cth)* (2012) 244 CLR 638.

other purposes such as general or specific deterrence, or denunciation, or rehabilitation, and may warrant a more severe sentence. However (except as provided by statute) the need to protect the community does not permit the imposition of a sentence which is disproportionate to the seriousness of the offending.[682]

436. This well-established common law principle has been applied in the sentencing of federal offenders, especially for preparatory terrorism offences.[683] Community protection will be of particular importance in sentencing those who commit such offences. Such offenders pose a very real danger to the community.[684] The sentencing court is not simply concerned with future criminal conduct of a recidivist character, but with the possibility of perfection of the very crime for the preparation of which the offender has been found guilty.[685] In such cases the element of protection of society must be given substantial weight.[686]

437. However the relevance of the principle of incapacitation or community protection is not confined to a particular class of offence. The protection of the community may be an important consideration in sentencing an offender whenever the nature and circumstances of the offending and of the offender are such as to suggest that the offender presents a danger to the community.[687] For example, community protection may be a weighty consideration in sentencing a repeat sexual offender.

3.5.2 Denunciation

438. One of the recognised purposes of punishment of offenders is to denounce the offending. To "denounce" – that is to declare publicly that a thing is evil or wicked – connotes righteous indignation.[688] Denunciation expresses the community's condemnation of the violation of "*our society's basic code of values as enshrined within our substantive criminal law*".[689] Denunciation is intended to vindicate the community values that have been insulted by the wrongful act; it works to confirm the validity of those

682 *Veen v R (No 2)* (1987) 164 CLR 465, 473-6; *DPP (Cth) v Besim; DPP (Cth) v MHK (No 3)* (2017) 52 VR 303, [29]-[42].

683 *Lodhi v R* [2007] NSWCCA 360, [87]-[88], [92], [274]; *Elomar v R* [2014] NSWCCA 303, [699]-[704]; *DPP (Cth) v Fattal* [2013] VSCA 276, [181], [218], [231]; *DPP (Cth) v MHK* (2017) 52 VR 272, [51], [54], [66]; *DPP (Cth) v Besim* [2017] VSCA 158, [112]-[114]; *IM v R* (2019) 100 NSWLR 110, [50]-[54]; *Said v R* [2019] NSWCCA 239, [83]; *Khalid v R* (2020) 102 NSWLR 160, [80], [86]; *Abbas v R* [2020] VSCA 80, [61]-[63], [69]; *DPP (Cth) v Shire Ali* [2020] VSCA 330, [74]. See *DPP (Cth) v Besim; DPP (Cth) v MHK (No 3)* (2017) 52 VR 303, [29]-[42]; *Khan v R* [2022] NSWCCA 47, [129].

684 *DPP (Cth) v MHK* (2017) 52 VR 272, [54]. If, when sentenced, the offender has not renounced the views that underlay the offending, the continuing danger is particularly great: compare *Lodhi v R* [2007] NSWCCA 360, [82]-[83], [88]; *DPP (Cth) v Fattal* [2013] VSCA 276, [181], [218]; *DPP (Cth) v Besim* [2017] VSCA 158, [112]-[114]; *Khalid v R* (2020) 102 NSWLR 160, [86]. Conversely, if the court is satisfied that the offender has genuinely renounced adherence to such views, and that the risk of re-offending is thereby very greatly reduced, considerations of community protection will be of less importance: *Mohamed v R* [2022] VSCA 136, [69]-[70]; *AH v R* [2023] NSWCCA 230, [115].

685 *Lodhi v R* [2007] NSWCCA 360, [108].

686 *Lodhi v R* [2007] NSWCCA 360, [109]; *DPP (Cth) v MHK* (2017) 52 VR 272, [54].

687 E.g. *Elmir v R* [2021] NSWCCA 19, [70]-[71] (foreign incursion offence); *Rodgerson v R [No 2]* [2022] VSCA 154, [89] (serious drug trafficking).

688 *R v O'Sullivan; Ex parte Attorney-General (Qld)* (2019) 3 QR 196, [74].

689 *R v M (CA)* [1996] 1 SCR 500, [81]; cited by Kirby J in *Ryan v R* (2001) 206 CLR 267, [118].

values by an act of judicial government that repudiates the offending conduct.[690] It thereby seeks to maintain the rule of law.[691]

439. Denunciation may be a weighty factor in sentencing even if, in the circumstances, the offender is not an appropriate medium for general deterrence. In *Munda*,[692] which concerned an offence of manslaughter, the plurality (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ) said–

> *[T]he proper role of the criminal law is not limited to the utilitarian value of general deterrence. The criminal law is more than a mode of social engineering which operates by providing disincentives directed to reducing unacceptably deviant behaviour within the community. To view the criminal law exclusively, or even principally, as a mechanism for the regulation of the risks of deviant behaviour is to fail to recognise the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence.*

440. The principle of denunciation is not confined to offences of violence or offences with individual victims. It has been invoked in sentencing for a range of Commonwealth offences.[693] For example, in *Gregory*[694] the court emphasised the importance of denunciation in sentencing for tax frauds:

> *A sentence imposed for fraud upon the taxation revenue, is intended to reaffirm basic community values that all citizens according to their means should fairly share the burden of the incidence of taxation so as to enable government to provide for the community, that the revenue must accordingly be protected and that the offender should be censured through manifest denunciation. When these considerations are not reflected in the responses of the courts, the criminal justice system itself fails to achieve its objectives.*

3.5.3 Parity

441. The common law requirements for a sentencing court to avoid unjustified disparity in the sentences imposed on co-offenders[695] apply to the sentencing of federal offenders.[696]

442. Although often expressed as a question whether the disparity is such as to give rise to "a justifiable sense of grievance"[697] in the offender, the test is not subjective:[698] whether there is unjustified disparity with a sentence imposed on a co-offender is to be assessed by an objective comparison with the co-offender's case.[699] Matters which must be considered include factors personal to the offender (such as

690 *R v O'Sullivan; Ex parte Attorney-General (Qld)* (2019) 3 QR 196, [145].
691 *R v O'Sullivan; Ex parte Attorney-General (Qld)* (2019) 3 QR 196, [148].
692 *Munda v Western Australia* (2013) 249 CLR 600, [54].
693 E.g. *R v Ronen* [2006] NSWCCA 123, [66] (tax fraud); *Nguyen v R* [2011] VSCA 32, [84] (drug importation); *DPP (Cth) v Beattie* [2017] NSWCCA 301, [120], [131], [177], [209] (child sexual abuse); *Kannis v R* [2020] NSWCCA 79, [124] (child abuse material and grooming offences); *DPP (Cth) v Shire Ali* [2020] VSCA 330, [107] (terrorism).
694 *DPP (Cth) v Gregory* (2011) 34 VR 1, [57].
695 *Lowe v R* (1984) 154 CLR 606; *Green v R* (2011) 244 CLR 462.
696 *Postiglione v R* (1997) 189 CLR 295. See also *Eakin v R* [2020] NSWCCA 294, [9]-[11] (Basten JA, dissenting in the result).
697 *Lowe v R* (1984) 154 CLR 606, 610 (Gibbs CJ), 613 (Mason J), 623 (Dawson J).
698 *Postiglione v R* (1997) 189 CLR 295, 323 (Gummow J), 338 (Kirby J).
699 *Green v R* (2011) 244 CLR 462, [31] (French CJ, Crennan and Kiefel JJ).

age, background, criminal history and general character) and the part each has played in the relevant criminal conduct or enterprise.[700]

443. Unjustified disparity may arise whether the sentence imposed on the co-offender is more lenient, the same or more severe.[701] For example, on appeal, unjustified disparity may be shown by comparing the sentence imposed on the appellant with a more severe sentence imposed on a co-offender, if the difference between the sentences is inadequate to reflect differences in the objective seriousness of their offending or in their subjective circumstances.[702]

444. A legitimate sense of grievance can arise as a result of a later sentence imposed on a co-offender; therefore a sentence which, but for the subsequent sentence imposed on a co-offender, would be free from error, may nonetheless be disturbed on appeal for disparity.[703]

445. If the co-offender has been resentenced following an appeal, the comparison to be made is with the revised sentence, not the original sentence.[704]

446. Where co-offenders are not sentenced by the same judge, the second judge is not bound by the findings made by the first judge in respect of another co-offender. Thus, differences in the result where different judges sentence co-offenders may be explicable by reference to differences in the evidence presented in each case, rather than by unjustifiable disparity.[705]

447. A parity ground on appeal does not afford an offender an opportunity to impugn the sentencing judgment of a co-offender by alleging error (for example, in a finding about the role of the applicant) in that judgment. A parity appeal accepts the sentence of the co-accused, and it is used as the benchmark from which to determine whether there is disparity.[706]

448. If the co-offender was dealt with as a juvenile offender, under a sentencing regime with different principles and different penalties, this greatly reduces, almost to vanishing point, the relevance of the sentence imposed to the sentencing of an adult offender.[707]

449. Parity comparison is also more difficult if the sentence imposed on the co-offender takes into account other offending (for example, under s 16BA of the *Crimes Act 1914* (Cth))[708] or consists of an aggregate

700 *Green v R* (2011) 244 CLR 462, [31]. In the consideration of sentencing disparity, the key points of comparison will be offence gravity; offender role and moral culpability; offender criminal record; and any significant personal circumstances: *Tawfik v R* (2021) 64 VR 561, [12] (Maxwell P).

701 *Eakin v R* [2020] NSWCCA 294, [42]-[48], [123]-[127].

702 E.g. *Eakin v R* [2020] NSWCCA 294.

703 *Jones v R* (1993) 67 ALJR 376, 377; see the discussion of the implications of this principle in *Kitson v R* [2022] NSWCCA 166, [44]-[54] (Bell CJ, Gleeson JA and Yehia J agreeing).

704 *Eakin v R* [2020] NSWCCA 294, [58]-[60], [131]; see also [22] (Basten JA, dissenting in the result). The resentencing of a co-offender on appeal may require the resentencing of the offender to preserve appropriate parity between their sentences: e.g. *Tawfik v R* (2021) 64 VR 561, [226]; .

705 *Martellotta v R* [2021] NSWCCA 168, [15]; *Narayan v R* [2022] NSWCCA 163, [52].

706 *Martellotta v R* [2021] NSWCCA 168, [58]; *Narayan v R* [2022] NSWCCA 163, [53]-[54]. For this reason, an appellate court should usually deal with a ground of appeal that a sentence was manifestly excessive before considering a ground alleging unjustified disparity: *Ritchie v R* [2023] NSWCCA 153, [2]-[13] (Adamson JA; McNaughton J agreeing).

707 *Apulu v R* [2022] NSWCCA 244, [107]-[114] (Wilson J; Davies J agreeing ([49])).

708 *Azari v R* [2021] NSWCCA 199, [76].

sentence which includes other offending,[709] or is otherwise part of a total sentence which includes unrelated offending (and which may therefore have been reduced in the application of the principle of totality).[710]

450. Although avoiding unjustified disparity may require the imposition of a more lenient sentence than would otherwise have been the case, the parity principle does not require the imposition of a sentence that is wholly inadequate or so lenient as to be an affront to the proper administration of justice.[711] The court does not compound one error by making another.[712] A sentencing court (or an appellate court) may decide that a sentence imposed on a co-offender was so low as to reduce or negate the operation of the principle of parity.[713]

451. The parity principle does not provide a basis for imposing a sentence of greater severity than would otherwise be appropriate on one co-offender in order to achieve consistency with a sentence imposed on another co-offender.[714]

452. The foundation of the parity principle in the norm of equality before the law[715] requires that its application be governed by consideration of substance rather than form; therefore the comparison is not confined to offenders charged with the same offence.[716] This approach also applies in the sentencing of federal offenders.[717]

453. The proper limits of the application of principles of parity and equal justice to persons who are not co-offenders in the conventional sense is the subject of conflicting authority. In Victoria, parity (or equal justice) comparisons may be made with offenders who are neither co-offenders nor parties to the same criminal enterprise, if there is some other connection such as a common victim.[718] Courts in Queensland[719] and New South Wales[720] have refused to extend parity (or equal justice) comparisons so far.

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709 If the court, in imposing an aggregate sentence, has specified indicative sentences for the relevant offences, they may be considered in assessing whether there is unjustified disparity: *RH v R* [2019] NSWCCA 64, [87]; *Ibrahim v R* [2022] NSWCCA 161, [86].

710 *Postiglione v R* (1997) 189 CLR 295. As to the proper approach to assessing parity in such a case, see *Kelly v R* [2017] NSWCCA 256, [21]-[39] (Beech-Jones J, Basten JA and Fagan J agreeing). Beech-Jones J concluded ([39]) that what must ultimately be compared is "*all the components of the sentence for all the offences that each of the offenders is serving and the circumstances of the common and unrelated offending of the co-offender*".

711 *Green v R* (2011) 244 CLR 462, [33].

712 *R v Simmons* [2008] VSCA 185, [32]. See *Fletcher v R* [2011] VSCA 4, [30]–[32] (Weinberg JA and King AJA).

713 *DPP v Holder* (2014) 41 VR 467, [29]. The Court held that the failure of the prosecution to contend for such an approach before the sentencing court may preclude such a submission on appeal: see "6.1.1 Prosecution not permitted or obliged to submit range of sentences".

714 *R v El Hassan* [2003] NSWCCA 139, [47]; *Majeed v R* [2013] VSCA 40, [49]; *R v Anthony* [2020] QCA 79; *R v Lembke* [2020] NSWCCA 293, [56]-[59].

715 *Green v R* (2011) 244 CLR 462, [28], [32].

716 *Green v R* (2011) 244 CLR 462, [30]. The parity principle does not apply merely because the corresponding offence has been taken into account (under s 16BA of the *Crimes Act 1914* (Cth) or its equivalents) in sentencing a co-offender for other unrelated offences: *Ahmad v R* [2019] NSWCCA 198, [70].

717 E.g. *Jimmy v R* (2010) 77 NSWLR 540; *DPP (Cth) v Gregory* (2011) 34 VR 1, [26]-[28]; *DPP (Cth) v Peng* [2014] VSCA 128, [33].

718 *Farrugia v R* (2011) 32 VR 140.

719 The Queensland Court of Appeal has declined to follow *Farrugia*: see *R v Leathers* [2014] QCA 327; *R v Hughes* [2018] 2 Qd R 134.

720 *Baladjam v R* [2018] NSWCCA 304, [146]-[149].

454. The greater the differences in nature and seriousness between the crimes charged, the more difficult the application of the parity principle will become, to the point where the differences are so great that the principle can no longer be applied.[721]

455. The failure of a sentencing court to deal with submissions about the application of the parity principle has been found to constitute error, although resentencing will not be warranted if there was in fact no unjustified disparity.[722]

456. The parity principle does not apply merely because, in sentencing a co-offender for other unrelated offences, the corresponding offence has been taken into account (under s 16BA of the *Crimes Act 1914* (Cth) or its equivalents); since the co-offender is not sentenced for the offence which is taken into account, there is no relevant comparison to be made.[723]

3.5.4 Delay

Common law principles

457. Delay between the detection of the offending and the bringing of charges, or in the hearing and determination of charges, or in sentencing, is not, of itself, a mitigating factor.[724] However delay (that is, delay which is undue, unwarranted or inordinate in the particular circumstances[725]) may be relevant to sentence in two principal ways.

458. First, as a result of the delay, the offender may have made progress towards rehabilitation, and the need for specific deterrence may accordingly be moderated.[726] Where there has been a relatively lengthy process of rehabilitation, insofar as circumstances permit, that process should not be jeopardised.[727] If, on the other hand, the offender has engaged in further offending since the detection of the initial offending, such mitigatory effect as the lapse of time between detection and sentencing might have produced may be diminished, if not extinguished.[728]

459. Second, fairness dictates that the fact that an offender has been kept in suspense as to their fate should be taken into account in mitigation.[729] Further, if during the period of delay the offender has adopted a reasonable expectation that they would not be charged, or that a pending prosecution would not proceed, and the offender has ordered their affairs on the faith of that expectation, fairness may require mitigation of the sentence.[730] Underlying this approach is the notion that the consequences of

721 *Jimmy v R* (2010) 77 NSWLR 540, [203]; *DPP (Cth) v Gregory* (2011) 34 VR 1, [26]-[28].
722 *He v R (Cth)* [2022] NSWCCA 205, [30]-[48].
723 *Dunn v R* [2018] NSWCCA 108, [13]-[16]; *Ahmad v R* [2019] NSWCCA 198, [70].
724 *Prehn v R* [2003] TASSC 55, [21]; *Scook v R* [2008] WASCA 114, [31], [58].
725 In *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [93], Basten JA (with whom S Campbell and N Adams JJ agreed) observed, "*in order to characterise a lapse of time as involving unwarranted delay, it may be necessary to form some judgment about what can reasonably be expected of the criminal justice system in its application to the particular circumstances of the proceedings.*"
726 *Duncan v R* (1983) 9 A Crim R 354, 356-7; *R v MWH* [2001] VSCA 196, [18]. Delay may be of particular significance in the sentencing of a young offender: e.g. *R v HCC* [2020] QCA 178.
727 *R v Cockerell* [2001] VSCA 239, [10]; *Fattah v R* [2016] VSCA 43, [8], [37]-[48]; *Hicks v R* [2016] VSCA 162, [23].
728 *Sergi v DPP (Cth)* [2015] VSCA 181, [43].
729 *R v Todd* [1982] 2 NSWLR 517, 519; *Mill v R* (1988) 166 CLR 59, 66; *R v Cockerell* [2001] VSCA 239, [10]; *R v Tiburcy* [2006] VSCA 244; *Arthars v R* (2013) 39 VR 613, [25]. However see *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194 (discussed below) as to the relevance of stress or anxiety resulting from delay in the sentencing of a federal offender.
730 *R v Schwabegger* [1998] 4 VR 649; *Scook v R* [2008] WASCA 114, [32], [63].

the delay (particularly stress or anxiety) may, in effect, constitute additional punishment of the offender.[731]

460. When considering whether a delay requires an element of fairness to be taken into account as a mitigating factor, the court must have regard to the degree to which the accused had control over the length of that delay.[732] Any suspense or uncertainty on the part of an offender as to whether the commission of the offence will ever be detected, or whether they will ever be prosecuted, is not to be taken into account.[733] An accused person is not to be regarded as at fault merely for exercising the right to contest a charge.[734] If the delay is no more than an inevitable consequence of the length or complexity of the offending, or the steps taken by the offender to prevent detection, or the refusal of the offender to cooperate in the investigation of a complex fraud, or the resulting scale of the investigation or the prosecution case, it will often carry little or no weight in mitigation.[735] Moreover, to the extent that delay is directly attributable to the conduct of an accused person (for example, by absconding, or by lying to investigators, or by obstructive tactics in the trial), it would often be contrary to the public interest to mitigate the sentence because of the delay.[736]

461. Some authorities proceed on the basis that fairness to the offender does not require that delay (although excessive) which is merely the inevitable consequence of an overburdened criminal justice system be treated as mitigating.[737] In other cases, however, courts have proceeded on the basis that stress and anxiety resulting from any undue delay which is caused by the prosecutorial process or the administration of the courts (and not attributable to the actions of the offender) may be treated as a factor in mitigation.[738]

462. There is no automatic discount in every case of asserted delay; the reasons and circumstances surrounding any delay need to be examined in each case.[739] In the general run of cases, delay will attract a significant discount only where the sentencing court concludes that there has been real progress towards rehabilitation as such or where other favourable factors have positively emerged in the time between the offences and the passing of sentence.[740]

463. An offender who relies upon delay as a factor in mitigation of sentence bears the onus of establishing, on the balance of probabilities, the basis upon which mitigation is said to be warranted.[741]

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731 E.g. *R v Katsoulis* [2008] VSCA 278, [13]-[14]; *R v Cox* [2013] QCA 10, [101].

732 *Arthars v R* (2013) 39 VR 613, [28].

733 *R v Spiers* [2008] NSWCCA 107, [37]-[38]; *Ocek v R* [2023] NSWCCA 308, [100]-[101].

734 *Arthars v R* (2013) 39 VR 613, [27]; *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [92].

735 See *R v Nikodjevic* [2004] VSCA 222, [20]; *Scook v R* [2008] WASCA 114, [59]-[60]; *Day v R* [2011] VSCA 243, [11]-[22]; *Giourtalis v R* [2013] NSWCCA 216, [1791]; *Zhou v R* [2014] VSCA 123; *Sergi v DPP (Cth)* [2015] VSCA 181, [44]-[48].

736 *R v Shore* (1992) 66 A Crim R 37, 47; *R v Whyte* (2004) 7 VR 397, [25]-[27]; *R v ONA* (2009) 24 VR 197, [4]; *Roberts v R* (2022) 141 SASR 73, [316].

737 E.g. *Scook v R* [2008] WASCA 114, [33], [61]; *Longworth v R* [2017] NSWCCA 119, [33]-[37]. Cf *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [105].

738 *Crawley v R* (1981) 36 ALR 241, 244, 247–8, 255; *R v Cockerell* [2001] VSCA 239, [10]; *R v Melrose* [2016] QCA 202, [25]-[27]. But, in relation to the sentencing of federal offenders, see *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, which is discussed below.

739 *R v Merrett* (2007) 14 VR 392, [34]; *Day v R* [2011] VSCA 243, [19]-[21]; *Arthars v R* (2013) 39 VR 613, [29]-[30]; *Zhou v R* [2014] VSCA 123, [22]. Cf *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [89]-[100].

740 *Bell v R* [2001] WASCA 40, [8]; *Roberts v R* (2022) 141 SASR 73, [318].

741 *Sabra v R* [2015] NSWCCA 38, [47]; *Hill v R* [2017] NSWCCA 136, [226].

Interaction with Crimes Act 1914, s 16A

464. Although the common law principles regarding delay have frequently been applied in the sentencing of federal offenders,[742] there has been relatively little analysis of the consistency of those principles with the provisions of s 16A of the *Crimes Act 1914* (Cth), which is the starting point in ascertaining the considerations relevant to the sentencing of a federal offender.

465. In *Scook*,[743] McLure JA (with whom Buss and Miller JJA agreed) said,

> *Delay itself is not one of the mandatory sentencing matters listed in s 16A(2) of the Crimes Act 1914 (Cth). Its relevance or otherwise to the sentencing of Commonwealth offenders will depend on the circumstances of the case. The principles articulated by State courts in sentencing State and Commonwealth offenders serve as a guide.*

466. In *Pratten (No 2)*,[744] Basten JA (with whom S Campbell and N Adams JJ agreed) referred to a number of factors specified in s 16A(2)[745] as examples of ways in which delay may be relevant in the sentencing of a federal offender. His Honour made two significant points about those statutory factors.

467. First, Basten JA referred to passages in some of the authorities involving the sentencing of federal offenders which suggest that mitigation should be accorded where delay is attributable to the dilatoriness or neglect on the part of the state or its instrumentalities.[746] His Honour noted that, in relation to the sentencing of a federal offender, such a suggestion "*has not been located squarely within any of the factors listed in s 16A(2). Nor does it self-evidently have such a home*."[747] Absent statutory authority, in sentencing a federal offender the severity of the penalty should not be reduced as an expression of disapproval of the conduct of the prosecutor or investigating authority.[748]

468. Second, with regard to stress or anxiety resulting from delay, Basten JA pointed out that stress and anxiety are a natural consequence of being charged and then convicted of serious criminal offences.[749] If they are to affect the severity of the sentence of a federal offender, it will be through the considerations referred to in s 16A(2).[750] The relevant factor in s 16A(2) is the "*physical or mental condition*" of the offender (s 16A(2)(m)).[751] In accordance with the High Court decision in *Bui*,[752] his Honour said, these

742 For example, *R v Schwabegger* [1998] 4 VR 649; *R v Kearnes* [2003] NSWCCA 367; *Prehn v R* [2003] TASSC 55; *Scook v R* [2008] WASCA 114; *Giourtalis v R* [2013] NSWCCA 216; *Zhou v R* [2014] VSCA 123; *Sergi v DPP (Cth)* [2015] VSCA 181; *Sabra v R* [2015] NSWCCA 38; *R v Melrose* [2016] QCA 202.

743 *Scook v R* [2008] WASCA 114, [16].

744 *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194.

745 Basten JA instanced paragraphs (fa), (g), (h), (m) and (n) of s 16A(2): *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [96], [100].

746 *R v Schwabegger* [1998] 4 VR 649; *Scook v R* [2008] WASCA 114, [21], [64]. See also *Crawley v R* (1981) 36 ALR 241, 244, 247–8, 255; *R v Blanco* [1999] NSWCCA 121, [17]; *R v Cockerell* [2001] VSCA 239, [10].

747 *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [100].

748 *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [100].

749 *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [113].

750 *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [113].

751 *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [96].

752 *Bui v DPP (Cth)* (2012) 244 CLR 638.

should be established as actual, not presumed, conditions.[753] In other words, it follows from *Bui*[754] that if delay is invoked in mitigation, on the basis that it has caused or exacerbated the offender's stress, anxiety, depression or other "*physical or mental condition*", neither the condition nor its cause can be presumed, and must be established by evidence (or concession).

469. The observations in *Pratten (No 2)* should not be read as authority for the proposition that delay has no relevance to the sentencing of a federal offender unless it finds a "home" in s 16A or elsewhere in Part IB of the *Crimes Act 1914*. Common law principles relating to delay remain a relevant consideration when sentencing a federal offender.[755]

3.5.5 Duress

470. Under s 10.2 of the *Criminal Code* (Cth), duress is a defence to an offence in the *Code* or an offence to which Chapter 2 of the *Code* applies. The defence contains both subjective and objective elements. Duress which falls short of such a defence (for example, because the objective elements cannot be made out) may be relevant in assessing the degree of the offender's culpability.[756] But non-exculpatory duress does not obviate the need for general deterrence: "*General deterrence is not excluded by threats. On the contrary, general deterrence may provide a counter-threat*".[757]

3.5.6 Entrapment

471. Where there is a real possibility that, but for the assistance, encouragement or incitement offered by a police officer (including an undercover officer), the offender would not have committed the offence, the involvement of the police may carry some weight in sentencing. Whether it does will depend on consideration of whether, in all the circumstances of the case, the involvement of the police in the commission of the crime was such as diminished the offender's culpability.[758] The focus is not on the propriety of the police conduct but the level of culpability of the offender.[759] Coercion or pressure by the police is one factor, but not essential to the assessment.[760]

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753 *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [96]. In *Pratten*'s case itself, there was evidence that the offender had long-standing symptoms of depression, chronic stress, anxiety and low self-esteem, and that the length of the unresolved proceedings was an important contributing factor to his condition ([106]-[112]). The Court of Criminal Appeal concluded that to the extent that stress and anxiety may be due in part to periods of unwarranted delay in the prosecution of the proceedings, "*some allowance should be made*" in determining the appropriate sentence, but that "*the effect would not be of great significance*" ([113]).

754 See *Bui v DPP (Cth)* (2012) 244 CLR 638, [21]-[23], endorsing the view of Simpson J in *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1, [279]-[280].

755 *Aboud v R* [2021] NSWCCA 77, [84]-[92].

756 *Tiknius v R* [2011] NSWCCA 215, [30]-[54]; *Kao v R* [2020] NSWCCA 38, [31]-[32], [39]-[41], [44], [45]; *Eyeson v R* [2024] NSWCCA 52, [40]-[47].

757 *R v Roach* [2005] VSCA 162, [15]; cf. *Tiknius v R* [2011] NSWCCA 215, [51]-[53]; *Eyeson v R* [2024] NSWCCA 52, [54]-[55].

758 *Taouk v R* (1992) 65 A Crim R 387, 404; *Kada v R* [2017] VSCA 339, [72]; applied in relation to a federal offender in *DPP (Cth) v Haidari* [2013] VSCA 149, [33]-[36]; *Ibrahim v R* [2022] NSWCCA 161, [43]; *Masri v R* [2023] NSWCCA 266, [32]-[35].

759 *Taouk v R* (1992) 65 A Crim R 387, 403; *Kada v R* [2017] VSCA 339, [72]; *Environment Protection Authority v Grafil Pty Ltd* [2022] NSWCCA 268, [69]-[70].

760 *Ibrahim v R* [2022] NSWCCA 161, [61].

472. If the court concludes that the offender's culpability is diminished, the diminution cannot be expressed as a proportion or a percentage, or otherwise quantified.[761]

3.5.7 Childhood deprivation

473. At common law, courts have recognised – principally in cases of unpremeditated violence – that profound childhood deprivation may be mitigating in a variety of ways.[762] For example, growing up in an environment surrounded by alcohol abuse and violence may compromise the person's capacity to mature and to learn from experience;[763] the moral culpability of such an offender is likely to be reduced.[764] In *Bugmy*,[765] the High Court held that the effects of profound deprivation do not diminish over time and that an offender's deprived background must be given "full weight" in the determination of the appropriate sentence in every case. Profound childhood deprivation may be mitigating in sentencing for some purposes, but not for others: for example, it may explain poor impulse control, which may reduce moral culpability, but increase the importance of protecting the community from the offender.[766] Any reduced moral culpability for the offending must be weighed against other purposes of sentencing such as denunciation and just punishment.[767]

474. The plurality in *Bugmy* did not say that if a background of profound childhood deprivation is established it will (as distinct from may) be a mitigating factor.[768] The circumstances in which mitigation is warranted have been considered in subsequent decisions of intermediate appellate courts, particularly in New South Wales.[769] The New South Wales Court of Criminal Appeal has held that the requirement to give "full weight" to profound childhood deprivation when it is established does not mean that it needs to be given the same weight in every case.[770] Nor does it mean that moral culpability must be reduced in every case; "full weight" can be given in other ways as part of the instinctive synthesis.[771] An offender's background is not relevant in and of itself, but rather its relevance lies in the manner in which it informs the purposes of sentencing.[772] The Court has applied the same principles in sentencing a federal offender.[773]

475. If a causal link is established between the offender's profound childhood deprivation and the offending, it is likely to reduce the offender's moral culpability.[774] In some cases that causal link may be inferred.[775] If such a causal link between the offending and the background of deprivation is established,

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761 *Ibrahim v R* [2022] NSWCCA 161, [53].
762 The leading authority is *R v Fernando* (1992) 76 A Crim R 58, which concerned an indigenous offender. However the principle is concerned with social disadvantage, not aboriginality: *Bugmy v R* (2013) 249 CLR 571, [37].
763 *Bugmy v R* (2013) 249 CLR 571, [43].
764 *Bugmy v R* (2013) 249 CLR 571, [40].
765 *Bugmy v R* (2013) 249 CLR 571, [44].
766 *Bugmy v R* (2013) 249 CLR 571, [44].
767 *Munda v Western Australia* (2013) 249 CLR 600, [54].
768 *Perkins v R* [2018] NSWCCA 62, [77].
769 See the review of relevant authorities in *Dungay v R* [2020] NSWCCA 209, [136]-[153].
770 *Dungay v R* [2020] NSWCCA 209, [139].
771 *Dungay v R* [2020] NSWCCA 209, [139], [153]; *Nasrallah v R* (2021) 105 NSWLR 451, [24]-[25]; *MH v R* [2022] NSWCCA 287, [36].
772 *Ibrahim v R* [2022] NSWCCA 134, [29].
773 *Calason v R* [2023] NSWCCA 209, [44]-[54].
774 *Perkins v R* [2018] NSWCCA 62, [80].
775 *R v Millwood* [2012] NSWCCA 2, [69].

it may, but will not necessarily, make the offender an unsuitable vehicle for general deterrence.[776] However the effects of an offender's deprived background will not necessarily be taken into account solely for the purpose of mitigation.[777] A causal link to the offending may give additional weight to a conflicting purpose of punishment such as the need for protection of the community.[778]

476. In *Herrmann*,[779] a five-member bench of the Victorian Court of Appeal said that the relevance of childhood deprivation did not depend upon the establishment of a 'nexus' or 'realistic connection' between the offending and the relevant background circumstances (although the Court found that such a nexus was established in that case). However in a number of cases in New South Wales, it has been held that if there is no causal link (or at least, in the language of *Bugmy*, nothing in the childhood deprivation which 'explains' the offending), the offender's moral culpability may not be reduced.[780] Similarly, in *Ross*,[781] the Victorian Court of Appeal (invoking the language of *Bugmy*) was unable to see how the offender's childhood deprivation might be said to 'explain' the offending, which involved drug trafficking and an attempt to avoid arrest through reckless driving, and found it "*difficult to conceive*" how it might lead to any "*'meaningful reduction in [his] moral culpability'*".

477. In *Black*,[782] the *Bugmy* principles were applied to the sentencing of a federal offender for offences of fraud. The application of *Bugmy* principles had not been raised in the plea hearing, or by the parties to the appeal; it was raised for the first time by the Court itself in the hearing of the appeal (in which specific error was not alleged).[783] The Court noted that it had not been submitted on the plea hearing that the offender's childhood and youth (marred by sexual abuse, neglect, self-harm, drug abuse and mental illness) could "*as a stand-alone factor, operate to diminish the appellant's moral culpability*".[784] Citing *Herrmann*, the Court said that "*it was unnecessary to demonstrate any causative nexus between the relevant deprivation and the offending conduct.*"[785] The Court concluded that the offender's "*childhood and adolescent experiences amply justified a reduction in the evaluation of her moral culpability*", although it did not identify why this was so, or how the extent of such a reduction could be determined, in the absence of a causative nexus, particularly in view of the nature of the offending (sustained fraud over two periods totalling more than 6 years). The Court did not refer to the body of authority in which appellate courts have declined to treat childhood deprivation as reducing an offender's moral culpability for an offence involving planning, organisation or premeditation.[786] The reasoning appears to be difficult to reconcile with the subsequent decision in *Ross*,[787] which proceeds on the basis that any "*meaningful reduction in moral culpability*" depends on how (applying the language in

776 *Kennedy v R* [2022] NSWCCA 215, [43].
777 *Lee v Western Australia* [2022] WASCA 137, [61]-[63].
778 *Bugmy v R* (2013) 249 CLR 571, [44].
779 *DPP (Vic) v Herrmann* [2021] VSCA 160, [44]-[46].
780 *Perkins v R* [2018] NSWCCA 62, [83]; *Judge v R* [2018] NSWCCA 203, [32]; *Ahmad v R* [2019] NSWCCA 198, [33]; *MH v R* [2022] NSWCCA 287, [34]. See also *Berkland v R* [2022] 1 NZLR 509, [110]-[111].
781 *Ross v R* [2022] VSCA 149, [39].
782 *Black v R* [2022] VSCA 125.
783 *Black v R* [2022] VSCA 125, [22].
784 *Black v R* [2022] VSCA 125, [25]. The reference to this consideration as a "standalone factor" reflected a distinction drawn by the Court between the application of the *Bugmy* principles and consideration of the mental health of the offender, which was the focus of the submissions for the offender at the plea hearing (see [22]).
785 *Black v R* [2022] VSCA 125, [28].
786 E.g. *Taysavang v R* [2017] NSWCCA 146, [41]-[43]; *Crowley v R* [2017] NSWCCA 99, [43]-[44]; *Kolaka v R* [2019] NTCCA 16, [38]-[39].
787 *Ross v R* [2022] VSCA 149, [39].

Bugmy) the offender's childhood deprivation might be said to 'explain' the offending. The Court in *Black* made no reference to s 16A of the *Crimes Act 1914*, or to the principles applicable to the sentencing of a federal offender; in particular it did not address the question whether treating childhood deprivation as *axiomatically* reducing the moral culpability of a federal offender would be tantamount to an "automatic discount", which is contrary to the requirements of s 16A of the *Crimes Act 1914* (Cth).[788] Given the conflicting authorities on the application of the *Bugmy* principles, the way in which the question arose (not at the plea hearing or by the parties to the appeal, but only at the instance of the Court at the hearing of the appeal), the fact that the only ground of appeal was manifest excess, and the absence of consideration of federal sentencing principles, in the view of the CDPP the decision should not be taken as establishing a general principle in relation to the sentencing of a federal offender.

3.5.8 Drug addiction

478. The fact that the offender has, or had at the time of the offence, a drug addiction is not of itself a mitigating factor,[789] and does not serve to excuse offending,[790] but may be relevant to sentencing in a number of ways.

479. In *Henry*[791] (which concerned sentencing for armed robbery), Wood CJ at CL set out a number of relevant principles, which have been widely followed and applied.[792] *Henry* and other cases establish the following:

(a) The genesis of the addiction may indicate it was not entirely a free choice and is therefore relevant to moral culpability; for example, where the addiction developed at a very young age, or in a person with a mental impairment, such that they could not exercise appropriate judgment about the consequences, or where the addiction arose from prescription of addictive medication for medical reasons.[793] Conversely, where addiction develops in an adult offender at an age of "rational choice", the offender will be morally culpable for the consequences of that choice.[794]

(b) There is a distinction between an offender motivated solely to feed a drug addiction and one who offends for other purposes (for example, financial gain and/or part of a wider criminal enterprise). Some appellate authorities suggest offending solely to sustain an addiction demonstrates lower

788 *Bui v DPP (Cth)* (2012) 244 CLR 638, [19]. To put the question another way (consistently with *Bui*, as explained in *Atanackovic v R* (2015) 45 VR 179, [47]), is a common law doctrine applied in Victoria that childhood deprivation must be taken to reduce the moral culpability of the offender regardless of whether or not there is any causative nexus to the offending capable of being either "*accommodated*" by s 16A of the *Crimes Act 1914* (Cth) or "*picked up*" by s 80 of the *Judiciary Act* 1903 (Cth)? (See "1.5 Applicability of the common law".)

789 *R v Henry* (1999) 46 NSWLR 346, [259] (Wood CJ at CL); *Upston v Tasmania* (2018) 30 Tas R 262, [27]; *DPP v Poole* [2015] TASCCA 10, [32]; *R v Bui* [2018] SASCFC 19, [30]; *R v Koumis* (2008) 18 VR 434, [53]; *Mourkakos v R* [2018] VSCA 26, [118].

790 *Akoka v R* [2017] VSCA 214, [119]; *R v Bui* [2018] SASCFC 19, [30]; *R v Hammond* [1997] 2 Qd R 195, 200.

791 *R v Henry* (1999) 46 NSWLR 346, [273].

792 E.g. *R v Vu* [2006] NSWCCA 188, [63]; *Damiani v Western Australia* [2006] WASCA 47, [7]-[8]; *R v Roe* (2017) 40 NTLR 187, [45]; *R v Monks* (2019) 133 SASR 182, [41]; *R v Proom* (2003) 85 SASR 120, [39]-[43]; *Upston v Tasmania* (2018) 30 Tas R 262, [28].

793 *R v Lacey* (2007) 176 A Crim R 331, [15]-[17]; *R v Monks* (2019) 133 SASR 182, [41].

794 *R v Henry* (1999) 46 NSWLR 346, [185] (Spiegelman CJ), [257] (Wood CJ at CL); *R v Vu* [2006] NSWCCA 188, [75]; *R v Roe* (2017) 40 NTLR 187, [58]; *DPP v Poole* [2015] TASCCA 10, [33]; *Damiani v Western Australia* [2006] WASCA 47, [3].

culpability,[795] while others suggest it simply shows the absence of an aggravating feature.[796] Whether characterised as mitigating or as an absence of aggravating circumstances, the distinction will have a bearing on the sentence imposed.[797]

(c) Drug addiction is relevant to an assessment of prospects of rehabilitation in sentencing.[798] While prior treatment might weigh favourably on an offender, an offender's history of addiction might show prospects of rehabilitation are poor, and greater emphasis is therefore needed on personal deterrence.[799]

(d) Addiction may be relevant to assessing the criminality of the offence, where the evidence shows reduced capacity for exercising judgment, for example where the offender was "*in the grip of an extreme state of withdrawal of the kind that may have led to a frank disorder of thought processes*".[800] On the other hand, carefully planned or premeditated offending may weigh against such a submission.

480. The relevance of addiction, being only one of many factors to be weighed, will vary between individual cases.[801] It may be outweighed by other sentencing factors,[802] for example, where the case warrants emphasis on deterrence.[803] Courts have rejected as a general proposition that less weight should be given to general deterrence where offending was committed to feed a drug addiction.[804]

481. Where an addiction is relied upon as a relevant factor in sentencing, the evidence must be of a nature and quality to enable an assessment of whether an addiction exists, its severity, and whether there was a causal link between the addiction and the offending.[805]

482. See also "3.4.13 Character, antecedents, age, means, physical/mental condition – s 16A(2)(m)".

3.5.9 Gambling

483. Courts have observed that many principles applicable to drug addiction as a factor in sentencing are also relevant to gambling addiction.[806] (See "3.5.8 Drug addiction".)

795 *R v Dang* [1999] QCA 414, [7]; *Upston v Tasmania* (2018) 30 Tas R 262, [27]- [28]; *R v Grossi* (2008) 23 VR 500, [53]; *Mourkakos v R* [2018] VSCA 26, [119]; cf WA authorities where the Court of Appeal observed that drug dealing to finance addiction is generally not a basis for leniency, because there is still a commercial element: *Chu v Western Australia* [2012] WASCA 135, [33]; *Italiano v Western Australia* [2020] WASCA 115, [53].

796 *R v Henry* (1999) 46 NSWLR 346, [274]; *R v Bui* [2018] SASCFC 19, [30]-[31].

797 *R v Koumis* (2008) 18 VR 434, [50].

798 *R v Henry* (1999) 46 NSWLR 346, [174], [273]; *R v Monks* (2019) 133 SASR 182, [41]; *Mourkakos v R* [2018] VSCA 26, [118]; *R v Bui* [2018] SASCFC 19, [30].

799 *R v Hammond* [1997] 2 Qd R 195, 200; *R v Roe* (2017) 40 NTLR 187, [45]; *R v Proom* (2003) 85 SASR 120, [43].

800 *R v Henry* (1999) 46 NSWLR 346, [273].

801 *R v Henry* (1999) 46 NSWLR 346, [270]-[271] (Wood CJ at CL); *R v Dang* [1999] QCA 414, [8]; *R v KAQ; Ex p Attorney-General (Qld)* [2015] QCA 98, [30]; *DPP v Poole* [2015] TASCCA 10, [33]; *Damiani v Western Australia* [2006] WASCA 47, [3].

802 *R v Proom* (2003) 85 SASR 120, [43].

803 *R v Proom* (2003) 85 SASR 120, [51]; *R v Koumis* (2008) 18 VR 434, [53]; *R v Roe* (2017) 40 NTLR 187, [57]).

804 *R v Henry* (1999) 46 NSWLR 346, [204]; *McNab v Western Australia* [2010] WASCA 66, [12].

805 *Jones v R* [2021] VSCA 114, [24]-[27]; *R v Vu* [2006] NSWCCA 188, [60]-[61], [65].

806 *R v Johnston* [2017] NSWCCA 53, [41]; *R v Grossi* (2008) 23 VR 500, [53]; *McNab v Western Australia* [2010] WASCA 66, [12]. In *Johnston*, [40], Bathurst CJ observed that general principles regarding the relevance of drug addiction to sentencing equally apply to fraud committed to fund a gambling addiction.

484. Mitigation on the basis of a gambling addiction or disorder will generally not be warranted.[807] Even where an offender has established a diagnosis of a pathological "gambling disorder" under the *Diagnostic and Statistical Manual of Mental Disorders* through psychiatric evidence, it has repeatedly been held that such a disorder will ordinarily not reduce the importance of general deterrence or warrant any appreciable moderation of an otherwise appropriate sentence.[808] To treat a gambling addiction as mitigating would be uncommon, unusual and exceptional.[809] While it may explain an offender's motivation to offend, it does not lessen the seriousness of the offending or reduce moral culpability.[810]

485. A gambling disorder or addiction will generally not be considered a cause of, or directly connected to, the offending, particularly where the offending involved repeated, calculated, pre-meditated criminal conduct, such as prolonged dishonesty offending. In such cases, offenders still exercise a degree of choice over how to fund their addiction.[811]

486. A gambling addiction may be relevant to sentencing in other ways, depending on the circumstances. For example, where all proceeds of offending are spent on gambling, it may negate an otherwise aggravating feature that the offending arose purely out of greed to fund an extravagant lifestyle.[812] On the other hand, offending to feed a gambling addiction does not mitigate a sentence on the basis that the offending was driven by financial hardship or need, especially in the context of serious fraud.[813]

487. As with other relevant mental health or addiction issues, treatment of a gambling disorder prior to sentence, or failure to seek any treatment, is relevant to assessing an offender's prospects of rehabilitation and risk of reoffending in sentencing.[814]

488. See also "3.4.13 Character, antecedents, age, means, physical/mental condition – s 16A(2)(m)".

3.5.10 Cultural background of the offender

489. For offences committed on or after 13 December 2006 it is no longer mandatory for a court sentencing a federal offender to take into account the defendant's cultural background (which was previously one of the matters listed in s 16A(2)(m) of the *Crimes Act 1914* (Cth)).[815] In addition, for offences committed on or after that date, the court must not take into account (other than under

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807 *R v Johnston* [2017] NSWCCA 53, [36]-[38]; *Hayward v R (Cth)* [2021] NSWCCA 63, [80]; *R v Grossi* (2008) 23 VR 500, [52], [53], [56]; *R v Wang* [2009] VSCA 67, [17]; *R v Telford* [2005] SASC 349, [16] (Doyle CJ), [30]-[31] (Bleby J); *Lambert v Western Australia* [2021] WASCA 199, [41]; *Johnstone v Tasmania* [2011] TASCCA 9, [13]-[14]; *Perri v Tasmania* [2022] TASCCA 3, [18].

808 *R v Johnston* [2017] NSWCCA 53, [38]-[42]; *R v Grossi* (2008) 23 VR 500, [56].

809 *R v Grossi* (2008) 23 VR 500, [52]; *Lambert v Western Australia* [2021] WASCA 199, [41]; *McNab v Western Australia* [2010] WASCA 66, [10]; *R v Martin* (1994) 119 FLR 220, 9.

810 *R v Johnston* [2017] NSWCCA 53, [38]; *R v Telford* [2005] SASC 349, [14] (Doyle CJ); *Gill v Trenerry* (1999) 109 A Crim R 201, [10].

811 *R v Grossi* (2008) 23 VR 500, [56]; *R v Johnston* [2017] NSWCCA 53, [36]-[38]; *R v Telford* [2005] SASC 349, [30] (Bleby J).

812 *R v Wang* [2009] VSCA 67, [18]; *R v Mudgway* [2014] QCA 268, [23].

813 *Bogers v Western Australia* [2020] WASCA 174, [66].

814 *Hayward v R (Cth)* [2021] NSWCCA 63, [89]; *R v Johnston* [2017] NSWCCA 53, [40] (citing *R v Henry* (1999) 46 NSWLR 346, [273]).

815 See *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth) effective from 12 December 2006 – Item 4 in Schedule 1. The relevant Explanatory Memorandum makes clear that the court may take into account an offender's cultural background, should this be appropriate, other than as a mitigating or aggravating factor.

s 16A(2)(ma)) any form of customary law or cultural practice in mitigation or aggravation of the offending – see *Crimes Act 1914* (Cth), s 16A(2A).[816]

3.5.11 Cooperation in the conduct of criminal proceedings against the offender

490. Cooperation with law enforcement agencies is specified as a factor in s 16A(2)(h), but cooperation in the conduct of criminal proceedings against the offender (for example, by making admissions to avoid putting the prosecution to proof of particular matters) is not.

491. Cooperation of the latter kind may show remorse or contrition (s 16A(2)(f)) and may be mitigating to that extent. But even if remorse has not been shown, cooperation with the prosecution and facilitation of the conduct of criminal proceedings against the offender may be taken into account as a mitigating factor in sentencing for its utilitarian value.[817]

492. There is no automatic entitlement to a reduction in sentence for cooperation; each case will depend upon its own circumstances.[818] For example, mere compliance with a statutory obligation to take steps to identify the real issues in dispute, to reduce the length of the trial and to avoid the calling of witnesses whose evidence was not in dispute or whose presence was not essential would only warrant a reduction in sentence in exceptional circumstances.[819] Also, if admissions were made for strategic reasons (e.g. in the conduct of a "confess and avoid" defence, or because there was no forensic advantage in prolonging a trial by putting in issue matters that the Crown was plainly in a position to prove), there may be no real utilitarian benefit and therefore no justification for mitigation.[820]

493. Conversely, an offender's *lack of cooperation*, or even obstruction, in the conduct of criminal proceedings cannot generally be treated as itself an aggravating factor in sentencing.[821] However it may be relevant in various ways, such as in determining whether contrition is shown (*Crimes Act 1914*, s 16A(2)(f)), in assessing the offender's prospects of rehabilitation (s 16A(2)(n)), and in determining the weight to be given to specific deterrence (s 16A(2)(j)).

494. Also, a court sentencing a federal offender is required (by s 16A(2)(fa)) to have regard to the extent to which the offender has failed to comply with an order of the Federal Court, or an obligation under a law of the Commonwealth or a State or Territory law applied by s 68(1) of the *Judiciary Act 1903* (Cth), about pre-trial disclosure, or ongoing disclosure, in proceedings relating to the offence.

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816 Examples of cases where cultural practice was taken into account for offending prior to 13 December 2006 include *TAN v R* (2011) 35 VR 109 and *Pham v R* [2012] VSCA 101. The prohibition in s 16A(2A) is subject to the requirement in s 16A(2)(ma) to take into account, as an aggravating factor, an offender's use of their standing in the community to commit the offence: see "3.4.14 Standing in the community – s 16A(2)(ma)".

817 *R v Doff* [2005] NSWCCA 119, [58]; *R v Maya* [2012] QCA 123; *Karam v R* [2015] VSCA 50, [145]-[156]; *Higgs v R* [2015] VSCA 223, [50]-[52].

818 *Karam v R* [2015] VSCA 50, [156]; *Stipkovich v R* [2018] WASCA 63, [53]. Compare *Bui v DPP (Cth)* (2012) 244 CLR 638, [19], where the court said (in relation to a claimed entitlement to a reduction in sentence in another context), "*Application of an automatic discount would not be consistent with the requirement of s 16A(1)* [of the *Crimes Act 1914*] *that a sentence be appropriate in its severity in all the circumstances of the case*".

819 *R v Deakes* [2002] VSCA 136, [35]-[39]. As to *non-compliance* with such an obligation, see *Crimes Act 1914* (Cth), s 16A(2)(fa).

820 *Karam v R* [2015] VSCA 50, [156]-[159]; *Higgs v R* [2015] VSCA 223, [50]-[52].

821 *R v Gray* [1977] VR 225, 231; *R v Yam* (1991) 55 A Crim R 116, 117; *Billis v R* (WA SC (Full Court), 24 February 1997, unreported), 11; *Siganto v R* (1998) 194 CLR 656, 663–664.

3.5.12 Conditions of custody

495. The fact that an offender is subject to onerous conditions of custody can be taken into account as a mitigating factor in sentencing a federal offender.[822] The relevant comparison is with the custodial conditions of the general prison population, not between persons convicted of similar offences.[823]

496. In *Hatahet*,[824] the plurality observed that "*a court's appreciation of … the conditions of imprisonment known to it at the time of sentencing*" was a matter which "*properly bear[s] upon the sentencing task*", in contrast to the "*speculation and remoteness*" in attempting to predict whether parole may be granted in the years ahead. While this observation endorses the practice of taking into account in sentencing existing conditions of custody, in context it may also be taken as a caution against speculation about conditions which may obtain well into the future, since prison conditions, like the policies of parole authorities, may change at any time (either to the benefit or disadvantage of an offender).

497. An offender who wishes to gain some benefit in the sentencing process because of the conditions under which the sentence is likely to be served should adduce evidence as to those conditions, to enable the court to make a prediction about the conditions in which the sentence would be served.[825] If the prosecution disputes that evidence, it can call its own evidence, otherwise the evidence of the offender should be given appropriate weight.[826]

498. Hardship caused to prisoners during the COVID-19 pandemic (such as restrictions on visitors to minimise the risk of infection) has also been treated as a mitigating factor,[827] but not where it would be speculative to conclude that the relevant restrictions would be in place for any more than a temporary period.[828]

499. The fact that a judge may not have expressly referred to the conditions of custody should not necessarily give rise to an inference that they have not been taken into account.[829]

3.5.13 "Extra-curial punishment" generally

500. At common law, a sentencing court may have regard to "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 the offence[830] or at least by reason of the offender having committed the offence.[831] The paradigm example is retributive assault.[832]

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822 *R v Rostom* [1996] 2 VR 97; *Lodhi v R* [2007] NSWCCA 360, [254]; *Benbrika v R* (2010) 29 VR 593, [558], [575], [593], [602]; *C v R* [2013] NSWCCA 81, [38]-[44], [46]; *Zahab v R* [2021] NSWCCA 7, [47]; *Al Maouie v R* [2022] NSWCCA 30, [47].

823 *Zahab v R* [2021] NSWCCA 7, [48].

824 *R v Hatahet* [2024] HCA 23, [37] (Gordon A-CJ, Gleeson and Steward JJ); see also [65] (Beech-Jones J).

825 *Lodhi v R* [2007] NSWCCA 360, [254]; *C v R* [2013] NSWCCA 81, [42]-[43]; *Baladjam v R* [2018] NSWCCA 304, [228]-[232]; *Zahab v R* [2021] NSWCCA 7, [49]; *Al Maouie v R* [2022] NSWCCA 30, [47].

826 *C v R* [2013] NSWCCA 81, [42]-[43]; *Zahab v R* [2021] NSWCCA 7, [49].

827 *Betka v R* [2020] NSWCCA 191, [83].

828 *Maxwell v R* [2020] NSWCCA 94, [126].

829 *Zahab v R* [2021] NSWCCA 7, [52].

830 *Melville v R* [2023] NSWCCA 284, [80].

831 *Silvano v R* [2008] NSWCCA 118, [29].

832 E.g. *R v Daetz* [2003] NSWCCA 216; *Silvano v R* [2008] NSWCCA 118; *Waterstone v R* [2020] NSWCCA 117, [124]. See the authorities cited in *Einfeld v R* [2010] NSWCCA 87, [87]. If an assault upon the offender is relied upon as "extra-curial punishment", the offender must establish that it was for the purpose of punishing the offender for

501. The term "extra-curial punishment" has not been applied with rigour and has been used on occasions in a manner which extends beyond its proper reach: for example, it is doubtful whether 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) are properly regarded as extra curial punishment.[833]

502. Detection and punishment of a criminal offence may have a range of adverse consequences for an offender. For example it may lead to a loss of employment or destruction of a business,[834] disqualification from public office, the loss of superannuation benefits,[835] banning or disqualification from the management of a corporation,[836] suspension or cancellation of an occupational licence or a right to practise a profession,[837] cancellation of a visa or deportation,[838] penalty taxes,[839] or the forfeiture or other confiscation of property pursuant to statute.[840] Sentencing courts have often treated such matters as "extra-curial punishment", even when the label is inapposite.[841]

503. In principle, adverse consequences should not be treated as "extra-curial punishment" unless they can be shown to be causally related to the offending,[842] and to be more than an ordinary incident or inevitable consequence of the sentence imposed.[843]

504. Since abuse of a professional position is usually an aggravating factor, disqualification from holding such a position which results from such abuse will not generally be a significant mitigating factor, especially if the disqualification is primarily intended to ensure the protection of the public.[844] For example, a person convicted of an offence specified in s 206B(1) of the *Corporations Act 2001* (Cth) is automatically disqualified from managing corporations for 5 years.[845] The prospect of such disqualification is often treated as a mitigating factor,[846] but will rarely provide a basis for declining to proceed to conviction for a disqualifying offence. Such automatic disqualification is not a means of exacting further punishment; the recording of convictions in such cases protects the community and

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the offence or at least by reason of the offender having committed the offence: *Ocek v R* [2023] NSWCCA 308, [95].

833 *Einfeld v R* [2010] NSWCCA 87, [86].

834 E.g. *Cargnello v DPP (Cth)* [2012] NSWCCA 162, [57]-[62].

835 E.g. *R v Wright (No 2)* [1968] VR 174, 180; *R v Bulger* [1990] 2 Qd R 559.

836 E.g. *R v Rivkin* [2003] NSWSC 447, [54] (referred to with apparent approval on appeal: *R v Rivkin* (2004) 59 NSWLR 284, [211]-[212]). However provisions for disqualification of persons from the management of a corporation following conviction are not punitive; therefore they do not infringe the prohibition on conferring on the Commonwealth executive a power to impose punishment for an offence against the law of the Commonwealth: *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350; *Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381.

837 E.g. *Einfeld v R* [2010] NSWCCA 87, [85]-[97]; *Parente v R* (2017) 96 NSWLR 633, [32], [126].

838 See "3.5.14 Prospect of cancellation of a visa and deportation".

839 E.g. *R v Ronen* [2006] NSWCCA 123.

840 See "3.5.15 Orders under Proceeds of Crime Act 2002 (Cth)", "3.5.16 Prospect of a future order under Proceeds of Crime Act 2002 (Cth)", "3.5.18 Forfeiture by operation of law" and "3.5.19 Superannuation order".

841 *Einfeld v R* [2010] NSWCCA 87, [89].

842 *Silvano v R* [2008] NSWCCA 118, [34]-[35].

843 *R v Stanbouli* [2003] NSWCCA 355, [81]; *Cargnello v DPP (Cth)* [2012] NSWCCA 162, [60]. See also *Melville v R* [2023] NSWCCA 284, [85].

844 *R v TA* (2003) 57 NSWLR 444, [32].

845 The period runs from the day of conviction or, if the offender serves a term of imprisonment, from the day on which they are released from prison: *Corporations Act 2001* (Cth), s 206B(2).

846 An example is *DPP (Tas) v Ohl* [2014] TASCCA 4, [8].

provides general deterrence; and members of the commercial community as well as the general public have a vital interest in ensuring that directors who abuse their office and breach the criminal or company law do not escape conviction.[847]

505. In *Talia*,[848] the Victorian Court of Appeal distinguished between occupational disqualification resulting from criminal conduct in the course of the employment from which the offender was disqualified (as occurred in that case) and occupational disqualification resulting from criminal conduct remote from that employment. In the former circumstance, the disqualification was not necessarily mitigating or carried modest weight; in the latter there might be a stronger argument for the incidental loss of employment being treated as a circumstance of mitigation.[849]

506. Removal of a child from the care of an offender who sexually abused another child in their care is not extra-curial punishment but a natural consequence of the offending.[850]

507. In *Ryan*,[851] McHugh J and Hayne J doubted that public opprobrium or stigma resulting from an offence should be treated as a mitigating factor in sentencing, while Kirby J and Callinan J considered that it should. Their Honours' observations were *obiter dicta* and the question has not been further addressed by the Court. However in *Sabel*,[852] the New South Wales Court of Criminal Appeal held that adverse social consequences that an offender may suffer from being convicted of accessing and possessing child abuse material was not a mitigating factor; it was a direct result of the offending conduct, the underlying nature of which is exploitative of children. Even widespread reporting or information dissemination about the offending, the conviction or the sentencing of the offender, cannot of itself be regarded as extra-curial punishment,[853] other than in an exceptional case where resulting public opprobrium reaches such a proportion that it has had some physical or psychological effect on the offender.[854]

508. The weight, if any, to be given to matters treated as "extra-curial punishment" will depend on the circumstances. Relevant considerations may include the nature and size of the administrative or other "extra-curial punishment", the extent to which the penalty relates to the conduct the subject of the offence, the capacity of the offender to pay, the effect that the administrative penalty had in real terms on the offender and other questions of hardship.[855]

509. In assessing the weight to be given to such matters as the actual or prospective loss of property, income, professional status or social standing, a sentencing court should bear in mind that "*it is not generally appropriate that those who are wealthier, or who have a higher public profile, should receive*

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847 *R v Wall* (2002) 71 NSWLR 692, [87].

848 *R v Talia* [2009] VSCA 260. The offender in that case was dealt with for State offences but there does not appear to be any reason why the same principles should not apply in sentencing a federal offender.

849 *R v Talia* [2009] VSCA 260, [25]-[30]. *R v Poynder* [2007] NSWCCA 157 and *Parente v R* (2017) 96 NSWLR 633, where solicitors were disqualified from practice as a consequence of offending unrelated to the offender's legal practice, can be seen as examples of cases falling within the latter category.

850 *RH v R* [2019] NSWCCA 64, [52]-[57].

851 *Ryan v R* (2001) 206 CLR 267, [52]-[55] (McHugh J), [123] (Kirby J), [157] (Hayne J), [177] (Callinan J).

852 *Sabel v R* [2014] NSWCCA 101, [211]. See also *Melville v R* [2023] NSWCCA 284, [80]-[87].

853 *Melville v R* [2023] NSWCCA 284, [87]; cf *Ryan v R* [2024] VSCA 74, [29]-[30]. That is not to say that it is wholly irrelevant in sentencing; for example, the destruction of the reputation of the offender may have the effect of reducing the need for specific deterrence: *Kenny v R* [2010] NSWCCA 6, [13]-[14] (Basten JA).

854 *Kenny v R* [2010] NSWCCA 6, [49].

855 *DPP (Cth) v Nippon Yusen Kabushiki Kaisha* (2017) 254 FCR 235, [277]. If an offender is unlikely to pay an administrative penalty, the imposition of the penalty may carry no weight in mitigation: *Bransby v R* [2010] WASCA 165, [40]-[43].

lesser sentences because they have more to lose as a result of conviction."[856] If such matters are taken into account, care must be taken to avoid double counting (for example, loss of good standing in the community and favourable consideration for prior good character).[857]

510. If "extra-curial punishment" is a relevant factor in sentencing, it must be weighed against other relevant factors, such as the need for adequate punishment (s 16A(2)(k)), general deterrence (s 16A(2)(ja)) and specific deterrence (s 16A(2)(j)) and the overarching obligation to impose a sentence or to make an order of a *"severity appropriate in all the circumstances"* of the offence (s 16A(1)).

511. See also the following discussions of particular issues:

- "3.5.14 Prospect of cancellation of a visa and deportation"
- "3.5.15 Orders under Proceeds of Crime Act 2002 (Cth)"
- "3.5.16 Prospect of a future order under Proceeds of Crime Act 2002 (Cth)"
- "3.5.18 Forfeiture by operation of law"
- "3.5.19 Superannuation order"
- "3.5.20 Registration of sexual offenders and other offenders"
- "3.5.21 Control orders, extended supervision orders and continuing detention orders"

3.5.14 Prospect of cancellation of a visa and deportation

512. The *Migration Act 1958* (Cth) provides for the cancellation of a visa (including a visa which allows permanent residency in Australia), and for the resultant deportation of a person, in a variety of circumstances. The prospect that an offender's visa may be cancelled, and that the offender may be deported, may raise a number of issues for a sentencing court.

Can the court impose a sentence to avoid or reduce the risk of deportation?

513. It is impermissible for a court to reduce an otherwise appropriate sentence, or to craft a sentence, to avoid or reduce the risk that the offender will be deported.[858] To do so would subvert the object of the *Migration Act 1958* (Cth) and undermine the sovereignty of Australia.[859]

Does the prospect of deportation prevent a court from fixing a non-parole period?

514. A court sentencing a federal offender is not precluded from fixing a non-parole period in respect of a federal sentence merely because the person is, or may be, liable to be deported from Australia.[860] The likelihood of an offender being deported once released should not of itself compel a sentencing judge to conclude that it is inappropriate to fix a non-parole period. A primary benefit of parole is rehabilitation

856 *Cargnello v DPP (Cth)* [2012] NSWCCA 162, [60]. Compare the observations of McHugh J in *Ryan v R* (2001) 206 CLR 267, [53]. In *Einfeld v R* [2010] NSWCCA 87, [89], Basten JA (with whom Hulme and Latham JJ agreed) observed, "*Taking account of the economic consequences (including loss of employment) which inevitably follow from imprisonment, may mean that those previously in employment will receive shorter sentences than those who were unemployed.*"

857 *Einfeld v R* [2010] NSWCCA 87, [89].

858 *R v Simard* [2003] 1 Qd R 76, [5]-[6]; *R v Berlinsky* [2005] SASC 316, [27], [33], [46], [68]; *R v MAO; Ex parte Attorney-General (Qld)* [2006] QCA 99; *Islam v R* [2006] ACTCA 21, [34]-[35]; *Loftus v R* [2019] VSCA 24, [81]; *R v Calica* (2021) 43 NTLR 7, [66]-[78], [161]; *Kroni v R* (2021) 138 SASR 37, [226]; *Tufue v R* [2024] VSCA 22, [29]-[34].

859 *R v Calica* (2021) 43 NTLR 7, [77]-[78], [164].

860 *Crimes Act 1914* (Cth), s 19AK.

of the offender and a non-resident non-citizen offender who is likely to be deported should also receive this benefit by being eligible for release on parole.[861]

Is the prospect of cancellation of a visa, or of deportation, capable of mitigating a sentence?

515. Australian authority is divided on the question whether the prospect that an offender's visa will be cancelled and that they will be deported can ever be a mitigating factor in sentencing.

516. In considering whether the prospect of deportation is a mitigating factor, appellate courts have not distinguished between offenders against State or Territory law on the one hand and federal offenders on the other. In jurisdictions in which possible deportation is not regarded as mitigatory, courts have generally applied the same approach in relation to the sentencing of a federal offender.[862] In jurisdictions in which possible deportation is regarded as potentially mitigatory, it has been treated the same way in the sentencing of a federal offender.[863]

517. Under the provisions of the *Migration Act 1958* (Cth), whether an offender's visa is cancelled as a consequence of committing an offence depends upon the exercise of executive discretion (even though visa cancellation is presumptively required in some circumstances). Appellate courts have held, in a number of contexts, that ordinarily a sentencing court should not engage in speculation about the possible future exercise of an administrative or a judicial discretion that might affect, or relate to, an offender.[864]

518. Although sometimes referred to as a form of "extra-curial punishment", the power to cancel the visa of a non-citizen and to deport them as a consequence of their commission of an offence is not punishment for the offence, as the plurality (Kiefel CJ, Bell, Keane and Edelman JJ) explained in *Falzon*:[865]

> *The exercise of a power of cancellation of a visa by reference to the fact of previous criminal offending does not involve the imposition of a punishment for an offence and does not involve an exercise of judicial power. It has long been recognised that the deportation of aliens does not constitute punishment. The cancellation of a visa as a step necessary to achieve the removal of a person from Australia should be viewed in the same light. … In O'Keefe v Calwell* [(1949) 77 CLR 261, 278]*, Latham CJ referred to the deportation of a convicted immigrant as a measure of protection of the community and not as punishment for any offence.*
>
> *The power to cancel a visa by reference to a person's character, informed by their prior offending, is not inherently judicial in character. It operates on the status of the person deriving from their conviction. By selecting the objective facts of conviction and imprisonment, Parliament does not seek to impose an additional punishment.*

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861 *R v Shrestha* (1991) 173 CLR 48.

862 E.g. *R v Latumetan* [2003] NSWCCA 70; *Ponniah v R* [2011] WASCA 105; *Kristensen v R* [2018] NSWCCA 189; *Afful v R* [2021] NSWCCA 111. In *R v Simard* [2003] 1 Qd R 76, in dealing with a federal offender, the Court treated the prospect of deportation as not mitigating, consistently with the approach then taken in sentencing State offenders in Queensland.

863 E.g. *DPP (Cth) v Peng* [2014] VSCA 128; *R v UE* [2016] QCA 58; *R v Schelvis* [2016] QCA 294.

864 See *DPP (Cth) v Besim; DPP (Cth) v MHK (No 3)* (2017) 52 VR 303, [48]-[58]; *R v Hatahet* [2024] HCA 23, [26], [37] (Gordon A-CJ, Gleeson and Steward JJ), [55], [57] (Jagot J).

865 *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, [47]-[48] (footnotes omitted).

519. Appellate courts in **New South Wales**[866] and **Western Australia**[867] have held that the prospect of deportation, without more, is not a mitigating factor in sentencing. Amongst the reasons for this approach are that "*the prospect of deportation … is the product of an entirely separate legislative policy area of the regulation of society*";[868] that deportation is entirely a matter for the executive government;[869] that it is wrong to characterise the Commonwealth statutory administrative scheme for the deportation of non-citizens on character grounds as additional punishment for the offence(s) which trigger its application because "*the purpose of that scheme is not penal or punitive in character*";[870] that the possible exercise of a discretionary executive power does not affect the duty of a court in determining an appropriate sentence;[871] and that it is an affront to the proper administration of criminal justice that offenders who are liable to deportation might be treated more leniently than Australian citizens.[872] Courts in these jurisdictions have also denied that an offender's anxiety about possible deportation should be treated as mitigatory, any more than should unavoidable uncertainty about other consequences of a sentence.[873]

520. By contrast, appellate courts in **Victoria**,[874] **Queensland**,[875] and the **Northern Territory**[876] have held that the prospect of deportation can be a mitigating factor, on either or both of two bases:

- that deportation consequent upon offending will constitute an additional "punishment", by the offender losing the opportunity to settle permanently in Australia; or
- that uncertainty about the prospect of deportation will make the service of a sentence of imprisonment more onerous for the particular offender.

(The application of these considerations is discussed below: see "*In jurisdictions which recognise the prospect of deportation as a potential mitigating factor, what must be shown?*".)

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866 *R v Chi Sun Tsui* (1985) 1 NSWLR 308, 311; *R v Latumetan* [2003] NSWCCA 70, [19]; *Ali v R* [2014] NSWCCA 45, [1], [47], [51]; *R v Pham* [2005] NSWCCA 94, [13]; *Khanchitanon v R* [2014] NSWCCA 204, [28]; *AC v R* [2016] NSWCCA 107, [79]; *Kristensen v R* [2018] NSWCCA 189, [23]-[36], [43]-[44]; *Hanna v Environment Protection Authority* [2019] NSWCCA 299, [61]-[97]; *Maxwell v R* [2020] NSWCCA 94, [123]-[125]; *Afful v R* [2021] NSWCCA 111, [51]-[67]; *Ke v R* [2021] NSWCCA 177, [48]-[51], [274].

867 *Dauphin v R* [2002] WASCA 104; *Houghton v Western Australia* (2006) 32 WAR 260; *Ponniah v R* [2011] WASCA 105; *Hickling v Western Australia* [2016] WASCA 124; *Brewerton v Western Australia* [2017] WASCA 191, [32]-[36].

868 *R v Chi Sun Tsui* (1985) 1 NSWLR 308, 311 (Street CJ). In *Guden v R* (2010) 28 VR 288, [16]-[24], the Court said that this dictum of Street CJ only related to a decision whether to fix a non-parole period, and was not of general application. However the NSW Court of Criminal Appeal has repeatedly treated the dictum of Street CJ as being of general application and it has been followed and applied on that basis: see *Hanna v Environment Protection Authority* [2019] NSWCCA 299, [67]-[83].

869 *R v Pham* [2005] NSWCCA 94, [13].

870 *Hickling v Western Australia* [2016] WASCA 124, [10].

871 *Hickling v Western Australia* [2016] WASCA 124, [58]-[59]; cf *DPP (Cth) v Besim; DPP (Cth) v MHK (No 3)* (2017) 52 VR 303, [43]-[59].

872 *Dauphin v R* [2002] WASCA 104, [22], quoting with approval *R v Simard* [2003] 1 Qd R 76, [6].

873 *Hickling v Western Australia* [2016] WASCA 124, [60] (Mazza JA and Mitchell J). McLure P said in that case (at [11]) that because the prospect of deportation is generally irrelevant, an offender who contends that leniency should be extended because the prospect of deportation would make imprisonment more burdensome faces a "*high, if not insurmountable, obstacle*".

874 *Guden v R* (2010) 28 VR 288; *Darcie v R* [2012] VSCA 11; *DPP (Cth) v Peng* [2014] VSCA 128, [23].

875 *R v UE* [2016] QCA 58; *R v Schelvis* [2016] QCA 294; *R v Norris; Ex parte Attorney-General (Qld)* [2018] 3 Qd R 420.

876 *R v Calica* (2021) 43 NTLR 7, reversing the approach espoused in *R v MAH* (2005) 16 NTLR 150, [41], [64]; *Russell v R* [2022] NTCCA 6.

521. The first stated basis for mitigation is that a sentence of imprisonment will result in the offender losing the opportunity of settling permanently in Australia and that, "*[t]aking a practical approach, … this may well be viewed as a serious 'punishing consequence' of the offending.*"[877] So, for example, in *Ankur*,[878] the Court said that an "*important mitigating circumstance*" was that the deportation of the offender, "*after he had lived in Australia for ten years, and made a wide circle of close friends here, would constitute an additional extra-curial punishment.*" In *Calica*,[879] the plurality acknowledged that the purpose of the deportation regime was not penal or punitive, but said that the approach to any form of "extra-curial punishment" was to look to the consequences, rather than exclusively at the purpose, of the detriment under consideration.

522. However in *Akot*,[880] the Victorian Court of Appeal observed,

> *[N]either the cancellation of the visa nor any consequent deportation constitutes punishment for the offending and it would be a mistake to treat them as such. They serve a different purpose and are undertaken at the command of the executive. The grave consequences of deportation for the individual cannot replace or stand as a proxy for the imposition of an appropriate sentence by a court following a guilty plea or a finding of guilt. The sentence must still reflect the nature and gravity of the offending.*

523. Where the offender faces the risk of deportation, "*that risk is only one of a multitude of sentencing considerations that must be taken into account as part of the intuitive synthesis. The weight to be accorded to it will depend upon all the circumstances of the case.*"[881]

524. The position in **South Australia** has been unclear, as a result of conflicting decisions of the Full Court of the Supreme Court in *Berlinsky*[882] and *Zhang*[883] (each of which concerned a federal offender). A number of subsequent cases noted the conflict but left the position unresolved.[884] In *Kroni*,[885] after reviewing the authorities, Livesey J (with whom Kourakis CJ and Doyle J agreed on this point) concluded that "*the risk of deportation is at least potentially relevant to the exercise of the sentencing discretion*", although the Court found that the sentencing judge in that case had not erred, in the circumstances, in declining to treat the prospect of deportation as a mitigating factor. In *Fati*,[886] *Kroni* was cited as authority for the proposition that "*the risk of deportation may be relevant in a general way, provided the*

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877 *Guden v R* (2010) 28 VR 288, [27].

878 *Ankur v R* [2021] VSCA 110, [117].

879 *R v Calica* (2021) 43 NTLR 7, [145]-[146] (Grant CJ, Kelly, Blokland and Barr JJ); see also [178] (Southwood J).

880 *Akot v R* [2020] VSCA 55, [39]. The Court cited *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 in support of the proposition in the first sentence.

881 *Matamata v R* [2021] VSCA 253, [78].

882 *R v Berlinsky* [2005] SASC 316, in which the Full Court held ([27]) that the prospect of deportation, as such, was an irrelevant consideration in sentencing.

883 *R v Zhang* [2017] SASCFC 5, in which the Full Court ([110]-[113]), without referring to *Berlinsky*, approved of the analysis in *R v Schelvis* [2016] QCA 294, and thereby accepted that the prospect of deportation could be a mitigating factor.

884 In *R v Leka* [2017] SASCFC 77, [27]-[29], Stanley J (with whom Peek and Hinton JJ agreed) noted that *Berlinsky* had not been cited in *Zhang*, and observed that *Zhang* may have been decided *per incuriam*. Hinton J (with whom Peek J also agreed) added (at [37]) that "*resolution of the question of the relevance or not of the likelihood of deportation to sentencing can await another day*". In *R v Taheri* [2017] SASCFC 115, [41]-[42] and in *R v Arrowsmith* [2018] SASCFC 47, [32]-[38], the Court also referred to, but found it unnecessary to resolve, the conflict in the authorities.

885 *Kroni v R* (2021) 138 SASR 37, [227].

886 *R v Fati* [2021] SASCA 99, [33].

prospect is not merely speculative and it is shown that deportation would involve hardship." Neither *Kroni* nor *Fati* concerned a federal offender, but the decisions imply that the approach taken in *Zhang* is likely to be preferred over that taken in *Berlinsky*. *Berlinsky* has not, however, been overruled.

525. The issue does not appear to have been authoritatively decided by an appellate court in **Tasmania**[887] or the **Australian Capital Territory**.[888]

Where the prospect of deportation is recognised as a potential mitigating factor, what must be shown?

526. In jurisdictions which recognise that the prospect of deportation may be mitigating, a mere "*speculative possibility*" of deportation will not suffice.[889] The mere existence of the statutory regime under s 501(3A) of the *Migration Act 1958* (Cth), by which certain offenders are presumptively liable to visa cancellation (subject to the exercise of administrative discretion), does not entitle such an offender to a reduced sentence.[890]

527. The prospect of deportation can only be mitigating if there is sufficient evidence (or a concession by the prosecution) "*to permit a sensible quantification of that risk to be undertaken*".[891] If the offender will not be eligible for parole for some years,[892] or if deportation will depend upon an administrative decision weighing many factors,[893] the assessment of the prospect of deportation will often be particularly speculative.

528. The offender must also establish (either by evidence or by a concession by the prosecution) an evidentiary foundation for concluding that deportation will in fact be a hardship for the particular offender.[894] It has been observed that in many cases it may be difficult to see how considerations of hardship can materially affect the sentence otherwise to be imposed by the sentencing court.[895]

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887 In *MAC v Tasmania* [2018] TasCCA 19, [196], the Court proceeded on the assumption that the prospect of deportation could be a mitigating factor in some circumstances, but no authorities were referred to and the Court did not need to decide the point.

888 In *Islam v R* [2006] ACTCA 21, the Australian Capital Territory Court of Criminal Appeal (at [35]) cited with apparent approval a passage from the judgment of Doyle CJ in *R v Berlinsky* [2005] SASC 316, [27], which denied that deportation could affect the sentencing process, but added (at [37]) that (by reason of the ACT counterpart of s 16A(2)(p)) "*it may go too far to say that the probability of deportation is an irrelevant consideration in the sentencing process*". That is, the Court suggested, *obiter dicta*, that deportation may be taken into account in sentencing to the extent of its probable impact on the offender's family. The prospect of deportation was taken into account on this basis in *R v Ruwhiu* [2023] ACTCA 18, [57], [83], [151]. See also *Ngata v R* [2020] ACTCA 18, [44]-[47].

889 *Guden v R* (2010) 28 VR 288, [28]; *R v Schelvis* [2016] QCA 294, [71]-[72]; *R v Lincoln* [2017] QCA 37, [68]-[70]; *Kroni v R* (2021) 138 SASR 37, [227].

890 *Konamala v R* [2016] VSCA 48; *Da Costa v R* [2016] VSCA 49; *Schneider v R* [2016] VSCA 76; *R v Schelvis* [2016] QCA 294, [74]-[82]; *R v Lincoln* [2017] QCA 37, [68]-[70]; *Kroni v R* (2021) 138 SASR 37, [227]. In *Schelvis*, [78]-[79], Fraser JA (with whom Morrison JA and Peter Lyons J agreed) preferred the reasoning in *Da Costa* to a contrary dictum in *DPP v Zhuang* [2015] VSCA 96, [54].

891 *Guden v R* (2010) 28 VR 288, [29]; *R v Schelvis* [2016] QCA 294, [71]-[72].

892 Compare *Da Costa v R* [2016] VSCA 49, [53]; *R v Schelvis* [2016] QCA 294, [81].

893 *Darcie v R* [2012] VSCA 11, [29]-[45]. Williams AJA (with whom Buchanan JA agreed) observed (at [44]) that a factor which further complicated assessment of the prospects of deportation was that the decision whether or not to deport the offender could be taken by the Minister, and that the Minister was not bound by a published direction (summarised at [32]-[35]) which set out and weighted relevant considerations.

894 *Guden v R* (2010) 28 VR 288, [29]; *DPP (Cth) v Peng* [2014] VSCA 128, [21]-[25]; *R v UE* [2016] QCA 58, [19]-[21]; *R v Pearson* [2016] QCA 212, [22]-[23]; *R v Schelvis* [2016] QCA 294, [71]-[72]; *R v Lincoln* [2017] QCA 37, [68]-[70]; *Kroni v R* (2021) 138 SASR 37, [227], [229].

895 *Kroni v R* (2021) 138 SASR 37, [227].

529. In *Fati*,[896] the Court observed that whilst the loss of the right to live in Australia is usually, and rightly, regarded as a form of general hardship, whether that is actually so may depend on the circumstances of the particular case.

530. An example is provided by *UE*.[897] In that case, it was put to the sentencing judge that the offender would suffer hardship if he were to be deported, on the basis that he had lived in Australia for 10 years, had married and had established a business. The Court of Appeal held that the judge did not err in indicating that he was not in a position to determine that being deported from Australia would be likely to result in hardship, given that the offender's marriage and business had failed and he retained close ties with his family in his home country.

531. An offender who, at the time of offending, did not have an existing visa to reside in Australia (for example, an offender whose visa had expired or who was otherwise in Australia unlawfully) and had only a diminished prospect of settling in Australia rather than a sense of real loss will not suffer real hardship.[898] If the offender has come to Australia for the sole purpose of criminal activity, and has no interest in making Australia their home, deportation to their country of origin may impose no burden upon them at all.[899]

532. If the hardship relied upon by the offender is that stress and anxiety about the prospect of deportation will make the service of a sentence of imprisonment more onerous, the relevant question would appear to be governed by s 16A(2)(m) of the *Crimes Act 1914* (Cth), which requires the sentencing court to have regard to "*the character, antecedents, age, means and physical or mental condition"* of the offender, so far as they are "*relevant and known to the court*". (See "3.4.13 Character, antecedents, age, means, physical/mental condition – s 16A(2)(m)".) In light of the High Court decision in *Bui*,[900] and cases which have applied the same principle in other contexts,[901] s 16A(2) of the *Crimes Act 1914* would seem to preclude a court sentencing a federal offender from acting on a mere *presumption* that uncertainty about the prospect of deportation would cause the offender stress or anxiety such as to warrant mitigation of the sentence. Rather, "*a condition of distress or anxiety must be demonstrated*",[902] and it must be causally linked to the prospect of deportation[903] (as distinct from distress or anxiety which is an incident of imprisonment and the uncertainties which flow from it[904]). Absent evidence or a concession that deportation will be associated with particular hardship, that is not a matter about which a sentencing court can usually take judicial notice or speculate; it is not a matter "*known to the court*" as the Act requires.[905]

533. Given the many ordinary incidents of imprisonment which commonly contribute to the stress and anxiety of a prisoner – including loss of liberty, loss of contact with family and friends, damage to

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896 *R v Fati* [2021] SASCA 99, [75].
897 *R v UE* [2016] QCA 58, [19]-[21].
898 *Nguyen v R* [2016] VSCA 198, [35].
899 *DPP (Cth) v Peng* [2014] VSCA 128, [24]; *Konamala v R* [2016] VSCA 48, [34].
900 *Bui v DPP (Cth)* (2012) 244 CLR 638.
901 *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194; *DPP (Cth) v Besim; DPP (Cth) v MHK (No 3)* (2017) 52 VR 303, [60]; *R v Hatahet* [2024] HCA 23, [35].
902 *Bui v DPP (Cth)* (2012) 244 CLR 638, [22]-[23], approving the view of Simpson J in *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1, [279]-[280].
903 Cf *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [97]-[113].
904 Cf *Hickling v Western Australia* [2016] WASCA 124, [60]; *DPP (Cth) v Besim; DPP (Cth) v MHK (No 3)* (2017) 52 VR 303, [62].
905 *R v Fati* [2021] SASCA 99, [75] (referring to the cognate provision in the *Sentencing Act 2017* (SA), s 11(1)).

relationships, loss of current and future income and employment opportunities, and uncertainty about the duration of the imprisonment, to mention just a few – anxiety about the prospect of deportation, even if proven, will not necessarily carry significant weight. In *Kroni*,[906] Livesey J (with whom Kourakis CJ and Doyle J agreed on this issue) observed, "*it is difficult to see how in many cases the anxiety and uncertainty associated with a future exercise of executive discretion will make any appreciable difference to the sentence otherwise to be imposed*".

Can a sentence be reduced or structured to facilitate deportation?

534. In *Fati*,[907] the sentencing judge had imposed a sentence of imprisonment, but wholly suspended it to facilitate the immediate deportation of the offender, on the basis that this would protect the community from further offending. The South Australian Court of Appeal held that the judge had erred in doing so. It was wrong in principle to impose a lesser sentence than is appropriate, such as a wholly suspended sentence when actual imprisonment is required, simply because the defendant will soon be deported.[908] Where a sentence of imprisonment is appropriate, it cannot be avoided by the offender by the simple expedient of consenting to deportation. To do so ultimately fails to protect the community. Proceeding in this way undermines the achievement of other sentencing objectives such as punishment and general and personal deterrence.[909] It was also contrary to principles of equal justice, as it treated an unlawful non-citizen far more leniently than an Australian citizen convicted of the same crimes would be treated.[910]

3.5.15 Orders under *Proceeds of Crime Act 2002* (Cth)

535. There is no reference in s 16A(2) of the *Crimes Act 1914* (Cth) to the making of a pecuniary penalty order against the offender, or a forfeiture order in relation to property of the offender, under the *Proceeds of Crime Act 2002* (Cth). However s 320 of the *Proceeds of Crime Act 2002* (Cth) (in operation since 1 January 2003) makes specific provision for matters which a court may or may not take into account in sentencing in relation to those matters.

536. Section 320 of the *Proceeds of Crime Act 2002* (Cth) provides:

> ***Effect of the confiscation scheme on sentencing***
> *A court passing sentence on a person in respect of the person's conviction of an *indictable offence:*
> *(a) may have regard to any cooperation by the person in resolving any action taken against the person under this Act; and*
> *(b) must not have regard to any *forfeiture order that relates to the offence, to the extent that the order forfeits *proceeds of the offence; and*
> *(c) must have regard to the forfeiture order to the extent that the order forfeits any other property; and*
> *(d) must not have regard to any *pecuniary penalty order, or any *literary proceeds order, that relates to the offence.*

537. Relevant terms used in this section are defined in the Act as follows:

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906 *Kroni v R* (2021) 138 SASR 37, [228].
907 *R v Fati* [2021] SASCA 99.
908 *R v Fati* [2021] SASCA 99, [61].
909 *R v Fati* [2021] SASCA 99, [73].
910 *R v Fati* [2021] SASCA 99, [71]-[72].

indictable offence is defined in s 338 (Dictionary) to mean an offence against a law of the Commonwealth, or a *non-governing Territory, that may be dealt with as an indictable offence (even if it may also be dealt with as a summary offence in some circumstances);

forfeiture order is defined in s 338 (Dictionary) as an order under Division 1 of Part 2-2 of the Act that remains in force;

proceeds of the offence is defined in ss 338, 329 and 330 as wholly or partially derived or realised, whether directly or indirectly, from the commission of the offence whether the property is situated outside Australia;

pecuniary penalty order is defined in s 338 as an order under s 116; and

literary proceeds order is defined in s 338 as an order under s 152.

538. In summary, therefore, s 320:

- *permits* a court sentencing a federal offender for an indictable offence to have regard to any cooperation by the offender in resolving any action taken against the offender under the Act (s 320(a));
- *precludes* the sentencing court from having regard to the forfeiture of the proceeds of the offence the person is convicted of (s 320(b)) or any pecuniary penalty order or literary proceeds order that relates to that offence (s 320(d)); and
- *requires* the sentencing court to have regard to the forfeiture of other property that is <u>not</u> proceeds of the offence the person is convicted of (such as real property or a motor vehicle used in the commission of the offence) (s 320(c)).

539. The broad scheme of s 320 of the *Proceeds of Crime Act 2002* (Cth) (consistently with that under other legislative confiscation schemes[911]) is that no regard is to be had to any order the effect of which would strip the benefits of the crime from the offender,[912] but regard must be had to the court-ordered forfeiture of property which does not represent the proceeds of crime (such as property used in the commission of the crime or property mixed with proceeds of crime), which property may have been acquired lawfully. The underlying rationale for this distinction is that the latter may constitute a penalty (and is therefore relevant in ensuring that the total punishment is proportionate to the offending), whereas the former does not. The obligation to disgorge the proceeds of crime is not to be treated as a penalty, but merely as a means of preventing unjust enrichment;[913] whereas forfeiture of property which is not proceeds of crime constitutes a separate penalty and may therefore be relevant to sentencing.[914]

540. The prohibition in s 320(d) on a court having regard to any pecuniary penalty order that relates to the offence renders that matter an irrelevant consideration in sentencing an offender for a Commonwealth indictable offence.[915] On its proper construction, s 320(d) precludes a sentencing court

911 See *R v McLeod* (2007) 16 VR 682, [14]-[23].

912 The provision was intended to reverse the effect of *McDermott v R* (1990) 49 A Crim R 105, under which a sentencing court was required to have regard to a pecuniary penalty: see the account of the history of s 320 which is given in *R v Host* [2015] WASCA 23, [11]-[22], [107]-[110].

913 *R v McLeod* (2007) 16 VR 682, [16]; *R v Host* [2015] WASCA 23, [13], [109].

914 See *R v McLeod* (2007) 16 VR 682, [14]-[23].

915 *R v Host* [2015] WASCA 23, [17], [103], [194].

from having regard not only to the mere fact of a pecuniary penalty order but also to any action taken in consequence of it, such as the payment of money pursuant to an order.[916]

541. However a sentencing court may have regard to the offender's cooperation in relation to any action under the *Proceeds of Crime Act* (s 320(a)), even an action relating to an order (such as a pecuniary penalty order) which the court is precluded from have regard to in sentencing: see "3.5.17 Cooperation in resolving action under Proceeds of Crime Act 2002 (Cth)".

542. Some uncertainty remains about the scope of the requirement (in s 320(c)) for a sentencing court, in relation to an indictable offence, to have regard to a forfeiture order to the extent that the order forfeits property other than proceeds of crime. Where, under State legislation, a sentencing court *may* have regard to forfeiture to the extent that the forfeited property is not proceeds of crime, it has been held that the offender bears an onus of establishing that the forfeiture should be regarded as mitigating; this means that the offender must establish not only that the forfeited property was not the proceeds of the relevant offence, but also that it was lawfully acquired.[917] In *TAN*,[918] the Court left open the question whether the same approach necessarily applies under s 320(c), by which the sentencing court *must* have regard to forfeiture of property which was not proceeds of crime.

543. Section 320 of the *Proceeds of Crime Act 2002* (Cth) is silent as to whether *automatic forfeiture* of property, by operation of the Act rather than pursuant to an order of a court, or the prospect of such forfeiture in future, can be taken into account in sentencing.[919] The relevance of such forfeiture is discussed below: see "3.5.18 Forfeiture by operation of law".

3.5.16 Prospect of a future order under *Proceeds of Crime Act* 2002 (Cth)

544. Pursuant to s 320(a) of the *Proceeds of Crime Act 2002* (Cth), a sentencing court may have regard to any cooperation by an offender in relation to any action taken against the offender under the Act: see "3.5.17 Cooperation in resolving action under Proceeds of Crime Act 2002 (Cth)". This may include cooperation which has occurred in relation to an application for a forfeiture order, a pecuniary penalty order or a literary proceeds order which is still pending at the time of sentencing.

545. However s 320 is silent as to whether the prospect that a forfeiture order, a pecuniary penalty order or a literary proceeds order will be made in future can be taken into account.

546. Section 321 of the *Proceeds of Crime Act 2002* (Cth) enables the court to defer sentencing pending the determination of an application for a confiscation order which has been made to that court, where the court is satisfied that it is reasonable to do so in all the circumstances. (A confiscation order means a forfeiture order, a pecuniary penalty order, a literary proceeds order or an unexplained wealth order under the Act: see the Dictionary to the Act.) Section 321 does not empower a sentencing court to defer sentencing where an application for a confiscation order has been made to another court, or where an application for a confiscation order has not yet been made.

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916 *R v Host* [2015] WASCA 23, [2]-[19], [103]-[110], [194]-[196]; *R v Jafari* [2017] NSWCCA 152, [38]-[39].

917 *R v McLeod* (2007) 16 VR 682.

918 *TAN v R* (2011) 35 VR 109, [67].

919 The references in s 320(b) and (c) to a "forfeiture order" is a reference to an order under Division 1 of Part 2-2 of the Act, that is, court-ordered forfeiture. It does not include automatic forfeiture under Part 2-3 of the Act: *TAN v R* (2011) 35 VR 109, [59]-[62].

547. In many cases, it will not be practicable or appropriate to defer sentencing pursuant to s 321. Since a sentencing court is precluded by s 320 of the *Proceeds of Crime Act 2002* (Cth) from taking into account the fact that *a pecuniary penalty order or literary proceeds order* has been made, the only reason to defer sentencing (pursuant to s 321) because an application for such an order is pending would be to assess whether the offender should be given any credit (pursuant to s 320(a) of the Act) for cooperating in relation to the application. On the other hand, if the pending application is for *a forfeiture order*, the sentencing court may consider deferring sentencing in order to see not only whether and to what extent the offender cooperates, but also whether the order is ultimately made and if so whether and to what the extent the property is determined to be *proceeds of the offence*. Even in such a case, however, a sentencing court may consider the deferral of sentence to be inappropriate if, for example, resolution of the application for a forfeiture order is unlikely in the near future,[920] or is unlikely to involve a determination of the extent to which the property is or is not proceeds of the offence, or if deferral of sentencing of one offender may have undesirable consequences for the sentencing of other offenders.[921]

548. Where sentencing is not deferred pursuant to s 321, a sentencing court may have regard to the prospect that a confiscation order may be made in future, but only in limited circumstances.[922]

549. In the first place, the prospect that *a pecuniary penalty order or literary proceeds order* may be made against the offender in relation to the offence should not, as such, be treated as a mitigating factor. If such an order is made prior to sentencing, the sentencing court is precluded from taking the order into account (*Proceeds of Crime Act 2002* (Cth), s 320(d)). It would be wrong in principle to take the prospect of such an order into account when the fact of such an order having been made cannot be taken into account.

550. Second, the prospect that *a forfeiture order may be made against the offender in relation to proceeds of the offence* should not be treated as a mitigating factor. If such an order is made prior to sentencing, the sentencing court is precluded from taking the order into account (*Proceeds of Crime Act 2002* (Cth), s 320(b)). Again, it would be wrong in principle to take the prospect of such an order into account when the fact of such an order cannot be taken into account.

551. Third, in relation to the prospect that *a forfeiture order will be made against the offender in relation to property which is not proceeds of the offence*, it will often be difficult for a sentencing court to assess the likelihood that an order will be made and the extent to which it forfeits property of that character. A sentencing court is not required to speculate about whether a forfeiture order will be made, or whether (or to what extent) the property the subject of such an order is not proceeds of crime.[923] An offender who relies on the prospect of such forfeiture as a mitigating factor must satisfy the court accordingly. That is, the offender must persuade the court that property is likely to be forfeited, and that at least some of the property is not proceeds of the crime. If the information available is insufficient to enable

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920 Cf *R v Thomas* [1991] 2 VR 207.

921 In *R v Thomas* [1991] 2 VR 207, an applicant for leave to appeal against sentence sought an adjournment pending the resolution of confiscation proceedings. The Court of Criminal Appeal refused to adjourn the application, in part on the basis that it would cause unwarranted delay in hearing applications for leave to appeal by two co-offenders, particularly when the appeals raised considerations of parity.

922 Compare, in relation to forfeiture under State legislation, *R v Yacoub* [2006] VSCA 203; *R v Tabone* [2006] VSCA 238; *R v Le* [2005] VSCA 284; *R v McLeod* (2007) 16 VR 682. The same principles apply to the federal forfeiture provisions, save to the extent there is any statutory provision to the contrary: *TAN v R* (2011) 35 VR 109, [55]-[57].

923 Cf *R v Tabone* [2006] VSCA 238, [10]-[14].

the sentencing judge to make an assessment of the likelihood of forfeiture or its likely effect there will be no error in declining to take this into account.[924]

552. The making of a forfeiture order after sentencing may constitute fresh evidence on appeal, where the prospect of forfeiture has not been taken into account in sentencing, and sometimes require resentencing.[925] Appellate courts have called for legislative change to allow review of the sentence by the sentencing court without the need for an appeal.[926]

3.5.17 Cooperation in resolving action under *Proceeds of Crime Act 2002* (Cth)

553. Pursuant to s 320(a) of the *Proceeds of Crime Act 2002* (Cth), a court sentencing an offender for an indictable offence "may have regard to any cooperation by the person in resolving any action taken against the person under" the Act. The cooperation may relate to any type of action under the Act, including freezing orders (Part 2-1A), restraining orders (Part 2-1), court-ordered forfeiture (Part 2-2), automatic forfeiture (Part 2-3), pecuniary penalty order (Part 2-4), literary proceeds orders (Part 2-5) or unexplained wealth orders (Part 2-6).

554. This provision is to be read broadly.[927] Cooperation in resolving any action under the Act may include: withdrawing or refraining from making an application for exclusion of property from a restraining order or from an order for forfeiture;[928] consenting to an order, particularly when done earlier rather than later;[929] and taking steps to aid the enforcement of an order, such as by obtaining loans or otherwise.[930]

555. Although a wide range of actions may constitute cooperation, cooperation requires a deliberate decision by the offender to facilitate the course pursued in the action under the *Proceeds of Crime Act*.[931] The offender bears the onus of establishing that their conduct amounted to cooperation which mitigated the severity of the sentence.[932] If the sentencing court is not satisfied that the offender's decision was deliberately made for reasons that disclose a willingness to cooperate, the fact that (for example) an application for exclusion was not made or was withdrawn will not amount to cooperation.[933]

556. The weight, if any, to be given to cooperation will depend upon the circumstances. A decision not to pursue a hopeless application for exclusion of property from a confiscation order should receive less weight than one where the offender does not pursue an arguable claim or where the circumstances are complicated and would involve protracted litigation.[934]

557. Cooperation may be treated as mitigating whether or not it is indicative of contrition or remorse.[935]

924 Cf *R v Tabone* [2006] VSCA 238, [10]-[14].
925 *R v McLeod* (2007) 16 VR 682; *Atkinson v R* [2013] NTCCA 5.
926 *R v McLeod* (2007) 16 VR 682, [40]-[43]; endorsed in *Atkinson v R* [2013] NTCCA 5, [14]-[15].
927 *R v Host* [2015] WASCA 23, [20], [193].
928 *TAN v R* (2011) 35 VR 109, [56].
929 *R v Host* [2015] WASCA 23, [20], [115](d).
930 *R v Host* [2015] WASCA 23, [20], [193].
931 *TAN v R* (2011) 35 VR 109, [56].
932 *TAN v R* (2011) 35 VR 109, [55].
933 *TAN v R* (2011) 35 VR 109, [56].
934 *TAN v R* (2011) 35 VR 109, [54]-[56].
935 *R v Host* [2015] WASCA 23, [20], [193].

3.5.18 Forfeiture by operation of law

558. Many Commonwealth statutes provide for the forfeiture of property, by operation of law, in particular circumstances.[936] Such forfeiture may occur independently of whether a person is convicted of an offence. The legislation providing for forfeiture often provides a means for the "condemnation" of forfeited property, that is, a determination by a court or the occurrence of an event that has the legal effect of confirming the forfeiture.

559. More general provision for forfeiture by operation of law is made by the *Proceeds of Crime Act 2002* (Cth). Part 2-3 of the Act provides for a scheme by which, if a person is convicted of a "serious offence" (a term which is given a complex definition in s 338 of the Act), property that is subject to a restraining order relating to the offence is forfeited to the Commonwealth unless the property is excluded from forfeiture. (The scheme is separate from the power of a court under Part 2-2 of the Act to order forfeiture of property.) Under Part 2-3, forfeiture occurs at the end of a specified period after a person is convicted of a serious offence (s 92). The specified period is either 6 months, or a longer period (up to 15 months after the conviction day) which is fixed by a court under s 93.

560. The person whose conviction triggers the forfeiture by operation of law under Part 2-3 of the *Proceeds of Crime Act 2002* (Cth) need not be the owner, or the sole owner, of the property. For example, a restraining order may apply to property of another person which is merely under the effective control of the relevant offender, or if there are reasonable grounds to suspect that the property is proceeds of the offence or an instrument of the offence (s 17). Such property will be forfeited unless excluded from the restraining order or from forfeiture.

561. At common law, a sentencing court is required to take into account, as a factor in mitigation, the fact that property of the offender that was not the proceeds of crime has been forfeited.[937] The offender bears the onus of establishing that the forfeiture should be treated as mitigatory; this means, amongst other things, that the offender must establish that the property was not proceeds of crime. The common law principles apply in sentencing a federal offender, as they are not excluded by or inconsistent with federal legislation.[938]

562. In addition, if property which is not proceeds of crime is likely to be forfeited this is also relevant to sentencing and must be taken into account where it is known.[939] However, it will often be difficult for a sentencing court to assess the likelihood that property of the offender will be subject to forfeiture by operation of law or the extent to which such property is not the proceeds of crime.[940] A sentencing court is not required to speculate about these matters.[941] An offender who relies on the prospect of such forfeiture as a mitigating factor must satisfy the court accordingly. That is, the offender must persuade the court that property is likely to be forfeited, and that at least some of the property is not proceeds of the crime. If the information available is insufficient to enable the sentencing judge to make an

936 E.g. *Customs Act 1901*, ss 228-230; *Excise Act 1901*, s 116; *Migration Act 1958*, s 261A; *Biosecurity Act 2015*, s 627-630; *Fisheries Management Act 1991*, ss 106A, 106AA.

937 *TAN v R* (2011) 35 VR 109, [66].

938 *TAN v R* (2011) 35 VR 109, [61]-[62].

939 *R v Campbell* [1999] VSCA 177, following *Pastras v R* (1993) 65 A Crim R 584.

940 Compare *R v Yacoub* [2006] VSCA 203; *R v Tabone* [2006] VSCA 238; *R v Le* [2005] VSCA 284; *R v McLeod* (2007) 16 VR 682.

941 Cf *R v Tabone* [2006] VSCA 238, [10]-[14].

assessment of the likelihood of forfeiture or its likely effect there will be no error in declining to take this into account.[942]

563. The weight (if any) to be given to the forfeiture, or likely forfeiture, of property that is not proceeds of crime will depend upon all the circumstances.

3.5.19 Superannuation order

564. The *Crimes (Superannuation Benefits) Act 1989* (Cth) provides for the making of a superannuation order. In summary, a superannuation order is an order forfeiting the Commonwealth's contribution to the superannuation of a Commonwealth public servant who has been convicted of a corruption offence.[943] Part VA of the *Australian Federal Police Act 1979* (Cth) similarly provides for the making of a superannuation order in relation to an employee or member of the Australian Federal Police.

565. A court sentencing a federal offender is precluded from taking into account the possibility that a superannuation order may be made, where a person is convicted of an offence punishable by imprisonment for a term longer than 12 months.[944]

3.5.20 Registration of sexual offenders and other offenders

566. Each State and self-governing Territory has laws which provide for statutory consequences following from the sentencing of a person for sexual offences against children.[945] Some such laws cover other sexual offences as well; some also cover offences of violence against children. The laws generally provide for the inclusion of offenders on a register, and for the imposition of reporting and other obligations.

567. In most jurisdictions,[946] the registration and reporting obligations arise automatically (with very limited exceptions[947]) once the court imposes sentence for a listed offence.[948] That is, there is no need for any further court order beyond the sentence. The provisions generally give courts power to make orders imposing registration or reporting obligations on a person who is sentenced for other specified offences.

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942 Cf *R v Tabone* [2006] VSCA 238, [10]-[14].

943 For example see *DPP v Dwayhi* [2009] NSWSC 1025.

944 *Crimes (Superannuation Benefits) Act 1989* (Cth), s 43 and also the *Australian Federal Police Act 1979* (Cth), s 55.

945 **NSW:** *Child Protection (Offenders Registration) Act* 2000 (NSW); **Vic:** *Sex Offenders Registration Act 2004* (Vic); **Qld:** *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld); **WA:** *Community Protection (Offender Reporting) Act 2004* (WA); **SA:** *Child Sex Offenders Registration Act 2006* (SA); **Tas:** *Community Protection (Offender Reporting) Act 2005* (Tas); **ACT:** *Crimes (Child Sex Offenders) Act 2005* (ACT); **NT:** *Child Protection (Offender Reporting and Registration) Act 2004* (NT).

946 Tasmania is the notable exception, where a specific order is required. Section 6 of the *Community Protection (Offender Reporting) Act 2005* (Tas) requires the Court to make such an order, unless the court is satisfied that the person does not pose a risk of committing a reportable offence in the future.

947 For example, some jurisdictions do not impose mandatory registration if the offender was a child, or if the offence was a single class 2 offence.

948 Most jurisdictions refer to the relevant offences as "class 1" or "class 2" offences. Since 2014, the Queensland legislation refers instead to "prescribed offences".

568. State and Territory legislation lists federal offences among the various offences which trigger registration and reporting requirements. The legislation in each jurisdiction is broadly similar in structure, and in terms of the types of federal offences listed.[949]

569. A list of federal offences which are "registrable offences" for the purposes of each jurisdiction's sex offender registration legislation is set out in Appendix 3 to this guide.

570. In cases involving offences to which such laws apply, the prosecution should take care to ensure that the sentencing court is informed of any relevant obligations, and that any necessary orders to give effect to the laws are sought.

571. The laws of some jurisdictions preclude a court in sentencing an offender from having regard to the consequences of sexual offender registration. In *ONA*,[950] such a provision in the *Sentencing Act 1991* (Vic) was held to apply to the sentencing of a federal offender by operation of 79(1) (and possibly also s 68(1)) of the *Judiciary Act 1903* (Cth). The Court held that nothing in s 16A of the *Crimes Act 1914* (Cth) was inconsistent with or otherwise precluded the application of the State provision to the sentencing of a federal offender. In *Sabel*,[951] a similar conclusion was reached in relation to a cognate provision under New South Wales law.

572. Even in the absence of such a provision, or if such a provision were not picked up and applied as surrogate federal law to the sentencing of a federal offender, the prospect of registration or reporting requirements or other restrictions consequent upon conviction or sentencing is not ordinarily to be treated as a mitigating factor in sentencing.[952]

573. A conviction for an offence (including a Commonwealth offence) which is a registrable child sex offence in any State or Territory has a number of consequences for an offender who is subsequently convicted of a Commonwealth child sexual abuse offence committed on or after 23 June 2020. It will trigger mandatory sentencing for the latter offence and, if that offence is a Commonwealth child sex offence, a presumption of cumulation of the sentence for that offence upon any uncompleted term of imprisonment for the registrable child sex offence. See "7.3.3 Mandatory terms of imprisonment for high-level Commonwealth child sex offences and for repeat child sexual abuse offences" and "7.3.4 Presumption of cumulation in sentencing for Commonwealth child sex offences".

3.5.21 Control orders, extended supervision orders and continuing detention orders

574. Division 104 of the *Criminal Code* (Cth) provides for the making of control orders in order to protect the public from a terrorist act, or to prevent the provision of support for or the facilitation of a terrorist act, or to prevent the provision of support for, or the facilitation of the engagement in, a hostile activity in a foreign country. The making of a control order in relation to a person is not conditioned upon the person being convicted or found guilty of an offence.

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949 In contrast to provisions in other jurisdictions, the list of Commonwealth offences in the *Community Protection (Offender Reporting) Act 2004* (WA), Schedules 1 and 2, refers to repealed offences under the *Crimes Act 1914* (Cth) and does not refer to relevant offences under the *Criminal Code* (Cth).

950 *R v ONA* (2009) 24 VR 197.

951 *Sabel v R* [2014] NSWCCA 101, [206]-[209].

952 *DPP v Ellis* (2005) 11 VR 287, [16]; *Muldrock v R* (2011) 244 CLR 120, [61]; *DPP (Cth) v Besim; DPP (Cth) v MHK (No 3)* (2017) 52 VR 303, [55]-[58], [62].

575. Division 105A of the *Criminal Code* (Cth) provides for the making of a continuing detention order (CDO) in relation to a terrorist offender who is in custody and serving a sentence of imprisonment for a specified terrorism offence or foreign incursion offence. A CDO requires the continuing detention of an offender beyond the completion of their sentence. The Division also provides for the making of an extended supervision order (ESO), which imposes conditions on the offender after the completion of their sentence.

576. In sentencing an offender for a specified national security offence, the sentencing court must warn the offender that an application may be made under Division 105A for a CDO or ESO see "6.11 Requirement to warn certain offenders about the possibility of a continuing detention order or extended supervision order".

577. Courts have declined to treat as a mitigating factor in sentencing the possibility that an offender will be subject to a control order[953] or CDO.[954] In *Besim and MHK (No 3)*, the Victorian Court of Appeal emphasised not only that the possibility of a CDO was merely a matter of speculation at the time of sentencing, but also that such a possibility did not affect the sentencing court's synthesis of considerations of general deterrence, denunciation, protection of the community and rehabilitation.[955] Moreover the Court rejected a contention that the prospect of a CDO should mitigate the sentence on the basis that it would make imprisonment more burdensome. Not only was there no evidence to support the contention in that case, but also the prospect of a CDO was merely an incident of the offending and of the sentences imposed, and was therefore not mitigating.[956]

3.5.22 "Double jeopardy" in resentencing on prosecution appeal

578. In resentencing an offender following a successfully prosecution appeal, appellate courts have often treated as a mitigating factor the stress and anxiety of the respondent to the appeal while the appeal is pending.[957] This is sometimes said to involve an element of "double jeopardy".[958] In most jurisdictions (including NSW,[959] Victoria,[960] Western Australia,[961] South Australia[962] and the ACT[963]), this practice has been reversed by statute.

953 *R v Benbrika* [2009] VSC 21, [242]-[244].

954 *DPP (Cth) v Besim; DPP (Cth) v MHK (No 3)* (2017) 52 VR 303; *Alou v R* (2019) 101 NSWLR 319, [148]-[150], [198], [201] (special leave refused: *Alou v R* [2020] HCATrans 83).

955 *DPP (Cth) v Besim; DPP (Cth) v MHK (No 3)* (2017) 52 VR 303, [43]-[59].

956 *DPP (Cth) v Besim; DPP (Cth) v MHK (No 3)* (2017) 52 VR 303, [60]-[62].

957 E.g. *Dinsdale v R* (2000) 202 CLR 321, [62]; *DPP (Cth) v Fincham* [2008] VSCA 186, [28]; *DPP (Cth) v Page* [2006] VSCA 224, [55].

958 See, e.g., *R v JW* (2010) 77 NSWLR 7, [54]; *DPP v Karazisis* (2010) 31 VR 634.

959 *Crimes (Appeal and Review) Act 2001* (NSW), s 68A. See *R v JW* (2010) 77 NSWLR 7.

960 *Criminal Procedure Act 2009* (Vic), ss 259(3), 262(3), 289(2) and 290(3). See *DPP v Karazisis* (2010) 31 VR 634.

961 *Criminal Appeals Act 2004* (WA), s 41(4).

962 *Criminal Law Consolidation Act 1935* (SA), s 340; see now *Criminal Procedure Act 1921* (SA), s 150. See *R v Harkin* (2011) 109 SASR 334; *R v V* [2012] SASCFC 10. The DPP may only appeal against sentence to the Court of Appeal with the permission of the Court (*Criminal Procedure Act 1921* (SA), s 157). The Full Court of the Supreme Court has held that, in applying public policy considerations in deciding whether to grant the DPP permission to appeal, the Court is entitled to assume that the offender will be stressed and anxious about a Crown appeal, although presumed anxiety and distress must be ignored when considering the adequacy of the sentence under appeal: *R v Buttigieg* [2020] SASCFC 38, [43]-[47]; *R v Faber* [2020] SASCFC 49, [30]-[46].

963 *Crimes Sentencing Act 2005* (ACT), s7; *R v Chatfield* (2012) 19 ACTLR 65.

579. In *Bui*,[964] the CDPP contended that a State statute which precluded an appeal court from having regard to any "*element of double jeopardy*" in resentencing the respondent following a successful prosecution appeal was applied to the sentencing of a federal offender by the provisions of the *Judiciary Act 1903* (Cth). In its decision, however, the High Court went further. The Court held that the so-called principle of double jeopardy was a principle of judge-made law which was not accommodated by s 16A of the *Crimes Act 1914* (Cth), and was not picked up or applied by s 80 of the *Judiciary Act 1903* (Cth) to a court exercising federal jurisdiction, as there was no gap in federal law. Therefore, the Court held, no question of picking up the State provisions which excluded elements of double jeopardy arose, because the judge-made rule did not apply.

580. The effect of the decision in *Bui* is that an appellate court (in any Australian State or Territory) in resentencing a federal offender following a successful prosecution appeal must not have regard to any element of double jeopardy (that is, the court must not have regard to the *presumed distress or anxiety* of the respondent), whether or not that element has been excluded by statute in that jurisdiction.[965]

581. However an appellate court is not necessarily precluded from having regard to any evidence of *actual distress or anxiety* experienced by the respondent.[966] The weight (if any) to be accorded to such evidence will vary from case to case.[967]

964 *Bui v DPP (Cth)* (2012) 244 CLR 638.

965 *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [43].

966 Compare *Bui v DPP (Cth)* (2012) 244 CLR 638, [24]. See "3.4.13 Character, antecedents, age, means, physical/mental condition – s 16A(2)(m)".

967 *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1, [279]-[280]; cited with apparent approval in *Bui v DPP (Cth)* (2012) 244 CLR 638, [22]-[23]. In *DPP (Cth) v Boyles (a pseudonym)* [2016] VSCA 267, evidence of actual anxiety and distress, in combination with other circumstances, led the Court of Appeal to dismiss the Director's appeal in the exercise of its residual discretion, notwithstanding the manifest inadequacy of the original sentence.

4 COMMONWEALTH SENTENCING OPTIONS

4.1 Introduction

582. **There are six sentencing options which apply generally in relation to a federal offender** once the court has found the charge proved. Those six options are described in this Chapter.

583. Of course, for some offences only some of these options are available: for example, for summary offences for which the maximum penalty is a fine, imprisonment is not available as a sentencing option. Conversely, there are statutory restrictions on the availability of some non-custodial options in relation to sentencing for particular Commonwealth national security offences (see "7.1.2 Minimum non-parole period: the three-quarters rule"), migration-related offences (see "7.2 Migration offences") and child sexual offences (see "7.3 Child sex offences and child sexual abuse offences").

584. State or Territory sentencing options do not apply to the sentencing of a federal offender of their own force, nor are they picked up and applied as surrogate federal laws by ss 68 and 79 of the *Judiciary Act 1903* (Cth).[968] State or Territory options are, however, made available in some circumstances by other Commonwealth laws. Notable examples are:

- Community service orders and the like, which are made available by **s 20AB of the *Crimes Act 1914***, as one of the six general options (see "4.7 Sentences and orders made available by Crimes Act 1914, s 20AB"); and
- State and Territory dispositions in relation to **children and young persons** which are applied by s 20AC of the *Crimes Act 1914*. These options are described in a later Chapter: see "7.4 Children and young persons".

585. Particular additional options apply to the sentencing of **mentally-ill or intellectually-disabled offenders**: see "7.8 Disposition of persons suffering from mental illness/intellectual disability ".

586. As to the options for dealing with persons charged with a federal offence who are found to be **unfit to be tried**, see "7.6 Fitness to be Tried".

587. The options for dealing with persons charged with a federal offence who are found **not guilty by reason of mental illness** are also described in a later Chapter: see "7.7 Dispositions following acquittal because of mental illness".

588. Examples of common State or Territory **sentencing options which are not generally available** in sentencing a federal offender are set out in "4.12 Options not generally available in sentencing a federal offender".

968 *All Cars Ltd v McCann* (1945) 19 ALJR 129; *R v Mirkovic* [1966] VR 371; *Harrex v Fraser* [2011] ACTSC 172, [38]-[39].

4.2 Six general sentencing options

589. The following table summarises the six general federal sentencing options, following a finding of guilt:

Option	*Criteria*	*Crimes Act sections*	
		Imposition	*Breach*
1. Dismiss charge	Having regard to: • the character, antecedents, age, health or mental condition of the person; or • the extent (if any) to which the offence is of a trivial nature; or • the extent (if any) to which the offence was committed under extenuating circumstances it is inexpedient to inflict any punishment	s 19B(1)(c)	N/A
2. Bond without conviction	Having regard to: • the character, antecedents, age, health or mental condition of the person; or • the extent (if any) to which the offence is of a trivial nature; or • the extent (if any) to which the offence was committed under extenuating circumstances it is inexpedient to inflict other than nominal punishment or probation Maximum good behaviour period under bond is 3 years or, if probation or other condition, 2 years	s 19B(1)(d)	S 20A
3. Bond with conviction	Conviction appropriate The court thinks fit. The person must give security, with or without sureties, by recognizance or otherwise that they will be of good behaviour for up to 5 years and comply with other specified conditions	s 20(1)(a)	S 20A
4. Fine (with conviction only)	Offence is punishable by a fine Conviction appropriate Must have regard to means and financial circumstances of offender Lower maxima for offences dealt with summarily Different maxima for natural persons and bodies corporate	ss 4B, 4D	S 15A State law generally
5. State/Territory post-conviction sentence or order	Conviction appropriate Sentence or order can only be made if:	s 20AB; Crimes Regulations	s 20AC

Option	*Criteria*	*Crimes Act sections*	
		Imposition	*Breach*
(e.g. community based orders, periodic/weekend detention, etc)	• under the law of the State or Territory, a court is empowered to pass such a sentence, or make such an order, in respect of a State or Territory offender in corresponding cases; and • the order is of a kind referred to in the provision (e.g. community based order, community service/work, community correction, attendance centre, periodic or weekend detention)[969]	2019, reg 15	
6. Imprisonment	Offence is punishable by imprisonment Conviction appropriate Imprisonment is mandatory; or no other sentence is appropriate in all the circumstances of the case Must be exceptional circumstances for certain minor property offences	s 17A(1) s 17B	

590. Key features of the regime for fixing a sentence of imprisonment are as follows:

Option	*Specific criteria (in addition to s 16A)*	*Crimes Act 1914 sections*	
		Imposition	*Breach*
Head sentence/total effective sentence	Individual sentences to be fixed. Total effective sentence to be fixed by orders for concurrency/cumulation Commencement according to State law	s 19 s 16E	
Period to be served Options: • To be released immediately under recognizance release order (RRO) • To be released on RRO after serving specified period • Non-parole period (NPP) • Straight sentence (sentence)	Governed by various factors, including length of head sentence and whether serving another federal sentence. RRO requires entry into recognizance to be of good behaviour for up to 5 years, other conditions may be imposed[970] Immediate release for certain child sex offences only in exceptional circumstances	s 20(1)(b) s 19AB s 19AC s 19AD s 19AE s 19AG s 20(1)(b) s 20(1)(b)	s 20A (RRO)

969 See "4.7.3 Types of State or Territory sentences or orders which are made available by s 20AB".
970 See "4.10.4 Non-parole period (NPP), recognizance release order (RRO) or straight sentence?"

Option	*Specific criteria (in addition to s 16A)*	*Crimes Act 1914 sections*	
		Imposition	***Breach***
	RRO generally only if head sentence or aggregate for federal offences is 3 years or less NPP generally only if head sentence or aggregate for federal offences is more than 3 years For certain national security offences, must be ¾ of head sentence or aggregate. For certain people smuggling offences, mandatory minimum NPP Otherwise period to be served to be determined by general sentencing principles. • RRO/NPP not appropriate having regard to the nature and circumstances of the offence or offences concerned and to the antecedents of the person; or • the person is expected to be serving a State/Territory sentence on the day after the end of the federal sentence. Open discretion to impose straight sentence if head sentence or aggregate for federal offences is 6 months or less	s 19AB(3) s 19AC(3) s 19AC(4) s 19AD(2) s 19AE(2) s 19AR(4) s 19AC(3)	s 20A Div 5 of Pt IB (breach of parole)

591. Other sentencing options and orders which are available in particular circumstances are described in Chapters 5 and 7. The present chapter deals with the six general sentencing options.

4.3 Dismiss charge – *Crimes Act 1914*, s 19B

592. Where a person is charged before a court with a federal offence or federal offences, the court may, by an order under s 19B(1)(c), dismiss the charge or charges, if it is satisfied of the criteria in the two-stage test set out in that subsection.

593. As to the applicable criteria, see "4.4.2 The 2-stage process".

594. The dismissal of a charge under s 19B cannot be subject to any conditions.[971]

595. A court may not make an order under s 19B (including an order dismissing the charge or charges) in respect of a charge for an offence against s 233B, 233C or 234A of the *Migration Act 1958* (Cth) (offences related to people-smuggling) unless the offender was aged under 18 years at the time of the offence (Migration Act, s 236A). See "7.2.1 People-smuggling offences".

971 *R v Matijevic* [1997] FCA 992.

4.4 Bond without conviction – *Crimes Act 1914*, s 19B

596. Section 19B of the *Crimes Act 1914* (Cth) empowers a court to discharge without conviction a person charged with one or more federal offences, where the charge is proved, upon the person giving security, with or without sureties, by recognizance or otherwise, to the satisfaction of the court, that they will be of good behaviour for a specified period and comply with any other conditions.

597. The section requires that the person give "*security … by recognizance or otherwise*". In practice, security is invariably given by recognizance (that is, a bond), and such an order is therefore commonly referred to as a s 19B bond.

598. The power in s 19B to discharge an offender on a bond without conviction is conferred whenever "*a person is charged before a court with a federal offence or federal offences*" (s 19B(1)(a)). It is not limited to summary proceedings or to proceedings before a court of summary jurisdiction (in contrast, for example, to the power in s 20BQ of the Act: see "7.8.1 Non-conviction disposition in a court of summary jurisdiction"). In practice, however, it is very rare for s 19B bond to be ordered for an offence prosecuted on indictment, because such offences are almost always too serious for such a disposition to be appropriate.

4.4.1 A non-conviction disposition

599. The power conferred on a court by s 19B(1)(d) is to "*discharge the person, without proceeding to conviction in respect of any charge*" upon the person giving security as described in that paragraph. That is, the power is exercisable only *without conviction*.

600. If a person is convicted of a federal offence and the conviction is set aside on appeal, the person is then a "*person charged before a court*" with the offence, within the meaning of s 19B(1)(a), and an order under s 19B(1)(d) is then available.[972]

4.4.2 The 2-stage process

601. The criteria for making an order under s 19B(1) of the *Crimes Act 1914* are set out in the section. It provides that the court may make such an order where—

> *(a) a person is charged before a court with a federal offence or federal offences; and*
> *(b) the court is satisfied, in respect of that charge or more than one of those charges, that the charge is proved, but is of the opinion, having regard to:*
> *(i) the character, antecedents, cultural background [deleted in December 2006], age, health or mental condition of the person;*
> *(ii) the extent (if any) to which the offence is of a trivial nature; or*
> *(iii) the extent (if any) to which the offence was committed under extenuating circumstances;*
> *that it is inexpedient to inflict any punishment or to inflict any punishment other than a nominal punishment, or that it is expedient to release the offender on probation …*

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972 *Huynh v R* (2021) 105 NSWLR 384, [50]-[53], [56]. Whether a court has power to set aside a conviction for a federal offence depends upon the relevant appeal provisions (usually under the law of the relevant State or Territory, applied as surrogate federal law by the *Judiciary Act 1903* (Cth)). In *Huynh*, the Court held ([57]) that while the District Court of NSW has such a power on an appeal against *conviction* from the Local Court, it does not have the power on an appeal against *sentence* from the Local Court.

602. The discretion conferred on a sentencing court by s 19B has been held to consist of two stages:[973]

- First, one or more of the factors specified in s 19B(1)(b)(i), (ii) or (iii) must be identified.
- Second, consideration must be given to whether, in light of that factor or factors and taking into account the principles and matters specified in s 16A of the Act, "*it is inexpedient to inflict any punishment, or to inflict any punishment other than a nominal punishment, or that it is expedient to release the offender on probation*".

603. **First-stage consideration:** The first stage involves identification of one or more of the factors set out in sub-paragraphs (i), (ii) or (iii) of s 19B(1)(b). The sub-paragraphs are alternatives.

604. Sub-paragraph (i) refers to "*the character, antecedents, age, health or mental condition*" of the person.[974] This reflects the considerations listed in s 16A(2)(m) of the Act: see "3.4.13 Character, antecedents, age, means, physical/mental condition – s 16A(2)(m)".

605. The consequences which would flow from a conviction (such as restrictions on entry into foreign countries or disqualification from being an officer of a corporation) do not form part of a person's antecedents.[975] That is, such a prospect could not, of itself, trigger the exercise of the discretion.

606. Sub-paragraph (ii) refers to "the extent (if any) to which the offence is of a trivial nature".

607. Sub-paragraph (ii) refers to "the extent (if any) to which the offence was committed under extenuating circumstances". Extenuating circumstances are circumstances which "serve to make the offence seem less serious", "lessen, or seem to lessen, the seeming magnitude of (guilt or offence) by partial excuses", or excuse, in any appreciable degree, the commission of the offence charged.[976] The provision does not allow the court to have regard to extenuating circumstances generally; there must be some link between the extenuating circumstances relied on and the commission of the offence.[977]

608. The fact that, through no fault of their own, the offender "*had a life marked by trauma, adversity and abuse*" may be matters to which regard should be had under sub-paragraphs (i) and (iii).[978]

609. Not all mitigating matters are capable of falling within (i), (ii) or (iii). In particular, the considerations listed do not include consequences that would flow from conviction for the offence. Nor does the list in the sub-paragraphs encompass other mitigating factors such as a plea of guilty, contrition, reparation or cooperation with law enforcement agencies. The factors relevant to the first stage are thus more confined than under the New South Wales counterpart of s 19B.[979]

610. The mitigating factors referred to in sub-paragraphs (i), (ii) or (iii) are not mere pegs on which to hang leniency dictated by some extraneous and idiosyncratic consideration. One or more of the mitigating

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973 *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332; *DPP (Cth) v Moroney* [2009] VSC 584, [15]; *Morrison v Behrooz* [2005] SASC 142.

974 An additional reference to the "cultural background" of the defendant was deleted from the list of factors to be taken into account under s 19B with effect from 12 December 2006: *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth). In addition, for offences committed on or after 13 December 2006, a sentencing court is precluded from taking into account any form of customary law or practice as a mitigating or aggravating factor.

975 *R v Barany* [2018] QCA 137, [41].

976 *Mansfield v Evans* [2003] WASCA 193, [20].

977 *Mansfield v Evans* [2003] WASCA 193, [20].

978 *R v Al Majedi* [2024] QCA 27, [24].

979 *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332, [12]-[13]. The NSW counterpart of s 19B is s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

matters listed must provide a sufficient ground to hold that it would be expedient to extend the leniency which the statute permits.[980]

611. **Second-stage consideration:** The second stage consideration involves a determination whether "it is inexpedient to inflict any punishment, or to inflict any punishment other than a nominal punishment, or that it is expedient to release the offender on probation". These alternatives may be broken down as follows:[981]

- Determining whether "*it is inexpedient to inflict any punishment*" involves determining whether the charge should be dismissed.
- Determining whether "*it is inexpedient … to inflict any punishment other than a nominal punishment*" involves a determination whether to make an order under s 19B(1)(d) for release on a recognizance without conviction.
- Determining whether "*it is expedient to release the offender on probation*" involves a determination whether to make an order under s 19B(1)(d) for release on a recognizance without conviction with a probation condition.

612. Determination that such an outcome (that is, no punishment or only nominal punishment or probation) is expedient requires consideration of a wide range of factors in addition to the mitigating factors relied upon at the first stage to enliven the discretion.

613. An order under s 19B(1) is an "order" within the meaning of s 16A(1);[982] therefore all matters under s 16A of the *Crimes Act 1914* which are relevant and known to the court must be considered in deciding whether to make an order under s 19B.[983]

614. It follows that, in considering whether it is expedient to make an order under s 19B(1), the court must consider, amongst other things—

- the nature and circumstances of the offence (s 16A(2)(a)),
- whether it forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character (s 16A(2)(c)),
- the personal circumstances of any victim (s 16A(2)(d)),
- any victim impact statement (s 16A(2)(ea)) and
- any injury loss or damage from the offence (s 16A(2)(e))—

to the extent that they are relevant and known to the court.

615. In determining whether an order under s 19B(1) is appropriate, the court must also have regard to the nature and severity of the conditions that may be imposed under that order (s 16A(3)).

616. The court must also consider at the second stage matters in mitigation, including matters which do not fall within sub-paragraphs (i), (ii) or (iii) of s 19B(1)(b), such as the likely consequences of a conviction,[984] to the extent that they are relevant and known to the court.

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980 *Cobiac v Liddy* (1969) 119 CLR 257, 276 (Windeyer J). Cf *Guerrero v Dickson* [2013] WASC 246, [32]-[25]; *DPP (Cth) v Ede* [2014] NSWCA 282, [27]; *R v Barany* [2018] QCA 137, [38]-[46].

981 See *Comptroller-General of Customs v C* [2020] WASC 290, [47]-[51]; *R v Wall* (2002) 71 NSWLR 692, [83]-[84].

982 *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332, [15].

983 *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332, [15]-[29].

984 *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332, [38].

617. The overarching obligation of the sentencing court remains: the court "*must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence*" (*Crimes Act 1914*, s 16A(1)). The court must give proper weight to considerations of general deterrence (s 16A(2)(ja)), specific deterrence (s 16A(2)(j)), denunciation and adequate (that is, proportionate) punishment (s 16A(2)(k)). An order which involves no punishment or only nominal punishment for a non-trivial offence necessarily accords little or no weight to such purposes.

618. In *Al Majedi*,[985] Dalton JA said that the option of imposing a s 19B bond with a condition for probation "*is not to be regarded as a minimal punishment or equal in leniency to the imposition of a good behaviour bond* [that is, without such a condition]*. It provides a meaningful option where there are reasons to try to avoid recording a conviction.*" It should be noted, however, that in that case Morrison JA and Fraser AJA ([29]), while agreeing generally with Dalton JA, refrained from agreeing with this observation. With respect, while in determining whether an order under s 19B is appropriate a court must have regard to the severity of the conditions that may be imposed (s 16A(3)), it is difficult to see how an order without conviction under s.19B(1)(d) with a probation condition (which is limited to a maximum of 2 years) is inherently and significantly less lenient than such an order with other conditions or an order of longer duration (maximum 3 years).

619. **Exercise of the discretion:** The circumstances in which an order under s 19B(1) will be appropriate have been described as "exceptional", "rare", "unusual", "atypical", "special" or "singular"[986] and as requiring something to distinguish the instant case from what may be regarded as a typical breach.[987] These terms are not substitutes for the language of the statute,[988] but describe the effect of applying the law. That is, unless the offence is trivial, an order which involves *no punishment* or only *nominal punishment* will rarely be an order "*of a severity appropriate in all the circumstances of the offence*" (s 16A(1)) or will rarely give sufficient effect to the requirement for adequate punishment (s 16A(2)(k)) or take sufficient account of the need for general deterrence (s 16A(2)(ja)) or denunciation.

620. For these reasons, it has been held that an exercise of the discretion under s 19B will be unusual or exceptional in cases involving fraudulent or deliberately deceptive conduct[989] or in other cases in which general deterrence is important. Examples are a case involving dishonesty by a public official (even though the benefit dishonestly obtained was relatively small)[990] and a case involving the unauthorised writing of prescriptions by a medical practitioner (despite the practitioner receiving no personal benefit from doing so).[991] Similarly, where offending is serious, a s 19B bond will usually be inappropriate notwithstanding the personal circumstances of the offender.[992]

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985 *R v Al Majedi* [2024] QCA 27, [21].

986 *Matta v ACCC* [2000] FCA 729, [3]; *R v Hooper* [2008] QCA 308, [27]; *Hayes v Weller* (1988) 50 SASR 182, 183 ("rare"), 187 ("exceptional"), 188 ("atypical"); *Uznanski v Searle* (1981) 26 SASR 388, 394; *Stark v Plant* [2010] WASCA 74; *R v Al Majedi* [2024] QCA 27, [24]. See *Guerrero v Dickson* [2013] WASC 246, [31], where relevant authorities are collected.

987 *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332 [72]; *DPP (Cth) v Moroney* [2009] VSC 584, [27].

988 *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332, [70]-[77].

989 *Matta v ACCC* [2000] FCA 729; *R v Wall* (2002) 71 NSWLR 692, [86]-[90]; *Moreland v Snowdon* [2007] WASC 137, [46].

990 *R v Matijevic* [1997] FCA 992.

991 *R v Price* [2008] QCA 330, [16]-[17].

992 *Sau v DPP (Cth)* [2009] SASC 47; *Warnakulasuriya v R* [2009] WASC 257; *RLG v Donnelly* [2012] WASC 230.

621. In *Moroney*,[993] T Forrest J observed that s 19B is probably being overused in Victoria in the context of welfare fraud.[994]

4.4.3 Single bond may be ordered for two or more federal offences

622. In general, the imposition of a single penalty in relation to more than one offence is permitted only to the extent that it is clearly authorised by statute. Commonwealth legislation provides for aggregate penalties only in limited circumstances. The main provision permitting aggregate penalties in courts of summary jurisdiction is s 4K(4) of the *Crimes Act 1914* (Cth). That subsection permits an aggregate penalty only for offences against the same provision of a law of the Commonwealth which are founded on the same facts, or form, or are part of, a series of offences of the same or a similar character. Section 4K(4) only relates to the aggregation of post-conviction penalties, not a non-conviction order such as an order under s 19B(1)(d). (See further "6.10 Aggregate penalty".)

623. In its own terms, s 19B applies whenever a person is charged before a court with *one or more* federal offences. It is implicit that a single order may be made in relation to more than one of the offences with which the person is charged. By contrast with s 4K, there is no explicit requirement that the charges be for the same offence, or for offences against the same provision of the Commonwealth law, or for offences of the same or similar nature, or that they be contained in the same charge-sheet or information. The better view would appear to be that the power to make a single order under s 19B in relation to multiple offences is not subject to any such implied limitations.

624. It should be noted, however, that there is no power to combine an order under s 19B with any kind of bond or order in relation to State or Territory offences.

4.4.4 Length of good behaviour period under s 19B

625. A recognizance (or other security) under s 19B may be (and almost always is) conditional on the person being of good behaviour for a specified period, not exceeding 3 years (s 19B(1)(d)(i)).

626. If the court imposes a probation condition, or any other condition under s 19B(1)(d)(iii), the maximum period which may be specified under s 19B(1)(d)(i) is 2 years (s 19B(1)(d)(iii)).

4.4.5 Reparation, restitution, compensation or costs as a condition of a bond

627. In accordance with s 19B(1)(d)(ii), a court may impose a condition of a s 19B bond that the offender make reparation or restitution, or pay compensation or costs, on or before a specified date, or by specified instalments. The condition may be for any making of reparation or restitution, or payment of compensation or costs that the court is otherwise empowered to order.

628. It is usually more appropriate for reparation to be the subject of a separate order, rather than made a condition of a recognizance, because of the greater range of enforcement options: see "5.3 Reparation – Crimes Act 1914, s 21B".

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993 *DPP (Cth) v Moroney* [2009] VSC 584, [31].

994 The most commonly-prosecuted offence for welfare fraud is the offence in s 135.2(1) of the *Criminal Code* (Cth). CDPP data shows that in the four years to 31 January 2023, s 19B orders were made in 19.34% of all cases under s 135.2(1) of the *Code* dealt with in the Magistrates' Court of Victoria, compared with 2.93% of all such cases in corresponding courts in the rest of Australia – that is, s 19B orders were made more than six times more frequently in Victoria than elsewhere for that offence.

4.4.6 Probation as a condition of a bond

629. In accordance with s 19B(1)(d)(iii), a s 19B bond may include a condition that the person will, during the period so specified, be subject to the supervision of a probation officer appointed in accordance with the order and obey all reasonable directions of a probation officer so appointed.

630. In some jurisdictions arrangements are in place for State or Territory probation officers to perform functions under such an order, at least in particular circumstances.

631. If the court imposes a probation condition under s 19B(1)(d)(iii), the maximum period of the bond which may be specified is 2 years (s 19B(1)(d)(iii)).

4.4.7 Other conditions of bond

632. In accordance with s 19B(1)(d)(iii), a court may impose such other conditions in a s 19B bond "as the Court thinks fit to specify in the order". Despite the apparent breadth of this provision, it is subject to implied limitations.[995] One such limitation is the general law principle that a person who has not been convicted of an offence should not be punished by a court; in the absence of clear statutory authority, a condition may not be imposed if it would amount to punishment.[996]

633. Any condition imposed must "be expressed in unambiguous and definitive language, so that the person submitting to it is left in no doubt as to what are the precise obligations to be satisfied".[997]

634. If the court imposes any condition under s 19B(1)(d)(iii), the maximum period of the bond which may be specified is 2 years (s 19B(1)(d)(iii)).

4.4.8 No power to order community work as a condition of a bond

635. The power in s 19B(1)(d)(iii) to impose conditions does not permit a condition to perform unpaid community work.[998]

4.4.9 Payment of money as condition of a bond

636. In *Brittain v Mansour*[999], it was held that there was no power to impose as a condition of a bond under the *Sentencing Act 1991* (Vic) a requirement that the offender pay money to the court fund or to a nominated charity. Such a condition was, in substance, a fine. The power to impose conditions on a bond did not extend to the imposition of such a monetary impost.[1000]

637. The reasoning in *Brittain v Mansour* would seem to apply equally to orders under s 19B of the *Crimes Act 1914* (Cth). It is therefore the view of the CDPP that a court cannot impose as a condition of a section 19B bond a condition to pay a monetary amount to a charitable organisation or to a court fund. The only power to order payment of money as a condition of a bond is the power in s 19B(1)(d)(ii) to require that the offender make reparation or restitution, or pay compensation or costs.

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995 For an example of unwarranted conditions of a bond, see *R v Manolakis* [2008] SASC 129.

996 *DPP (Cth) v Ede* [2014] NSWCA 282, [34]-[36].

997 *Temby v Schulze* (1991) 57 A Crim R 284, 289.

998 *DPP (Cth) v Ede* [2014] NSWCA 282. See also "4.5.10 Other conditions: unpaid community service as a condition of a bond".

999 *Brittain v Mansour* [2013] VSC 50.

1000 The effect of the decision in *Brittain v Mansour* [2013] VSC 50 has since been reversed for State offences by statute in Victoria by the *Justice Legislation Amendment Act 2013.*

4.4.10 Form of bond

638. No particular form of bond under s 19B is required by statute. The section itself provides (in s 19B(1)(d)) that the court may, by order, "*discharge the person, without proceeding to conviction … upon his or her giving security, with or without sureties, by recognizance or otherwise, to the satisfaction of the court …*". The essential requirement, therefore is "*security … to the satisfaction of the court*".

639. The form of security is not specified, but in practice is invariably a specified sum. There is no statutory limit on the sum that can be fixed and there is some variation around Australia in the amounts chosen.[1001] In practice a surety is rarely, if ever, required.

640. A form of s 19B bond is prescribed as Form 10 under the *Crimes Regulations 2019* (Cth), although the use of the prescribed form is optional. A State or Territory bond form should not be used for a s 19B bond.[1002]

4.4.11 Order under s 19B not available for certain people-smuggling offences

641. A court may not make an order under s 19B (including a bond) in respect of a charge for an offence against s 233B, s 233C or s 234A of the *Migration Act 1958* (Cth) (offences related to people-smuggling) unless the offender was aged under 18 years at the time of the offence (Migration Act, s 236A). See "7.2.1 People-smuggling offences".

4.4.12 Corporations

642. The provisions of s 19B (and s 20) apply to a corporation as well as to a natural person.[1003]

4.4.13 Explaining the order and providing a copy

643. The court must:

- explain or cause to be explained the purpose of the order, the consequences which may follow if it is not complied with and that the recognizance may be discharged or varied under s 20AA (s 19B(2)); and
- provide a copy of the order to the offender (s 19B(4)).

4.4.14 Breach action of a s 19B bond – *Crimes Act 1914*, s 20A

644. The procedure for dealing with a breach of a bond under s 20(1)(a) is governed by s 20A of the *Crimes Act 1914* (Cth).

645. Breach action is initiated by information laid before a magistrate alleging that the person has, without reasonable cause or excuse, failed to comply with a condition of the order (s 20A(1)).

646. The information must be laid before the end of the period for which the person is required by the order to give security to be of good behaviour, unless the failure to comply is constituted by the

1001 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006), Appendix 2, [61].

1002 *DPP (Cth) v Cole* (2005) 91 SASR 480.

1003 *John C. Morish Pty Ltd v Luckman* (1977) 16 SASR 143; *Sheen v Geo Cornish Pty Ltd* [1978] 2 NSWLR 162; *Lanham v Brambles-Ruys Pty Ltd* (1984) 37 SASR 16.

commission of an offence (s 20A(1A)). If the breach consists of the commission of an offence, breach action can be taken either within or outside the period of the bond.[1004]

647. The magistrate may issue a summons directing the person to appear, on a date, and at a time and place fixed in the summons, before the court by which the order was made (s 20A(1)(a)).

648. If the information is laid on oath and the magistrate is satisfied that proceedings by summons might not be effective, the magistrate may issue a warrant for the apprehension of the person (s 20A(1)(b)). Provision is made for bail or remand of the person following their arrest (s 20A(4)).

649. If the person fails to attend before the court as required, the court may issue an arrest warrant (s 20A(2)).

650. If the court which made the original order under s 19B(1) (whether or not constituted by the same judge or magistrate) is satisfied that the person has without reasonable cause or excuse failed to comply with a condition of the order, the options available to the court are set out in s 20A(5)(a). They are:

- revoke the order, convict the person of the offence or offences in respect of which the order was made and deal with the person, for that offence or those offences, in any manner in which they could have been dealt with for that offence or those offences if the order had not been made (s 20A(5)(a)(i)); or
- take no action (s 20A(5)(a)(ii)).

651. In dealing with the offender under s 20A(5), the court must take into account (a) the fact that the order was made, (b) anything done under the order and (c) any other order made in respect of the offence or offences (s 20A(6)).

652. The court may also order that any recognizance or surety be estreated, or that any other security be enforced (s 20A(7)).

1004 Cf *DPP (Cth) v Fabri* [2008] NSWSC 655.

4.5 Bond with conviction – *Crimes Act 1914*, s 20(1)(a)

653. Section 20 enables the court, following the conviction of a person for a federal offence, to release the offender on a bond ("recognizance").

4.5.1 The nature of a s 20(1)(a) order

654. Section 20(1)(a) provides that, where a person is convicted of a federal offence, the court may "*by order, release the person, without passing sentence on him or her, upon his or her giving security, with or without sureties, by recognizance or otherwise, to the satisfaction of the court, that he or she will comply with*" specified conditions.

655. An order under s 20(1)(a) is a final order; the reference to releasing the offender "*without passing sentence upon him or her*" does not refer to releasing the offender from custody with sentence postponed, but to releasing the offender absolutely from liability in respect of the conviction.[1005]

656. The order is a form of conditional release, as an alternative to "*passing sentence*" (that is, a sentence of imprisonment[1006]) on the offender. The offender's release is conditional on the offender giving security, to the satisfaction of the court, that they will comply with conditions which are specified in s 20(1)(a)(i)-(iv).

657. The core condition of the release is that the offender be of good behaviour for a specified period (up to 5 years) (s 20(1)(a)(i)). The court has wide powers to impose other conditions. The conditions which may (and may not) be imposed are discussed below.

658. The "security" which the offender must give may be "*by recognizance or otherwise*". In practice, the security required is invariably in the form of a recognizance, in a specified monetary sum. A recognizance, more commonly referred to as a "bond", is a binding contractual agreement between the offender and the Crown, traditionally referred to as a "contract of record".[1007] One or more sureties may also be required, although in practice the person is usually released on their own undertaking.

659. A s 20 order must be reduced to writing and a copy given to the offender (s 20(4)). Although there is no express requirement that the recognizance itself be in writing, in practice it is always in writing. (As to the form of the recognizance, see "4.5.15 Form of bond".) If the court orders security by way of recognizance, the offender is not "released" until the recognizance is entered into. The specified monetary sum required as security is not usually payable unless the recognizance is breached and the security is enforced under s 20A(7) of the *Crimes Act 1914* (see "4.5.18 Breach of a s 20 bond – *Crimes Act 1914*, s 20A").

4.5.2 Single bond may be ordered for two or more federal offences

660. In general, the imposition of a single penalty in relation to more than one offence is permitted only to the extent that it is clearly authorised by statute. Commonwealth legislation provides for aggregate penalties only in limited circumstances. The main provision permitting aggregate penalties in courts of

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1005 *Devine v R* (1967) 119 CLR 506, 516 (Windeyer J).

1006 "*The word "sentence" connotes a judicial judgment or pronouncement fixing a term of imprisonment. A term of imprisonment is the period fixed by the judgment as the punishment for the offence*": *Winsor v Boaden* (1953) 90 CLR 345, 347 (Dixon CJ).

1007 *DPP (Cth) v Cole* (2005) 91 SASR 480, [14]-[16].

summary jurisdiction is s 4K(4) of the *Crimes Act 1914* (Cth). That subsection permits an aggregate penalty only where charges against the same person for any number of offences against the same provision of a law of the Commonwealth have been joined in the same information, complaint or summons on the basis that the charges are founded on the same facts, or form, or are part of, a series of offences of the same or a similar character. (See further "6.10 Aggregate penalty".)

661. In its own terms, s 20(1)(a) applies whenever a person is convicted of one or more federal offences. It is implicit that a single order may be made in relation to more than one of the offences with which the person is charged. By contrast with s 4K, there is no explicit requirement that the charges be for the same offence, or for offences against the same provision of the Commonwealth law, or for offences of the same or similar nature, or that they be contained in the same charge-sheet or information. The better view would appear to be that the power to make a single order under s 20 in relation to multiple offences is not subject to any such implied limitations.

662. It should be noted, however, that there is no power to combine an order under s 20 with any kind of bond or order in relation to State or Territory offences.

4.5.3 Core condition: good behaviour period (s 20(1)(a)(i))

663. The core condition of a bond under s 20(1)(a) is that the offender "*will be of good behaviour for such period, not exceeding 5 years, as the court specifies in the order*" (s 20(1)(a)(i)).

4.5.4 Other conditions: reparation, restitution, compensation or costs (s 20(1)(a)(ii))

664. In accordance with s 20(1)(a)(ii), a court may impose a condition that the offender make reparation or restitution, or pay compensation or costs, on or before a specified date, or by specified instalments. The condition may be for any making of reparation or restitution, or payment of compensation or costs, that the court is otherwise empowered to order.

665. A condition under s 20(1)(a)(ii) is a condition imposed by order of the court even though it becomes a condition of a recognizance and an obligation to make reparation (or, presumably, other payment) is an obligation arising under an order of the court.[1008]

666. An order for costs or for any other payment by an offender is enforceable in the same way as a fine.[1009] This would appear to include a requirement imposed as a condition of a recognizance under s 20(1)(a)(ii). That is, it appears that a failure to comply with such a condition may be dealt with either by proceedings for breach of the recognizance (see "4.4.14 Breach of a s 20 bond – Crimes Act 1914, s 20A") or by enforcement action of a kind applied by s 15A of the *Crimes Act 1914 (Cth)*. However in either case, a person is not to be imprisoned for such a failure: *Crimes Act*, s 20(2A).

667. An order under s 20(1) should not be expressed as requiring any such payment as a precondition of release on recognizance, as this would run counter to s 20(2A).[1010]

668. It will usually be preferable for reparation, restitution, compensation or costs to be the subject of a separate order, rather than made a condition of a s 20 recognizance. There are two reasons for this. First, making such an order a condition of a recognizance effectively draws it within the ambit of the

1008 *Paterson v Commonwealth* (1990) 23 FCR 412, 414.
1009 See "4.6.10 Enforcement of fines – Crimes Act 1914, s 15A".
1010 See *Hayes v R* [2014] VSCA 309, [9], [26].

overall penalty.[1011] One consequence is that the order must be taken into account in assessing the offender's capacity to pay a pecuniary penalty. Second, a reparation order is enforceable as a final judgment of the court (s 21B(3)) (see "5.3 Reparation – Crimes Act 1914, s 21B"). This enables the person in whose favour the order is made to take action to enforce the order, by any of the means provided for enforcing such a judgment. There is no corresponding provision in relation to an order as a condition of a recognizance under s 20(1)(a)(ii).

4.5.5 Other conditions: pecuniary penalty (s 20(1)(a)(iii))

669. Pursuant to s 20(1)(a)(iii), a court may impose a condition of a s 20(1)(a) order that the offender will pay to the Commonwealth such pecuniary penalty (if any) as the court specifies in the order, on or before a date specified in the order or by specified instalments as provided in the order. The maximum pecuniary penalty is that specified in s 20(5). If the offence is punishable by a fine, the maximum pecuniary penalty is the amount of the maximum fine that the court is empowered to impose on the person for the offence. If not, the maximum pecuniary penalty is 60 penalty units in the case of a court of summary jurisdiction, or 300 penalty units otherwise. (For the value of a penalty unit at a particular time, see "4.6.3 Penalty unit value".)

670. An order under s 20(1) should not be expressed as requiring any such payment as a condition of release on recognizance, as this would run counter to s 20(2A).[1012]

4.5.6 Other conditions: general power (s 20(1)(a)(iv))

671. Other conditions may be imposed for up to 2 years: s 20(1)(a)(iv). Under this sub-paragraph the court can impose such conditions *"as the court thinks fit to specify in the order"*.

672. Although these words are very wide, they only permit the imposition of a condition which has some connection with a "*relevant principle such as retribution, correction or punishment and perhaps various moral and social considerations*".[1013] The sub-paragraph does not "*authorize the imposition of conditions which are repugnant to the principles or policy of the law or are foreign to the purpose of the power*".[1014]

673. A condition imposed must not be inconsistent with the release of the person, and must be reasonably capable of compliance.[1015]

674. A condition must "*be expressed in unambiguous and definitive language, so that the person submitting to it is left in no doubt as to what are the precise obligations to be satisfied*".[1016]

4.5.7 Other conditions: treatment or probation (s 20(1)(a)(iv))

675. An example given in the legislation of a condition which may be specified under s 20(1)(a)(iv) is a condition that "*the person will undertake a specified counselling, education or treatment program during a specified part of, or throughout, the specified period*".

1011 *Johannessen v Collins* (1992) 24 ATR"306, 319.
1012 See *Hayes v R* [2014] VSCA 309, [9], [26].
1013 *Isaacs v McKinnon* (1949) 80 CLR 502, 529 (McTiernan J).
1014 *Isaacs v McKinnon* (1949) 80 CLR 502, 523 (Dixon J, dissenting in the result).
1015 See *R v Keur* (1973) 7 SASR 13, 15.
1016 *Temby v Schulze* (1991) 57 A Crim R 284, 289. As to the other requirements for a valid condition of a bond, see *Dunn v Woodcock* [2003] NTSC 24, [7].

676. Section 20 also contemplates a condition that the person "*be subject to the supervision of a probation officer appointed in accordance with the order*" and "*obey all reasonable directions of the probation officer*", because such a condition is referred to in s 20(1A). Under that subsection, if the court imposes such a condition it "*must also specify the condition that the person will not travel interstate or overseas without the written permission of the probation officer*."

677. In *Jones*,[1017] Burt CJ doubted that a condition requiring the defendant to *"undergo such treatment for your drug addiction as the probation officer shall direct"* was a valid condition under s 20. Although it is clear that a condition requiring treatment for drug addiction would be valid, the area for doubt is whether a condition could be imposed that left to the discretion of another person the nature and extent of the treatment. Such a condition might be regarded as akin to impermissible sub-delegation, or be too uncertain in what it requires of the offender.

4.5.8 Other conditions: travel restriction orders

678. A court which makes an order under s 20(1) for a serious drug offence or certain passport-related offences may, at the same time or a later time, make certain travel restriction orders under s 22 of the *Crimes Act 1914* (Cth). See "5.2 Travel restriction orders – Crimes Act 1914, s 22".

4.5.9 Other conditions: curfew, reporting conditions and restrictions on residence, visitors and movement

679. In *Evans*,[1018] Wigney J (with whom Allsop CJ agreed) said that conditions imposed on a bond under s 20(1)(a)(iv) for a curfew, reporting requirements and restrictions on residence, visitors and movement "*were not repugnant to the sentencing principles in the Crimes Act or foreign to the purposes of the power in s 20(1). Indeed, quite to the contrary*." Bromwich J (with whom Allsop CJ and Wigney J agreed) said that just like bail conditions to the same effect, these conditions "*are not themselves replacements for a custodial sentence, but rather recognisance conditions to facilitate release from custody.*"[1019]

4.5.10 Other conditions: unpaid community service as a condition of a bond

680. The weight of authority is that unpaid community service cannot be required as a condition of a s 20 recognizance, if it relies on a scheme established as a sentencing option under State or Territory legislation.[1020]

681. In *Adams v Carr*,[1021] the Full Court of the Supreme Court of South Australian held that a condition for performance of community service and an associated order that the offender comply with the lawful direction of a community service officer could validly be imposed under s 20(1)(a) of the *Crimes Act 1914* (Cth) and carried out in South Australia by arrangements under s 3B of the Act. However in

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1017 *R v Jones* [1984] WAR 175, 180. See also *R v Manolakis* [2008] SASC 129 relating to appropriateness of a condition to obey the directions of a corrections officer as to psychological or psychiatric treatment or counselling.

1018 *DPP (Cth) v Evans* (2022) 294 FCR 512, [14].

1019 *DPP (Cth) v Evans* (2022) 294 FCR 512, [38].

1020 *Bantick v Blunden* [1981] Tas R (NC) N9; *R v Shambayati* [1999] QCA 102; *Dimech v Watts* [2016] ACTSC 221; *DPP (Cth) v Evans* (2022) 294 FCR 512. See also *DPP (Cth) v Ede* [2014] NSWCA 282 (the performance of unpaid work cannot be made a condition of a bond without conviction under s 19B of the *Crimes Act 1914* (Cth)).

1021 *Adams v Carr* (1987) 47 SASR 205. *Adams v Carr* was followed in *Dowling v Hamlin* [2006] ACTSC 117,[32]-[34]; but in *Dimech v Watts* [2016] ACTSC 221, [19]-[22], another judge of the ACT Supreme Court declined to follow *Dowling v Hamlin* on this point. See also *Sweeney v Corporate Security Group* (2003) 86 SASR 425, [25]-[31].

Shambayati,[1022] the Queensland Court of Appeal held that a condition of a recognizance under s 20(1)(a) that the offender perform 50 hours of community service was invalid. The Court observed that although the terms of s 20(1)(a)(iv) are wide enough to include community service, "community service" had no meaning or regime for its performance except relevantly as a separate sentencing option under State legislation, which was not incorporated by s 20.[1023] The Court distinguished *Adams v Carr* on the basis that under the State legislation considered in that case, community service could be imposed only as a condition of a recognizance (that is, not under a sentence or order made available by s 20AB(1)).[1024] The Court in *Shambayati* concluded that the only way in which community service could be imposed for a federal offence in Queensland was by an order made pursuant to s 20AB(1), not as a condition of a s 20 recognizance.[1025]

682. In *Evans*,[1026] Bromwich J (with whom Allsop CJ and Wigney J agreed) said that (contrary to the view of the primary judge in that case), *Shambayati* was correctly decided and should be followed. His Honour also went further than the Court in *Shambayati*, expressing the view that the decision in *Adams v Carr* should not be followed. Bromwich J said that the conclusion in *Adams v Carr* relied upon "community service" retaining the meaning of that form of sentencing alternative under the State Act, applying the directions and procedures under that Act; his Honour said that that reasoning was not persuasive in light of *Shambayati*.[1027]

683. Following the decisions in *Shambayati* and *Evans*, it is now clear that community service which depends for its meaning or performance on a regime under a State or Territory law cannot be ordered as a condition of a s 20 bond. Specific community service orders under State or Territory laws, and the laws which provide for carrying those orders into effect, are available under s 20AB of the *Crimes Act 1914*, but only in relation to orders under that section. So, for example, in South Australia, community service is now available as a condition of an intensive correction order (ICO),[1028] an order which is available under s 20AB.[1029] The power to order community service as a condition of a State bond[1030] is not made available by s 20AB. Community service arrangements under the State law, in relation to either an ICO or a bond, are not applied so as to be available as a condition of a s 20 bond.

684. In *Evans*,[1031] Wigney J (with whom Allsop CJ also agreed) suggested, *obiter dicta*, that it would be possible to craft conditions of a s 20 bond so as to require an offender to perform unpaid community service, if it did not require the application of a State or Territory law that provided for the community service regime. On the approach taken by Bromwich J in that case, general conditions of a s 20 bond could be imposed "*provided they do not seek to bypass* [the scheme in s 20AB] *and its limitations and*

1022 *R v Shambayati* [1999] QCA 102.
1023 *R v Shambayati* [1999] QCA 102, [16].
1024 *R v Shambayati* [1999] QCA 102, [17].
1025 *R v Shambayati* [1999] QCA 102, [17]. See also *R v Medalian* (2019) 133 SASR 50, [16] (the recognizance release order (RRO) regime prescribed in Part IB of the *Crimes Act* is exhaustive and leaves no scope for any State sentencing options to be imposed in addition to a RRO).
1026 *DPP (Cth) v Evans* (2022) 294 FCR 512, [26], [36]; see also [9] (Wigney J).
1027 *DPP (Cth) v Evans* (2022) 294 FCR 512, [26].
1028 *Sentencing Act 2017* (SA), Part 3, Div 7, sub-div 2.
1029 See "4.7.3 Types of State or Territory sentences or orders which are made available by s 20AB".
1030 *Sentencing Act 2017* (SA), ss 96-98.
1031 *DPP (Cth) v Evans* (2022) 294 FCR 512, [9], [12]. Cf *Registrar of the Court of Appeal v Maniam (No 2)* (1992) 26 NSWLR 309, 318-319.

conditions".[1032] If conditions for unpaid community service did not rely on State or Territory laws for their efficacy, and did not impose duties on State or Territory officials to carry them into effect,[1033] and were not intended to "bypass" the scheme in s 20AB, such conditions would appear to be permissible. They would need to be carefully drafted in order to be clear and entirely self-contained, and to provide for various matters corresponding to those dealt with in State or Territory legislation in relation to community service obligations applied by s 20AB(3).[1034]

685. As to whether s 20AB implicitly imposes limitations on the general power to impose conditions under s 20(1)(a)(iv), see "4.5.11 Does s 20AB impose implied limitations on the conditions of a s 20 bond?".

4.5.11 Does s 20AB impose implied limitations on the conditions of a s 20 bond?

686. In *Evans*,[1035] the primary judge (sitting as a judge of the Supreme Court of Norfolk Island), in sentencing the offender for two Commonwealth offences, had ordered a s 20 bond with conditions which, the judge said, "*have the same effect that could be achieved were there power under s 20AB(1) [of the Crimes Act 1914] to impose any of the alternate sentencing options, including home detention available under the [Sentencing Act 2007 (NI)]*".[1036] Home detention under that Act (in contrast to home detention orders in some other jurisdictions) was not made available as a sentencing option for federal offenders under s 20AB. On appeal, Bromwich J (with whom Allsop CJ and Wigney J agreed) said that the reasoning of the primary judge did not adequately take account of the role that the specific power in s 20AB has in confining the operation of the general power in s 20(1)(a)(iv).[1037] The purpose of s 20AB, his Honour said, is to allow for a wider range of sentencing options when such States or Territories both have them available, and choose also to make them available for federal offenders, but also to limit them to that circumstance, especially when it comes to alternatives to imprisonment. It is not for a court to bypass the legislative choice as to the steps that must be taken before such a regime becomes available. Bromwich J said that the primary judge had erroneously reasoned that imposing an effective sentence of home detention was permissible.

687. However Bromwich J concluded that, read carefully, the conditions imposed by the primary judge in that case (including a residential and curfew requirement, restrictions on movement of the offender, visitor restrictions, reporting requirements and a requirement to remain on the island) were authorised by s 20(1)(a) and (b) and were not a further or different sentence. The conditions were, like bail conditions, not replacements for a custodial sentence, but conditions to facilitate release from custody.[1038] Wigney J (with whom Alllsop CJ also agreed) highlighted the very wide power to impose conditions in s 20(1)(a)(iv).[1039] Referring to limitations on the power which were identified in *Isaacs v McKinnon*,[1040] Wigney J said that the conditions imposed were not "*repugnant to the sentencing*

1032 *DPP (Cth) v Evans* (2022) 294 FCR 512, [35].
1033 The scope of the power of the Commonwealth, absent specific authority in the Constitution, to impose duties on State officials is uncertain: see P Hanks, F Gordon and G Hill, *Constitutional Law in Australia* (4th edition, 2018), [5.77]-[5.88].
1034 E.g. *Sentencing Act 2017* (SA), ss 86, 87.
1035 *DPP (Cth) v Evans* (2022) 294 FCR 512.
1036 *R v Evans (No 1)* [2021] NFSC 2, [21].
1037 *DPP (Cth) v Evans* (2022) 294 FCR 512, [36]-[37].
1038 *DPP (Cth) v Evans* (2022) 294 FCR 512, [37]-[38].
1039 *DPP (Cth) v Evans* (2022) 294 FCR 512, [14].
1040 *Isaacs v McKinnon* (1949) 80 CLR 502, 523 (Dixon J); also 529 (McTiernan J).

principles in the Crimes Act or foreign to the purposes of the power in s 20(1). Indeed, quite to the contrary."[1041]

688. Although agreeing generally with Bromwich J, and prefacing his judgment by saying it was "*by way of brief further explication*", Wigney J offered a very different reconciliation of the relationship between the power to impose conditions under s 20(1)(a) and the provisions of s 20AB.[1042] His Honour said that nothing in the text or context of either s 20 or s 20AB was suggestive of any legislative intention that the availability of the additional sentencing options in s 20AB would somehow exclude or limit the types of orders that the sentencing court could otherwise lawfully make under s 20(1). The fact that an order made under s 20(1) might be said to be "substantially similar" to an order that might also be available under s 20AB, his Honour said, is essentially beside the point, other than in the particular circumstance considered in *Shambayati*.[1043] Thus, on his Honour's analysis of *Shambayati*, the existence of a State option for a community service order which was available under s 20AB would not have precluded the court from ordering community service as a condition of a bond under s 20(1); the problem in that case could have been overcome by framing the condition in a way that did not require the application of the State law that provided for the community service regime.

4.5.12 No power to impose a condition to appear for sentence if and when called upon

689. In contrast to a common law bond or an order binding over an offender to be of good behaviour, a s 20 recognizance cannot be subject to a condition that the offender come up for sentence if and when called upon.[1044] Breach of a s 20 bond is governed by s 20A (see "4.5.18 Breach of a s 20 bond – Crimes Act 1914, s 20A").

4.5.13 Other conditions: payment of money to charity

690. In *Brittain v Mansour*[1045], it was held that there was no power to impose as a condition of a bond under the *Sentencing Act 1991* (Vic) a requirement that the offender pay money to the court fund or to a nominated charity. Such a condition was, in substance, a fine. The power to impose conditions on a bond did not extend to the imposition of such a monetary impost.[1046]

691. The view of the CDPP is that, for similar reasons, a court cannot impose as a condition of a s 20 recognizance a condition to pay a monetary amount to a charitable organisation or to a court fund. The only powers to order payment of money as a condition of a s 20 recognizance are those in s 20(1)(a)(ii) (reparation, restitution, compensation or costs that the court is otherwise empowered to order) and s 20(1)(a)(iii) (payment to the Commonwealth of a pecuniary penalty).

1041 *DPP (Cth) v Evans* (2022) 294 FCR 512, [14].
1042 *DPP (Cth) v Evans* (2022) 294 FCR 512, [12].
1043 *R v Shambayati* [1999] QCA 102. See "4.5.10 Other conditions: unpaid community service as a condition of a bond".
1044 *Devine v R* (1967) 119 CLR 506, 516, 519 (Windeyer J), 524 (Owen J).
1045 *Brittain v Mansour* [2013] VSC 50.
1046 The effect of the decision in *Brittain v Mansour* [2013] VSC 50 has since been reversed by statute for State offences in Victoria by the *Justice Legislation Amendment Act 2013.*

4.5.14 Other impermissible conditions of a s 20 bond

692. A condition imposed on an offender found guilty of social security fraud that she not apply for a sole parent's pension for two years was held to be invalid as contrary to public policy.[1047]

693. In *Manolakis*,[1048] conditions which prohibited contact with any politician and required the offender to obey the directions of a corrections officer in relation to psychological or psychiatric counselling were considered unsuitable, in the particular circumstances of the case.

4.5.15 Form of bond

694. A form of bond under s 20(1)(a) is prescribed as Form 11 under the *Crimes Regulations 2019* (Cth), although the use of the prescribed form is optional. A State bond form should not be used.[1049]

695. Although the prescribed form requires that the offences to which the bond relates be specified in the form, the omission or misdescription of such an offence will not necessarily render the bond invalid or unenforceable.[1050]

696. A s 20 bond must specify the monetary amount of security to be given by the offender.[1051] The section does not limit the amount.

4.5.16 When a s 20 bond is not available

697. Mandatory terms of imprisonment are required for certain migration-related offences (see "7.2 Migration offences") and by ss 16AAA and 16AAB for offenders convicted of certain Commonwealth child sex offences (see "7.3.3 Mandatory terms of imprisonment for high-level Commonwealth child sex offences and for repeat child sexual abuse offences"). When these provisions apply, the court is required to impose a sentence of imprisonment. Although some dicta have suggested that these requirements do not preclude the imposition of a s 20 bond, the relevant provisions are unequivocal and decisions of intermediate appellate courts have held that where the provisions apply, they have the effect of making alternatives to imprisonment unavailable. See "4.8.5 Mandatory imprisonment".

4.5.17 Explaining the order and providing a copy

698. If a person is released by order under s 20(1)(a) of the *Crimes Act 1914* (Cth), the court must:

- before making the order, explain or cause to be explained the purpose and effect of the order, the consequences which may follow if it is not complied with and that the recognizance may be discharged or varied under s 20AA (s 20(2)); and
- provide a copy of the order to the offender as soon as practicable (s 20(4)).

1047 *R v Theodossio* [2000] 1 Qd R 299, [15]-[19]. The Court also considered ([6]-[7]) that the sentencing judge erred in failing to take into account the probable effect of the order on the family of the offender, as required by s 16A(2)(p) of the Act.

1048 *R v Manolakis* [2008] SASC 129.

1049 See *DPP (Cth) v Cole* (2005) 91 SASR 480.

1050 Cf *Chatterton v Police* (2020) 136 SASR 431.

1051 *R v Chapman* [2001] NSWCCA 457, [17]; *Assafiri v R (No.2)* [2007] NSWCCA 356, [1]; *R v Donald (No 2)* [2013] NSWCCA 290.

4.5.18 Breach of a s 20 bond – *Crimes Act 1914*, s 20A

699. The procedure for dealing with a breach of a bond under s 20(1)(a) is governed by s 20A of the *Crimes Act 1914* (Cth).

700. Breach action is initiated by information laid before a magistrate alleging that the person has, without reasonable cause or excuse, failed to comply with a condition of the order (s 20A(1)).

701. The information must be laid before the end of the period for which the person is required by the order to give security to be of good behaviour, unless the failure to comply is constituted by the commission of an offence (s 20A(1A)). If the breach consists of the commission of an offence, breach action can be taken either within or outside the period of the bond.[1052]

702. The magistrate may issue a summons directing the person to appear, on a date and at a time and place fixed in the summons, before the court by which the order was made (s 20A(1)(a)).

703. If the information is laid on oath and the magistrate is satisfied that proceedings by summons might not be effective, the magistrate may issue a warrant for the apprehension of the person (s 20A(1)(b)). Provision is made for bail or remand of the person following their arrest (s 20A(4)).

704. If the person fails to attend before the court as required, the court may issue an arrest warrant (s 20A(2)).

705. If the court which made the original order under s 20(1)(a) (whether or not constituted by the same judge or magistrate) is satisfied that the person has without reasonable cause or excuse failed to comply with a condition of the order, the options available to the court are set out in s 20A(5)(b). They are:

- without prejudice to the continuation of the order, impose *a monetary penalty not exceeding 10 penalty units* (s 20A(5)(b)(i));[1053] or
- *revoke the order and deal with the person for the offence or offences in respect of which the order was made*, in any manner in which the offender could have been dealt with for that offence or those offences if the order had not been made and the offender was before the court for sentence in respect of the offence or offences (s 20A(5)(b)(ii)); or
- *take no action* (s 20A(5)(b)(iii)).

706. A person is not to be imprisoned for failure to pay an amount of reparation or costs as a condition of a bond: s 20(2A).

707. The power under s 20A(5)(b)(ii) to revoke the order and deal with the offender for the original offence does not empower the court to set aside the conviction for that offence.[1054]

708. In dealing with the offender under s 20A(5), the court must take into account (a) the fact that the order was made, (b) anything done under the order and (c) any other order made in respect of the offence or offences (s 20A(6)).

709. The court may also order that any recognizance or surety be estreated, or that any other security be enforced (s 20A(7)).

1052 *DPP (Cth) v Fabri* [2008] NSWSC 655.

1053 Such a pecuniary penalty falls within the definition of a "fine" (s 3(2)) and is therefore enforceable in the same way: see "4.6.10 Enforcement of fines – Crimes Act 1914, s 15A". As to the value of a penalty unit, see "4.6.3 Penalty unit value".

1054 *DPP (Cth) v Seymour* [2009] NSWSC 555, [8]-[10].

4.6 Fine/pecuniary penalty

4.6.1 Meaning of "fine"

710. A reference in the *Crimes Act 1914* (Cth) to a "fine" is defined in s 3(2) of the Act to include a reference to a pecuniary penalty other than:

(a) a pecuniary penalty imposed under Division 3 of Part 13 of the *Customs Act 1901*,

(b) a pecuniary penalty order under the *Proceeds of Crime Act 1987* (Cth), and from 1 January 2003, a pecuniary penalty order or a literary proceeds order under the *Proceeds of Crime Act 2002* (Cth); or

(c) a superannuation order made under the *Australian Federal Police Act 1979* or the *Crimes (Superannuation Benefits) Act 1989* (Cth).

4.6.2 Power to fine

711. Almost all Commonwealth offences are punishable by a fine. Many Commonwealth offence-creating laws specify that the offence is punishable by a fine (either alone or in addition to, or instead of, a term of imprisonment or other penalty). But even if the law creating an offence does not so specify, and the only penalty specified is a term of imprisonment, a fine may usually be imposed in addition to or instead of imprisonment, in accordance with s 4B of the *Crimes Act 1914* (Cth) (see "4.6.4 Imprisonment converted into a fine formula – *Crimes Act 1914*, s 4B").

712. For some offences, the maximum fine may be specified by some other calculation: for example, as a multiple of the benefits attributable to the offence (see "4.6.6 Fine calculated by benefit attributable to the offence").

713. Maximum fines are now specified not as a particular sum but in "penalty units": see "4.6.3 Penalty unit value".

4.6.3 Penalty unit value

714. The *Crimes Act 1914* (Cth), and other Commonwealth laws, describe the maximum permissible fines (either for a particular offence or in particular circumstances, such as on summary disposition of an indictable offence) in "penalty units".[1055] "Penalty unit" is defined in s 4AA(1) of the Act. The specified value of a penalty unit is subject to triennial indexation, in line with changes to the Consumer Price Index, under s 4AA(3) of the Act.[1056]

715. The current value of a penalty unit is **$275**. This applies to offences committed on or after 1 January 2023.[1057]

716. Previous values of penalty units under s 4AA are as follows:

1055 The specification of fines (or maximum fines) in penalty units, instead of fixed sums, was introduced by the *Crimes Legislation Amendment Act 1992* (Cth), implementing a recommendation in the Fifth Interim Report (June 1991) of the Review of Commonwealth Criminal Law (Gibbs Committee). A penalty unit was initially valued at $100.

1056 The amendments which provide for triennial indexation were introduced by the *Crimes Legislation Amendment (Penalty Unit) Act 2015* (Cth).

1057 *Crimes Amendment (Penalty Unit) Act 2022* (Cth), which came into effect on 1 January 2023.

- **$222** for offences committed between 1 July 2020 and 31 December 2022;[1058]
- **$210** for offences committed between 1 July 2017 and 30 June 2020;
- **$180** for offences committed between 31 July 2015 and 30 June 2017;[1059]
- **$170** for offences committed between 28 December 2012 and 30 July 2015;[1060] and
- **$110** for offences committed between 7 April 1997 and 27 December 2012.

4.6.4 Imprisonment converted into a fine formula – *Crimes Act 1914*, s 4B

717. If an offence is punishable by imprisonment only (that is, a fine is not specified as an alternative or additional penalty), s 4B of the *Crimes Act 1914* (Cth) permits the court to impose a pecuniary penalty, instead of or in addition to imprisonment, on a natural person who has been convicted of the offence.[1061]

718. The maximum fine is calculated according to a formula contained in s 4B. The relevant number of penalty units is the maximum term of imprisonment for the offence (expressed in months) multiplied by 5. For example, if the offence is punishable by imprisonment for 12 months, the maximum fine is 60 penalty units.

719. Where a corporation is convicted of a federal offence, unless the contrary intention appears, the maximum pecuniary penalty that can be imposed is five times the amount that could be imposed on a natural person convicted of the same offence.[1062]

4.6.5 Fines which may be imposed when an indictable offence is dealt with summarily

720. When an indictable offence is dealt with summarily, the fine which may be imposed is less than the maximum penalty for the offence. See "1.8.3 Limits on penalties on summary disposition of an indictable offence – *Crimes Act 1914*, ss 4J and 4JA". However the court must still have regard to the maximum penalty for the offence, not the limit on the penalty on summary disposition, as the "yardstick" against which to assess the seriousness of the offence: see "3.2.4 Assessing the seriousness of the offence by reference to the maximum penalty".

4.6.6 Fine calculated by benefit attributable to the offence

721. For offences relating to bribery of a foreign public official (*Criminal Code* (Cth), s 70.2), the maximum fine for a corporation (s 70.2(5)) is the greatest of:

(a) 100,000 penalty units;

(b) if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the conduct constituting the offence—3 times the value of that benefit;

1058 See the "Notice of indexation of the penalty unit amount" dated 14 May 2020, issued by the Attorney-General under s 4AA(1A) of the *Crimes Act 1914* (Cth).

1059 *Crimes Legislation Amendment (Penalty Unit) Act 2015*, s 2.

1060 *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012*, s 3 and Schedule 3.

1061 *Crimes Act 1914* (Cth), s 4B(2).

1062 *Crimes Act 1914* (Cth), s 4B(3). See *Gold Coast Boats Pty Ltd v Nixon* [2019] 2 Qd R 292.

(c) if the court cannot determine the value of that benefit—10% of the annual turnover of the body corporate during the period (the turnover period) of 12 months ending at the end of the month in which the conduct constituting the offence occurred.

722. In *Jacobs Group*,[1063] the High Court held that the value of the relevant benefit (which consisted of obtaining construction contracts) reasonably attributable to the offending conduct was the amount the corporation received for performing the contracts. The value was not to be reduced by the costs, expenses, or other outgoings incurred in performing the contracts.

4.6.7 Means and financial circumstances of offender

723. In sentencing a federal offender, the court is required to have regard to the "means" of the offender: *Crimes Act 1914* (Cth), s 16A(2)(m). In addition to this and to any other factors that the court is permitted or required to take into account, before imposing a fine on a federal offender, the court must have regard to the "financial circumstances" of the offender: *Crimes Act 1914* (Cth), s 16C(1).[1064] However a court is not precluded from imposing a fine if the financial circumstances of the offender cannot be ascertained by the court: s 16C(2).

724. The requirement to take financial circumstances into account does not dictate that the financial circumstances will determine the fine that is to be imposed.[1065] That is, the capacity of the offender to pay is relevant but not decisive.[1066] A fine or pecuniary penalty which exceeds the capacity of the offender to pay is not necessarily excessive, and may be entirely appropriate (to satisfy the requirements of general and specific deterrence) where the offence was committed for financial gain.[1067]

725. Consideration of the financial circumstances of the offender may increase, rather than decrease, a fine in order for it to be a deterrent for the offender.[1068]

4.6.8 Aggregate fine for multiple offences

726. There is no general power to impose a single aggregate fine for multiple federal offences. There are, however, particular circumstances in which a court may impose an aggregate fine in sentencing a federal offender: see "6.10 Aggregate penalty".

727. In no circumstances can a court impose a single aggregate fine for a Commonwealth offence and a State offence.

4.6.9 Fine in addition to imprisonment

728. Many Commonwealth offences are punishable by a fine or imprisonment or both (either by specification in the law creating the offence or under s 4B of the *Crimes Act*). The most common

1063 *R v Jacobs Group (Australia) Pty Ltd* (2023) 97 ALJR 595.

1064 In its report *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006), the Australian Law Reform Commission recommended (recommendation 28-5) that the reference to "means" in s 16A(2)(m) be amended to "financial circumstances", consistently with s 16C. The recommendation has not been acted on.

1065 *Jahandideh v R* [2014] NSWCCA 178, [15].

1066 *Darter v Diden* (2006) 94 SASR 505, [29]-[32]; *Jahandideh v R* [2014] NSWCCA 178, [16].

1067 *Customs v Rota Tech Pty Ltd* [1999] SASC 64, [35]-[36]; *Customs v Labrador Liquor Wholesale Pty Ltd* [2006] QCA 558, [95]-[98].

1068 *Jahandideh v R* [2014] NSWCCA 178, [17].

circumstance in which a fine is imposed in addition to a term of imprisonment is where the offender has profited from the offending.[1069]

4.6.10 Enforcement of fines – *Crimes Act 1914*, s 15A

729. Section 15A adopts State/Territory law relating to enforcement of fines.[1070] Section 15A(1) provides:

> *(1) A law of a State or Territory relating to the enforcement or recovery of a fine imposed on an offender applies to a person convicted in the State or Territory of an offence against a law of the Commonwealth. The law applies:*
> *(a) so far as it is not inconsistent with a law of the Commonwealth; and*
> *(b) with the modifications (if any) made by or under this section.*

730. For this purpose, "fine" includes a pecuniary penalty (other than under Division 3 of Part XIII of the *Customs Act 1901*, or the *Proceeds of Crime Act 1987* or *Proceeds of Crime Act 2002*, or a superannuation order) and costs or other amounts ordered to be paid by offenders: *Crimes Act 1914* (Cth), s 3(2).

731. Section 15A applies State and Territory law in a similar way to s 79 of the *Judiciary Act 1903 (Cth)*.[1071] State/Territory laws apply notwithstanding that in their terms they are confined to persons convicted in courts of the State/Territory of offences against the laws of the State/Territory. To that extent, and to that extent only, the State laws are given an expanded meaning. Otherwise the laws are applied with their meaning unchanged.[1072]

732. Like the cognate provisions of the *Judiciary Act*, s 15A does not apply State or Territory law to the extent that to do so would be contrary to the Constitution or inconsistent with a law of the Commonwealth. To avoid inconsistency with the requirements of Chapter III of the Constitution, s 15A includes provisions to ensure that, in the application of State or Territory law, the judicial power of the Commonwealth is not exercised other than by a court and that a court is not vested with a non-judicial power or function which is not auxiliary or incidental to the exercise of judicial power. To this end s 15A modifies State or Territory law as applied so that only a court may impose a penalty for failure to pay a fine (s 15A(1AA)) and provides for the enforcement of fines other than by a court (s 15A(1ACB) and (1AD)).

733. If a court imposes a sentence or sentences of imprisonment on a person in respect of a failure to pay a fine or fines imposed for a federal offence or offences, the court must direct that the sentence, or all the sentences, commence to be served from the earliest practicable day despite the fact that the person may, on that day, already be serving another sentence of imprisonment for a federal, State or Territory offence (s 15A(3)). However the court may order whole or partial cumulation where it is of the opinion that, in all the circumstances of the case, it is more appropriate to do so (s 15A(4)).

1069 See *Fox & Freiberg's Sentencing – State and Federal Law in Victoria* (Thomson Reuters, third ed, 2014), [7.25].

1070 Section 15A was amended by the *Crimes Amendment (Enforcement of Fines) Act 1998*. The purpose of the amendment, which commenced on 29 June 1998, was to ensure that the full range of State fine enforcement procedures applies in respect of federal offenders. The amendments apply whether the fine was imposed before or after 29 June 1998.

1071 *Thomas v Ducret* (1984) 153 CLR 506. See "1.7 The application of State and Territory laws by Judiciary Act 1903, ss 68 and 79".

1072 *Thomas v Ducret* (1984) 153 CLR 506.

734. A person is not liable to be imprisoned for a failure to pay an amount by way of reparation, restitution or compensation or an amount in respect of costs which is required to be paid under a recognizance under s 19B or s 20 or an amount required to be paid under a reparation order under s 21B(1) of the *Crimes Act 1914*: see *Crimes Act 1914*, ss 19B(2A), 20(2A), 21B(2), respectively.

4.7 Sentences and orders made available by *Crimes Act 1914*, s 20AB

4.7.1 The power conferred by s 20AB

735. Section 20AB of the *Crimes Act 1914* (Cth) was inserted in 1982.[1073] The then Attorney-General said that the purpose of the section was to "*make available to the courts, when dealing with Commonwealth offenders, sentencing options such as community service orders now available in relation to State and Territory offenders*".[1074] The section enables a court sentencing a federal offender to impose a State or Territory order of a specified type.

736. Subsection 20AB(1) provides:

> *(1) A court may pass a sentence, or make an order, in respect of a person convicted before the court in a participating State or participating Territory of a federal offence, if:*
> *(a) subsection (1AA) applies to the sentence or order; and*
> *(b) under the law of the State or Territory, a court is empowered to pass such a sentence, or make such an order, in respect of a State or Territory offender in corresponding cases; and*
> *(c) the first-mentioned court is:*
> *(i) empowered as mentioned in paragraph (b); or*
> *(ii) a federal court.*

737. As to the meaning of "participating State" and "participating Territory" see "4.7.2 Participating State or Territory". Each State is a participating State and each Territory is a participating Territory.

738. Section 20AB (1AA) describes the relevant types of sentences or orders. See "4.7.3 Types of State or Territory sentences or orders which are made available by s 20AB".

739. The effect of s 20AB(1) is that if a court in a State or Territory has power to pass a sentence or to make an order of a kind described in s 20AB(1AA) in respect of a State or Territory offender in corresponding cases (see "4.7.5 Corresponding cases"), the court may pass such a sentence or make such an order in respect of a person convicted before the court of a federal offence.

740. A sentence or order under s 20AB(1) is available only on conviction. Therefore even if, under State or Territory law, a court may pass a sentence or make an order of the relevant type without conviction, there is no power to do so in sentencing a federal offender.[1075]

741. Section 20AB is an ambulatory provision; it is intended to make available, as far as practicable, State or Territory sentencing options of the kinds described in s 20AB(1AA) under State or Territory laws as in force from time to time.[1076]

4.7.2 Participating State or Territory

742. A sentence or order of a kind described in s 20AB(1AA) is only available in sentencing a federal offender in a "participating State" or "participating Territory". "Participating State" and "participating Territory" are defined in s 3(1) of the *Crimes Act 1914* (Cth) as having the meanings given by s 3B(2).

1073 *Crimes Amendment Act 1982* (Cth), s 8. The new section did not come into operation until 16 December 1985.
1074 Second Reading Speech of the Attorney-General (Senator Durack) on the *Crimes Amendment Bill 1981*, *Commonwealth Parliamentary Debates, Senate*, 15 October 1981, 1291.
1075 *DPP v Meyers* (Vic SC (Balmford J), 26 April 1996, unreported); *DPP (Cth) v Ede* [2014] NSWCA 282, [34].
1076 *DPP (Cth) v Costanzo* [2005] 2 Qd R 385, [22].

Section 3B(2) provides that a State is a participating State, and the Australian Capital Territory or Northern Territory is a participating Territory, if an arrangement is in force under s 3B(1). A territory other than the ACT or the NT is a participating Territory: s 3B(2)(b)(i).

743. Subsection 3B(1) provides for the making of arrangements between the Governor-General and the Governor of a State, or the Government of the ACT, or the Administrator of the NT, for officers of the State or Territory to exercise powers and perform functions, and facilities and procedures of the State or Territory to be made available, in relation to the carrying out or enforcement under the *Crimes Act* of orders made under that Act or another Act.

744. Relevant arrangements under s 3B(1) of the *Crimes Act* have been in place between the Commonwealth and each State, the ACT and the NT since at least 1990 (earlier in relation to some jurisdictions).[1077]

745. Therefore each State is a participating State, and the ACT, the Northern Territory and each other Territory is a participating Territory for the purposes of s 20AB.

4.7.3 Types of State or Territory sentences or orders which are made available by s 20AB

746. The sentences or orders which are made available by s 20AB are specified in s 20AB(1AA), which provides:

> *(1AA) This subsection applies to a sentence or order that is:*
>
> *(a) known as any of the following:*
>
> *(i) an attendance centre order or attendance order;*
>
> *(ii) a community based order;*
>
> *(ii) a community correction order;*
>
> *(iv) a community custody order;*
>
> *(v) a community service order;*
>
> *(vi) a community work order;*
>
> *(vii) a drug or alcohol treatment order or rehabilitation order;*
>
> *(viia) a residential treatment order;*[1078]
>
> *(viii) a good behaviour order;*
>
> *(ix) an intensive correction order;*
>
> *(x) an intensive supervision order;*
>
> *(xi) a sentence of periodic detention or a periodic detention order;*
>
> *(xii) a sentence of weekend detention or a weekend detention order;*
>
> *(xii) a work order; or*
>
> *(b) similar to a sentence or order to which paragraph (a) applies; or*
>
> *(c) prescribed for the purposes of this subsection.*

747. The list in s 20AB(1AA)(a) describes various sentences or orders which are, or have been, provided for by State or Territory laws. Paragraph (b) extends the list to include a sentence or order that is "*similar*

1077 *Adams v Carr* (1987) 47 SASR 205, 206-7, 209-10; *R v Winchester* (1992) 58 A Crim R 345; *DPP (Cth) v Costanzo* [2005] 2 Qd R 385, [14]; *Dowling v Hamlin* [2006] ACTSC 117.

1078 Sub-paragraph (viia) was inserted by the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), s 3 and Schedule 12, item 1. The amendment applies to a sentence passed, or an order made, on or after 23 June 2020, in respect of a person convicted before, on or after that date: see s 2(1) and Schedule 12, item 3 of the amending Act.

to a sentence or order to which paragraph (a) applies". Paragraph (c) allows for other sentences or orders to be prescribed by regulations.

748. Whether a particular option under State or Territory law is "*similar to a sentence or order to which paragraph (a) applies*" (s 20AB(1AA)(b)) is a question of degree, which must be considered in the context of the legislation as a whole, and in particular Part IB, and in the light of the legislative purpose to extend sentencing options.[1079] A State order which was interim or provisional has been held not to be "similar to" a community service order, which was necessarily a final order.[1080]

749. The following orders are prescribed, for the purposes of s 20AB, by regulation 15 of the *Crimes Regulations 2019* (Cth) (which commenced on 27 July 2019):

Item	Prescribed order	Law under which order is made
1	Home detention order	Subdivision 1 of Division 7 of Part 3 of the *Sentencing Act 2017* (SA), as in force at the commencement of this instrument
2	Home detention order	Part 5A of the *Sentencing Act 1997* (Tas), as in force at the commencement of this instrument
3	Home detention order	Subdivision 2 of Division 5 of Part 3 of the *Sentencing Act 1995* (NT), as in force at the commencement of this instrument

750. By virtue of a combination of the prescriptions in the *Crimes Regulations* and the operation of s 20AB(1AA)(a) and (b) of the Act, at least the following current options under State or Territory laws are sentences or orders to which s 20AB(1AA) applies:

- **New South Wales:** intensive correction orders and community correction orders[1081]
- **Victoria:** community correction orders[1082]
- **Queensland:** community service orders and intensive correction orders[1083]
- **Western Australia:** community based orders and intensive supervision orders[1084]
- **South Australia:** home detention orders and intensive correction orders[1085]
- **Tasmania:** home detention orders and community service orders[1086]
- **Australian Capital Territory:** good behaviour orders[1087] and intensive correction orders[1088]
- **Northern Territory:** community work orders, community based orders, home detention orders and community custody orders[1089]

1079 *Adams v Carr* (1987) 47 SASR 205, 211-2; *DPP (Cth) v Costanzo* [2005] 2 Qd R 385, [23].
1080 *DPP (Cth) v Costanzo* [2005] 2 Qd R 385, [23]-[26].
1081 *Crimes (Sentencing Procedure) Act 1999* (NSW), ss 7, 8. However, as to the availability of an intensive correction order, see "Appendix 4: A4.1 New South Wales".
1082 *Sentencing Act 1991* (Vic), Part 3A; see *Atanackovic v R* (2015) 45 VR 179.
1083 *Penalties and Sentences Act 1992* (Qld), Part 5 Div 2, Part 6.
1084 *Sentencing Act 1995* (WA), Part 9, Part 10.
1085 *Sentencing Act 2017* (SA), Part 3, Div 7, sub-div 1 and 2. Although not prescribed, a sentence of community service under the Act may also be available, on the basis that it is similar to a community service order.
1086 *Sentencing Act 1997* (Tas), Part 5A, Part 4.
1087 *Crimes (Sentencing) Act 2005* (ACT), Ch 6 Part 6.1; see *Dowling v Hamlin* [2006] ACTSC 117.
1088 *Crimes (Sentencing) Act 2005* (ACT), s 11.
1089 *Sentencing Act 1995* (NT), Part 3 div 4, Part 3 div 4A, Part 3 div 5 sub-div 2, Part 3 div 5 sub-div 2A.

4.7.4 Relief from preconditions for an order under State/Territory law (s 20AB(1A))

751. Some State or Territory laws contain a precondition for passing a sentence or making an order of a kind to which s 20AB(1AA) applies that the court must first pass another sentence or make another order (including a suspended sentence or order). A court sentencing a federal offender is relieved of such a precondition by virtue of s 20AB(1A). That is, the court may pass a sentence or make an order made available by s 20AB without first passing the other sentence or making the other order. For example, if a State law requires that a court must first fix an appropriate term of imprisonment before considering whether it should be served by way of periodic detention, s 20AB(1B) is effective to remove that requirement.[1090]

752. However s 20AB(1A) only relieves a court sentencing a federal offender of a "requirement" under State or Territory law to first pass another sentence or make another order. In *Togias* (2001),[1091] Spigelman CJ said that s 20AB(1A) should not be read as if the words "*requires that a court must first pass another sentence*" encompass both a negative and positive formulation, as these words are negative rather than positive in effect. They did not have the effect of removing a qualification under State law that a sentence of periodic detention was available only in relation to a sentence of imprisonment not exceeding three years.[1092] Similarly, in *Homewood*,[1093] Beech-Jones CJ at CL said that s 20AB(1A) does not operate on an order which provided for a way of serving a sentence of imprisonment; to remove the requirement of a sentence of imprisonment as a precondition for the order would deprive it of any substantive content.

753. A court sentencing a federal offender is not otherwise relieved of preconditions under State or Territory law that apply to the passing of a sentence or making of an order under s 20AB(1). For example, if a State law requires the consent of the offender to the making of the order, the same requirement would apply to the sentencing of a federal offender.[1094] Similarly, if State law requires a prior assessment that the offender would be suitable for a particular type of order, the same requirement would apply to the sentencing of a federal offender.[1095]

4.7.5 Corresponding cases

754. A court sentencing a federal offender may impose a sentence or make an order of a kind to which s 20AB(1AA) applies only if, under the law of the relevant State or Territory, "*a court is empowered to pass such a sentence, or make such an order, in respect of a State or Territory offender in corresponding cases*" (s 20AB(1)(b)).

755. This limitation requires a comparison between the instant federal case and the powers of the court "*in respect of a State or Territory offender in corresponding cases*". The comparison in question is concerned with the powers of a court in "cases" generally, not with a single hypothetical State or Territory offender whose case corresponds with that of the federal offender. Close attention must be

1090 *R v Togias* [2002] NSWCCA 363, [22]-[23].
1091 *R v Togias* [2001] NSWCCA 522, [24].
1092 *R v Togias* [2001] NSWCCA 522, [24]; see also per Grove J, [100]-[107]; *Johnsson v R* [2007] NSWCCA 192, [17]-[24].
1093 *Homewood v R* [2023] NSWCCA 159, [2]-[6].
1094 *R v Shambayati* [1999] QCA 102, [15].
1095 E.g. *Fedele v R* [2015] NSWCCA 286, [71]-[73], [100]-[101].

paid to the circumstances in which, under State/Territory law, a court may pass the relevant sentence or make the relevant order in corresponding cases.

756. *Tran*[1096] provides an example of the application of this comparison. In that case, the sentencing judge imposed a sentence of imprisonment for a Commonwealth offence and ordered that the offender serve a period of that sentence in home detention and then be released on a recognizance release order (RRO) under s 20(1)(b) of the *Crimes Act 1914*. Although home detention under State sentencing legislation fell within s 20AB(1AA), the Full Court of the Supreme Court held that s 20AB did not empower the sentencing judge to make the order because the court was not empowered to make such an order in corresponding State cases. That was because under the State Act, a home detention order was not available in relation to that part of a partially suspended sentence which was to be served before the release of the offender, which was the disposition which corresponded with a RRO under s 20(1)(b).[1097]

4.7.6 Decision whether or not to pass a sentence or make an order under s 20AB(1) is governed by s 16A

757. The power to pass a sentence or make an order of a kind made available by s 20AB is conferred by s 20AB(1). Thus a number of provisions of the *Crimes Act 1914* (Cth) refer to a "sentence or order under s 20AB(1)" or variants of that phrase.[1098]

758. Subsection 20AB(1) provides, "*A court may pass a sentence, or make an order, in respect of a person convicted before the court in a participating State or participating Territory of a federal offence, if*" the three specified conditions are met. This confers a discretion.

759. The exercise of the discretion under s 20AB(1) is governed by s 16A(1), which requires that "*[i]n determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence*". The court must also take into account such of the matters listed in s 16A(2) as are relevant and known to the court. A number of those matters (s 16A(2)(j), (ja) and (p)) and s 16A(3) require the court to make its decision by reference to the particular sentence or order under consideration.[1099] So, for example, the court must take into account, amongst other things, the deterrent effect that *the sentence or order under consideration* would have on the offender (s 16A(2)(j)), and on other persons (s 16A(2)(ja)).

760. These requirements leave little, if any, scope for the application to the sentencing of a federal offender of either general sentencing considerations under the law of the relevant State or Territory, or specific considerations which govern the passing of a particular sentence or the making of a particular order for a State or Territory offence: see "3.1.3 Limited scope for applying sentencing principles under State/Territory legislation". See also "4.7.19 Application of State/Territory laws with respect to a sentence passed or order made under s 20AB(1)".

1096 *R v Tran* [2019] SASCFC 5. That decision concerned a home detention order under the *Criminal Law (Sentencing) Act 1988* (SA). In *R v Medalian* (2019) 133 SASR 50, similar reasoning was applied to an order under the successor to that Act, the *Sentencing Act 2017* (SA).

1097 *R v Tran* [2019] SASCFC 5, [50]-[63]. See also "4.10.14 Can a RRO be combined with a sentence or order under s 20AB(1) for the same offence(s)?".

1098 E.g. *Crimes Act 1914* (Cth), s 16A(3); s 20AB(1B), (2), (3), (4), (5) and (6); s 20AC(1), (2), (6), (7), (8) and (9); s 20BQ(3); s 22(7); s 23WA(8)(b). See also s 20A(5)(2)(c)(ic).

1099 *Atanackovic v R* (2015) 45 VR 179, [102].

761. In *Atanackovic,*[1100] the Victorian Court of Appeal held that a guideline judgment which emphasised the advantage of a community correction order (CCO) over imprisonment was inapplicable to the sentencing of a federal offender. The guideline judgment strongly relied on a provision of the *Sentencing Act 1991* (Vic) which gave express pre-eminence to a CCO over imprisonment. This provision, the Court said, was "*inconsistent with ss 16A and 17A(1) of the Crimes Act* 1914 *(Cth)*".[1101]

4.7.7 Obligation on court to explain the sentence or order

762. A court must explain the purpose and effect of the sentence or order, the consequence of non-compliance and (if applicable) that the sentence or order may be revoked or varied (s 20AB(2)). The sentence or order must be reduced to writing as soon as possible and a copy given to the offender (s 20AB(5)).

4.7.8 Whether a single sentence or order under s 20AB(1) can be imposed for more than one federal offence

763. A single sentence or order under s 20AB(1) of the *Crimes Act 1914* (Cth) may be imposed for two or more federal offences (that is, as an aggregate sentence) if the sentencing court is permitted to do so either by a law of the Commonwealth or by a State or Territory law which is applied as surrogate federal law to the sentencing of a federal offender.

764. **Commonwealth laws permitting aggregate sentences in summary proceedings:** The principal Commonwealth provision which empowers a court to impose an aggregate sentence for two or more offences is s 4K(4) of the *Crimes Act 1914*. It empowers a court exercising summary jurisdiction to impose a single sentence for two or more Commonwealth offences against "*the same provision of a law of the Commonwealth*", where charges for the offences have been joined in the same information, complaint or summons. See "6.10.5 Aggregate penalty for offences dealt with summarily – Crimes Act 1914, s 4K".

765. Some Commonwealth Acts also empower a court to impose a single sentence for a particular offence or offences against that Act. The most commonly-used of these provisions is s 219 of the *Social Security (Administration) Act 1999* (Cth). See "6.10.4 Aggregate penalties permitted for particular Commonwealth offences".

766. Either of these provisions would appear apt to permit a single sentence or order applied by s 20AB to be imposed for two or more federal offences, if the relevant preconditions are satisfied.

767. **State/Territory laws permitting aggregate sentence**: The existence of provisions in Commonwealth law which permit aggregate sentencing in summary proceedings do not preclude the application of general State/Territory laws which permit aggregate sentencing in proceedings on indictment.[1102] Nor (probably) do they preclude the application of State/Territory laws which permit the imposition of an aggregate sentence in proceedings determined summarily.[1103]

768. Some State/Territory laws make specific provision for a sentence or order of a kind described in s 20AB(1AA) to be imposed for more than one offence. Such laws are picked up and applied to the

1100 *Atanackovic v R* (2015) 45 VR 179.

1101 *Atanackovic v R* (2015) 45 VR 179, [104], [108]. See "4.7.18 Application of a guideline judgment regarding use of a sentence or order under s 20AB(1)"

1102 *Putland v R* (2004) 218 CLR 174. See "6.10.7 Aggregate penalty for charges on indictment".

1103 See "6.10.6 State/Territory provisions permitting aggregate sentences in matters determined summarily".

sentencing of federal offenders by s 68(1) of the *Judiciary Act 1903* (Cth),[1104] except to the extent that they are incapable of application or inconsistent with a law of the Commonwealth. There does not appear to be any law of the Commonwealth which would generally preclude the application of such a law to the sentencing of a federal offender.

4.7.9 Sentence or order may be combined with a fine/pecuniary penalty order

769. If a court passes a sentence or makes an order under s 20AB(1), it may also impose any fine or other pecuniary penalty that the court is empowered to impose on the person for the offence: *Crimes Act 1914* (Cth), s 20AB(4)(a).

4.7.10 Sentence or order may be combined with an order for reparation, restitution or compensation

770. If a court passes a sentence or makes an order under s 20AB(1), it may also make any order requiring the person to make reparation or restitution, or pay compensation, in respect of the offence that the court is empowered to make: *Crimes Act 1914* (Cth), s 20AB(4)(b).

771. The main power to order a federal offender to make reparation or restitution or to pay compensation is set out in s 21B of the *Crimes Act 1914* (Cth). See "5.3 Reparation – Crimes Act 1914, s 21B".

4.7.11 Sentence or order may be combined with another order

772. If a court passes a sentence or makes an order under s 20AB(1), it may also "*make any other order that the court is empowered to make*": *Crimes Act 1914* (Cth), s 20AB(4)(c). This may include, for example, orders for forfeiture or disqualification.

773. It is doubtful whether s 20AB(4)(c) empowers a court to combine an order made available by s 20AB with an additional sentencing option (such as an additional State or Territory option made available under s 20AB) for the same offence. Even assuming that, absent statutory authority, two sentences or orders can be imposed for the same offence,[1105] a sentence or order applied by s 20AB will often be incompatible with another sentence or order. For example, it has been held that:

- a community correction order under the *Sentencing Act 1991* (Vic) (an option of a kind described in s 20AB(1AA)) could not be combined with a sentence of imprisonment;[1106] and
- a home detention order under South Australian legislation (also an option of a kind described in s 20AB(1AA)) could not be combined with a recognizance release order (RRO) under s 20(1)(b).[1107]

1104 In *Watson v R* [2020] NSWCCA 215, [25], Adamson J (with whom Johnson and Davies JJ agreed) observed that the power to impose an aggregate sentence of a kind applied by s 20AB derived not from s 20AB itself but from State or Territory procedural law applied by s 68(1) of the *Judiciary Act 1903*.

1105 In *Atanackovic v R* (2015) 45 VR 179, [88]-[93], the Court left open the question whether, under the *Crimes Act 1914* (Cth), two sentencing options could be combined in a sentence for a single offence in the absence of statutory authority to do so. See also *R v Tran* [2019] SASCFC 5, [48], [54].

1106 *Atanackovic v R* (2015) 45 VR 179. See "4.7.15 Whether sentence or order can be combined with a term of imprisonment for the same offence".

1107 *R v Tran* [2019] SASCFC 5; *R v Medalian* (2019) 133 SASR 50. See "4.10.14 Can a RRO be combined with a sentence or order under s 20AB(1) for the same offence(s)?".

4.7.12 Order for one offence can be coupled with a term of imprisonment for another

774. If a federal offender is to be sentenced for more than one federal offence, it is open to impose a period of imprisonment for one offence and a sentence or order made available by s 20AB for another.[1108]

775. The commencement of the order under s 20AB(1) would need to be fixed in accordance with State or Territory law. For example, s 38(2) of the *Sentencing Act 1991* (Vic) requires that a CCO must not commence more than 3 months after it was made (that is, the date the sentence was imposed).[1109] This would make it impractical to make a CCO for a federal offence if, under a sentence for another offence, the offender would be in custody for the whole of the following 3 months.

4.7.13 Travel restriction orders

776. A court which passes a sentence under s 20AB(1) for a serious drug offence or certain passport-related offences may, at the same time or a later time, make certain travel restriction orders under s 22 of the *Crimes Act 1914* (Cth). See "5.2 Travel restriction orders – Crimes Act 1914, s 22".

4.7.14 When a sentence or order within s 20AB(1AA) is not available

777. A sentence or order which appears to fall within s 20AB(1AA) will nevertheless not be available in sentencing a federal offender either because of the operation of s 20AB(6) or because the State or Territory sentence or order is inconsistent with the requirements of the *Crimes Act 1914* (Cth) or another Commonwealth law.

778. **Minimum non-parole period offence (s 20AB(6)):** A court is not permitted to pass a sentence or make an order under s 20AB(1) that involves detention or imprisonment in respect of a conviction for a minimum non-parole offence mentioned in s 19AG: s 20AB(6). Minimum non-parole offences are specified terrorism and other national security offences to which the three-quarters rule applies: see "4.10.8 The three-quarters rule in fixing a NPP for certain national security offences". The effect is that a court cannot make an order for the service of a sentence of imprisonment for such an offence by way of, for example, home detention, periodic detention or an intensive correction order (that is, even if such an order would otherwise be available). See "7.1.3 Sentences and orders under s 20AB(1) for the service of a sentence not available for minimum non-parole offence".

779. **Inconsistency with Commonwealth law:** A sentence or order which falls within s 20AB(1AA) will be unavailable in the following circumstances:

- **Mandatory sentence of imprisonment:** Mandatory sentences of imprisonment apply for certain migration-related offences (see "7.2 Migration offences") and Commonwealth child sex offences and child sexual abuse offences (see "7.3.3 Mandatory terms of imprisonment for high-level Commonwealth child sex offences and for repeat child sexual abuse offences"). If a mandatory sentence of imprisonment applies to an offence, it will have the

1108 *Atanackovic v R* (2015) 45 VR 179, [78]-[79]. An example of such a sentence is that imposed on resentencing in *Alam v R* [2015] VSCA 48, [21]-[22].

1109 An exception is provided in s 44(3) of the *Sentencing Act 1991* (Vic) where a CCO is combined with a term of imprisonment under s 44 of the Act (in which case, the CCO commences on the offender's release or, if the offender is released on parole, on the completion of the parole period). But that exception could have no application in relation to a term of imprisonment imposed for a federal offence, because s 44 is not applicable in such a case: *Atanackovic v R* (2015) 45 VR 179.

effect of rendering unavailable sentences or orders under s 20AB(1AA) which are inconsistent with the imposition of a sentence of imprisonment.

- **Mandatory minimum period of imprisonment to be served:** For certain people-smuggling offences the court is required to impose a non-parole period (NPP) of a certain duration (see "7.2.1 People-smuggling offences"). If such a mandatory minimum NPP applies, it will have the effect of rendering unavailable sentences or orders under s 20AB(1AA) which are inconsistent with that requirement.
- **Sentence or order which is inconsistent with a recognizance release order (RRO):** If a court sentencing a federal offender imposes a sentence of imprisonment of, or sentences of imprisonment which are in the aggregate, 3 years or less it is generally required to make a RRO: see "4.10.4 Non-parole period (NPP), recognizance release order (RRO) or straight sentence?". The applicable requirements are mandatory and operate to the exclusion of State or Territory laws.[1110] If a court makes a RRO in respect of a sentence or sentences of imprisonment, it will render unavailable an order under s 20AB(1) which is inconsistent with it: see "4.10.14 Can a RRO be combined with a sentence or order under s 20AB(1) for the same offence(s)?".
- **Sentence or order which is otherwise inconsistent with Part IB:** In *Atanackovic*,[1111] the Victorian Court of Appeal held that the comprehensive and exclusive regime in Division 4 of Part IB for conditional release of an offender who is sentenced to a term of imprisonment for a federal offence leaves no room for a sentence or order under s 20AB(1) by which conditions are imposed on an offender when released as part of a sentence that includes a term of imprisonment. See "4.7.15 Whether sentence or order can be combined with a term of imprisonment for the same offence".

4.7.15 Whether sentence or order can be combined with a term of imprisonment for the same offence

780. Under the laws of some States and Territories, a particular sentence or order of a kind described in s 20AB(1AA) may be combined with a term of imprisonment, or provide a means of serving the whole or part of a sentence of imprisonment in the community.

781. An example is the *Sentencing Act 1991* (Vic), which was considered in *Atanackovic*.[1112] Section 44(1) permitted a community correction order (CCO) to be imposed in addition to a term of imprisonment not exceeding two years involving immediate incarceration. Under s 11 (as then in force[1113]), if the court imposed a term of imprisonment of less than 2 years but not less than 1 year it had a discretion whether to fix a non-parole period (NPP). The Victorian Court of Appeal held that the legislative scheme established by Part IB, Division 4, of the *Crimes Act 1914* (Cth)[1114] left no room for the operation of either s 11 or s 44 of the *Sentencing Act 1991* (Vic). If a court sentencing a federal offender imposed a term of imprisonment without any form of conditional release (that is, a straight sentence), then a CCO could not

1110 *Hili v R* (2010) 242 CLR 520, [20]-[22], [26]-[28], [39]-[41], [52].

1111 *Atanackovic v R* (2015) 45 VR 179, [54]-[55], [59], [80]-[87].

1112 *Atanackovic v R* (2015) 45 VR 179 (Weinberg, Kyrou and Kaye JJA).

1113 Section 11 has since been amended; it now provides that if the court, in accordance with s 44, makes a CCO in respect of the offender in addition to imposing the sentence of imprisonment, the court must not fix a non-parole period as part of a sentence of imprisonment (s 11(2A)).

1114 The requirements of Division 4 of Part 1B are summarised in "4.10.4 Non-parole period (NPP), recognizance release order (RRO) or straight sentence?".

be made. If the court was required to fix a non-parole period in accordance with Part IB, Division 4, a NPP could not be fixed under s 11. If the court decided to impose a term of imprisonment inclusive of conditional release in a form other than parole, that conditional release was required to be in the form of a recognizance release order (RRO) and could not be in the form of a CCO. Accordingly, a combination sentence of a term of imprisonment and a CCO for a single federal offence was not available.[1115]

782. Significantly, the Court in *Atanackovic* did not confine its reasoning to particular inconsistencies with s 11 or s 44 of the *Sentencing Act 1991* (Vic). After referring to the decision of the High Court in *Hili*,[1116] and to the provisions of Division 4 of Part IB, the definition of RRO in s 16 and the terms of s 20 of the *Crimes Act*, the Court said:[1117]

> *The cumulative effect of these provisions is that conditional release, other than in the form of parole, of an offender who has been sentenced to a term of imprisonment must be by way of recognizance release order that is subject to the conditions in s 20(1)(a).*
>
> *Although Hili did not refer to pt 1B div 5, it must logically follow from the Court's reasoning in that case that the conditions set out in s 20(1)(a), which apply to a recognizance release order by virtue of s 20(1)(b), must be treated as the only conditions that can be imposed upon a federal offender when released on such an order as part of a sentence that includes a term of imprisonment.*
>
> *It follows from the above discussion that the legislative scheme in the Crimes Act 1914 (Cth) leaves no room for conditional release in the form of a CCO for a federal offender who is sentenced to a term of imprisonment. This is because a CCO is subject to the conditions in pt 3A div 4 of the Sentencing Act rather than those in s 20(1)(a) of the Crimes Act 1914 (Cth).*

783. That is, the comprehensive regime in Division 4 of Part IB for conditional release of an offender who is sentenced to a term of imprisonment for a federal offence (which applies to the exclusion of State or Territory law) leaves no room for the application (by implication, under s 20AB or otherwise) of any State or Territory sentence or order by which conditions are imposed on an offender when released as part of a sentence that includes a term of imprisonment.[1118]

784. See also "4.10.14 Can a RRO be combined with a sentence or order under s 20AB(1) for the same offence(s)?".

4.7.16 A single sentence or order cannot be imposed for a federal offence and a State/Territory offence

785. It is not permissible to impose a single aggregate penalty for a federal offence and a State or Territory offence.[1119] Therefore a court could not impose a single sentence or order of a kind described in s 20AB(1AA) of the *Crimes Act 1914* for both a Commonwealth offence and a State/Territory offence.

4.7.17 Issues relating to sentences or orders under s 20AB(1) specific to a particular State or Territory

786. Issues relating to s 20AB which are specific to a particular State or Territory are discussed in Appendix 4 to this guide.

1115 *Atanackovic v R* (2015) 45 VR 179, [82]-[85].
1116 *Hili v R* (2010) 242 CLR 520.
1117 *Atanackovic v R* (2015) 45 VR 179, [85]-[87].
1118 See also *ABC (a pseudonym) v R* [2023] VSCA 280, [35]-[42].
1119 *Fasciale v R* (2010) 30 VR 643, [27].

4.7.18 Application of a guideline judgment regarding use of a sentence or order under s 20AB(1)

787. In *Boulton,*[1120] the Victorian Court of Appeal issued a guideline judgment[1121] on the use of community correction orders (CCOs) under Part 3A of the *Sentencing Act 1991* (Vic). Under s 6AG of the *Sentencing Act 1991* (Vic), a sentencing court was required to take into account guidelines in a guideline judgment of the Court of Appeal. *Boulton* espoused an approach to sentencing which emphasised the advantages of a CCO compared to imprisonment and which required sentencing judges to take into account those advantages before concluding that imprisonment is the only sentencing option.[1122] A CCO was an option to which s 20AB(1AA) applied. In *Atanackovic*,[1123] the Court of Appeal held that the guideline judgment in *Boulton* could not be accommodated by s 16A of the *Crimes Act 1914* (Cth), did not satisfy the requirements of s 80 of the *Judiciary Act 1903 (Cth)* and, accordingly, did not apply to the sentencing of federal offenders.

788. The Court in *Atanackovic* said that the primary duty of a court sentencing a federal offender, under s 16A(1), is to consider "*whether the sentence to be imposed 'is of a severity appropriate in all the circumstances of the offence'. That is a different question to the question posed by the guideline judgment, namely, whether, having regard to the availability of the CCO as a sentencing option, there is 'any feature of the offence, or the offender, which requires the conclusion that imprisonment, with all of its disadvantages, is the only option'*.[1124] The judgment in *Boulton* also strongly relied on s 5(4C) of the *Sentencing Act 1991* (Vic), which "*gives express pre-eminence to a CCO over imprisonment*"; that provision was inconsistent with ss 16A and 17A(1) of the *Crimes Act*.[1125]

4.7.19 Application of State/Territory laws with respect to a sentence passed or order made under s 20AB(1)

789. Subsection 20AB(3) of the *Crimes Act 1914* (Cth) provides:

> *Where a sentence or order referred to in subsection (1) is passed or made under that subsection in respect of a person convicted in a State or Territory of a federal offence, the provisions of the laws of the State or Territory with respect to such a sentence or order that is passed or made under those laws shall, so far as those provisions are capable of application and are not inconsistent with the laws of the Commonwealth, apply, by virtue of this subsection, to and in relation to the sentence or order passed or made under subsection (1).*

790. The effect of this provision is that, subject to the specified limitation (discussed below), if a sentence or order under s 20AB(1) is passed or made in respect of a federal offender, provisions of the laws of the relevant State or Territory with respect to such a sentence or order apply to and in relation to the sentence or order.

791. The evident purpose is to apply State or Territory laws in relation to the operation and administration of a sentence or order which has been made under s 20AB(1), including its conditions. Section 20AC

1120 *Boulton v R* (2014) 46 VR 308.

1121 That is, "*a judgment that is expressed to contain guidelines to be taken into account by courts in sentencing offenders*": *Sentencing Act 1991* (Vic), s 6AA. The definition of "guideline judgment" in s 6AA now expressly excludes Commonwealth offences as the subject of a guideline judgment.

1122 *Atanackovic v R* (2015) 45 VR 179, [98].

1123 *Atanackovic v R* (2015) 45 VR 179, [99].

1124 *Atanackovic v R* (2015) 45 VR 179, [101].

1125 *Atanackovic v R* (2015) 45 VR 179, [104], [108].

refers to provisions of State or Territory law which are applied by s 20AB(3) as "*applied provisions*" (s 20AC(1)). Proceedings may be brought under s 20AC if (amongst other things) an offender fails to comply "*with any requirements made in relation to the sentence or order by or under the applied provisions*" (see s 20AC(2), (6)).

792. The limitation specified in s 20AB(3) is that the State or Territory provisions apply "*so far as those provisions are capable of application and are not inconsistent with the laws of the Commonwealth*" (s 20AB(3)). This limitation is similar to those which apply under ss 68(1) and 79(1) of the *Judiciary Act 1903* (Cth): see "1.7 The application of State and Territory laws by Judiciary Act 1903, ss 68 and 79". That is, a State or Territory law of the kind described in s 20AB(3) would not be picked up and applied by that subsection if "*a Commonwealth law expressly or by implication made contrary provision, or if there were a Commonwealth legislative scheme … which was ''complete upon its face'' and can ''be seen to have left no room'' for the operation of*" the State or Territory law.[1126]

793. It has sometimes been assumed that s 20AB(3) applies *all* State or Territory law with respect to a relevant sentence or order (subject to the qualification that they be capable of application and not inconsistent with the laws of the Commonwealth), including laws which govern the passing of such a sentence or the making of such an order.[1127] That assumption is questionable. Subsection 20AB(3) has a temporal limitation. It applies State or Territory law only "*[w]here a sentence or order referred to in [s 20AB(1)] is passed or made under that subsection*": that is, it applies *upon a sentence being passed or an order made* under s 20AB(1).[1128] (Contrast s.20AB(2), which sets out the obligations of a court where it "*proposes to pass a sentence, or make an order, under subsection (1)*".) It does not appear to apply State or Territory law *prior to the point in time when a sentence is passed or an order made* under s 20AB(1). That is, it is at least doubtful whether s 20AB(3) applies State or Territory laws which govern the anterior decision of a court whether or not to pass a sentence or make an order of a kind which may be the subject of a sentence or order under s 20AB(1).

794. Such a temporal distinction is consistent with the scheme of s 20AB. The decision whether or not to pass such a sentence or to make such an order is a decision *not under any applied State or Territory law but under s 20AB(1)*; that decision is governed by s 16A (and by any common law principles which are accommodated by that section): see "4.7.6 Decision whether or not to pass a sentence or make an order under s 20AB(1) is governed by s 16A". It will of course be necessary for a court to consider State or Territory law in order to determine whether a court is empowered to pass the relevant sentence or make the relevant order "*in respect of a State or Territory offender in corresponding cases*" (s 20AB(1)(b)) (see "4.7.5 Corresponding cases"). If the "corresponding cases" condition is not met, the court sentencing the federal offender has no power to make the order; if it is, the power in s 20AB(1) is enlivened (subject to other express or implied restrictions: "4.7.14 When a sentence or order within s 20AB(1AA) is not available"). But neither s 20AB(1) nor s 20AB(3) appears to be expressed so as to apply, as surrogate federal law, the State or Territory law relating to the passing of the sentence or the making the order.[1129]

1126 *Putland v R* (2004) 218 CLR 174, [7] (Gleeson CJ); see also *Solomons v District Court (NSW)* (2002) 211 CLR 119; *Bui v DPP (Cth)* (2012) 244 CLR 638, [25].

1127 E.g. *Adams v Carr* (1987) 47 SASR 205, 210; *DPP (Cth) v Costanzo* [2005] 2 Qd R 385, [20]; cf *Mourtada v R* [2021] NSWCCA 211, [20].

1128 Cf *R v Shambayati* [1999] QCA 102, [15]-[17].

1129 Nor is there any room for s 68(1) or s 79(1) of the *Judiciary Act 1903* (Cth) to do so: see "1.7.5 Legislative schemes which leave no room for the operation of State/Territory laws".

4.7.20 Breach of a sentence or order made under s 20AB(1)

795. If an offender fails to comply with a sentence passed or order made under s 20AB(1), s 20AC sets out the consequences. A breach does not constitute a separate offence.[1130] Instead, s 20AC provides for a specific procedure by which the breach may be dealt with.

796. Breach action is initiated by summons or information and warrant (s 20AC(2)) to compel the attendance of the person before the court which passed the sentence or made the order under s 20AB(1). A summons or warrant can only be issued by a magistrate.

797. If the court is satisfied that the person has, without reasonable cause or excuse, failed to comply with the sentence or order or with any requirements made in relation to the sentence or order by or under the applied provisions,[1131] it may (pursuant to s 20AC(6)):

- impose a pecuniary penalty not exceeding 10 penalty units (s 20AC(6)(a));[1132]
- revoke the original order and resentence the offender (s 20AC(6)(b)); or
- take no action (s 20AC(6)(c)).

798. In dealing with the person under s 20AC(6), the court must (in addition to any other matters that the court considers should be taken into account) take into account (a) the fact that the sentence was passed or the order was made, (b) anything done under it and (c) any fine or other pecuniary penalty imposed, and any other order made, for or in respect of the offence (s 20AC(7)).

799. Where a person is dealt with under s 20AC(6) for the original offence, the same rights of appeal apply as if "*the court had, immediately before so dealing with him or her, convicted him or her of the offence … and … the manner in which he or she is dealt with had been a sentence passed upon that conviction*" (s 20AC(8)). No appeal right is conferred if the court instead deals with the breach by imposing a pecuniary penalty or by taking no action.

800. The provisions in s 20AC operate to the exclusion of any provisions of State or Territory law relating to a breach of a sentence or order of the relevant kind.[1133] So, for example, State or Territory provisions which allow a parole authority to cancel periodic detention and have the offender taken back into custody do not apply.[1134] Underlying s 20AC is the constitutional requirement that the federal judicial power can only be exercised by a court; to have permitted an administrative body to revoke or vary an order might have infringed this requirement.[1135]

801. A court is not precluded from passing a sentence, or making an order, under s 20AB(1) only because the court is empowered under s 20AC to take action on failure to comply that is, or may be, inconsistent

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1130 This may be contrasted with some State or Territory laws: see, e.g., *Atanackovic v R* (2015) 45 VR 179, [107].

1131 In s 20AC, "the applied provisions" means the provisions of the laws of a State or Territory that apply to and in relation to a sentence passed or an order made under s 20AB(1) by virtue of subsection 20AB(3): s 20AC(1). As to the operation of s 20AB(3), see "4.7.19 Application of State/Territory laws with respect to a sentence passed or order made under s 20AB(1)".

1132 *Crimes Act 1914* (Cth), s 20AC(6)(a). In *Grimm v R* (1995) 124 FLR 372 the Court proceeded on the basis that if a court revokes the original sentence and resentences the offender under s 20AC(6)(b), it cannot also impose a pecuniary penalty order under s 20AC(6)(a).

1133 *Adams v Carr* (1987) 47 SASR 205, 213-4; *DPP (Cth) v Costanzo* [2005] 2 Qd R 385, [20].

1134 *Lewis v Chief Executive Department of Justice and Community Safety* [2013] ACTSC 198, [45]-[46].

1135 *Lewis v Chief Executive Department of Justice and Community Safety* [2013] ACTSC 198, [46].

with action that the State or Territory court may take for such a failure by a State or Territory offender: s 20AB(1B).[1136]

1136 This subsection was inserted by the *Crimes Legislation Amendment Act (No. 2) 1989*. The intention was to "overcome" the decision in *Adams v Carr* (1987) 47 SASR 205, 213-4: *Crimes Legislation Amendment Bill (No 2) 1989* (Cth), *Explanatory Memorandum (Senate)*, 37.

4.8 Imprisonment: head sentence

4.8.1 Imprisonment available only if applicable to the offence

802. An offender may only be sentenced to a term of imprisonment if the offence is punishable by imprisonment (see "1.8.1 Maximum penalties for Commonwealth offences".) The authority to impose a sentence of imprisonment comes from the statutory prescription that the offence is punishable by imprisonment, not from any provision in Part IB of the *Crimes Act 1914*.[1137]

803. Some offences are only punishable by imprisonment in certain circumstances: for example, for a repeat offence. If such a condition applies, the court must be satisfied beyond reasonable doubt that that it is met before it may impose such a sentence.

4.8.2 Imprisonment as a sentence of last resort – *Crimes Act 1914*, s 17A

804. Section 17A(1) of the *Crimes Act 1914* (Cth) provides:

> *A court shall not pass a sentence of imprisonment on any person for a federal offence, or for an offence against the law of an external Territory that is prescribed for the purposes of this section, unless the court, after having considered all other available sentences, is satisfied that no other sentence is appropriate in all the circumstances of the case.*

805. This provision restates the established common law position that imprisonment is a sentence of last resort.[1138] Before imposing a sentence of imprisonment, the court must consider "*all other available sentences*" and "*all the circumstances of the case*".[1139] The determination of whether the sentencing judge is satisfied of the appropriateness of a sentence of imprisonment after considering all other available sentences is not a binary question which admits of only one correct answer; rather it is part of the discretionary process of determining the appropriate sentence having regard to all the relevant factors and principles.[1140]

806. If the court imposes a sentence of imprisonment, it is required by s 17A(2) to give reasons and have them entered in the record of the court. The obligation to give reasons does not require that the sentencing court give separate and distinct reasons, or run through a checklist of possibilities and state why each of them is not appropriate; the reasons need only adequately explain why no other sentence but one of imprisonment is considered appropriate.[1141] A "*slavish or formulaic*" approach is not required in determining whether a sentence of full-time imprisonment is inevitable.[1142]

807. Failure to comply with the provisions of s 17A does not invalidate the sentence[1143] (in the sense that is does not render it a nullity[1144]), but if the sentencing court is shown to have erroneously considered

1137 *R v Tran* [2019] SASCFC 5, [43]-[44].
1138 *R v Carroll* [1991] 2 VR 509; see also *R v Robison* (1992) 62 A Crim R 374, 381.
1139 *Atanackovic v R* (2015) 45 VR 179, [103].
1140 *Woods v R* [2023] NSWCCA 37, [56].
1141 *Dadson v O'Brien* [1998] TASSC 75; *Warnakulasuriya v R* [2009] WASC 257, [31]-[35]; *R v Engeln* [2014] QCA 313, [46]-[53]; *Fedele v R* [2015] NSWCCA 286, [28]-[36], [39].
1142 *Kannis v R* [2020] NSWCCA 79, [210]; see also *Lee v R* [2020] NSWCCA 307, [58]-[66].
1143 *Crimes Act 1914* (Cth) s 17A(2); *Janssen v McShane* [1992] TASSC 99.
1144 *Freeman v Pulford* (1988) 92 FLR 122; *Clayton v Mulcahy* [1990] TASSC 25.

that no other sentencing option could be imposed it will constitute a vitiating error in the exercise of the sentencing discretion.[1145]

808. Section 17A applies subject to any contrary intention in the law creating the offence: *Crimes Act 1914* (Cth), s 17A(4). In *Bahar*,[1146] the McLure P (Martin CJ and Mazza J agreeing) said that a statutory requirement for a mandatory minimum sentence of imprisonment[1147] was "*positively inconsistent with s 17A of the Crimes Act which requires that consideration be given to different types of sentence*". In *Taylor*,[1148] Simpson AJA (with whom Davies and Wilson JJ agreed on this point), after citing this passage, added that s 17A "*cannot stand against a mandated minimum term of imprisonment … because, in those circumstances, a non-custodial term is not an "available" sentence*".

809. In *Hurt*,[1149] Gageler CJ and Jagot J took a different approach. Their Honours said that a statutory minimum sentence and a statutory maximum sentence are "*circumstances of the case*" of fundamental importance for the purposes of s 17A(1), which have to be considered in deciding if there is no sentence other than imprisonment that is "*appropriate in all the circumstances of the case*".[1150]

4.8.3 Restriction on imprisonment for certain minor offences – *Crimes Act 1914*, s 17B(1)

810. Section 17B(1) imposes a restriction on the imposition of a sentence of imprisonment for minor examples of specified federal property offences (a "section 17B offence"). By s 17B(3), a "section 17B offence" is defined to mean:[1151]

- an offence against s 29 of the *Crimes Act 1914* (Cth);
- an offence against s 131.1, 132.1, 132.6, 132.7, 134.1, 134.2, 135.1, 135.2, 135.4, 145.4 or 145.5 of the *Criminal Code (Cth)*; or
- a prescribed offence against federal law. (No offences have been prescribed.)

811. If a person is convicted of one or more s 17B offences relating to property, money or both, the total value of which does not exceed $2,000,[1152] and the person has not previously been sentenced to imprisonment, the court convicting the person is not to pass a sentence of imprisonment for that offence, or for any of those offences, unless the court is satisfied that there are exceptional circumstances that warrant it: s 17B(1).

1145 *Freeman v Pulford* (1988) 92 FLR 122; *Warnakulasuriya v R* [2009] WASC 257, [31]-[34]; *R v Engeln* [2014] QCA 313, [45]; *Fedele v R* [2015] NSWCCA 286, [26].

1146 *Bahar v R* (2011) 45 WAR 100, [53].

1147 See "4.8.5 Mandatory imprisonment".

1148 *R v Taylor* [2022] NSWCCA 256, [63].

1149 *Hurt v R; Delzotto v R* (2024) 98 ALJR 485. The judgment of the plurality in that case (Edelman, Steward and Gleeson JJ) did not refer to s 17A.

1150 *Hurt v R; Delzotto v R* (2024) 98 ALJR 485, [32]. This view was premised on the assumption ([34]) that other options were available which "*enable a court to impose less than the statutory minimum sentence in appropriate cases*". As to the foundation for that premise, see "4.8.5 Mandatory imprisonment".

1151 The list of offences was amended by Item 148 of Schedule 2 to *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*, with effect from 24 May 2001. Prior to the amendment, the restriction in s 17B also applied to offences against ss 29A, 29B, 29C, 29D, 71 and 72 of the *Crimes Act 1914* (Cth).

1152 For the purposes of calculating the total value, if a s 17B offence is taken into account, it is to be treated as if the person has been convicted of it: *Crimes Act 1914* (Cth), s 17B(2).

4.8.4 Maximum period of imprisonment for an indictable offence determined summarily

812. If an indictable offence punishable by imprisonment is heard and determined by a court of summary jurisdiction, a lesser maximum penalty will apply: see "1.8.3 Limits on penalties on summary disposition of an indictable offence – *Crimes Act 1914*, ss 4J and 4JA".

4.8.5 Mandatory imprisonment

813. In general, federal legislation does not provide for mandatory penalties. Exceptions are created by the following provisions:

- ***Migration Act 1958* (Cth), s 236B:** a minimum head sentence and non-parole period must be imposed for certain offences related to people smuggling. See "7.2.1 People-smuggling offences".
- ***Migration Act 1958* (Cth), s 76DA:** a sentence of imprisonment of at least one year must be imposed upon conviction for certain offences related to breaches of bridging visa conditions. See "7.2.2 Bridging visa offences".
- ***Criminal Code* (Cth), s 395.40:** a sentence of imprisonment of at least one year must be imposed upon conviction for an offence of contravening a community safety supervision order (s 395.38 of the *Code*) or an offence relating to a monitoring device required by a community safety supervision order (s 395.39 of the *Code*). See "7.2.3 Offences relating to community safety supervision order".
- ***Crimes Act 1914* (Cth), ss 16AAA to 16AAC:** mandatory minimum terms of imprisonment must be imposed upon conviction for certain Commonwealth child sex offences or child sexual abuse offences. (Although there are no mandatory minimum periods to be served, immediate release on a recognizance release order is permitted only in exceptional circumstances.) See "7.3 Child sex offences and child sexual abuse offences".

814. In *Magaming,*[1153] the High Court held that legislative prescription of a mandatory minimum term of imprisonment is not inconsistent with Chapter III of the Constitution.

815. The principles to be applied in sentencing for an offence to which the mandatory requirements apply were set out by McLure P (Martin CJ and Mazza J agreeing) in *Bahar*,[1154] a decision which has been followed and applied in many subsequent decisions of intermediate appellate courts, in relation to people-smuggling offences[1155] and Commonwealth child sex offences and sexual abuse offences,[1156] and in relation to cognate provisions under State or Territory law.[1157]

816. *Bahar* established the following principles:

1153 *Magaming v R* (2013) 252 CLR 381.

1154 *Bahar v R* (2011) 45 WAR 100 (McLure P, Martin CJ and Mazza J agreeing).

1155 *R v Karabi* [2012] QCA 47; *R v Nitu* [2013] 1 Qd R 459; *R v Latif; Ex parte DPP (Cth)* [2012] QCA 278; *R v Selu; Ex parte DPP (Cth)* [2012] QCA 345; *DPP (Cth) v Haidari* [2013] VSCA 149, [40]-[43]; *Karim v R* (2013) 83 NSWLR 268 (special leave to appeal on this issue was refused: *Bayu v R* [2013] HCATrans 144); *Bin Radimin v R* [2013] NSWCCA 220, [101]-[102]; *R v Abbas* [2019] WASCA 64.

1156 *R v Delzotto* [2022] NSWCCA 117, [30]-[39], [71]-[94]; *Hurt v R* (2022) 18 ACTLR 272, [120]-[157]; *R v Taylor* [2022] NSWCCA 256, [45]; *R v Stiller* (2023) 14 QR 38.

1157 *R v Deacon* [2019] NTCCA 22; *Eldridge v Western Australia* [2020] WASCA 66, [25]-[57]; *Western Australia v Popal* [2020] WASCA 200, [82]; *Western Australia v Krakouer* [2022] WASCA 118, [34].

- The mandatory sentencing provisions are inconsistent with, and prevail over, s 17A of the *Crimes Act 1914.*[1158]
- Otherwise, there is no positive inconsistency in terms between the mandatory sentencing requirement and the general sentencing principles in the *Crimes Act* as supplemented by common law principles; the sentencing principles are intentionally framed at a level of generality for application within the boundaries of power established not only by the maximum statutory penalty but also the minimum statutory penalty.[1159]
- The statutory maximum and minimum also dictate the seriousness of the offence for the purpose of s 16A(1).[1160]
- It would be positively inconsistent with the statutory scheme for a sentencing judge to make their own assessment as to the 'just and appropriate' sentence ignoring the mandatory minimum or mandatory maximum penalty and then to impose something other than a 'just and appropriate' sentence (whether as to type or length) in order to bring it up to the statutory minimum or down to the statutory maximum, as the case may be.[1161]
- The statutory minimum and maximum penalties are the floor and ceiling respectively within which the sentencer has a discretion and to which general sentencing principles are to be applied.[1162]
- Where there is a mandatory minimum sentence of imprisonment the question for the sentencing judge is where, having regard to all relevant sentencing factors, the offending falls in the range between the least serious category of offending for which the minimum is appropriate and the worst category of offending for which the maximum is appropriate.[1163]

817. In *Hurt*,[1164] the High Court unanimously dismissed two appeals which sought to challenge the *Bahar* principles, one from the decision of the Australian Capital Territory Court of Criminal Appeal in *Hurt*[1165] and the other from the decision of the New South Wales Court of Criminal Appeal in *Delzotto*.[1166] Each case concerned the sentencing for a relevant Commonwealth child sexual abuse offence of an offender

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1158 *Bahar v R* (2011) 45 WAR 100, [53]; *R v Taylor* [2022] NSWCCA 256, [63]. See "4.8.2 Imprisonment as a sentence of last resort – Crimes Act 1914, s 17A". But note the different approach taken by Gageler CJ and Jagot J, *obiter dicta*, in *Hurt v R; Delzotto v R* (2024) 98 ALJR 485, which is discussed below.

1159 *Bahar v R* (2011) 45 WAR 100, [53].

1160 *Bahar v R* (2011) 45 WAR 100, [54]. In *Magaming v R* (2013) 252 CLR 381, [48], French CJ, Hayne, Crennan, Kiefel and Bell JJ said "*The prescription of a mandatory minimum penalty may now be uncommon but, if prescribed, a mandatory minimum penalty fixes one end of the relevant yardstick.*" Cf *R v Taylor* [2022] NSWCCA 256, [66].

1161 *Bahar v R* (2011) 45 WAR 100, [54]. In *Karim v R* (2013) 83 NSWLR 268, [45], Allsop P (with whom Bathurst CJ, Hall and Bellew JJ agreed on this point) said that such an approach "*would see cases of perceived different seriousness by force of statute given the same penalty*"; thus "*[t]he statute, and through it the order of the Court, would be the instrument of unequal justice and, so, injustice*".

1162 *Bahar v R* (2011) 45 WAR 100, [54].

1163 *Bahar v R* (2011) 45 WAR 100, [58]. In *R v Taylor* [2022] NSWCCA 256 (which concerned mandatory minimum sentencing requirements for Commonwealth child sexual abuse offences), Simpson AJA (with whom Davies and Wilson JJ agreed on this point) said ([54]-[55], [67]) that this did not mean that, *as a matter of law*, the specified minimum was reserved for offences falling within the least serious category, although, her Honour said ([69]), "*It may well be that, as a matter of judgment, it will be a rare case that a sentence at the level of the mandated minimum meets the requirements of sentencing unless the case is judged to be "within the least serious category of offending*"".

1164 *Hurt v R; Delzotto v R* (2024) 98 ALJR 485.

1165 *Hurt v R* (2022) 18 ACTLR 272.

1166 *R v Delzotto* [2022] NSWCCA 117.

who had a previous conviction for a child sexual abuse offence, and was therefore subject to a mandatory minimum sentence under s 16AAB of the *Crimes Act 1914* (Cth). As the plurality noted, in each case, the Court had held that "*the approach that should be followed, which has now been adopted generally by trial and intermediate appellate courts across Australia, is that which treats the minimum term of imprisonment as serving the double function of generally restricting sentencing power as well as providing a yardstick, corresponding with the maximum term of imprisonment, for the exercise of the sentencing discretion.*"[1167] The plurality (Edelman, Steward and Gleeson JJ) held that each decision was correct.[1168] In a separate judgment, Gageler CJ and Jagot J also concluded that "*the appeal courts below did not err in their approach to the mandatory minimum sentence provision in s 16AAB of the Crimes Act*".[1169]

818. In *Markarian*,[1170] the plurality said that maximum penalties "*invite comparison between the worst possible case and the case before the court at the time …and … in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick*". On the approach taken in *Bahar* (and applied by the intermediate appellate courts in *Hurt* and *Delzotto*), a minimum sentence performs a similar function. That is, as the plurality said in *Magaming*,[1171] "*if prescribed, a mandatory minimum penalty fixes one end of the relevant yardstick*." In *Hurt*, the High Court held that this was the correct approach. In its operation as a yardstick, the minimum sentence functions as the opposite of the maximum sentence.[1172] The plurality accepted that "*[a]s a yardstick that imposes an increased starting point for the appropriate term of imprisonment for the offence in the least serious circumstances, the minimum term operates to increase the appropriate term of imprisonment generally for that offence.*"[1173] Gageler CJ and Jagot J said that the mandatory minimum functions "*as a yardstick representing … the least worst possible case warranting imprisonment against which the case before the court at the time can be measured*".[1174]

819. The Court rejected the appellants' contention that Parliament could not have intended to adopt the prescribed minimum sentences as a yardstick, since the effect would be to increase sentences generally for the relevant offences. Extrinsic material indicated that Parliament did so intend.[1175] Also, if the minimum sentences prescribed did not serve as a yardstick then the same sentence might be given for one offender who committed the same offence as another but whose conduct and circumstances were objectively much less serious. This would make the court the instrument of unequal justice and therefore injustice.[1176] Nor did the fact that the minimum sentence prescribed by s 16AAB did not apply in all

1167 *Hurt v R; Delzotto v R* (2024) 98 ALJR 485, [57] (Edelman, Steward and Gleeson JJ).
1168 *Hurt v R; Delzotto v R* (2024) 98 ALJR 485, [58] (Edelman, Steward and Gleeson JJ).
1169 *Hurt v R; Delzotto v R* (2024) 98 ALJR 485, [52] (Gageler CJ and Jagot J).
1170 *Markarian v R* (2005) 228 CLR 357, [30] (Gleeson CJ, Gummow, Hayne and Callinan JJ). See "3.2.4 Assessing the seriousness of the offence by reference to the maximum penalty".
1171 *Magaming v R* (2013) 252 CLR 381, [48] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
1172 *Hurt v R; Delzotto v R* (2024) 98 ALJR 485, [65] (Edelman, Steward and Gleeson JJ).
1173 *Hurt v R; Delzotto v R* (2024) 98 ALJR 485, [54] (Edelman, Steward and Gleeson JJ).
1174 *Hurt v R; Delzotto v R* (2024) 98 ALJR 485, [39] (Gageler CJ and Jagot J); see also [28], [33], [35], [40], [50].
1175 *Hurt v R; Delzotto v R* (2024) 98 ALJR 485, [41]-[43] (Gageler CJ and Jagot J), [92] (Edelman, Steward and Gleeson JJ).
1176 *Hurt v R; Delzotto v R* (2024) 98 ALJR 485, [51] (Gageler CJ and Jagot J), [93] (Edelman, Steward and Gleeson JJ), each citing *Karim v R* (2013) 83 NSWLR 268, [45] (Allsop P).

circumstances detract from the role of the minimum sentence as a yardstick.[1177] The plurality considered that the principle of legality (an interpretive principle that rights recognised to be fundamental by the common law are not to be abrogated or diminished other than by a law expressed with "irresistible clearness") did not "*overcome the clear and unequivocal legislative intention that the prescribed minimum sentences serve as a yardstick*";[1178] Gageler CJ and Jagot J considered that the principle of legality was not engaged.[1179]

820. The plurality also made observations about the operation of s 16AAC, which permits a court to impose a sentence of imprisonment of less than the minimum period specified in s 16AAA or s 16AAB (as the case may be) if the court considers it appropriate to reduce the sentence for a guilty plea or cooperation. See "7.3.3 Mandatory terms of imprisonment for high-level Commonwealth child sex offences and for repeat child sexual abuse offences".

821. In *obiter dicta* comments, Gageler CJ and Jagot J said that other "available sentences" for an offence to which s 16AAB applies included an order under s 19B(1) (discharge or bond without conviction), s 20(1)(a) (bond with conviction) or s 20(1)(b) (recognizance release order).[1180] However, as the plurality pointed out, the exercise of a power under s 19B to discharge an offender without proceeding to conviction is not an exception to s 16AAB(2) but simply a circumstance where the provision does not apply;[1181] and an order under s 20(1)(b) is concerned with the point of release, not with the sentence imposed, and therefore does not alter the prescribed minimum sentence.[1182] The plurality also said that the exercise of power under s 20(1)(a) was not an exception to a sentencing requirement of a minimum sentence, "*if no sentence is passed*", but added, "*it is unnecessary on these appeals to consider any further the operation of s 20(1)(a) or to resolve any tension between the operation of s 20(1)(a) and s 16AAB.*"[1183]

822. These *obiter* observations provide no authority for the proposition that a s 20 bond is an available sentencing option for an offence to which s 16AAB applies. That question was not before the High Court and no such proposition had been advanced in either of the proceedings below. As the plurality noted,[1184] counsel for Delzotto expressly (and, in the view of the CDPP, rightly) conceded that such an option was not available. Nor did counsel for Hurt contend that it was.[1185] The requirement of s 16AAB(2) is clear: "*if the person is convicted of a current offence described in column 1 of an item in the following table, the court must impose for the current offence a sentence of imprisonment of at least the period specified in column 2 of that item.*" The cognate requirements in s 16AAA of the *Crimes Act*,

1177 *Hurt v R; Delzotto v R* (2024) 98 ALJR 485, [36]-[39] (Gageler CJ and Jagot J), [97]-[105] (Edelman, Steward and Gleeson JJ).
1178 *Hurt v R; Delzotto v R* (2024) 98 ALJR 485, [106]-[107] (Edelman, Steward and Gleeson JJ).
1179 *Hurt v R; Delzotto v R* (2024) 98 ALJR 485, [49]-[50] (Gageler CJ and Jagot J).
1180 *Hurt v R; Delzotto v R* (2024) 98 ALJR 485, [34] (Gageler CJ and Jagot J).
1181 *Hurt v R; Delzotto v R* (2024) 98 ALJR 485, [99] (Edelman, Steward and Gleeson JJ).
1182 *Hurt v R; Delzotto v R* (2024) 98 ALJR 485, [101] (Edelman, Steward and Gleeson JJ).
1183 *Hurt v R; Delzotto v R* (2024) 98 ALJR 485, [100] (Edelman, Steward and Gleeson JJ).
1184 *Hurt v R; Delzotto v R* (2024) 98 ALJR 485, [98] (Edelman, Steward and Gleeson JJ).
1185 In *Hurt v R; Delzotto v R* (2024) 98 ALJR 485, [98], Edelman, Steward and Gleeson JJ said, "*In Mr Hurt's written submissions it was suggested that a recognizance release order under s 20(1)(a) was an exception to the application of the minimum penalty provisions*". A RRO is an order under s 20(1)(b), not s 20(1)(a): see the definition of "recognizance release order" in s 16(1) of the *Crimes Act*.

ss 76DA and 236B(3) of the *Migration Act 1958* (Cth) and s 395.40 of the *Criminal Code* (Cth) are similarly unequivocal. As was pointed out by McLure P in *Bahar*[1186] and by Simpson AJA in *Taylor*,[1187] the "*unequivocally clear*" requirement that, upon conviction, the court must impose a sentence of imprisonment of not less than the specified length displaces the requirement in s 17A(1) of the *Crimes Act* that the court must first decide that a sentence of imprisonment is the only appropriate sentence; a sentence without a term of imprisonment of the requisite length is not an available sentence. There is no "tension" between s 20(1)(a) and any of these requirements; the mandatory imprisonment requirements prevail. The decisions in *Bahar* and in *Taylor* are authority for this proposition. As McLure P said in *Bahar*,[1188] these provisions deprive a judicial officer sentencing an offender for a relevant offence of both the power to impose a non-custodial sentence and the power to impose a sentence of less than the specified minimum.

4.8.6 Aggregate sentence of imprisonment for multiple federal offences

823. There is no general power to impose a single aggregate term of imprisonment for multiple federal offences. There are, however, particular circumstances in which a court may impose an aggregate penalty, including an aggregate sentence of imprisonment, in sentencing a federal offender: see "6.10 Aggregate penalty".

4.8.7 Aggregate sentence of imprisonment for federal and State offences is not permitted

824. It is not permissible to impose a single aggregate period of imprisonment for a Commonwealth offence and a State offence.[1189]

4.8.8 Period or minimum period to be served is not a consideration in fixing a head sentence

825. It is a long-standing common law principle that (subject to any contrary statutory provision) the length of a sentence of imprisonment must be fixed independently of the fixing of the period or minimum period (if any) to be served.[1190] The head sentence should be proportionate to all the circumstances of the offending, on the assumption that the offender may be required to serve all of it.[1191] A corollary of this principle is that (except as required by statute) the court should determine the appropriate head sentence before determining the length of the period or minimum period to be served or (if applicable) the mode of service of that term.[1192]

826. Accordingly, at common law, it is an error for a court, in imposing a sentence of imprisonment–

1186 *Bahar v R* (2011) 45 WAR 100, [53].
1187 *R v Taylor* [2022] NSWCCA 256, [63].
1188 *Bahar v R* (2011) 45 WAR 100, [53].
1189 *Fasciale v R* (2010) 30 VR 643, [27].
1190 *R v Governor of Her Majesty's Gaol at Pentridge; Ex parte Cusmano* [1966] VR 583, 587; *R v Currey* [1975] VR 647; *R v Yates* [1985] VR 41; *R v Williams* (SA SC (Full Court), 17 December 1997, unreported); *R v Zamagias* [2002] NSWCCA 17, [26]-[29]; *R v Ryan* [2006] NSWCCA 394, [1]; *Gordon v Tasmania* [2020] TASCCA 17, [56].
1191 *R v Morgan* (1980) 7 A Crim R 146, 155-6; *PNJ v R* (2009) 83 ALJR 384, [11].
1192 *R v Governor of Her Majesty's Gaol at Pentridge; Ex parte Cusmano* [1966] VR 583, 587; *R v Grmusa* [1991] 2 VR 153, 157-8; *R v Williams* (SA SC (Full Court), 17 December 1997, unreported); *R v Zamagias* [2002] NSWCCA 17, [26]-[29]; *De Hollander v R* [2012] WASCA 127, [86]; *R v Egan* [2013] NSWCCA 196, [81], [92]. See also *Dinsdale v R* (2000) 202 CLR 321, [79].

- to fix a longer head sentence than would otherwise be the case because the offender will not be required to serve any of it or will be required to serve only a small part of it;[1193]
- to fix a longer head sentence because of the prospect that the offender would obtain remissions from the sentence;[1194]
- to fix a longer head sentence because the sentence is to be served by way of periodic detention or home detention;[1195]
- to take into account in fixing the head sentence the likelihood or unlikelihood that the offender will be granted parole upon becoming eligible or the conditions to which parole may be subject;[1196]
- to fix the length of a head sentence in order to fall within, or to avoid falling within, a statutory provision relating to the period to be served;[1197] or
- to fix a shorter head sentence in order to offset the effect of a mandatory minimum ratio between the head sentence and the non-parole period.[1198]

827. The common law principle is applicable to the sentencing of a federal offender,[1199] because it is accommodated by, and gives content to, the requirements of s 16A of the *Crimes Act 1914* (Cth), such as the requirement that a court sentencing a federal offender must impose a sentence or make an order "*of a severity appropriate in all the circumstances of the offence*" (s 16A(1)) and the requirement to take into account "*the need to ensure that the person is adequately punished for the offence*" (s 16A(2)(k)).[1200]

828. In *Hatahet*,[1201] the High Court held that the New South Wales Court of Criminal Appeal had erred in reducing an otherwise appropriate sentence for a foreign incursion offence to allow for the unlikelihood that the offender would be released on parole (because of the restriction on parole imposed by s 19ALB of the *Crimes Act*: see "4.11.2 Terrorism-related restrictions on parole"). The High Court held that the fixing of the total sentence and the fixing of the non-parole period are not to be undertaken by reference

1193 *R v Percy* [1975] Tas SR 62, 73; *Stevens v Giersh* (1976) 14 SASR 81, 82; *BB v R* [2014] NTCCA 13.

1194 *Hoare v R* (1989) 167 CLR 348.

1195 *R v Jurisic* (1998) 45 NSWLR 209, 249; *R v Wegener* [1999] NSWCCA 405.

1196 See *R v Hatahet* [2024] HCA 23 (discussed below).

1197 *R v Ryan* [2006] NSWCCA 394, [2]-[4] (impermissible to reduce a head sentence to make it qualify for suspension); *Alou v R* (2019) 101 NSWLR 319, [188] (impermissible to impose a life sentence rather than a term of more than 30 years so as to avoid a more stringent requirement for a minimum non-parole period).

1198 *Lodhi v R* [2007] NSWCCA 360, [255]–[262]; *Alou v R* (2019) 101 NSWLR 319, [181]. But see *R v Kruezi* (2020) 6 QR 119, in which the court held that it was open to the sentencing judge, in the particular circumstances, to reduce the head sentence for a terrorism offence (which was subject to a mandatory ratio between the head sentence and period to be served) so that the offender would not be disadvantaged in the period to be served for another offence which was not subject to the same requirement. In the view of the CDPP, this approach is contrary to principle and should not be adopted in other jurisdictions.

1199 See, for example, *Lodhi v R* [2007] NSWCCA 360, [255]–[262]; *De Hollander v R* [2012] WASCA 127, [86]; *DPP (Cth) v Besim; DPP (Cth) v MHK (No 3)* (2017) 52 VR 303, [50], [58]; *Alou v R* (2019) 101 NSWLR 319, [181]-[183], [188]. In *R v Hatahet* [2024] HCA 23, [25]-[28], [36]-[38] (Gordon A-CJ, Steward and Gleeson JJ; Beech-Jones J agreeing generally), [55] (Jagot J), the High Court confirmed that the common law principle that the prospect of remissions and the likelihood of parole are irrelevant in sentencing applies to the sentencing of a federal offender.

1200 Cf *Hili v R* (2010) 242 CLR 520, [25]; *Bui v DPP (Cth)* (2012) 244 CLR 638, [18].

1201 *R v Hatahet* [2024] HCA 23.

to an assessment of whether or not an offender is likely to be released on parole at the conclusion of their non-parole period.[1202]

829. The plurality (Gordon A-CJ, Steward and Gleeson JJ; Beech-Jones J agreeing generally) said that, for the purposes of Division 4 of Part IB of the *Crimes Act*, a judge must undertake three distinct steps in sentencing an offender:[1203]

- First, the judge must only pass a sentence of imprisonment if, having considered all other available sentences, they are satisfied that no other sentence is appropriate in all the circumstances of the case (s 17A).
- Second, if no other type of sentence is appropriate, the sentencing judge must determine the sentence of imprisonment "*that is of a severity appropriate in all the circumstances of the offence*" (s 16A(1)), taking into account, in addition to "*any other matters*" that bear upon that issue, such matters listed in s 16A(2) "*as are relevant and known to the court*".
- Third, where the term exceeds three years, fix a single non-parole period, except where satisfied that it is not appropriate to do so (in that case, under s 19AB).

830. Beech-Jones J said that the Court of Criminal Appeal erred in its approach in resentencing, by starting with a non-parole period and adding an "additional term", a period which "*has no statutory status or particular significance under the Crimes Act*"; this approach involved a reasoning process that did not conform with the *Crimes Act*.[1204]

831. The plurality noted that the probability of parole being granted, and any consequences arising from a grant of parole being probable or not, were not factors listed in s 16A(2) of the *Crimes Act* and did not form part of the "*circumstances of the offence*" so as to engage s 16A(1).[1205] The common law principle in all Australian jurisdictions, and in the United Kingdom and New Zealand, is that a sentencing judge, in fixing a sentence of imprisonment, should not take into account the likelihood of release on parole;[1206] the plurality held that that principle was applicable to the sentencing of the offender.[1207] The common law principles derived from *Hoare*[1208] were also applicable: just as increasing an otherwise proportionate sentence by reference to the possibility of remissions would be a departure from basic principle (as the Court held in *Hoare*), so would reducing a sentence by reference to the unlikelihood of parole.[1209]

1202 *R v Hatahet* [2024] HCA 23, [21]-[28], [38]-[39] (Gordon A-CJ, Gleeson and Steward JJ); [54]-[55] (Jagot J); [62], [66] (Beech-Jones J).

1203 *R v Hatahet* [2024] HCA 23, [10]-[12]. The applicable requirements at the third stage will depend on the length of the head sentence (or total effective sentence, or the aggregate of the sentence and the unserved portion of any other federal sentence) and other factors (such as whether the offence was committed while the offender was on federal parole or licence and the sentence for the instant offence is more than 3 months). If the head sentence or total effective sentence is 3 years or less, the court is generally required to make a recognizance release order rather than to fix a non-parole period, although it may decline to do so and impose a straight sentence instead. See "4.10.4 Non-parole period (NPP), recognizance release order (RRO) or straight sentence?".

1204 *R v Hatahet* [2024] HCA 23, [68], [71].

1205 *R v Hatahet* [2024] HCA 23, [14]. See also [57], where Jagot J said, "*the likelihood, or lack thereof, of the offender being granted a parole order for any reason, including by operation of s 19ALB, cannot be a circumstance of the offence within the meaning of s 16A(1) as that potential cannot be known at the time of sentencing and is outside the control of the sentencing court*".

1206 *R v Hatahet* [2024] HCA 23, [25].

1207 *R v Hatahet* [2024] HCA 23, [26]-[28], [36]-[37]; see also [55] (Jagot J).

1208 *Hoare v R* (1989) 167 CLR 348.

1209 *R v Hatahet* [2024] HCA 23, [21]-[24], [36]-[37].

832. The plurality in *Hatahet* emphasised that the differing and distinct functions of the judicial and executive branches support this conclusion.[1210] The sentencing judge's task is separate to, and distinct from, the function of the executive in considering whether or not to grant parole.[1211] The judicial function is exhausted upon the making of the order which sentences the offender.[1212] The sentence imposed cannot be affected by the paroling authority;[1213] the policy of the paroling authority is irrelevant to sentencing.[1214] An offender has no right or entitlement to parole and there can never be a guarantee whether an offender will or will not be paroled.[1215] To take the prospect of parole into account would be too speculative and remote.[1216] The exercise of the sentencing discretion is not to be distorted by "*best guesses at the prospect of parole*".[1217] "*[T]he making of an administrative guess*" would lead to outcomes that are inconsistent with a core object of sentencing: the need to ensure that an offender is adequately punished.[1218] Adjusting a sentence arrived at in conformity with s 16A, *"whether upwards or downwards, to take account of the probability of parole would result in a sentence which then had precisely ceased to be in conformity with what the law requires"*.[1219]

833. The plurality held that to reduce a sentence as a result of the requirement in s 19ALB that, where applicable, parole must not be granted unless exceptional circumstances exist would turn the purpose of that provision "*on its head*"; it would subvert the very point, and undo the very work, of the presumption.[1220]

834. The plurality also rejected as "misconceived" a submission of the offender that his reduced prospects of parole would make his imprisonment more burdensome. The issue of parole was left to the executive branch, who may legitimately change the conditions for securing parole; the offender had not lost his opportunity to be considered for parole and his sentence remained as it was.[1221] The plurality also doubted whether there was a sufficient evidentiary basis for a finding that his mental condition was likely to be adversely affected, or that the reduced prospect of parole had an effect on deterrence or rehabilitation or had any consequences for his family or dependants.[1222]

1210 *R v Hatahet* [2024] HCA 23, [27].
1211 *R v Hatahet* [2024] HCA 23, [15].
1212 *R v Hatahet* [2024] HCA 23, [19], [27].
1213 *R v Hatahet* [2024] HCA 23, [20].
1214 *R v Hatahet* [2024] HCA 23, [27].
1215 *R v Hatahet* [2024] HCA 23, [20], [22]; see also [68] (Beech-Jones J).
1216 *R v Hatahet* [2024] HCA 23, [26], [37]; see also [54]-[55] (Jagot J). That was so even though in the instant case, by the time of the hearing of the appeal to the New South Wales Court of Criminal Appeal, the offender had become eligible for parole, but parole had been refused by the Attorney-General.
1217 *R v Hatahet* [2024] HCA 23, [38].
1218 *R v Hatahet* [2024] HCA 23, [28].
1219 *R v Hatahet* [2024] HCA 23, [28]. Jagot J said ([51]), "*the subject-matter, scope and purpose of the Crimes Act indicate that, in imposing a sentence of a term of imprisonment, a sentencing court is not to consider the likelihood, or lack thereof, that a person may be granted parole*". Her Honour said ([56]) that to reduce a head sentence because of the unlikelihood of parole would be contrary to s 16A(1), as it would not be a sentence of a "*severity appropriate*".
1220 *R v Hatahet* [2024] HCA 23, [24], [33].
1221 *R v Hatahet* [2024] HCA 23, [34]-[35].
1222 *R v Hatahet* [2024] HCA 23, [35].

4.8.9 Commencement of sentences

835. There is no single nationally-applicable law relating to the commencement of a federal sentence of imprisonment.[1223] Instead, s 16E(1) *Crimes Act 1914* (Cth) provides that the law of a State or Territory relating to the commencement of sentences and of non-parole periods applies to a person who is sentenced in that State or Territory for a federal offence in the same way as it applies to a person who is sentenced in that State or Territory for a State or Territory offence.

836. Section 16E(1) is subject to s 16E(2) and (3), which relate to the effect of pre-sentence custody for the offence: see "4.8.10 Allowance for pre-sentence custody for the offence".

837. The purpose of picking up and applying State or Territory laws relating to the commencement of a sentence of imprisonment is "*to avoid the problem of an offender who is sentenced to joint State and federal terms (e.g. a drug offender) commencing the terms on different dates*".[1224]

838. In most jurisdictions, by default a sentence of imprisonment commences on the day on which the offender is taken into custody, or if already in custody, when sentence is imposed.[1225] Laws in some States and Territories provide for a sentence to be backdated, either automatically or pursuant to a direction of the court, to account for periods of pre-sentence custody for the offence.[1226] In some jurisdictions, a court may direct that a sentence commence at a later date (for example, at the completion of other sentences).[1227] Such State or Territory laws are generally picked up and applied by s 16E.

839. The application of State and Territory laws relating to the commencement of a sentence of imprisonment is subject to an implicit but important qualification under s 19 of the *Crimes Act 1914* (Cth). That provision requires a court sentencing a federal offender to direct when the sentence for a federal offence commences, if the offender is sentenced to imprisonment for more than one offence (including a State or Territory offence) or is already serving a sentence of imprisonment. By that means, cumulation or concurrency of sentences is achieved. See "4.9 Imprisonment: concurrency or cumulation of sentences".

840. Although State and Territory laws generally apply in relation to *the commencement of a federal sentence of imprisonment* (that is, the head sentence), the *Crimes Act 1914* (Cth) makes comprehensive

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1223 In its report *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006), the Australian Law Reform Commission recommended (recommendation 10-1) that federal sentencing legislation should provide that a federal sentence commences on the day on which it is imposed, subject to any court order directed to the consecutive service of sentences. The recommendation has not been acted upon.

1224 *Crimes Legislation Amendment Bill (No 2) 1989* (Cth), *Explanatory Memorandum (Senate)*, 8.

1225 For example, the *Sentencing Act 1991* (Vic), s 17(1) provides that (subject to particular exceptions) a sentence of imprisonment commences on the day that it is imposed unless the offender is not then in custody, in which case it commences on the day they are apprehended under a warrant to imprison issued in respect of the sentence. Another example is the *Penalties and Sentences Act 1992* (Qld) s 154, which (subject to identified exceptions) provides a term of imprisonment for a conviction on indictment starts on the day the court imposed the imprisonment on the offender, while a term of imprisonment for a conviction for a summary offence starts at the beginning of the offender's custody for the imprisonment.

1226 See "4.8.10 Allowance for pre-sentence custody for the offence".

1227 E.g. *Crimes (Sentencing Procedure) Act* 1999 (NSW), ss 47(2)(b), (5). These provisions are applied to the sentencing of federal offenders by s 16E of the *Crimes Act 1914* (Cth): *Payda v R* [2013] NSWCCA 109, [52]-[60]; *Burbridge v R* [2016] NSWCCA 128, [11]. These provisions have given rise to difficult questions where the offender is in custody following the revocation of parole: see *White v R* [2016] NSWCCA 190, [6]-[8] (Bathurst CJ), [25]-[27] (Basten JA), [118]-[119] (Simpson JA); *Tompkins v R* [2019] NSWCCA 37, [36]-[37] (Hoeben CJ at CL, Schmidt J agreeing), [59]-[60] (Adamson J).

provision (to the exclusion of State and Territory laws[1228]) for the making of orders governing the period, or minimum period, to be served. See "4.10 Imprisonment: period to be served".

841. A non-parole period for one or more federal offences cannot be fixed to commence earlier than the commencement date of the head sentence(s).[1229]

842. If an appeal court has power, on resentencing an offender, to vary another sentence (although not the subject of the appeal), that power will extend to variation of the commencement of a federal sentence, because the State or Territory law which permits the court to do so is applied either by s 16E of the *Crimes Act 1914* (Cth) or by s 68(1) of the *Judiciary Act 1903* (Cth).[1230]

4.8.10 Allowance for pre-sentence custody for the offence

843. In general, in sentencing a federal offender to imprisonment, an allowance will be made for pre-sentence custody for the offence. Subsections 16E(2) and (3) of the *Crimes Act 1914* (Cth) provide for ways in which such an allowance may be made.

844. **Applied State or Territory laws:** Subsection 16E(2) provides that where a law of a State or Territory has the effect that a sentence of imprisonment may be reduced by the period that the person has been in custody for the offence or is to commence on the day on which a person was taken into custody for that offence, that law applies in the same way to a federal sentence imposed on a person in that State or Territory or to a non-parole period fixed in respect of that sentence.

845. Examples of State or Territory laws which plainly fall within s 16E(2) are laws which provide for:

- a sentencing court to **backdate a sentence**[1231] to the commencement of custody for the offence[1232] to allow for the offender's pre-sentence custody for the offence; or

1228 *Hili v R* (2010) 242 CLR 520, [21]-[22], [52].

1229 *R v TW (No 2)* [2014] ACTCA 37.

1230 *R v Burton* [2023] NSWCCA 299, [66]-[71].

1231 **NSW:** *Crimes (Sentencing Procedure) Act 1999* (NSW), s 47(2)(a). See *R v McHugh* (1985) 1 NSWLR 588; *Assafiri v R* [2007] NSWCCA 159, [11]; *Danial v R* [2008] NSWCCA 15, [22]; *Starmer v R* [2008] NSWCCA 27, [10]-[12]; *R v Zeng* [2008] NSWCCA 183, [75]-[77]; *Shi v R* [2017] NSWCCA 126, [6]; *Kljaic v R* [2023] NSWCCA 225 at [22]-[24], taking into account "time" includes not only the length or quantity of the time, but also the quality of the time). **WA:** *Sentencing Act 1995* (WA) s 87(d). See *Mercanti v R* [2011] WASCA 120, [22]-[24]; *HSH v Western Australia* [2023] WASCA 113, [159]-[162]. **SA:** *Sentencing Act 2017* (SA), s 44(2)(b). That section does not permit a judge to backdate a sentence to give credit for a period of home detention bail (*R v Franceschini* (2015) 123 SASR 396, [34]-[41]; *Ribbon v R* [2022] SASCA 15, [36]), although the court has a common law discretion to reduce a sentence (by significantly less than the total amount of time spent on home detention bail) to allow for such a period (*Franceschini*, [42]). **Tas:** *Sentencing Act 1997* (Tas), s 16(1); see *Geale v Tasmania* (2009) 18 Tas R 338. **ACT:** *Crimes (Sentencing) Act 2005* (ACT), s 63; see *McIver v R* (2023) 20 ACTLR 303, [82]-[94] regarding both s 16A *Crimes Act 1914* (Cth) and s 63 *Crimes (Sentencing) Act*. **NT:** *Sentencing Act 1995* (NT), s 63(5). See *Lovegrove v R* (2018) 41 NTLR 61, where the Court found that s 63(5) permitted backdating of sentence to include a period of "quasi-custody" on bail, in a drug rehabilitation facility or subject to electronic monitoring. Whether this power is applied by s 16E is discussed below.

1232 Courts in NSW and SA have held that if a court has power under State law to backdate a sentence it may do so even though the offender was not in custody throughout the period since the backdated commencement date: *R v Newman* [2004] NSWCCA 102,[25]-[32]; *R v Tilley* [2010] SASCFC 73; *Rodgers v R* [2018] NSWCCA 47, [65]-[78]. In *McIver* at [93], the Australian Capital Territory Court of Criminal Appeal concluded that s 63(4) of the *Crimes (Sentencing) Act 2005* (ACT) did not permit a period on remand for other offences to be taken into account as "time served" where the offender had not been in continuous custody for those offences.

- a sentencing court to **reduce the sentence** to be imposed on an offender by a period corresponding to the offender's pre-sentence custody for the offence.[1233]

846. **Backdating or reduction of sentence:** If a court has power either to backdate a sentence or to reduce the sentence to account for time spent in custody for the offence, backdating is usually the preferable course,[1234] but reduction of the sentence may be more appropriate where custody prior to sentence has not been continuous[1235] or to make an allowance for a period of custody for which no allowance can be made by backdating.[1236] The extent of the reduction should be transparent.[1237] Although mathematical precision in the degree of reduction is not necessarily required, there must be good reason – that is, some reason or circumstance that reflects sound sentencing principles – not to accord full credit for time served in custody.[1238]

847. The relevant law in South Australia has been interpreted as permitting an allowance to be made for a period of custody by a mixture of backdating the sentence and reducing the period to be served.[1239]

848. **Declaration of time served:** As the Australian Law Reform Commission noted in its 2006 report on federal sentencing,[1240] s 16E(2) does not expressly refer to State or Territory laws (as in Victoria[1241] and Queensland[1242]) that allow for time spent in pre-sentence custody to be declared as time already served under the sentence. Courts have, however, treated such laws as being picked up and applied to the sentencing of federal offenders by s 16E.[1243] In sentencing federal offenders, the practice of courts in Victoria and Queensland is to allow for pre-sentence custody for the offence by declaring the time already served, in the same way as they would in sentencing a State offender.

849. **Residual requirement:** Subsection 16E(3) provides that where the law of the State or Territory does not have the effect mentioned in s 16E(2), a court imposing a federal term of imprisonment or non-parole

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1233 E.g. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 24(a); *Sentencing Act 1995* (WA) s 87(c); *Sentencing Act 2017* (SA) s 44(2)(a).

1234 *R v Newman* [2004] NSWCCA 102,[24]-[36]; *Assafiri v R* [2007] NSWCCA 159, [11]; *R v Franceschini* (2015) 123 SASR 396, [23]-[61]; *R v Tsonis* (2018) 131 SASR 416, [70]; *Ribbon v R* [2022] SASCA 15, [25].

1235 *R v Tsonis* (2018) 131 SASR 416, [71]; *Ribbon v R* [2022] SASCA 15, [26].

1236 *Ribbon v R* [2022] SASCA 15, [36]-[37] (allowing for a period of home detention bail). Where such an allowance is made, it inevitably will be significantly less than the total amount of time spent on home detention bail: *R v Franceschini* (2015) 123 SASR 396, [42].

1237 *Ribbon v R* [2022] SASCA 15, [34]-[35], [40].

1238 *R v Tsonis* (2018) 131 SASR 416, [69], [75]; *Ribbon v R* [2022] SASCA 15, [28]-[29], [38]-[40].

1239 *Gonis v R* [2024] SASCA 42, [32]-[43].

1240 *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006), [10.16].

1241 *Sentencing Act 1991* (Vic), s 18. The history of the practice for accounting for time in custody for the instant offence in Victoria is recounted in *R v Jennings* [1999] 1 VR 352. The law in Victoria does not generally permit the backdating of a sentence (*R v Singh* (Vic CCA, 26 March 1991, unreported), 13-14; *R v Nagy* [1992] 1 VR 637), except that in resentencing on appeal, the County Court (*Criminal Procedure Act 2009* (Vic), ss 256(4), 259(4); *Children, Youth and Families Act 2005* (Vic), ss 426(4), 429(7)), the Trial Division of the Supreme Court (*Children, Youth and Families Act 2005* (Vic), ss 426(4), 429(7)) or the Court of Appeal (see *Barbat v R* [2014] VSCA 202) may backdate a sentence to the date of the original sentence.

1242 *Penalties and Sentences Act 1992* (Qld), s 161(1). The history of the practice for accounting for time in custody for the instant offence in Queensland is summarised in *Scott v NPQ* [2022] QCA 98, [11]-[15].

1243 *R v Singh* (Vic CCA, 26 March 1991, unreported), 12 (in relation to s 16 of the *Penalties and Sentences Act 1985* (Vic), the ancestor of s 18 of the *Sentencing Act 1991* (Vic)); *R v Hill; Ex parte DPP (Cth)* [2011] QCA 306, [278]-[279]. Were these laws not picked up under s 16E(2) of the *Crimes Act 1914* (Cth), sentencing courts in these States would be required to reduce the sentence imposed to take account of pre-sentence custody for the offence, pursuant to s 16E(3).

period must take into account any period that the person has spent in custody in relation to the offence concerned.[1244] This residual provision operates to ensure that pre-sentence time in custody for the offence is taken into account in fixing sentence, if the law of the relevant State or Territory does not make provision for it to be credited towards the service of a sentence in one of the ways referred to in s 16E(2). This might arise if, for example, a period in custody was of a kind which is "*custody for the offence*" within s 16E, but is not custody of a kind which, under the law of the State or Territory, may be taken into account in backdating a sentence or in declaring a period of custody as time already served.[1245] Nothing in s 16E(3) mandates how the period of custody is to be taken into account.[1246]

850. As the Australian Law Reform Commission pointed out in 2006, s 16E(3) is ambiguous, in that it is not clear whether it requires the court to give full credit for time in custody or whether it simply requires the court to take the pre-sentence custody into account as a relevant consideration in determining the commencement date of the sentence.[1247] In the view of the CDPP, it must have the latter meaning; otherwise it would require a reduction for time in custody which was plainly inappropriate (for example, where the offender was also in custody for an unrelated offence, and the sentence for that offence had been reduced to account for the whole of that period).

851. **"Custody for the offence":** In *Alimudin*,[1248] the Northern Territory Court of Appeal held that the references in s 16E to "*custody for the offence*" should be construed broadly. The Court held that a period of *pre-charge detention* of the offender (pursuant to the *Fisheries Management Act 1991* (Cth) and in immigration detention) which arose from the offending (pending consideration of whether charges for the offence should be laid) should be treated as "*custody for the offence*" within s 16E, and that Territory law which permitted backdating of a sentence if the offender had been "*in custody on account of his or her arrest*" for the offence should be taken to apply.

852. The Court in *Alimudin* also observed that it was sufficient "*that there is conformity between the conduct that led to the arrest and the conduct for which the person was ultimately sentenced to imprisonment*".[1249] It follows that if, for example, the offender was originally arrested and held in custody on a charge for a State drug offence, but ultimately charged with and sentenced for a Commonwealth drug offence arising from the same conduct, the custody for the State offence may be treated as custody for the Commonwealth offence for the purposes of s 16E, and credited in sentencing

1244 It is notable that s 16E(3) makes no reference to the fixing of a recognizance release order (RRO) under s 20(1)(b) of the *Crimes Act 1914* (Cth). That is, if s 16E(3) applies, while a court is required to take into account a period of custody for the offence in fixing the head sentence and the non-parole period (if applicable), it is not required to do so in fixing the period to be served under a RRO. It is not apparent why this should be so.

1245 Even certain periods of *pre-charge custody* or periods of *immigration detention* may be regarded as "custody for the offence" within s 16E: *Alimudin v McCarthy* [2008] NTCA 7 (discussed below). However under State or Territory law, such periods may not be of a kind which could be taken into account in backdating a sentence or in declaring a period already served: see the authorities cited in fn 1250. In those circumstances, the court would be required, under s 16E(3) to "take into account" that period in fixing the head sentence and the non-parole period. In Victoria, the result is similar to the position which applies in sentencing for a State offence (*Sahhitanandan v R* [2019] VSCA 115, [32]-[38]), but the result would be different if under State or Territory law a period of immigration detention would not be regarded as a matter to be taken into account in sentencing.

1246 *Rodgers v R* [2018] NSWCCA 47, [70].

1247 *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006), [10.17].

1248 *Alimudin v McCarthy* [2008] NTCA 7.

1249 *Alimudin v McCarthy* (2008) 23 NTLR 102, [28]. Cf *PNJ v R* (2009) 83 ALJR 384, [17]-[19].

the offender for the Commonwealth offence either in accordance with the law applied by s 16E(2) or under s 16E(3) (as the case may be).

853. In sentencing offenders for State offences, courts have held that, under State law, post-charge periods in immigration detention were not required to be reckoned as pre-sentence custody for an offence,[1250] although an allowance could be made in the exercise of the court's discretion.

854. In *Marai*,[1251] which concerned a federal offence, Sweeney J (with whom Kirk JA agreed) said, "*It is not clear that the provisions of s 16E* [of the *Crimes Act*] *and ss 24 and 47(3)* [of the *Crimes (Sentencing Procedure) Act 1999* (NSW)] *which refer to persons being held in custody were intended to encompass immigration detention, although courts have interpreted them to that effect*". However in that case, in resentencing the offender, the majority backdated the sentence to account for the whole period of the offender's immigration detention which was "referable to the offence", not in reliance on those provisions but in the exercise of the Court's broad discretion to backdate sentences (under s 47(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW)).[1252]

855. Custody in another country while awaiting extradition for the offence may also be treated as "*custody for the offence*" within s 16E.[1253] However the period for which credit is given may be reduced on the basis that the offender had prolonged challenges to extradition beyond what was reasonably necessary.[1254]

856. A period of custody does not cease to be "custody for the offence" within s 16E merely because it is "doubly warranted" – that is, if the person was also in pre-sentence custody for another offence, including an unrelated offence.[1255]

857. **"Quasi-custody":** "Custody" ordinarily refers to detention of a person against their will by a government authority[1256] (and sometimes more narrowly as custody in prison[1257]). However laws in some States[1258] and Territories[1259] (but not in others[1260]) have been construed as permitting a period on bail with onerous conditions for home detention or residence in a drug rehabilitation facility to be taken

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1250 **NSW:** *R v Cheraghi* [2020] NSWCCA 70, [64] (a period in immigration detention while the offender was on bail for the instant (State) offence was not "*time for which the offender has been held in custody in relation to the offence*" within the meaning of s 47(4) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), so that the offender was not entitled to have the sentence backdated to credit that period towards the service of the sentence). **Vic:** *Sahhitanandan v R* [2019] VSCA 115, [29]-[31] (a person held in immigration detention as a result of arrest for the instant offence is not "*held in custody in relation to … proceedings for the offence*", within the meaning of s 18 of the *Sentencing Act 1991* (Vic), and was therefore not required to be reckoned as "*a period of imprisonment or detention already served under the sentence*" under that section; "*a connection between the custody and the proceedings which is more than tenuous or incidental*" is required).

1251 *Marai v R* [2023] NSWCCA 224, [102].

1252 *Marai v R* [2023] NSWCCA 224, [103]. The general power of an appellate court, under State law, to backdate a sentence on resentencing is applied in relation to a federal offender either by s 16E(1) of the *Crimes Act 1914* (Cth) or by s 68(1) of the *Judiciary Act 1903* (Cth): cf. *R v Burton* [2023] NSWCCA 299, [66]-[71].

1253 *R v Lau* [2009] WASCA 99.

1254 *R v Lau* [2009] WASCA 99 (special leave refused: *Lau v R* [2009] HCATrans 275).

1255 *Dib v R* [2023] NSWCCA 243, [65]-[66]; *McIver v R* (2023) 20 ACTLR 303, [87].

1256 *Marai v R* [2023] NSWCCA 224, [8] (Fagan J, dissenting in the result).

1257 *Marai v R* [2023] NSWCCA 224, [63] (Sweeney J, Kirk JA agreeing).

1258 E.g. *Brown v R* [2013] NSWCCA 44.

1259 E.g. *Lovegrove v R* (2018) 41 NTLR 61.

1260 *R v Franceschini* (2015) 123 SASR 396, [34]-[41].

into account in backdating a sentence or in fixing the term of a sentence of imprisonment (almost always at a substantially discounted rate), on the basis that it is "quasi-custody". Bail conditions will only be considered to be "quasi-custody", so as to justify a lesser sentence or the backdating of a sentence, when it is established on a proper evidentiary foundation[1261] that the conditions are so harsh or restrictive that they should be treated as the notional equivalent of custody.[1262]

858. It is at least doubtful whether a period on conditional bail, even if so onerous as to be "quasi-custody" in this sense, can properly be regarded as "custody" within the meaning of s 16E.[1263] If it cannot, State laws which permit backdating or reduction of sentence for such "quasi-custody" would not, to that extent, be applied by s 16E(2) and no residual discretion would arise under s 16E(3).

859. In some cases, courts have proceeded on the assumption that such "quasi-custody" for the offence can nevertheless be taken into account broadly in the exercise of the sentencing discretion.[1264] The weight (if any) to be given to a period of quasi-custody must be assessed in light of the overarching obligation of the court to impose a sentence of a severity appropriate in all the circumstances of the offence (s 16A(1)), and to give due weight to sentencing principles such as the need for adequate punishment (s 16A(2)(k)), general deterrence (s 16A(2)(ja)), specific deterrence (s 16A(2)(j)) and denunciation.

860. **No double-counting:** Credit for pre-sentence custody will not be allowed where an allowance has been made for the same period of custody in sentencing the offender for another offence[1265] (including in another jurisdiction[1266]). However the sentence for the other offence might fall to be taken into account under the principle of totality, if the sentence is being served at the time of sentencing for the instant offence: see "3.3 Other sentences not yet served – s 16B (totality principle)".

4.8.11 Taking into account immigration detention in sentencing for certain offences against the Migration Act 1958 (Cth)

861. In imposing a sentence of imprisonment or fixing a non-parole period for an offence against Part 2, Division 12, Subdivision A of the *Migration Act 1958* (Cth) (that is, ss 229–236), the court must take into account any period that the person has spent in immigration detention during the period starting when the offence was committed; and ending when the person is sentenced for the offence (Migration Act, s 236C).

862. This applies not only to offences which are subject to mandatory minimum periods of imprisonment and mandatory minimum non-parole periods ("7.2.1 People-smuggling offences"), but also to other

1261 *Bonett v R* [2013] NSWCCA 234, [50].

1262 *R v Quinlan* [2021] NSWCCA 284, [87]-[88]. A regime for electronic monitoring of the offender would not necessarily constitute "quasi-custody": *Lovegrove v R* (2018) 41 NTLR 61, [38].

1263 Cf *R v Eastway* (NSW CCA, 19 May 1992, unreported); *Akoka v R* [2017] VSCA 214, [111]; *R v Franceschini* (2015) 123 SASR 396, [38].

1264 A sentencing court in South Australia has a common law discretion to reduce a sentence to allow for a period of home detention bail for the offence, but only by significantly less than the total amount of time spent on home detention bail: *R v Franceschini* (2015) 123 SASR 396, [42]. In *R v Hudson* (2016) 125 SASR 171, [16]-[17], the Full Court held that it could do so in sentencing a federal offender as that period formed part of the "antecedents" of the offender within s 16A(2)(m) of the *Crimes Act 1914* (Cth) and s 16A left room for the exercise of the common law discretion to do so.

1265 E.g. *R v Karageorge* [1999] NSWCCA 213, [28].

1266 E.g. *Tsang v DPP (Cth)* (2011) 35 VR 240, [169]-[171].

offences against Subdivision A. However it applies only in relation to the fixing of a non-parole period and not to the determination of the pre-release period of a recognizance release order.

863. There is no requirement that any such period of immigration detention be attributable to, or otherwise connected with, the offence for which the person is being sentenced. For example, the person may be in immigration detention because they do not have a visa or their visa has expired and they are therefore an unlawful non-citizen under the Migration Act.

864. As to whether an allowance for a period in immigration detention should otherwise be made as "custody for the offence" for which a federal offender is sentenced, see "4.8.10 Allowance for pre-sentence custody for the offence". As to whether a period in custody which is not custody for the offence may otherwise be taken into account, see "4.8.12 Taking into account other pre-sentence custody".

4.8.12 Taking into account other pre-sentence custody

865. This section of the guide addresses whether a period of pre-sentence custody can be taken into account in sentencing a federal offender if it is not "custody for the offence" ("4.8.10 Allowance for pre-sentence custody for the offence") and is not a period of immigration detention which is required to be taken into account under s 236C of the *Migration Act 1958* (Cth) ("4.8.11 Taking into account immigration detention in sentencing for certain offences against the Migration Act 1958 (Cth)").

866. A period of pre-sentence custody which was, or has become, part of a sentence *for another offence* may fall to be taken into account under the totality principle[1267] (see "3.3 Other sentences not yet served – s 16B (totality principle)").

867. If the sentence for the other offence has been completed prior to sentencing for the instant offence, the totality principle (both at common law and under s 16B of the *Crimes Act 1914*) does not apply. However the Victorian Court of Appeal has held that the fact the offender has finished a term of imprisonment for different offending shortly before the imposition of a sentence may be a relevant factor for the sentencing judge to take into account.[1268]

868. Beyond these circumstances, there is no provision in the *Crimes Act 1914* for taking into account, so as to reduce the period to be served, any period of pre-sentence custody other than custody for the instant offence.[1269]

869. Authority is divided on whether a sentencing court has a discretion to take into account any such period of custody. The line of authority that it does derives from a discretion recognised by the Victorian Court of Appeal in *Renzella*[1270] (referred to as the *Renzella* discretion), which has also been applied by appellate courts in Tasmania and Queensland. The line of authority to the contrary derives from a series

1267 See *Tsang v DPP (Cth)* (2011) 35 VR 240, [172]-[177].

1268 *Tiba v R* [2013] VSCA 302, [37]; *Visser v R* [2015] VSCA 168, [165]. Cf *Vincent v R* [2022] NSWCCA 210, [45], [72].

1269 In *McIver v R* (2023) 20 ACTLR 303, [86], the Court of Appeal said "*there may be a question*" as to whether s 63 of the *Crimes (Sentencing) Act 2005* (ACT) (which, by s 63(4), extends the pre-sentence custody to be taken into account to include a period of custody for an unrelated offence which is continuous with custody for the instant offence) can be applied by s 16E of the *Crimes Act 1914* (Cth) to the sentencing of federal offences. In the view of the CDPP, s 63 is applied by s 16E(2), but only to the extent that it has the effect of allowing for backdating for a period of "*custody for the offence*" for which the person is sentenced; that is, s 63 is not applied to the extent that it requires or permits backdating for any other period of custody.

1270 *R v Renzella* [1997] 2 VR 88.

of decisions of the New South Wales Court of Criminal Appeal, which is consistent with decisions of appellate courts in Western Australia, South Australia and the Australian Capital Territory.

870. ***Renzella* discretion:** *Renzella* itself was concerned with custody for the instant offence – an issue which is comprehensively dealt with, in relation to the sentencing of a federal offender, by s 16E of the *Crimes Act 1914* (Cth): see "4.8.10 Allowance for pre-sentence custody for the offence". In *Renzella*, which concerned a State offence, the State statute as then in force did not permit pre-sentence custody for the instant offence to be reckoned as time served if the offender was also in custody for any other reason ("doubly-warranted" custody). The Court concluded (*obiter dicta*) that a sentencing court was empowered and "*obliged as a matter of justice*" to take into account a period of pre-sentence custody in those circumstances[1271] and that the period of custody should ordinarily be taken into account at the first opportunity and not left to the court imposing a later sentence.[1272]

871. In subsequent cases, courts in Victoria[1273] (and occasionally in other States[1274]) have applied the *Renzella* discretion well beyond recognising periods of doubly-warranted custody. In particular, courts have made allowance for a period where the offender was in custody (including in another State[1275] or even another country[1276]) only for an unrelated offence, where the charge for that unrelated offence has ultimately been discontinued, or the person has been acquitted, or a conviction has been quashed on appeal (referred to as "*unallocated pre-sentence detention*" or "*dead time*"). Such a period may be taken into account by reduction of the head sentence or the period to be served, or both. The rationale advanced for reducing a sentence to account for such a period is that it is compensation for the injustice of incarceration on a charge which did not lead to conviction.[1277] Although that may suggest an *entitlement* on the part of the offender, it has been said that such a period of custody is not to be treated as "*a kind of bank balance on which to draw in relation to subsequent offences unconnected with the reason for custody*".[1278] The allowance to be made is within the discretion of the sentencing court and the exercise is not a mathematical one;[1279] that is, the offender is not entitled, in each case, to a reduction

1271 *R v Renzella* [1997] 2 VR 88, 96-7. Courts in other jurisdictions have recognised a similar discretion to take into account a prior period of doubly-warranted custody which does not fall to be taken into account under a State law as pre-sentence custody for the instant offence: e.g. *Narkle v Hamilton* [2008] WASCA 31; *R v Fabre* [2008] QCA 386.

1272 *R v Renzella* [1997] 2 VR 88, 98.

1273 See the review of authorities by Tate JA in *Karpinski v R* (2011) 32 VR 85, [30]-[64]. More recent affirmations include *Thurlow v R* [2021] VSCA 71, [42], and *Mokbel v R* [2023] VSCA 40, [63].

1274 In *Geale v Tasmania* (2009) 18 Tas R 338, the Court of Criminal Appeal of Tasmania, by majority, held that a period of custody on an unrelated charge (which remained unresolved) while the offender was, and continued to be, on bail for the instant offence should have been taken into account in sentencing for a State offence. In *R v Hill; Ex parte DPP (Cth)* [2011] QCA 306, [280]-[282], [307], the Queensland Court of Appeal, in resentencing one of the offenders, took into account a period of custody interstate on unrelated charges (which were ultimately discontinued) while the offender was, and continued to be, on bail for the instant offences. In neither case was any reference made to authorities to the contrary in other jurisdictions.

1275 *R v Kotzmann* [1999] 2 VR 123. See also *R v Hill; Ex parte DPP (Cth)* [2011] QCA 306, [280]-[282].

1276 In *Tsang v DPP (Cth)* (2011) 35 VR 240, [170]-[171], the Court said that in principle the discretion would apply to a period in custody in another country; it did not apply in that case as the relevant period in which the offender was in custody in Canada was not "dead time" since it had been taken into account in sentencing for the offence in Canada.

1277 *Kheir v R* [2012] VSCA 13, [16].

1278 *R v Kotzmann* [1999] 2 VR 123, [42] (Callaway JA).

1279 *Warwick v R* [2010] VSCA 166, [10].

in the sentence that is identical to the 'dead time' already spent by the offender in custody.[1280] Nevertheless in some cases, a sentencing judge has been found to have erred in failing to give full credit for a period of custody for an unrelated offence,[1281] or not to have erred in doing so.[1282]

872. In *Karpinski*,[1283] Weinberg JA expressed the view that the law (in Victoria) regarding the credit to be given for pre-sentence detention in respect of unrelated custody is in an unsatisfactory state, and that the credit for such detention "*is often now invoked in circumstances where its application is difficult to justify, either as a matter of logic, or in principle.*" His Honour said that, while any accused who has been wrongly imprisoned is the victim of a grave injustice, "*[i]t does not follow … that it is society's duty to ameliorate that injustice by giving the accused credit for the time spent in custody when he is sentenced at a later time for entirely unrelated offending.*"[1284] In *Cook*,[1285] the Court noted the criticisms made by Weinberg JA in *Karpinski* and observed that the *Renzella* discretion "*is sometimes somewhat bizarre in its application*". In *McIver*,[1286] the Australian Capital Territory Court of Criminal Appeal said that Weinberg JA's criticisms of treating unrelated custody as "time served" were well founded.

873. In *Dib*,[1287] after quoting what Weinberg JA said in *Karpinski*, Simpson AJA (with whom Garling and Ierace JJ agreed) observed that the expansion of the *Renzella* discretion in Victoria to include custody for unrelated offences had occurred "*without explanation of why that expansion was justified*" and without any reference to a series of decisions of the New South Wales Court of Criminal Appeal to the contrary.

874. **Allowance for unrelated periods of custody is not recognised in other jurisdictions:** Courts in New South Wales maintain a "*sharp distinction*" between periods of custody for the offence and custody that is solely attributable to an unrelated matter.[1288] Sentences are neither backdated nor reduced for the latter.[1289] The Court of Criminal Appeal has consistently declined to recognise the existence of a residual common law discretion to reduce a sentence to allow for unrelated periods of custody.[1290] Appellate

1280 *Thurlow v R* [2021] VSCA 71, [42].
1281 E.g. *Kheir v R* [2012] VSCA 13; *Jojic v R* [2017] VSCA 77.
1282 E.g. *DPP (Vic) v Moustafa* [2018] VSCA 331.
1283 *Karpinski v R* (2011) 32 VR 85, [2]-[8].
1284 *Karpinski v R* (2011) 32 VR 85, [7]. This observation might be said to apply with even greater force where the relevant "society" whose criminal justice system is imposing the sentence is not the "society" whose criminal justice system was responsible for putative injustice. This would be the case where the relevant period of custody was in another State (as in *R v Kotzmann* [1999] 2 VR 123 and *R v Hill; Ex parte DPP (Cth)* [2011] QCA 306) or another country (as affirmed in *Tsang v DPP (Cth)* (2011) 35 VR 240), or where the offender is sentenced for a federal offence and the previous custody was for a State offence.
1285 *Cook v R* [2011] VSCA 187, [12].
1286 *McIver v R* (2023) 20 ACTLR 303, [105] (special leave refused: [2024] HCASL 166).
1287 *Dib v R* [2023] NSWCCA 243, [81].
1288 *SY v R* [2020] NSWCCA 320, [48].
1289 *Dib v R* [2023] NSWCCA 243, [51].
1290 *R v Niass* (NSW CCA, 16 November 1988, unreported); *Hampton v R* [2014] NSWCCA 131, [25]-[36] (special leave refused: [2015] HCASL 76); *SY v R* [2020] NSWCCA 320; *Dib v R* [2023] NSWCCA 243 (special leave refused: [2024] HCASL 169).

courts in Western Australia,[1291] South Australia[1292] and the Australian Capital Territory[1293] have taken a similar view.

875. In *McIver*,[1294] the Australian Capital Territory Court of Criminal Appeal said, "*Central to the approach in New South Wales (and the reservations expressed by Weinberg JA in Karpinski) are the public policy concerns that weigh against consideration of unrelated offending for which an offender is ultimately acquitted as "credit in the bank", which may then be deducted from the sentence imposed in respect of any future offending*". These concerns have been expressed in a number of cases. In *Al-Zuain*,[1295] Vanstone J said that if the time in custody is not referable to the particular offending, then it should not form part of the penalty, because it does not advance the punitive, protective, deterrent and rehabilitative purposes of punishment. In *Hampton*, a five-member bench of the New South Wales Court of Criminal Appeal held that "*bare reliance on a period in custody for an unrelated matter, without more, is extraneous to the exercise of sentencing discretion for other matters*".[1296] In *SY*,[1297] the Court said that the legal basis for the pre-sentence custody is, in logic and in principle, the criterion of whether time on remand should count.

876. ***Renzella* discretion and federal offenders:** Courts in Victoria[1298] and Queensland[1299] have proceeded on the assumption that the *Renzella* discretion in its broad application applies to the sentencing of a federal offender, without consideration of whether the legislative scheme under the *Crimes Act 1914* (Cth) (particularly ss 16A, 16B and 16E) can accommodate the extension of the *Renzella* discretion to custody for unrelated offences.

877. In *Mokbel*,[1300] the Victorian Court of Appeal said that (contrary to a submission by the CDPP) "dead time" in custody for an unrelated offence (for which the conviction was ultimately overturned on appeal) could be taken into account in sentencing a federal offender as part of the "antecedents" of the offender, under s 16A(2)(m) of the *Crimes Act*,[1301] and that consideration of such dead time was not contrary to the requirement to take into account "*the need to ensure that the person is adequately punished for the*

1291 *Narkle v Hamilton* [2008] WASCA 31, [43] ("*in a case in which an offence is committed after serving time in custody in respect of a charge upon which the offender was subsequently acquitted, there would ordinarily be no reason to take the prior period of custody into account so as to reduce the sentence imposed in respect of the current offence*").

1292 *R v Hughey* [2007] SASC 452, [6]-[7]; *R v Galgey* [2010] SASC 134, [10]; *R v Sprecher* (2015) 123 SASR 15, [28]-[32].

1293 *McIver v R* (2023) 20 ACTLR 303, [95]-[109].

1294 *McIver v R* (2023) 20 ACTLR 303, [101].

1295 *R v Al-Zuain* (2009) 103 SASR 567, [89].

1296 *Hampton v R* [2014] NSWCCA 131, [30].

1297 *SY v R* [2020] NSWCCA 320, [52].

1298 *Tsang v DPP (Cth)* (2011) 35 VR 240, [164]-[172]. The observations were *obiter*; the period of custody for an unrelated offence was not taken into account because it had been taken into account in sentencing for that offence.

1299 *R v Hill; Ex parte DPP (Cth)* [2011] QCA 306, [280]-[282], [307]. In resentencing one of the offenders, the Court took into account a period of dead time custody in NSW for an unrelated offence while the offender was on bail for the instant offence. The Court did not explain how this course was permissible in sentencing a Commonwealth offender. The only authorities cited by the Court were Queensland authorities concerned with doubly warranted custody, not custody solely for an unrelated offence.

1300 *Mokbel v R* [2023] VSCA 40, [65].

1301 The Court cited *R v Hudson* (2016) 125 SASR 171, [16], in support of this conclusion. However *Hudson* did not concern "dead time" for an unrelated offence, but a period of home detention bail for the instant offence.

offence" (s 16A(2)(k)). These observations were *obiter dicta*, because ultimately the dead time was not taken into account in respect of a federal offence but only in resentencing for State offences. The Court in *Mokbel* did not identify how "dead time" for an unrelated offence is "relevant" for the purposes of s 16A(2); nor did it refer to the body of authority in other States to the effect that it is extraneous to the exercise of the sentencing discretion.

878. By contrast, appellate courts in New South Wales and the Australian Capital Territory have held that, in the sentencing of federal offenders, unrelated periods of custody are not to be taken into account as time served. In *Dib*, Simpson AJA (with whom Garling and Ierace JJ agreed) accepted the applicant's contention that there is a single common law of Australia, but rejected a submission that the Victorian cases expanding the *Renzella* discretion established a "*common law principle*" which it should follow in sentencing a federal offender; her Honour said that the argument "*did not address why those authorities in Victoria or other States that deviate from the position adopted in NSW … should prevail over Niass and those decisions that follow it*."[1302]

879. In *McIver*,[1303] the Australian Capital Territory Court of Criminal Appeal concluded, "*although presentence custody for unrelated offending may be taken into account when considering the offender's subjective case and issues of totality, we do not consider that time spent by an offender in custody for wholly unrelated offending should be taken into account in and of itself as "time served". The criticisms of such an approach in New South Wales authority …, and by Weinberg JA in Karpinski are well-founded.*"

4.8.13 Correction of error in sentence of imprisonment

880. The *Crimes Act 1914* (Cth) contains two powers for a sentencing court to correct errors in relation to a sentence of imprisonment imposed on a federal offender:

- Section 19AHA confers a power for a sentencing court to rectify an error of a technical nature made by the court or a defect of form or an ambiguity in an order imposing a sentence of imprisonment or an order fixing a non-parole period (NPP) or a recognizance release order (RRO). The section also preserves the validity of the order despite the error, defect or ambiguity. See "6.12.2 Power to correct error in sentence of imprisonment: Crimes Act 1914, s 19AHA".
- Section 19AH provides a mechanism by which a court may, on application, correct a failure to fix, or properly to fix, a NPP, or to make, or properly to make, a RRO, under the Act. The section also preserves the validity of the order despite the error. See "6.12.3 Power to correct error in fixing NPP or making RRO: Crimes Act 1914, s 19AH".

1302 *Dib v R* [2023] NSWCCA 243, [61]-[62], [81]. (Special leave refused: [2024] HCASL 169).
1303 *McIver v R* (2023) 20 ACTLR 303, [105].

4.9 Imprisonment: concurrency or cumulation of sentences

4.9.1 The mechanism for cumulation or concurrency of sentences on a federal offender: *Crimes Act* 1914, s 19

881. The mechanism by which a sentence imposed on a federal offender is to be served cumulatively upon or concurrently with one or more other federal sentences or sentences for State/Territory offences (whether imposed at the same time or previously, and whether or not imposed by the same court) is governed by s 19 of the *Crimes Act 1914* (Cth). State and Territory laws do not apply directly.[1304]

882. In sentencing for a Commonwealth child sex offence committed on or after 23 June 2020, there is a presumption that a term of imprisonment for the offence must be ordered to be served wholly cumulatively upon an uncompleted term of imprisonment that is, or has been, imposed on the person for another Commonwealth child sex offence or for a State or Territory registrable child sex offence (s 19(5)). See "4.9.3 Presumption of cumulation in sentencing for Commonwealth child sex offences".

883. In sentencing of a federal offender for any other offence, there is no default rule that a sentence is to be served concurrently with or cumulatively upon another sentence. (This may be contrasted with the position in a number of States and Territories.[1305]) Instead, whether a sentence for a federal offence is to be served concurrently with or (wholly or partly) cumulatively upon another sentence (whether imposed at the same time or previously) is to be determined by the sentencing court.

884. The discretion whether to order cumulation or concurrency must be exercised in accordance with the principle of totality: see "4.9.2 Whether sentences should be concurrent or cumulative" and "3.3 Other sentences not yet served – s 16B (totality principle)".

1304 *DPP v Swingler* [2017] VSCA 305, [67]. A State or Territory procedural law cannot directly bind a court exercising federal jurisdiction; it binds such a court only if it is applied as surrogate federal law by a Commonwealth law, such as a provision of the *Judiciary Act 1903* (Cth): see "1.6 Commonwealth provisions which apply relevant State and Territory laws". For this reason, a State law which purports, of its own force, to direct a court sentencing a federal offender as to orders to be made for the cumulation of sentences would be invalid. Section 6E of the *Sentencing Act 1991* (Vic) appears to be an example of such a law. Section 6E creates a presumption of cumulation for every sentence of imprisonment imposed on a "serious offender" for a "relevant offence". "Serious offender" is defined to include a "serious sexual offender" (s 6B(3)). A person convicted of any of the Commonwealth offences listed in cl 1 of Schedule 1 of the Act would fall within the definition of "serious sexual offender" (s 6B(2)). An offender may therefore be a "serious offender" merely from having been convicted of a specified Commonwealth offence (including at the same sitting). That is, in its own terms, the State law purports to direct a court sentencing an offender for a federal offence to impose cumulative sentences in certain circumstances. This anomaly was not referred to in *Swingler* and does not seem to have been the subject of judicial comment.

1305 E.g. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 55 and *Sentencing Act 1991* (Vic), s 16, each of which creates a general presumption of concurrency (subject to specific statutory exceptions), unless the sentencing court otherwise directs.

885. The court is required to make orders for the commencement of each federal sentence, which effectively provide for concurrency or cumulation of the sentence.[1306] This mechanism has been criticised as "*unnecessarily cumbersome, confusing and prone to error*".[1307]

886. Section 19 of the *Crimes Act 1914* (Cth) covers a range of federal sentencing situations. It applies:
   (a) where the offender is already the subject of a State/Territory sentence–- s 19(1);
   (b) where two or more federal sentences are imposed–- s 19(2); or
   (c) where an offender is sentenced for State/Territory and federal offences at the same time–- s 19(3).

887. The requirement in s 19(2) is not enlivened by *a single aggregate sentence of imprisonment* for two or more federal offences.[1308]

888. In any of the situations in which s 19 applies, the court must *"by order direct"* when each federal sentence imposed (that is, the head sentence of imprisonment) commences.[1309] In *Swingler*,[1310] the Victorian Court of Appeal expressed the view that this requirement can be complied with by any of the following techniques:
   - fixing a particular date (for example, '16 April 2019');
   - describing a period (for example, '12 months after the commencement of the sentence on charge 1', or 'nine months before the expiry of the sentence on charge 2');[1311] or
   - identifying a triggering event (for example, 'at the completion of the sentence imposed on charge 1').

889. Merely to order that a federal sentence "*be served cumulatively upon*" another sentence may not be sufficient to comply with the requirements of s 19.[1312] Nor is it sufficient merely to order that a recognizance release order commence on a particular date; the obligation is to direct the date for

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1306 Section 19 relates to federal sentences imposed (that is, head sentences of imprisonment), not to the non-parole period or recognizance release period: *R v DS* [2005] VSCA 99, [15]. Pursuant to s 19AB of the *Crimes Act 1914* (Cth), a single federal non-parole period or a recognizance release order (commencing when the first federal sentence of imprisonment commences) is imposed in light of the length of the effective head sentence/aggregate sentence for the federal offences: *R v DS* [2005] VSCA 99, [14]-[15]; *Lodhi v R* [2007] NSWCCA 360, [255]–[262].

1307 *Truong v R* [2016] VSCA 228, [43] (Priest JA). Compare *Nguyen v R* [2017] VSCA 262, [2](fn 1).

1308 *DPP (Cth) v AB (No 2)* [2006] SASC 112.

1309 In view of the mandatory terms of s 19, failure to give the required direction will normally invalidate a sentence. However in *R v Petrovic* [1998] VSCA 95, [17], the failure to declare a commencement date for a Commonwealth sentence did not invalidate the sentence where the sentencing court ordered complete concurrency and the effect was that all sentences were to commence immediately.

1310 *DPP v Swingler* [2017] VSCA 305, [72]. See also *R v Alimic* [2006] VSCA 273, [5]-[7].

1311 Compare *R v Scerri* [2010] VSCA 287, [56], in which the Court of Appeal, in resentencing the appellant for one State offence and one Commonwealth offence, said, "*The sentence on the Commonwealth count is to commence upon the expiration of the first twelve months of the non-parole period of the State sentence.*" See also *DPP (Cth) v Watson* [2016] VSCA 73, [99], in which in resentencing the respondent, the majority of the Court of Appeal fixed the commencement date for each Commonwealth offence as a certain number of months after the commencement of the sentence on another specified charge (e.g. "43 months after commencement of charge 6").

1312 The weight of authority is that it does not comply with s 19: *R v O'Brien* (1991) 57 A Crim R 80; *R v Daswani* [2005] QCA 167, [10], [22]-[27]; *R v NK* [2008] QCA 403, [99]; *Mercanti v R* [2011] WASCA 120, [26]-[28]. Dicta to the contrary in *DPP (Cth) v AB (No 2)* [2006] SASC 112, [26], and *Rajabizadeh v R* [2017] WASCA 133, [24], should be treated with caution; in neither case did the court refer to any of the relevant authorities.

commencement of *the sentence of imprisonment* (that is, the head sentence).[1313] And it is at least doubtful whether a sentence can be validly directed to commence on a date that is uncertain or that is dependent upon a decision of a State administrative body (such as the date on which the offender will be granted parole for a State offence).[1314]

890. In each situation to which s 19 applies, the commencement of each federal sentence of imprisonment must be fixed so that no federal sentence commences "*later than the end of the sentences the commencement of which has already been fixed or the last to end of those sentences*". The reference to "*a sentence the commencement of which has already been fixed*" includes a reference to another sentence imposed at the same time: s 19(4).

891. The object of the requirements in s 19 is to ensure that there is no gap between the end of a sentence which an offender is serving at the time when they are convicted for a federal offence and the commencement of the sentence for that federal offence.[1315] That is, s 19 is designed to prevent a hiatus which results in the offender being released and subsequently returned to prison to serve the next sentence.[1316]

892. The requirement in s 19(1)(a) that no federal sentence commence "*later than the end of the sentences the commencement of which has already been fixed or the last to end of those sentences*" does not mean that *all* federal sentences must commence no later than the end of the pre-existing sentences. It requires only that there must be no gap between the pre-existing sentence and the first federal sentence to be imposed. The same obligation to avoid a gap will apply to each further federal sentence to be imposed. Suppose, for example, when an offender is sentenced for two federal offences, the offender is subject to a pre-existing State sentence to which no non-parole period applies, which will expire in one year's time. In accordance with s 19(1)(a), the court must direct that the first federal sentence commence no later than the date on which the pre-existing State sentence expires. The second federal sentence must commence no later than the date when the pre-existing State sentence expires, or when the first federal sentence expires, whichever is the later.

893. If a non-parole period[1317] applies in respect of any State or Territory sentences that the offender is serving or subject to when sentenced for the federal offence(s) (that is, any State or Territory non-parole period which has not expired when the federal sentence is imposed[1318]), the first federal sentence to commence after the end of that non-parole period must be fixed so that it commences immediately after the end of the State or Territory non-parole period: *Crimes Act 1914* (Cth), s 19(1)(b) and s 19(3)(d). The references to the Commonwealth sentence commencing "*immediately after*" the State or Territory non-parole period is not a prescription that this is what must occur; it is only a bar to any later commencement

1313 *DPP (Cth) v Couper* (2013) 41 VR 128, [125]–[127].
1314 *R v Knight* [2013] QCA 277, [20]-[23].
1315 *R v Dobie* [2004] 2 Qd R 537, [21]; *R v DS* [2005] VSCA 99, [15].
1316 *Mercanti v R* [2011] WASCA 120, [14]-[16].
1317 "*Non-parole period*" is defined in s 16(1) of the *Crimes Act 1914* (Cth) to mean, in relation to a sentence or sentences of imprisonment, "*that part of the period of imprisonment for that sentence or those sentences during which the person is not to be released on parole, whether that part of the period is fixed or recommended by a court or fixed by operation of law*". It applies both to a period at the end of which a prisoner *must be released* and to a period at the end of which the prisoner *may apply for release*; and it applies both to a period nominated by a court (whether by fixing or recommending) and to one fixed by operation of law: *R v MacCormack* [2005] QSC 49, [16].
1318 *R v Dobie* [2004] 2 Qd R 537; *R v MacCormack* [2005] QSC 49; *Mercanti v R* [2011] WASCA 120, [17]-[20].

date being fixed, so as to avoid the creation of a "gap" in incarceration.[1319] In other words, the sentencing court may direct that the first federal sentence commence on a date during the currency of the State or Territory non-parole period or at the expiration of that period, but not later.

894. If, at the time of sentencing, the federal offender is serving or subject to a State or Territory sentence, but any non-parole period for that sentence has expired, the requirement in s 19(1)(b) of the *Crimes Act 1914* has no application. That is, the requirement that a federal sentence (or the first of the federal sentences) commence no later than immediately after the end of the State or Territory non-parole period arises only if a non-parole period "applies" at the time of sentencing of the federal offender. No non-parole period "applies" if the non-parole period date has passed. The scheme does not contemplate that the commencement of the federal sentence which is to be cumulative or concurrent can or should be backdated.[1320]

895. The requirement that a sentence for a Commonwealth offence commence not later than immediately after a State or Territory non-parole period may have the practical effect of precluding any cumulation of the federal head sentence on the head sentence for the State or Territory offence(s).[1321] For example if an offender is sentenced for a State offence to 3 years' imprisonment with a non-parole period of 2 years, and at the same sitting is sentenced to 12 months' imprisonment for a federal offence, it is impossible to achieve cumulation of any part of the federal sentence on the head sentence for the State offence, because the federal sentence must be directed to commence no later than immediately after the State non-parole period. That is, in this example, even if the latest permissible commencement date is chosen, the federal sentence will be completed at the same time as the completion of the State sentence. In some jurisdictions, it may be possible to overcome this limitation by making appropriate orders for the State sentence to be served cumulatively (or partly cumulatively) upon the federal sentence,[1322] but whether there is power to do so would depend upon State law.[1323]

896. It is open to a court sentencing a federal offender to impose a federal sentence which operates beyond the State or Territory non-parole period, even though it does not extend beyond the State or Territory head sentence.[1324]

1319 *Fasciale v R* (2010) 30 VR 643, [24]-[37]; *Mokbel v R* [2023] VSCA 40, [76].

1320 *R v Dobie* [2004] 2 Qd R 537, [21]; *Mercanti v R* [2011] WASCA 120, [21]-[29].

1321 *R v O'Brien* (1991) 57 A Crim R 80; *R v Daswani* [2005] QCA 167, [10], [22]-[27].

1322 *R v O'Brien* (1991) 57 A Crim R 80; *Carroll v R* [2011] VSCA 150, [48].

1323 In Victoria, s 16(4) of the *Sentencing Act 1991* (Vic) permits a court to make orders which have the effect of cumulating a State sentence on a federal sentence in certain circumstances. However in *DPP v Swingler* [2017] VSCA 305, [78]-[87], the Court doubted whether s 16(4) applied if the Commonwealth sentence is imposed at the same sitting as the State sentence. The position in some other States is even more uncertain. See "4.9.6 Fixing cumulation or concurrency in sentencing for Commonwealth and State/Territory offences in the same indictment".

1324 *Fasciale v R* (2010) 30 VR 643, [32]-[33]. In that case, the offender was convicted of both State and Commonwealth offences. He was sentenced to a total effective sentence of 6 years for the State offences, with a non-parole period of 4 years. For the Commonwealth offences, he was sentenced to concurrent straight sentence of 6 months' imprisonment, to commence immediately after the expiry of the State non-parole period. The effect was that although he would become eligible for parole on the State offences after 4 years, he would remain in custody for a further 6 months on the Commonwealth offences, but the total length of the head sentence was not affected. The Court of Appeal held that such a sentence, although unusual, was open, provided that the ratio between the total effective head sentence and the minimum period of incarceration was appropriate.

897. If, at the time of sentencing, the offender is serving or subject to a federal sentence of imprisonment, the sentencing court must comply with the applicable requirements of s 19AB, s 19AC, s 19AD, s 19AE or s 19AR of the *Crimes Act 1914* (Cth) (as the case may be). Those provisions govern the fixing of a non-parole period or recognizance release order or the decision to decline to do so. For an overview of these requirements, see "4.10.4 Non-parole period (NPP), recognizance release order (RRO) or straight sentence?".

4.9.2 Whether sentences should be concurrent or cumulative

898. Determination of questions of concurrency and cumulation of federal sentences is governed by the requirement in s 16A(2)(k) of the *Crimes Act 1914* to ensure that the person is adequately punished for the offence (which may require a degree of cumulation of sentences[1325]) and by s 16B and by common law principles of totality (which apply to the exclusion of principles in State or Territory statutes).[1326] That is, the overall sentence must reflect the total criminality of all the offences for which the offender is sentenced (and any other sentence that the offender has not yet served, or any sentence that the offender is liable to serve through the revocation of a parole order or licence).

899. An important question in determining whether sentences should be at least partly cumulative is whether the offender's conduct involves "*truly two or more incursions into criminal activity*" or "*one multi-faceted course of criminal conduct*".[1327] But questions of cumulation or concurrency are not to be answered solely by characterising the offending as one or the other, as Howie J (with whom Adams and Price JJ agreed) succinctly explained in *Cahyadi*:[1328]

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

900. In every case, determining the level of accumulation in the structure of the sentence is a matter within the discretion of the sentencing judge, applying a principled approach.[1329] It is not axiomatic that

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1325 Cf *Atai v R* [2020] NSWCCA 302, [87], [133]-[134].

1326 *Johnson v R* (2004) 78 ALJR 616.. See the discussion of the principles of totality and their conceptual basis in *DPP (Cth) v Beattie* [2017] NSWCCA 301 [26]-[45] (Basten JA). See also "3.3 Other sentences not yet served – s 16B (totality principle)".

1327 *Attorney-General v Tichy* (1982) 30 SASR 84, 92-3. See also *R v Mantini* [1998] 3 VR 340, 349 (Callaway JA); *Haak v R* [2022] NSWCCA 28, [15]-[20] (Beech-Jones CJ at CL).

1328 *Cahyadi v R* [2007] NSWCCA 1, [27].

1329 *Holt v R* [2021] NSWCCA 14, [74].

concurrent sentences must be imposed for offences that have substantial common elements,[1330] or where one offence relates to the proceeds derived from the commission of the other.[1331]

901. A presumption in favour of full cumulation applies in certain circumstances when a court is sentencing an offender for a Commonwealth child sex offence committed on or after 23 June 2020: see "4.9.3 Presumption of cumulation in sentencing for Commonwealth child sex offences".

4.9.3 Presumption of cumulation in sentencing for Commonwealth child sex offences

902. As a general principle, in sentencing a federal offender there is no presumption in favour of either concurrency or cumulation of sentences with another sentence of imprisonment imposed on the offender by the court, or which the offender is serving. However s 19(5)-(7) of the *Crimes Act 1914* (Cth), which were inserted in 2020,[1332] create an exception to the general principle.

903. Those subsections apply to a court which sentences a person to a term of imprisonment for a Commonwealth child sex offence[1333] committed on or after 23 June 2020.[1334] In such a case, an order under s 19 directing when a sentence commences must not have the effect that the term of imprisonment be served partly cumulatively, or concurrently, with an uncompleted term of imprisonment that is, or has been, imposed on the person for another Commonwealth child sex offence or for a State or Territory registrable child sex offence[1335] (s 19(5)). That is, subject to the exception in s 19(6), there must be full cumulation in the service of the sentences.

904. The Explanatory Memorandum for the Bill for the relevant amending Act sought to explain the purpose of s 19(5) as follows:[1336]

1330 *Johnson v R* (2004) 78 ALJR 616; *Colbourn v R* [2009] TASSC 108, [18]-[20].

1331 *Holt v R* [2021] NSWCCA 14, [74]-[84].

1332 *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), s 3 and Sch 10.

1333 "Commonwealth child sex offence" is defined in s 3(1) of the Act. See "7.3.2 Meaning of "Commonwealth child sex offence"".

1334 New subsections 19(5)-(7) apply "*in relation to an order made, on or after the commencement of this Schedule [that is, 23 June 2020], directing when sentences commence, where the offences to which the sentences relate were committed on or after that commencement*": *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), Sch 10, Item 3.

1335 The term "State or Territory registrable child sex offence" describes a class of offences; it is not concerned with whether a particular offender's name was actually placed on a register, or was liable to be placed on a register, as a child sex offender in any State or Territory as a result of the commission of the particular offence. "State or Territory registrable child sex offence" is defined in s 3(1) of the *Crimes Act 1914* (Cth) to mean "*an offence: (a) that a person becomes, or may at any time have become, a person whose name is entered on a child protection offender register (however described) of a State or Territory for committing; and (b) in respect of which (i) a child was a victim or an intended victim; or (ii) the offending involved child abuse material*". Under this definition, it is sufficient that the offence was or became registrable, in any State or Territory, at any time. The class is not confined to State or Territory offences; it may include a Commonwealth offence which, under the law of any State or Territory (not necessarily the State or Territory in which the offence was committed in the particular case), was or became a registrable offence. For a list of Commonwealth offences which are registrable offences under State or Territory sex offender laws, see "Appendix 3: Federal offences triggering registration under State and Territory sex offender legislation".

1336 *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019* (Cth), *Explanatory Memorandum (House of Representative)*, [286].

The objective of the presumption is to act as a yardstick against which to examine a proposed sentence of an offender for multiple child sex offences to ensure that the effective sentence represents a tougher response to the objective seriousness of the sexual abuse of children. It benefits circumstances such as where offences are committed against separate victims over an extended period of time.

905. The requirement of full cumulation does not apply if the court is satisfied that imposing the sentence in a different manner would still result in sentences that are of a severity appropriate in all the circumstances (s 19(6)). If the court does so, it must state its reasons for imposing the sentence in that manner and cause the reasons to be entered in the records of the court (s 19(7)).[1337]

906. The amendments are not intended to exclude or limit the operation of the principle of totality.[1338] The court must have regard to any sentence (federal, State or Territory) that the offender has not served, or any sentence liable to be served through the revocation of a parole order or licence (s 16B). The sentence must be structured so that the overall sentence is just and appropriate to the totality of the offending behaviour (see "3.3 Other sentences not yet served – s 16B (totality principle)"). If the application of that principle requires partial or total concurrency between sentences in order to achieve a total effective term of Imprisonment which is of a severity appropriate in all the circumstances, it will be necessary for the court to proceed under s 19(6).

4.9.4 Different means of giving effect to the requirements of totality

907. In cases in which terms of imprisonment are imposed for more than one offence, the orthodox approach to give effect to the requirements of totality is to impose individually appropriate sentences for each offence and then to work out the total effective sentence, making such limited orders for cumulation as are fair in order to reach an overall sentence which is not in breach of the principle of totality or any other relevant sentencing principle.[1339] The alternative approach (known as 'moderate and cumulate'[1340]) is to accommodate the principle of totality by reducing the individual sentences imposed, but ordering a greater measure of cumulation.[1341]

908. The first (orthodox) approach should be departed from only when some special feature of the case requires such a departure.[1342] A sentencing court which does so should make clear that, in order to achieve an appropriate total effective sentence, it has imposed individual sentences below what would otherwise be appropriate.[1343]

909. Queensland courts have held that a quite different mechanism is also available as a means of complying with the requirements of the totality principle. In Queensland, in sentencing an offender for

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1337 The reasons may be brief. For example, in resentencing the offender in *Phibbs v R* [2023] VSCA 123, [59], the Court said, "*We have provided that the two sentences be served concurrently because any cumulation would result in an inappropriately severe total effective sentence.*"

1338 *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019* (Cth), *Explanatory Memorandum (House of Representative)*, [287].

1339 *Mill v R* (1988) 166 CLR 59, 62-3; *Pearce v R* (1998) 194 CLR 610, [45]; *Johnson v R* (2004) 78 ALJR 616, [26]. See also *DPP v Grabovac* [1998] 1 VR 664; *R v Lomax* [1998] 1 VR 551; *R v Coukoulis* (2003) 7 VR 45, [32]; *R v Cook* [2018] TASCCA 20, [3], [51]-[56].

1340 *R v Izzard* (2003) 7 VR 480, [21]-[23].

1341 *Mill v R* (1988) 166 CLR 59, 62–63.

1342 *DPP (Cth) v KMD* [2015] VSCA 255, [89]-[96].

1343 *R v Abbas* [2019] WASCA 64, [62].

several offences, it is open to the court to impose a higher head sentence for the most serious offence (or the last in point of time) so as to reflect the overall criminality of the offending, but to apply a greater degree of concurrency than would otherwise be the case.[1344] The overall effect of the sentence must not be manifestly excessive and the sentences must not result in double punishment for the same acts.[1345] The aim of doing so is "*to avoid the possible unintended complications and consequences which sometimes flow from the combination of cumulative sentences and complex sentencing and related statutes*";[1346] it should be used "*only as a more practical alternative to the imposition of cumulative sentences*".[1347] In *Kruezi*,[1348] the Queensland Court of Appeal held that this practice is available in sentencing a federal offender in Queensland; it has also been adopted in sentencing an offender for both Commonwealth and State offences.[1349]

910. One of the limitations of this practice is illustrated by *Schulz*.[1350] In that case, the sentencing judge attempted to reflect the overall offending (for 27 Commonwealth and four State offences) by allowing for "*a degree of uplift*" on the most serious (Commonwealth) offence, while imposing a sentence "*within a proportionate range*" for that offence standing alone; this led to the imposition of a sentence which the Court of Appeal (by majority) held to be manifestly inadequate. In resentencing, Bond JA (with whom Dalton JA agreed) said "*the Nagy approach cannot be applied, and it is necessary that there be a degree of accumulation of the sentences which are imposed in relation to the remaining counts.*"[1351]

911. In contrast to the approach taken in Queensland, the New South Wales Court of Criminal Appeal has held, in relation to both State and federal offenders, that a sentencing court may not increase a sentence for one offence merely to reflect the totality of the criminality disclosed by all of the offences for which sentence is being passed.[1352] In the view of the CDPP, the New South Wales decisions (which were not cited in *Kruezi*) are consonant with the principle of proportionality (implicitly accommodated by s 16A of

1344 *R v Nagy* [2004] 1 Qd R 63, [39]; *R v Bowditch* [2014] QCA 157; *R v McRea* [2015] QCA 110; *R v Kruezi* (2020) 6 QR 119. The practice is said to be supported by the judgments in *Griffiths v R* (1989) 167 CLR 372.

1345 *R v Bowditch* [2014] QCA 157, [2]. In *R v BEB* [2023] QCA 105, the Court (by majority) held that the *Nagy* approach permitted the imposition of concurrent sentences of life imprisonment (the maximum sentence) for the two most serious offences, even though (as McMurdo JA, dissenting, pointed out ([9]-[10])) the sentencing judge accepted that neither could have warranted the maximum sentence. The High Court (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ) refused special leave to appeal on the basis that the proposed appeal "*is not a suitable vehicle to consider the correctness of the decision in R v Nagy [2004] 1 Qd R 63*": *BEB v R* [2024] HCASL 51.

1346 *R v Bowditch* [2014] QCA 157, [2]; *R v Kruezi* (2020) 6 QR 119.

1347 *R v Armstrong* [2016] QCA 243, [34].

1348 *R v Kruezi* (2020) 6 QR 119. The *Nagy* approach was adopted by the sentencing judge in sentencing a federal offender in *R v Harrison; Ex parte DPP (Cth)* [2021] QCA 279, but in resentencing the offender on appeal, the Court of Appeal instead proceeded on the conventional approach ([93]).

1349 In *R v Burman* [2023] QCA 245, [118], the Court held that it was open to the sentencing judge to impose a more severe sentence for a State offence to reflect in part the offending in a number of separate Commonwealth offences for which the offender was also sentenced.

1350 *R v Schulz; Ex parte DPP (Cth)* [2023] QCA 150.

1351 *R v Schulz; Ex parte DPP (Cth)* [2023] QCA 150, [65].

1352 *R v Knight* [2004] NSWCCA 145, [31]; *Wray v R* [2007] NSWCCA 162, [57]. In each case, such a practice was said to be contrary to *Pearce v R* (1998) 194 CLR 610.

the *Crimes Act 1914* (Cth)[1353]), which requires that individual sentences should, so far as possible, accurately reflect the gravity of each offence.[1354]

4.9.5 Cumulation or concurrency of a State/Territory sentence imposed after a federal sentence

912. Section 19 of the *Crimes Act 1914* (Cth) provides for (amongst other things) the cumulation of a federal sentence on, or concurrency with, a State or Territory sentence of imprisonment, whether that State or Territory sentence has been imposed previously and is being served at the time of sentencing for the federal offence, or is imposed at the same time.

913. Section 19 does not govern the converse situation, where an offender who is undergoing a federal sentence is sentenced to imprisonment for a State or Territory offence. In that situation, the law of the State or Territory governs the manner in which concurrency or cumulation of the sentence is achieved.

914. The laws of some jurisdictions specifically provide for the cumulation or concurrency of a State sentence for an offender who is serving a federal sentence. In Victoria, for example, specific provision is made in s 16(4) of the *Sentencing Act 1991* (Vic), in broadly similar terms to those in s 19 of the *Crimes Act 1914* (Cth). It requires that when a court imposes a sentence of imprisonment for a Victorian offence on "*a person already undergoing a sentence or sentences of imprisonment*" for a Commonwealth offence, the court "*must direct when the new term commences*" (instead of providing for a presumption of concurrency or cumulation as would ordinarily be the case). Section 16(4) does not permit a sentencing court to work backwards from the total effective sentence which the court intends to achieve and fix upon a starting point for the State sentence to fit that aim; the judge must address the commencement date of the State sentence and specify it in terms.[1355] The subsection requires that the commencement date for the State sentence "*be no later than immediately after … the completion of that sentence or those sentences if a non-parole period or pre-release period (as defined in Part 1B of the Crimes Act 1914 of the Commonwealth) was not fixed in respect of it or them; or … the end of that period if one was fixed*". As is the case with s 19 of the Commonwealth Act, the evident purpose of s 16(4) of the *Sentencing Act 1991* (Vic) is to ensure that there is no gap between the respective periods of incarceration.

915. Section 16(4) of the *Sentencing Act 1991* (Vic) contains no counterpart of ss 19(3) and 19(4) of the *Crimes Act 1914* (Cth). As a result it is at least doubtful whether s 16(4) of the *Sentencing Act 1991* (Vic) applies to the sentencing of an offender for a State offence merely because the offender is also sentenced for a Commonwealth offence on the same indictment; even if the Commonwealth sentence is pronounced first, it may not be possible to regard the offender (for that reason alone) as "*a person already undergoing a sentence … of imprisonment*" for a Commonwealth offence.[1356]

1353 *Bui v DPP (Cth)* (2012) 244 CLR 638, [18], citing *Wong v R* (2001) 207 CLR 584, [31], [71].

1354 *Nguyen v R* (2016) 256 CLR 656, [64] (Gageler, Nettle and Gordon JJ), citing 3A(a) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which is in similar terms to s 16A(2)(k) of the *Crimes Act 1914* (Cth). See "3.4.12 Need for adequate punishment – s 16A(2)(k)".

1355 *R v Fulop* [2009] VSCA 296 [7]-[8].

1356 *DPP v Swingler* [2017] VSCA 305, [79]-[81]. Under s 19(3) of the *Crimes Act 1914* (Cth), provision is made for ordering concurrency or cumulation of a federal sentence on a State sentence imposed at the same sitting. Pursuant to s 19(4), the State sentence would be treated as having "already been fixed", for the purposes of s 19. The sentencing court is therefore required to direct when the federal sentence commences: s 19(4). The time for commencement of the federal sentence must comply with s 19(3)(c) and (d). But these provisions contain no requirements or powers relating to fixing cumulation or concurrency of a State sentence on a federal sentence.

916. In jurisdictions which have no counterpart of s 16(4) of the *Sentencing Act 1991* (Vic), the position may be even less clear. Unless explicitly provided for, State or Territory provisions which permit or require the cumulation of a State/Territory sentence on a pre-existing sentence may not be expressed in a way which makes them capable of applying if the pre-existing sentence is for a federal offence.[1357]

917. State or Territory law which provides for the presumptive or mandatory cumulation of sentences for certain offences against State or Territory law may also be triggered by a conviction or sentence for a particular Commonwealth offence. For example, in Victoria s 6C(3) of the *Sentencing Act 1991* (Vic) provides (amongst other things) that a conviction for a particular Commonwealth offence which is 'substantially similar to' the relevant State offence may trigger the operation of s 6E of the *Sentencing Act*, which provides for the presumptive cumulation of sentences imposed on various classes of serious offender.[1358]

4.9.6 Fixing cumulation or concurrency in sentencing for Commonwealth and State/Territory offences in the same indictment

918. It should be apparent from the foregoing summary that in imposing terms of imprisonment on an offender charged on a joint indictment (that is, where the offender is to be sentenced for both Commonwealth and State/Territory offences), pitfalls abound (particularly, but not exclusively, with regard to ordering cumulation or concurrency of sentences of imprisonment). As the Victorian Court of Appeal observed in *Swingler*,[1359] "*This entire area is fraught with unnecessary complexity, and is full of hidden traps for the unwary.*"

919. In *Swingler*, the Court identified three possible approaches to be taken by a sentencing court in such a case:[1360]

> 1. *The judge can simply sentence for each offence on the indictment, in the order in which each offence is listed. He or she can then differentiate between them by making orders as to cumulation or concurrency with regard to the State offences and orders as to commencement with regard to the Commonwealth offences. …* [The Court noted that the sentencing judge's adoption of this approach in the instant case "was not an unqualified success".]
>
> 2. *The judge can group all the State offences together, and first sentence upon them individually. This has the advantage of enabling the sentences for the Commonwealth offences to be directed to commence at, for example, the expiration of the relevant State non-parole period. That avoids any gap in the custodial term, and seemingly simplifies the process, by ensuring*

1357 E.g. *R v McMillan* [2005] QCA 93, [22]; *R v NK* [2008] QCA 403, [78].

1358 *DPP v Swingler* [2017] VSCA 305, [67]. Although not referred to in *Swingler*, a conviction for one of a number of specified Commonwealth offences can also trigger the operation of the "serious offender" provisions in Part 2A of the *Sentencing Act 1991* (Vic): see the definitions of "relevant offence" and related terms in s 6B. Apart from presumptive cumulation of sentences (under s 6E), an additional consequence of an offender being sentenced as a "serious offender", is that, pursuant to s 6D of the Act, community protection must be regarded as the primary purpose of sentencing, even if the sentence is thereby made disproportionate to the objective gravity of the offence.

1359 *DPP v Swingler* [2017] VSCA 305, [82]. Compare *Burbridge v R* [2016] NSWCCA 128, [45], in which Rothman J (with whom MacFarlan JA and Bellew J agreed) referred to "*complexities created by the interaction of the State and Commonwealth sentencing regimes, made more complex by the casuistry in the Commonwealth Crimes Act*"; *Mokbel v R* [2023] VSCA 40, [48].

1360 *DPP v Swingler* [2017] VSCA 305, [78] (footnotes omitted).

that relevant rules as to cumulation and concurrency are applied appropriately, and within the proper sphere of each sentencing regime.

3. *The judge can group all the Commonwealth offences together, and deal with them first. This potentially gives rise to the difficulty that State offences ordinarily operate from the date of sentence, as per s 17(1) of the Sentencing Act* [i.e. *Sentencing Act 1991* (Vic)]*. They cannot, as a general proposition, be made to commence at the expiration of a Commonwealth sentence, subject only to s 16(4).”* [The Court then set out the terms of that provision and (at [79]-[81]) proceeded to identify difficulties in interpreting s 16(4) in a way that would apply when an offender is sentence for Commonwealth and State offences at the same sitting.[1361]]

920. The position may be no less fraught in other jurisdictions, in the absence of clear power to order that a State or Territory sentence commence at a later date, or be cumulative upon a sentence for a federal offence.

921. Ordinarily, therefore, unless the sentences for Commonwealth offences are to be served wholly concurrently with sentences for State/Territory offences, or there is clear power under State/Territory law to proceed effectively by the third approach,[1362] the safest course for a sentencing court in these circumstances is generally to proceed in accordance with the second approach identified in *Swingler*. That is, a State/Territory sentence should be the base sentence,[1363] any other State/Territory sentences should be grouped appropriately, and the time of commencement for each federal sentence should be fixed to create appropriate cumulation upon the State/Territory sentences. This is an appropriate method of overcoming some of the complexities created by the interaction of the State and Commonwealth sentencing regimes.[1364]

922. The last step (fixing the time of commencement for each federal sentence) requires a direction which complies with s 19 of the *Crimes Act 1914* (Cth).[1365] In particular, the direction must have the effect that:

- there is no gap between any State/Territory non-parole period and the first federal sentence, or if no such non-parole period applies, that there is no gap between the completion of a State/Territory sentence and the commencement of the first federal sentence; and

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1361 This analysis of s 16(4) was endorsed in *Mokbel v R* [2023] VSCA 40, [54]-[56].

1362 In *Rodgers v R* [2018] NSWCCA 47, the sentencing judge made orders for the commencement of sentences which had the effect that a sentence for a State offence was to be served partly cumulatively upon a shorter sentence for a Commonwealth offence; the judge did so because otherwise the Commonwealth sentence would have been subsumed by the State sentence and would have failed to reflect the additional criminality. The New South Wales Court of Criminal Appeal (at [75]) described this course as “*a principled and appropriate response to the difficult task of sentencing an offender in respect of Commonwealth and State offences.*” In that case, cumulation of the State sentence upon the Commonwealth sentence could be effectively achieved by backdating the commencement of the Commonwealth and State sentences to different dates. That option may not be available in Victoria or Queensland, where there is no general power to backdate the commencement of a sentence.

1363 That is, the sentence upon which other sentences of imprisonment are to be served wholly or partly cumulatively, or by reference to which other sentences of imprisonment are to be served concurrently. At least in Victoria, whenever more than one sentence of imprisonment is imposed, there must be a base sentence: *R v Nikodjevic* [2004] VSCA 222, [34]-[39]. A base sentence may also be chosen when sentencing for multiple Commonwealth offences: *DPP v Swingler* [2017] VSCA 305, [74].

1364 *Burbridge v R* [2016] NSWCCA 128, [45]; *Mokbel v R* [2023] VSCA 40, [57]-[60].

1365 See “4.9.1 The mechanism for cumulation or concurrency of sentences on a federal offender: Crimes Act 1914, s 19”.

- no gap between periods of incarceration can otherwise occur.

923. Usually, the most severe sentence should be chosen as the base sentence,[1366] but this practice is not mandatory. It would seem to be open to a court to proceed by the second approach even though the base sentence chosen (for a State/Territory offence) is less severe than one or more of the federal sentences, particularly if the reason for doing so is uncertainty about the power under State/Territory law to proceed by the third approach described in *Swingler*.[1367] A court may direct that a sentence for a State/Territory offence and one for a federal offence be served in the order which is most practical and appropriate.[1368]

924. An incidental consequence of making a State or Territory sentence rather than a Commonwealth sentence the base sentence is that it might affect the application of a State or Territory law which abrogates, modifies or restricts the operation of the totality principle in relation to the relevant State or Territory offence.[1369] The order of sentences might therefore affect the degree of cumulation and the total effective sentence. It remains an open question whether this consideration is relevant in determining the appropriate order of sentences.[1370]

925. The order of sentences might also affect the consequences of allowing for a period of pre-sentence custody on one set of charges rather than the other; it may be an error for a court not to take this into account.[1371]

1366 *R v MDB* [2003] VSCA 181, [14].

1367 An example is *R v Falconi* [2014] QCA 230, [14], in which, "*after discussing the sentencing requirements under the Crimes Act 1914 (Cth)*" the sentencing judge "*considered it prudent to first sentence the applicant on the Queensland offences and then make the Commonwealth sentence cumulative*", even though the sentences for the Commonwealth offences exceeded those for the Queensland offences. An application by the offender for an extension of time to appeal was refused.

1368 *R v O'Brien* (1991) 57 A Crim R 80, 96.

1369 E.g. *Sentencing Act 1991* (Vic), s 6E; see *DPP v Morris* [2015] VSCA 155, [68]-[69]. That section provides for presumptive cumulation of sentences and consequent modification of the totality principle for certain "serious offenders". The provision would apply if a State sentence for a "relevant offence" is imposed cumulatively on a Commonwealth sentence for another "relevant offence" (which, pursuant to the definitions in s 6B of the Act, includes a number of specified Commonwealth offences) in the same class which is imposed at the same time. However the State law could not operate to require that any Commonwealth sentence be presumptively cumulative upon a State sentence or to modify the operation of the principle of totality in relation to sentencing for the Commonwealth offence.

1370 See *Barbat v R* [2014] VSCA 202 as to the effect of the choice of base sentence on the operation of s 6E of the *Sentencing Act 1991* (Vic).

1371 E.g. *Gonis v R* [2024] SASCA 42. See "4.8.10 Allowance for pre-sentence custody for the offence".

4.10 Imprisonment: period to be served

4.10.1 Determining the length of the period of incarceration

926. A court which imposes a sentence of imprisonment for a federal offence must also determine the period, or minimum period, of that sentence (if any) for which the offender is to be incarcerated. The mechanisms for fixing that period (non-parole period, recognizance release order or what is known as a straight sentence), and the complex provisions which govern them, are described later in this part of the guide. It is first necessary to summarise the principles which apply to the fixing of the period to be served.

927. State or Territory laws which prescribe how periods, or minimum periods, of incarceration for offenders sentenced to imprisonment are to be fixed do not apply to the sentencing of federal offenders. Such laws cannot apply of their own force, and the exhaustive regime in Part IB of the *Crimes Act 1914* (Cth) leaves no room for such State or Territory laws to be applied as surrogate federal law.[1372] So, for example, it is an error for a court in sentencing a federal offender to proceed in accordance with a State law by which the court fixes a non-parole period and then fixes an "additional term" to comprise the sentence; such an approach involves "*a reasoning process that does not conform with the Crimes Act*".[1373]

928. The fixing of periods or minimum periods of imprisonment to be served by a federal offender is governed by Part IB, together with common law principles applied by s 80 of the *Judiciary Act 1903* (Cth).

929. With the exception of specific provisions relating to sentencing for certain national security offences[1374] and for certain people-smuggling offences,[1375] Commonwealth law generally does not contain prescriptive requirements for any particular ratio or proportion between the head sentence of imprisonment imposed on a federal offender and the period or minimum period to be served.[1376] Nor (apart from the exceptions mentioned) does Commonwealth law otherwise mandate any particular minimum period to be served. In some circumstances, a court sentencing a federal offender to imprisonment has power to order that a federal offender be released "immediately" (with the effect that the offender is not required to serve any of the sentence, subject to entering into and complying with a recognizance);[1377] in others, it may require the offender to serve the whole of the sentence in prison (a

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1372 *Hili v R* (2010) 242 CLR 520, [21]-[22], [52].

1373 *R v Hatahet* [2024] HCA 23, [68], [71] (Beech-Jones J), referring to the erroneous approach taken by the New South Wales Court of Criminal Appeal in resentencing the offender in that case. Another apparent example of the same error is *Fakhreddine v R* [2024] NSWCCA 74, [46], in which the Court resentenced the offender to a specified "*non-parole period*" followed by a specified "*balance of term*"; this reflected the process described in s 44 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), not the process required by Part IB of the *Crimes Act 1914* (Cth), under which the "sentence" (that is, the head sentence) must be determined and then any non-parole period fixed (in the circumstances of that case, in accordance with s 19AB of the *Crimes Act*).

1374 The relevant offences include offences relating to terrorism, treason and espionage: see "4.10.8 The three-quarters rule in fixing a NPP for certain national security offences".

1375 See "7.2.1 People-smuggling offences".

1376 The existence of a rule that for certain national security offences a sentencing court must fix a non-parole period (NPP) of at least three-quarters of the head sentence ("4.10.8 The three-quarters rule in fixing a NPP for certain national security offences") does not impose any implicit limit on the ratio between the head sentence and the NPP in sentencing for any other offences: *Stipkovich v R* [2018] WASCA 63, [36]-[37] (disapproving dicta in *Lam v R* [2014] WASCA 114, [56]).

1377 This is done by a recognizance release order (RRO). For a description of when a RRO may be imposed, see "4.10.4 Non-parole period (NPP), recognizance release order (RRO) or straight sentence?". In sentencing for certain

"straight sentence"). Usually, however, the court will fix a period, or minimum period, to be served and has a wide (although not unfettered) discretion in setting that period.

930. Discretionary judgments about the period of a sentence of imprisonment to be served must be made according to the same general principles that govern other aspects of the sentencing of a federal offender. The fundamental obligation of a court in sentencing a federal offender is to impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence (*Crimes Act*, s 16A(1)). As the High Court emphasised in *Hili*,[1378] s 16A(1) and (2) make it plain that all of the circumstances, including such of the matters listed in s 16A(2) as are relevant and known to the court, must be taken into account in fixing the period to be served under a recognizance release order, just as they must be taken into account in imposing a sentence of imprisonment. The same is true in relation to a decision whether to release the offender immediately, or conversely to impose a "straight sentence", or in determining an appropriate non-parole period.[1379] The relevant factors may be differently weighted at each stage of the exercise because there are different purposes behind each function.[1380]

931. One consequence of the application of the sentencing principles in s 16A is that there is no scope for any presumptive approach, or "norm", in determining the appropriate period or minimum period which the offender should be required to serve.[1381] The High Court in *Hili* held that statements by the New South Wales Court of Criminal Appeal[1382] which purported to dictate, as a "norm" to be departed from only in special circumstances, that the period or minimum period to be served should represent a particular proportion of the head sentence, were erroneous.[1383] The plurality in *Hili* observed that s 16A "*does not permit the making of generalisations across all forms of federal offence about how individual sentences are to be fixed. To attempt such a generalisation would depart from the injunction that the sentencing court "must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence" [scil. the particular offence for which a sentence is to be imposed].*"[1384]

932. The plurality in *Hili*[1385] also said that, in fixing a period of incarceration to be served, what is the "severity appropriate" (within the meaning of s 16A(1)) is to be determined having regard to the general

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Commonwealth child sex offences, an order for immediate release under a RRO may only be made in exceptional circumstances: see "4.10.12 Immediate release under RRO".

1378 *Hili v R* (2010) 242 CLR 520, [23]-[25], [40].

1379 Although *Hili* was concerned with the fixing of the pre-release period of a recognizance release order, it is implicit in the judgment of the plurality that the same obligation applies to the fixing of a non-parole period: *Hili (v R* (2010) 242 CLR 520, [39]-[44]); see also *R v Ruha; Ex parte DPP (Cth)* [2011] 2 Qd R 456, [46]; *De Hollander v R* [2012] WASCA 127, [77]-[83]. The obligation in s 16A(1) is to "*impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence*"; for this purpose a non-parole period is properly to be regarded as part of the sentence to be imposed: *R v Rajacic* [1973] VR 636, 641.

1380 *Bugmy v R* (1990) 169 CLR 525, 531; *R v Ruha; Ex parte DPP (Cth)* [2011] 2 Qd R 456, [46]; *De Faria v Western Australia* [2013] WASCA 116, [58]-[59].

1381 *Hili v R* (2010) 242 CLR 520, [12]-[13], [25], [36]-[45].

1382 *Jones v R* [2010] NSWCCA 108, [39].

1383 *Hili v R* (2010) 242 CLR 520, [12]-[13], [36]-[45]. Similar observations to those made by the New South Wales Court of Criminal Appeal in *Jones* must also be regarded as wrong in light of the decision in *Hili*; they include *R v CAK and CAL; Ex parte DPP (Cth)* [2009] QCA 23, [18]; *R v Martinsen* [2003] NSWCCA 144, [14]; *Ly v R* [2007] NSWCCA 28, [16]. Pre-*Hili* sentencing decisions in NSW must be treated with caution as comparators in determining the appropriate length of a NPP or RRO period, because they may have been affected, to some extent, by the problematic "norm": *Aboud v R* [2017] NSWCCA 140, [36].

1384 *Hili v R* (2010) 242 CLR 520, [25] (emphasis in original).

1385 *Hili v R* (2010) 242 CLR 520, [40].

principles identified in *Power*,[1386] *Deakin*[1387] and *Bugmy*.[1388] Those cases establish that the purpose of fixing a minimum period of incarceration is to provide for mitigation of the punishment of the offender in favour of their rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time that a sentencing court determines justice requires that the offender must serve, having regard to all the circumstances of the offence.[1389] In determining what period justice requires, the objective gravity of the offending and the interests of the community, which imprisonment is designed to serve, must be taken into account.[1390]

933. It follows from these principles that the period, or minimum period, to be served must be fixed after determination of the head sentence.[1391]

934. A minimum period determined in accordance with these principles is not to be adjusted, whether upwards or downwards, to take account of the probability of parole; to do so would result in a sentence which then had precisely ceased to be in conformity with what the law requires.[1392] The prospect that the offender will or will not be released at the expiry of a non-parole period is irrelevant in sentencing (including in fixing a non-parole period).[1393]

935. Sentencing courts must endeavour to ensure reasonable consistency in the sentencing of federal offenders, including in the fixing of the period, or minimum period, to be served, but "*consistency is not demonstrated by, and does not require, numerical equivalence*".[1394] What is required is consistency in the application of sentencing principle.[1395] In seeking consistency, sentencing judges must have regard to what has been done in other cases,[1396] but the range of sentences that have been imposed in the past does not fix the boundaries within which future judges must, or even ought, to sentence.[1397] Past

1386 *Power v R* (1974) 131 CLR 623.
1387 *Deakin v R* (1984) 58 ALJR 367.
1388 *Bugmy v R* (1990) 169 CLR 525.
1389 *Power*, *Deakin* and *Bugmy* were each concerned with the fixing of a non-parole period, that is, the minimum period to be served before the offender is eligible for release. However *Hili* was a case involving a recognizance release order, that is, an order which itself fixed the period to be served. It is implicit in the judgment of the plurality in *Hili* ((2010) 242 CLR 520, [39]-[44]) that the same central principles apply (with necessary modifications) to the fixing of a period to be served or to a minimum period to be served. In *DPP (Cth) v Haynes* [2017] VSCA 79, [26], referring to the principles applicable to fixing a recognizance release order, the Court said, "*The rationale applicable to the determination of a non-parole period is substantially applicable to the ascertainment of the proportion of the sentence, if any, which should be suspended*"; see also at [65]. See also *R v Ruha; Ex parte DPP (Cth)* [2011] 2 Qd R 456, [46]; *De Hollander v R* [2012] WASCA 127, [77]-[83]; *R v Host* [2015] WASCA 23, [177].
1390 *Kumova v R* (2012) 37 VR 538, [27], referring to the principles established by *Power*, *Deakin* and *Bugmy*. The fixing of a period or minimum period of imprisonment to be served which is not proportionate to the seriousness of the offending, or which fails to give adequate weight to general deterrence, may constitute an appellable error, even if the head sentence or total effective sentence is not shown to be erroneous: e.g. *DPP (Cth) v Page* [2006] VSCA 224, [53]-[54]; *DPP (Cth) v Coory* [2011] VSCA 316.
1391 *Bugmy v R* (1990) 169 CLR 525, 531; *Lodhi v R* [2007] NSWCCA 360, [255]–[262].
1392 *R v Hatahet* [2024] HCA 23, [28] (Gordon A-CJ, Gleeson and Steward JJ; Beech-Jones J agreeing generally).
1393 *R v Hatahet* [2024] HCA 23, [21], [26]-[28], [38] (Gordon A-CJ, Gleeson and Steward JJ); [51]-[55] (Jagot J); [66] (Beech-Jones J).
1394 *Hili v R* (2010) 242 CLR 520, [48].
1395 *Hili v R* (2010) 242 CLR 520, [49].
1396 *Hili v R* (2010) 242 CLR 520, [53].
1397 *Hili v R* (2010) 242 CLR 520, [54].

sentences can, and should, provide guidance to sentencing judges, and to appellate courts, and stand as a yardstick against which to examine a proposed sentence.[1398]

936. In practice, in the sentencing of federal offenders there is considerable variation, both within and between jurisdictions, in the ratio between the length of the head sentence (or total effective sentence in the case of sentencing for multiple offences) and the period fixed as the period, or minimum period, to be served. Broadly speaking, the ratio in most cases is between one-third and three-quarters. Ratios at the lower end are found more commonly where the head sentence is shorter and a release period is fixed.[1399] Where the head sentence is greater than 3 years, and a minimum term is imposed, ratios are typically between 50% and 75%. A ratio of 75% is usually reserved for an offender who is a recidivist, or an offender who otherwise has poor prospects of rehabilitation.[1400] The ratio tends to be greater (sometimes higher than 80%[1401]) for very serious offending, when the head sentence or total effective sentence is particularly long. This summary is not only very general but no more than descriptive. It must be emphasised that the proportion which the period, or minimum period, to be served in prison bears to the whole term is not itself a separate and distinct object of any part of the sentencing exercise, but is the result of discretionary determination after taking into account all of the circumstances of the offence, rather than by applying or making adjustments to any rule of thumb.[1402]

937. The tendency of courts to impose higher ratios in relation to very serious offending has been attributed to the need to avoid inordinately long parole periods and to ensure that the period to be served properly reflects the gravity of the offending and gives sufficient weight to the need for relevant purposes of sentencing, such as general deterrence and protection of the community.[1403] In such cases, just as the needs of denunciation, deterrence, condign punishment and community protection demand a head sentence of a higher order, so too are they likely to dictate that the non-parole period be a higher percentage of the head sentence.[1404]

938. On the other hand, it has been said that a minimum term of imprisonment should not be fixed so close to the head sentence that it may fail to give effect to the prisoner's prospects for rehabilitation and so mitigate punishment. The prospect of early release also serves as an incentive to the prisoner to behave within the prison setting and to pursue rehabilitative programs.[1405]

4.10.2 Allowance for pre-sentence custody in relation to period to be served

939. In fixing the period, or minimum period, of a sentence of imprisonment which must be served (and the head sentence), credit may be given for pre-sentence detention for the instant offence. The way in which, and the extent to which, such credit may be given is governed by State or Territory law, which is

1398 *Hili v R* (2010) 242 CLR 520, [54]. See further "2.5 Reasonable consistency in sentencing".
1399 See *R v Robertson* [2008] QCA 164, [17]-[18], [37]-[42]; *R v Ruha; Ex parte DPP (Cth)* [2011] 2 Qd R 456, [26]-[30], [64]-[66], [69].
1400 *Heng v R* [2022] SASCA 24, [70] (Doyle and Bleby JJA), [19] (Livesey P, dissenting in the result).
1401 E.g. *Lam v R* [2014] WASCA 114, in which a NPP equivalent to 85.7% of the head sentence was held not to be manifestly excessive in the circumstances.
1402 *R v Ruha; Ex parte DPP (Cth)* [2011] 2 Qd R 456, [57]. See also *Adam v R* [2023] NSWCCA 62, [31]-[39].
1403 *Romero v R* (2011) 32 VR 486, [25]; *Kumova v R* (2012) 37 VR 538, [14], [19], [28].
1404 *Kumova v R* (2012) 37 VR 538, [19].
1405 *Kumova v R* (2012) 37 VR 538, [28]. The same incentive does not apply if the period of imprisonment is fixed, for example, under a recognizance release order.

applied by s 16E of the *Crimes Act 1914* (Cth). See "4.8.10 Allowance for pre-sentence custody for the offence".

940. In fixing a non-parole period for a sentence of imprisonment for an offence against Part 2, Division 12, Subdivision A of the *Migration Act 1958* (Cth) (that is, ss 229–236), the court must take into account any period that the person has spent in immigration detention between the commission of the offence and sentencing (*Migration Act*, s 236C). See "4.8.11 Taking into account immigration detention in sentencing for certain offences against the Migration Act 1958 (Cth)".

941. As to whether credit may also be given (in relation to either the head sentence or period to be served or both) for other periods in custody, see "4.8.12 Taking into account other pre-sentence custody".

942. In South Australia, the usual practice is for credit for a period in custody to be allowed explicitly in relation to both the head sentence and the period to be served (either by backdating the sentence or by reducing the head sentence and period to be served by the equivalent of the period of custody).[1406] In *Ribbon*,[1407] in sentencing a federal offender, the sentencing judge reduced the head sentence by the time spent in custody and, in fixing the non-parole period, without quantifying the reduction, said that she had taken into account time spent in custody. The South Australian Court of Appeal held that while it was not an error to have proceeded as the judge did, it would have been more transparent and preferable for the judge to have proceeded according to the usual practice, and the Court discouraged the approach taken.

4.10.3 The mechanisms for setting the period, or minimum period, of imprisonment to be served for a federal offence

A unique and self-contained regime

943. Commonwealth law provides for a self-contained regime relating to the fixing of periods of imprisonment, or minimum periods of imprisonment, to be served for federal offences. State law governing the setting of minimum periods of imprisonment (whether by non-parole period or otherwise) has no application.[1408] It is an error for a sentencing judge to apply State law rather than federal law to the fixing of a period or minimum period of incarceration for a federal offender.[1409]

944. The regime for federal offenders is complex, and is different from that in any State or Territory. The complexity and uniqueness of the regime are, unfortunately, often productive of error; very careful attention must be paid to the legislative requirements. Even appellate courts sometimes overlook mandatory statutory requirements which govern decisions about the period (if any) or the minimum period of a term of imprisonment which must be served.[1410]

945. A sentencing court is expected to understand the basics of the operation of this regime, including the effect of the orders to be made fixing the period or minimum period of imprisonment to be served.

1406 *R v Tsonis* (2018) 131 SASR 416, [69]-[71].

1407 *Ribbon v R* [2022] SASCA 15.

1408 *Hili v R* (2010) 242 CLR 520, [20]-[29], [52]; *Atanackovic v R* (2015) 45 VR 179, [26]-[29], [38], [41]-[42], [78]-[87].

1409 E.g. *De Hollander v R* [2012] WASCA 127, [71]-[85]; *Elshani v R* [2015] NSWCCA 254, [1], [17]-[22], [39]; *Younan v R* [2016] NSWCCA 248, [149]-[159]; *Voronov v R* [2017] NSWCCA 241.

1410 E.g. *Henderson v R* [2024] ACTCA 3, [28]-[33], in which the Australian Capital Territory Court of Criminal Appeal overlooked the mandatory requirements of s 19AC, which applied to the sentence of imprisonment imposed in that case.

So, for example, in *Veale*,[1411] the sentencing judge was found to have erred in proceeding on a misconception that the order fixing a minimum period of imprisonment (non-parole period) would result in the immediate release of the offender.

Term of imprisonment must be determined first, before considering the period or minimum period to be served

946. The first question which a sentencing court must consider is whether a sentence of imprisonment should be imposed and, if so, the length of the sentence (see "4.8 Imprisonment: head sentence"). (A single sentence of imprisonment is commonly referred to as a "head sentence".) If more than one such federal sentence is imposed, the court must determine the degree to which they should be served concurrently or cumulatively (see "4.9 Imprisonment: concurrency or cumulation of sentences"), and thereby determine the "total effective sentence". The question of the period, or minimum period, to be served arises only after the head sentence or total effective sentence has been determined and must be determined independently: "4.8.8 Period or minimum period to be served is not a consideration in fixing a head sentence". The length of the head sentence, or total effective sentence, is one of the determinants of the applicable mechanism for fixing the period, or minimum period, of imprisonment to be served.

Three mechanisms for determining the period, or minimum period, to be served

947. There are three mechanisms by which a court sentencing a federal offender to a term of imprisonment may determine the period, or the minimum period, of imprisonment which must be served by the offender. The court must proceed by one of the three specified mechanisms.[1412]

First mechanism: RRO

948. The first mechanism is a **recognizance release order (RRO)**, that is, an order for the conditional release of the offender under s 20(1)(b) of the *Crimes Act 1914* (Cth).[1413] That provision empowers a court which sentences an offender to imprisonment for one or more federal offences to direct, by order, that the person be released, upon giving security by recognizance or otherwise, either *immediately* or *after he or she has served a specified period of imprisonment for the offence(s)*. The required security is in practice invariably provided by recognizance. The recognizance is subject to a standard condition that the offender will, upon release, be of good behaviour for such period (up to 5 years) as the court specifies. Other conditions (such as the payment of reparation or compensation, or participation in a treatment or rehabilitation program) may also be fixed. Unless required to be held in custody on some other basis, the offender must be released on the appointed day,[1414] provided the security required by the court has

1411 *Veale v R* [2022] NSWCCA 154, [43]-[44].

1412 In *ABC (a pseudonym) v R* [2023] VSCA 280, [35]-[42], the Court rejected a submission that a sentencing court could (under s 20(1) of the *Crimes Act 1914* (Cth)) make an order for the release of an offender that was neither a recognizance release order under s 20(1)(b) nor a non-parole period. The Court said ([41]), "*The plain legislative intent is that where a sentence of 3 years or longer is imposed, a non-parole period will be set unless the Court determines that a non-parole period should not be set. There is no third means.*" The Court noted that the effect of a decision that a non-parole period should not be fixed is that the prisoner will serve out the entire sentence.

1413 *"Recognizance release order"* is defined in s 16(1) of the *Crimes Act 1914* (Cth) as an order under s 20(1)(b) of the Act. Although similar in effect to a suspended sentence of imprisonment, a RRO is materially different in a number of ways: see *Frost v R* (2003) 11 Tas R 460; *DPP (Cth) v Cole* (2005) 91 SASR 480.

1414 *Selimoski v Picknoll* (WA SC (Full Court), 9 October 1992, unreported).

been given. *Generally speaking,*[1415] *a RRO is only available if the federal sentence of imprisonment imposed (or if more than one, the total effective sentence for the federal offences, or if there are other federal sentences, the total unserved period) is 3 years or less.*[1416]

Second mechanism: NPP

949. The second mechanism is a **non-parole period (NPP)**. A NPP fixes the minimum period of imprisonment which the offender must serve before being eligible for parole.[1417] Whether the offender is released on parole after that period is determined at the discretion of the Commonwealth Attorney-General.[1418] Parole entails a greater degree of supervision than a RRO. Parole may be revoked by the Attorney-General if the offender has breached a condition of the parole order, or if there are reasonable grounds for suspecting that the offender has done so (*Crimes Act 1914 (Cth)*, s 19AU). Parole is also automatically revoked if the parolee commits an offence on parole and is sentenced to more than 3 months' imprisonment for that offence (*Crimes Act 1914 (Cth)*, s 19AQ). *Generally speaking, a NPP is only available if the federal sentence of imprisonment imposed (or if more than one, the total effective sentence for the federal offences, or if there are other federal sentences, the total unserved period) is greater than 3 years.*

Third mechanism: straight sentence

950. In certain circumstances, Part IB of the *Crimes Act 1914* (Cth) also provides for what is commonly known as a **straight sentence** to be imposed: that is, a sentence of imprisonment with no provision for release during the period of imprisonment.[1419]

RRO and NPP are almost always mutually exclusive alternatives

951. The circumstances in which a RRO is available and those in which a NPP is available are almost entirely mutually exclusive: in only one (uncommon) factual circumstance can a sentencing court choose between them.[1420] It is an error to impose a NPP or a RRO in circumstances where it is not available, although the sentencing court has powers to correct such an error without the need of an appeal: see "4.10.23 Correction of error in fixing NPP/RRO".

The relevant provisions apply whenever a court imposes a sentence of imprisonment

952. The relevant provisions of Part IB of the *Crimes Act 1914* (Cth) (Division 4 and ss 19AQ, 19AR and 20(1)(b)) are prescriptive about when a RRO or NPP may or must be imposed, and about the exercise of

1415 An exception may arise by virtue of s 19AE: see Table 3 at [963] below.

1416 Until 2015, a RRO was also available as an option in relation to longer sentences. This option was removed by amendments to the *Crimes Act 1914* (Cth) made by the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act* 2015. The relevant amendments came into effect on 27 November 2015 and apply in relation to a federal sentence imposed on or after that date: see the amending Act, Schedule 7, Part 4, item 16.

1417 For a summary of the law governing federal parole see "4.11 Imprisonment: federal parole, leave and licence".

1418 *Crimes Act 1914 (Cth)*, s 19AL. For terrorist offenders and offenders who otherwise pose a national security risk, the Attorney-General may make a parole order only in exceptional circumstances: "4.11.2 Terrorism-related restrictions on parole". Prior to amendments which came into effect on 4 October 2012, s 19AL required the Attorney-General to make a parole order if the head sentence was 10 years or less and a NPP had been fixed, unless the offender was or would be serving a State or Territory sentence.

1419 A prisoner serving a straight sentence may, in exceptional circumstances, be released on licence at the discretion of the Attorney-General under s 19AP of the *Crimes Act 1914* (Cth): see "4.11.8 Release on licence".

1420 The exception is a case to which s 19AE of the *Crimes Act 1914* (Cth) applies: see [985] below.

the discretion to impose a straight sentence instead of making a RRO or fixing a NPP. The requirements are summarised in the following sections of this part of the guide.

953. The requirements apply *whenever a court imposes a "federal sentence"* – that is, a sentence of imprisonment for an offence against the law of the Commonwealth (see the definitions of "federal sentence", "sentence" and federal offence" in s 16(1)). This refers to the head sentence of imprisonment. This is consistent with the meaning of references to a "sentence of imprisonment" throughout Part IB.[1421]

No room for other sentence or order by which conditions are imposed on offender when released

954. In *Atanackovic*,[1422] the Victorian Court of Appeal (Weinberg, Kyrou and Kaye JJA) held that the comprehensive regime in Division 4 of Part IB for conditional release of an offender who is sentenced to a term of imprisonment for a federal offence leaves no room for the application of any State or Territory sentence or order by which conditions are imposed on an offender when released as part of a sentence that includes a term of imprisonment.

4.10.4 Non-parole period (NPP), recognizance release order (RRO) or straight sentence?

955. The applicable requirements for fixing the period, or the minimum period, of imprisonment to be served by a federal offender who is sentenced to imprisonment are determined by a matrix of legislative provisions. The following is a brief overview of those requirements; they are described in more detail later in this part.

956. Specific provisions apply if the offender is to be sentenced for:

- a minimum non-parole period offence (that is, any of the national security-related offences listed in s 19AG(1)), or
- a people-smuggling offence to which s 236B of the *Migration Act 1958* (Cth) applies.

1421 E.g. ss 16AAA; 16AAB(2); 16AAC(2); 17A(1), (2); 17B(1), (2); 19(2), (3), (4); 20(1)(b). Part IB clearly distinguishes between a *sentence* of imprisonment and the *service* of some or all of the sentence in custody: for example, the "*unserved portions*" of two or more sentences or terms of imprisonment (s 16(1), definition of "aggregate"); "*that part of the period of imprisonment for that sentence or those sentences during which the person is not to be released on parole*" (s 16(1), definition of "non-parole period"); in relation to a RRO, "*the period of imprisonment specified in that order as the period of imprisonment in respect of that sentence or those sentences after service of which the offender may be released on the giving of security*" (s 16(1), definition of "pre-release period"); "*periods of imprisonment required to be served*" (s 16B, heading); State or Territory law applies to "*a federal sentence* [ie of imprisonment] *imposed on a person in that State or Territory or to a non-parole period fixed in respect of that sentence*" (s 16E(1)); "*service of the sentence will entail a period of imprisonment of not less than the non-parole period*" (s 16F(1)(a)); "*service of the sentence will entail a period of imprisonment equal to the pre-release period (if any) specified in the order and a period of service in the community equal to the balance of the sentence*" (s 16F(1)(b)); "*Where a person who is convicted of a federal offence … is at the time … serving, or subject to, one or more federal, State or Territory sentences, the court must, when imposing a federal sentence for that federal offence … by order direct when the federal sentence commences*" (s 19(1)); "*A federal offender who is ordered by a court or a prescribed authority to be detained in prison*" (s 19A). The distinction between the *sentence* (that is, the head sentence or total effective sentence) and *service* of some or all of the sentence in custody also underlies all of the provisions of Div 4 and Div 5.

1422 *Atanackovic v R* (2015) 45 VR 179, [78]-[87]; see also *R v Medalian* (2019) 133 SASR 50, [16]. See "4.7.15 Whether sentence or order can be combined with a term of imprisonment for the same offence".

In these circumstances prescriptive requirements apply, and options which would otherwise be available are excluded. For details of the prescriptive requirements see "4.10.8 The three-quarters rule in fixing a NPP for certain national security offences" and "7.2.1 People-smuggling offences" (respectively).

957. The following summary describes the law which is applicable generally (that is, when the offender is not sentenced for one of these offences).

958. The general provisions governing the fixing of periods or minimum periods of imprisonment to be served by a federal offender distinguish between *sentencing a federal offender not presently undergoing a federal sentence* and *sentencing a federal offender who is presently undergoing a federal sentence of imprisonment*. "Federal sentence", in the relevant provisions, means a sentence of imprisonment for an offence against the law of the Commonwealth (see the definitions of "federal sentence", "sentence" and "federal offence" in s 16(1) of the *Crimes Act 1914* (Cth)). Specific provision is also made for sentencing an offender for *an offence committed while the offender was on parole or was released on licence* for a federal offence.

959. In sentencing **a federal offender who is not presently serving or subject to a federal sentence** (even if the offender is undergoing a State/Territory sentence of imprisonment), a NPP will be required, or a RRO will be permitted or required, depending on the length of the sentence to be imposed, although a straight sentence (a sentence with no provision for release before its expiry) may instead be imposed in specified circumstances.[1423] Table 1 summarises the requirements:

Table 1: Fixing period to be served by federal offender who is not presently serving or subject to a federal sentence of imprisonment

Sentence/aggregate sentences	*Required option*	*Crimes Act 1914* (Cth) section
Not exceeding 6 months	Single RRO is optional. NPP not available. Discretion to order immediate release. Discretion to decline to make RRO (ie to impose straight sentence).	19AC(3) 20(1)(b) 19AC(4)
Greater than 6 months but not greater than 3 years	Single RRO required. NPP not available. Discretion to order immediate release. Discretion to decline to make RRO (ie to impose straight sentence).	19AC(1) 20(1)(b) 19AC(4)
Greater than 3 years	Single NPP required. RRO not available. Discretion to decline to fix NPP (ie to impose straight sentence).	19AB(1) 19AB(3)

960. For more detail on these requirements, see "4.10.5 Where federal offender is not undergoing a federal term of imprisonment: NPP, RRO or straight sentence".

961. In sentencing a federal offender who is presently serving or subject to a federal sentence (whether or not the offender is also serving a State/Territory sentence of imprisonment), the applicable requirements depend on whether or not the offender is subject to an existing RRO or (federal) NPP.

1423 *Crimes Act 1914* (Cth), ss 19AB and 19AC.

962. If **the offender is presently serving or subject to a federal sentence but is not subject to an existing RRO or federal NPP**, a RRO or NPP (or neither in certain circumstances) will be imposed, according to the aggregate length of the sentences which will remain to be served (including the unserved portion of the existing sentence and the new head sentence(s)). Table 2 summarises the applicable requirements:

Table 2: Fixing period to be served by federal offender who is presently serving or subject to a federal sentence of imprisonment, but who is not subject to an existing RRO or federal NPP

Aggregate period to serve (including new sentence(s))	*Required option*	*Crimes Act 1914* (Cth) section
Not exceeding 6 months	Single RRO is optional. NPP not available. Discretion to order immediate release. Discretion to decline to make RRO (ie to impose straight sentence).	19AC(3) 20(1)(b) 19AC(4)
Greater than 6 months but not greater than 3 years	Single RRO required. NPP not available. Discretion to order immediate release. Discretion to decline to make RRO (ie to impose straight sentence).	19AC(2) 20(1)(b) 19AC(4)
Greater than 3 years	Single NPP required. RRO not available. Discretion to decline to fix NPP (ie to impose straight sentence).	19AB(2) 19AB(3)

963. If **the offender is subject to an existing RRO or (federal) NPP**, the court is required to make orders to deal with the existing order as well as the new sentence(s). The orders will involve either confirming the existing NPP or RRO or replacing it with a single NPP or RRO applicable to all the federal sentences or with a straight sentence (*Crimes Act*, ss 19AD and 19AE). Table 3 summarises the applicable requirements:

Table 3: Fixing period to be served by federal offender who is presently serving or subject to a federal sentence of imprisonment and is subject to an existing RRO or federal NPP

Circumstance	*Options*	*Crimes Act 1914* (Cth) section
Existing RRO – where aggregate of unserved portion of existing RRO and further sentence(s) is 3 years or less	• Make order confirming existing RRO • Make a new RRO in respect of all federal sentences the offender is to serve or complete • Cancel existing RRO and decline to make new RRO	19AE
Existing RRO – where aggregate of unserved portion of existing RRO and further sentence(s) is greater than 3 years	• Make order confirming existing RRO • Make a new RRO in respect of all federal sentences the offender is to serve or complete	19AE

Circumstance	*Options*	*Crimes Act 1914* (Cth) section
	• Fix a single NPP in respect of in respect of all federal sentences the offender is to serve or complete • Cancel existing RRO and decline to make new RRO	
Existing NPP	• Make order confirming existing NPP • Fix a single NPP in respect of all federal sentences the offender is to serve or complete • Cancel existing NPP and decline to make new NPP	19AD

964. For more detail on these requirements, see "4.10.6 Where the offender is already undergoing a federal term of imprisonment".

965. Specific provision is also made in ss 19AQ and 19AR of the *Crimes Act* for the fixing of periods, or minimum periods, to be served by **an offender who commits an offence (including a State or Territory offence) while on federal parole or while released on licence** in relation to a sentence for a federal offence.[1424] (These will be referred to as "the breaching offence" and "the outstanding sentence", respectively.) The need for these provisions arises because federal parole or a federal licence will be taken to be revoked if the offender commits a further offence (whether federal, State or Territory) during the parole or licence period and is sentenced to imprisonment, or a total period of imprisonment, for more than 3 months (other than a suspended sentence) for the breaching offence(s), even if the sentence is imposed after the completion of the sentence for the original federal offence(s). The court sentencing for the breaching offence must make orders in relation to the outstanding sentence. The requirements are summarised in Table 4 (below).

966. Under s 19AQ, the court sentencing for the breaching offence must determine the time (the revocation time) when the parole order or licence is taken to have been revoked – that is, when the breaching offence was committed, or was most likely to have been committed, or was most likely to have first begun to have been committed. The parolee or licensee will then be required to serve the balance of the sentence that was outstanding upon their release, less any allowance made by the sentencing court for "clean street time" (that is, good behaviour during the period between the person's release and the revocation time). If the person becomes liable to serve a part of the outstanding sentence, the court sentencing for the breaching offence must generally make a new NPP for the outstanding sentence.

1424 This regime was substantially amended by the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), s 3 and Schedule 13, which came into effect on 20 July 2020. The amendments to ss 19AQ and 19AR apply in relation to the revocation, on or after 20 July 2020, of a parole order or licence relating to a sentence, regardless of when the sentence was imposed: see s 2 and Schedule 13, item 21(1) of the amending Act. For a description of the regime which applied before these amendments, see Appendix 2, "A2.4 Automatic revocation of federal parole or licence prior to 20 July 2020".

Table 4: Sentences or orders to be made when sentencing an offender on or after 20 July 2020 for federal, State or Territory offence committed while the offender was on federal parole or while released on federal licence

Breaching offence	*Requirements*	*Crimes Act 1914* (Cth) section
Federal offence(s) – sentence of life imprisonment, or sentence or total sentence of more than 3 months	• Must determine the revocation time • Must not make a RRO • Must fix a single NPP in respect of the new sentence(s) (ie for the breaching offence(s)) and the outstanding sentence(s) • May decline to fix a NPP	19AQ(1) or (2) 19AR(1) 19AR(4)
State or Territory offence(s) – sentence of life imprisonment, or sentence or total sentence of more than 3 months	• Must determine the revocation time • Must not make a RRO • Must fix a single NPP in respect of the outstanding federal sentence(s) • May decline to fix a NPP	19AQ(1) or (2) 19AR(3) 19AR(4)

967. For further details, see "4.11.11 Automatic revocation of parole or licence".

968. Other key aspects of the legislative regime governing the fixing of periods, or minimum periods, to be served include the following:

- The requirements relating to the period of a federal sentence of imprisonment which must be served **apply regardless of whether or not the offender is or will be serving a State/Territory sentence**. (Service of a State/Territory sentence may, however, be a reason for declining to fix a NPP or RRO.)
- If the offender is sentenced for more than one federal offence at the same sitting, **a single NPP must be fixed or a single RRO ordered in respect of all federal sentences** then imposed (except to the extent that the court imposes straight sentences).
- **A NPP can never be imposed in conjunction with a RRO** for any combination of federal sentences (including a NPP or RRO imposed on a previous occasion).
- It is **not possible to impose a single NPP in respect of both federal and State/Territory sentences**.
- It is **not possible to combine a RRO with an order in relation to a State/Territory sentence**.
- Subject to mandatory minimum requirements for certain national security offences and people smuggling offences, **there is no fixed (or "normal") ratio between the head sentence and the period, or minimum period, to be served**. The minimum period to be served must be determined according to general sentencing principles.
- Whenever a RRO is open, **it can provide that the offender be released (on that sentence) immediately** upon entering into a recognizance. That is, a RRO can operate in a similar way to a wholly suspended sentence. However if one of the offences is a Commonwealth child sex offence committed on or after 23 June 2020, this power may only be exercised in exceptional circumstances.
- A court may only **decline to fix a NPP or to make a RRO** (that is, impose a straight sentence) when it would otherwise be required to do so if it is satisfied of particular statutory criteria.

- Whenever the court declines to fix a NPP or to make a RRO, it must state its reasons for doing so and cause them to be entered in the records of the court.

969. The succeeding parts of this section of the guide describe these requirements in more detail.

4.10.5 Where federal offender is not undergoing a federal term of imprisonment: NPP, RRO or straight sentence

970. If the offender is to be sentenced for one of the people-smuggling offences to which s 236B of the *Migration Act 1958* (Cth) applies, mandatory requirements apply to the fixing of both the head sentence and NPP. See "7.2.1 People-smuggling offences".

971. If the offender is to be sentenced for one of the national security related offences which is a "minimum non-parole period offence", sentencing is governed by s 19AG of the *Crimes Act 1914* (Cth), which overrides other provisions relating to the fixing of periods, or minimum periods of imprisonment. See "4.10.8 The three-quarters rule in fixing a NPP for certain national security offences".

972. In any other case, the fixing of a period, or minimum period, to be served for one or more federal offences by an offender who is not already serving or subject to a federal sentence (that is, a sentence of imprisonment for a federal offence: see the definitions of "*federal sentence*" and "*sentence*" in s 16(1) of the *Crimes Act*) is governed by ss 19AB(1) or 19AC(1) of the Act (whichever is applicable), subject to the exceptions provided in those sections.

973. These provisions apply even if the offender is undergoing a State or Territory sentence of imprisonment. (However if the offender is serving a State or Territory sentence, it may affect the order to be made for the federal offence(s)[1425] and must be taken into account under the totality principle in s 16B: see "3.3 Other sentences not yet served – s 16B (totality principle)".)

974. When an offender is to be sentenced to a term of imprisonment for one or more federal offences, the applicable requirements under the *Crimes Act* relating to NPPs or RRO periods turn on the length of the head sentence for those federal offences. If there is more than one federal offence, the requirements depend on the aggregate of those sentences. *"Aggregate"* is defined in s 16(1) of the Act to mean, in relation to two or more sentences of imprisonment, the total effective sentence, having regard to whether the sentences are to be served cumulatively, partly cumulatively, or concurrently.

975. The requirements in relation to an offender who is not serving or subject to a federal sentence, by reference to the head sentence or total effective sentence imposed for the federal offences, are as follows:

- **6 months or less:** If the federal sentence is, or sentences are in the aggregate, for a period of imprisonment of 6 months or less, there is no power to fix a NPP[1426] (except if one of the offences is a "minimum non-parole period offence" in which case a NPP is mandatory[1427]).

1425 *Hancock v R* [2012] NSWCCA 200, [45].

1426 *R v Fulop* [2009] VSCA 296; *Hunt v DPP* [2009] SASC 116, [10]. This is subject to the exception referred to above, if one or more of the offences is a "minimum non-parole period offence" (that is, one of a number of national security offences specified in s 19AG(1)). In such a case, a RRO is not available (s 20(6)), and a NPP of at least three-quarters of the length of the regardless of the length of the head sentence (or aggregate sentence) for the minimum non-parole period offence(s): s 19AG(2).

1427 See "4.10.8 The three-quarters rule in fixing a NPP for certain national security offences".

The court may, but is not required to, make a RRO (ss 19AC(3), 20(1)(b)). That is, the court may either make a RRO or impose a straight sentence.

- **More than 6 months up to 3 years:** If the federal sentence imposed is, or sentences are in the aggregate, for a period of imprisonment of more than 6 months but not more than 3 years, there is no power to fix a NPP (except if one of the offences is a "minimum non-parole period offence" in which case a NPP is mandatory[1428]). *The court is required to make a RRO* (ss 19AC(1), 20(1)(b)), unless it exercises the discretion to decline to fix a RRO (that is, to impose a straight sentence) in the circumstances set out in s 19AC(4).
- **More than 3 years (including a life sentence):** If the federal sentence imposed is imprisonment for life or (alone or in the aggregate) for a period of imprisonment in excess of 3 years, *the court must fix a single NPP* (s 19AB(1)), subject to the discretion to decline to do so (that is, to impose a straight sentence) in the circumstances set out in s 19AB(3).

976. As to the criteria for, and the exercise of, the discretion to decline to make a RRO or to decline to fix a NPP (that is, to impose a straight sentence), see "4.10.7 Discretion to decline to fix a NPP or RRO (straight sentence)".

977. Where a court imposes a NPP/RRO it must explain or cause to be explained the purpose and consequence of fixing, and non-compliance with, a non-parole order/RRO.[1429]

4.10.6 Where the offender is already undergoing a federal term of imprisonment: NPP, RRO or straight sentence

978. If the offender is to be sentenced for one of the people-smuggling offences to which s 236B of the *Migration Act 1958* (Cth) applies, mandatory requirements apply to the fixing of both the head sentence and NPP. See "7.2.1 People-smuggling offences".

979. If the offender is to be sentenced for one of the national security related offences which is a "minimum non-parole period offence", sentencing is governed by s 19AG of the *Crimes Act 1914* (Cth), which overrides other provisions relating to the fixing of periods, or minimum periods of imprisonment. See "4.10.8 The three-quarters rule in fixing a NPP for certain national security offences".

980. In any other case, the fixing of a period, or minimum period, to be served for one or more federal offences by an offender who is already serving or subject to a federal sentence is governed by s 19AB(2), 19AC(2), 19AD or 19AE of the Act (whichever is applicable). "Federal sentence", in these provisions, means a sentence of imprisonment for an offence against the law of the Commonwealth (see the definitions of "federal sentence", "sentence" and "federal offence" in s 16(1) of the Act).

981. **Offender in prison and serving or subject to a federal sentence of imprisonment but not subject to an existing RRO or NPP:** Sections 19AB(2) and 19AC(2) govern a case in which an offender who is in prison and serving or subject to a federal sentence of imprisonment but is not subject to an existing RRO or NPP is to be sentenced for one or more further federal offences. In such a case, the applicable requirements relating to NPPs or RRO periods depend upon the aggregate length of the *unserved portions of federal sentences* which will result from the imposition of the further sentence(s).

1428 See "4.10.8 The three-quarters rule in fixing a NPP for certain national security offences".

1429 *Crimes Act 1914* (Cth), s 16F. Failure to comply with the requirements of this section does not invalidate a sentence: *R v Hutton* [2004] NSWCCA 60, [17]-[28].

982. The unserved portions of the existing sentence must be calculated at the time of sentencing for the further federal offence(s). For example, suppose the offender to be sentenced for federal offences is already serving a federal sentence of 3 years for previous offences, but is not subject to a NPP or RRO.[1430] At the time of sentencing for further federal offences, the offender has served 2 years' imprisonment. The unserved portion of the existing sentence is one year. The applicable requirement in relation to fixing a NPP or RRO (or imposing a straight sentence) for the further offences will depend on the aggregate of the unserved portion of the existing sentence (1 year in this instance) and the total effective sentence (or head sentence) for the further offences.

983. In summary, the respective requirements relating to the unserved portions of federal sentences in such a case are as follows:

- **6 months or less:** If the unserved portions of the federal sentences (including the additional sentences to be imposed) will, in the aggregate, not exceed 6 months, there is no power to fix a NPP[1431] (except if one of the offences is a "minimum non-parole period offence" in which case a NPP is mandatory[1432]). *The court may, but is not required to, make a RRO* (*Crimes Act*, ss 19AC(3), 20(1)(b)). That is, the court may either make a RRO or impose a straight sentence.
- **More than 6 months up to 3 years**: If the unserved portions of the federal sentences (including the additional sentences to be imposed) will, in the aggregate, be more than 6 months but not more than 3 years, there is no power to fix a NPP (except if one of the offences is a "minimum non-parole period offence" in which case a NPP is mandatory[1433]). *The court is required to make a RRO* (ss 19AC(2), 20(1)(b)), unless it exercises the discretion to decline to fix a RRO (that is, to impose a straight sentence) in the circumstances set out in s 19AC(4).
- **More than 3 years (including a life sentence**): If the offender is or will be subject to a federal life sentence, or if the unserved portions of the federal sentences (including the further sentences to be imposed) will, in the aggregate, be in excess of 3 years, *the court must fix a single NPP* (s 19AB(2)), subject to the discretion to decline to do so (that is, to impose a straight sentence) in the circumstances set out in s 19AB(3).

984. **Offender in prison and serving or subject to a federal sentence of imprisonment and subject to an existing NPP:** If an offender who is serving an existing NPP for one or more federal sentences is to be sentenced for one or more federal offences, the court must take one of the steps required by

1430 This might come about in various ways. A common example would be where the existing federal sentence was a straight sentence to be served concurrently with or partly cumulatively upon a sentence for a State or Territory offence. Another is where the offender has served a NPP for the existing federal offence but has not been released on parole.

1431 *R v Fulop* [2009] VSCA 296; *Hunt v DPP* [2009] SASC 116, [10]. This is subject to the exception referred to above, if one or more of the offences is a "minimum non-parole period offence" (that is, one of a number of national security offences specified in s 19AG(1)). In such a case, a RRO is not available (s 20(6)), and a NPP of at least three-quarters of the length of the regardless of the length of the head sentence (or aggregate sentence) for the minimum non-parole period offence(s): s 19AG(2).

1432 See "4.10.8 The three-quarters rule in fixing a NPP for certain national security offences".

1433 See "4.10.8 The three-quarters rule in fixing a NPP for certain national security offences".

s 19AD(2).[1434] The court's options (under s 19AD(2)), after considering the relevant circumstances, including the existing NPP, the nature and circumstances of the offence(s) concerned and the antecedents of the person, are:[1435]

- make an order confirming the existing NPP;
- fix a new single NPP in respect of all federal sentences the person is to serve or complete; or
- where the court decides that, in the circumstances, a NPP is not appropriate, cancel the existing NPP and decline to fix a new NPP (that is, in effect, impose a straight sentence).

985. **Offender in prison and serving or subject to a federal sentence of imprisonment and subject to an existing RRO:** If an offender who is subject to an existing RRO and has not been released under that RRO is to be sentenced for one or more further federal offences, the court must take one of the steps required by s 19AE(2). The court's options (under s 19AE(2)), after considering the relevant circumstances, including the existing RRO, the nature and circumstances of the offence(s) concerned and the antecedents of the person, are:[1436]

- make an order confirming the existing RRO;
- fix a new single RRO in respect of all federal sentences the person is to serve or complete;
- fix a single NPP in respect of all federal sentences that the person is to serve or complete, if, as a result of the further federal sentences, the person is to serve or complete either a federal life sentence, or the aggregate of the unserved portions of federal sentences that the person is to serve or complete exceeds 3 years, and the court decides that it is appropriate to fix a NPP; or
- where the court decides that, in the circumstances, a RRO is not appropriate, cancel the existing RRO and decline to make a new RRO (that is, in effect, impose a straight sentence).

986. If the court fixes a new single NPP under either s 19AD(2)(e) or s 19AE(2)(f), or makes a new RRO under s 19AE(2)(e), it must not be such as to allow the person to be released earlier than would have been the case if the further sentence had not been imposed (s 19AD(3)(b), s 19AE(3)(b) and s 19AE(4)(b)). The new NPP or RRO is to be treated as having superseded the existing order (s 19AD(3)(a), s 19AE(3)(a) and s 19AE(4)(a)).

987. As to the criteria for, and the exercise of, the discretion to decline to make a RRO or to decline to fix a NPP (that is, to impose a straight sentence) in any of these circumstances, see "4.10.7 Discretion to decline to fix a NPP or RRO (straight sentence)".

988. Where a court imposes a NPP/RRO it must explain or cause to be explained the purpose and consequence of fixing, and non-compliance with, a non-parole order/RRO.[1437]

1434 In *Betka v R (No 3)* [2021] NSWCCA 121, the requirements of s 19AD had been overlooked by both a judge of the NSW Supreme Court in sentencing the offender and by the CCA. When later brought to the attention of the CCA, the Court corrected the error, pursuant to s 19AH of the *Crimes Act 1914* (Cth) (see "6.12.3 Power to correct error in fixing NPP or making RRO: Crimes Act 1914, s 19AH"), by fixing a single NPP for both federal sentences.

1435 Subject to the prescriptive requirements in relation to certain people-smuggling or national security offences referred to above.

1436 Subject to the prescriptive requirements in relation to certain people-smuggling or national security offences referred to above.

1437 *Crimes Act 1914* (Cth), s 16F. Failure to comply with the requirements of this section does not invalidate a sentence: *R v Hutton* [2004] NSWCCA 60, [17]-[28].

4.10.7 Discretion to decline to fix a NPP or RRO (straight sentence)

When the discretion arises

989. As described above, a court sentencing a federal offender may impose a "straight sentence"[1438] (that is, a sentence of imprisonment with no provision for release before the expiry of the full term[1439]) by declining to fix a NPP or to make a RRO in a number of circumstances. The following is a summary of those circumstances.

990. If the sentence for a federal offence, or the aggregate sentence for federal offences, is 6 *months or less*, the court may, but is not required to, impose a RRO (*Crimes Act 1914* (Cth), s 19AC(1), (3)(a)); that is, the court may impose a straight sentence. A similar discretion applies when the offender is already serving a federal sentence at the time of sentencing, but is not subject to a RRO or NPP, and the unserved portion of that sentence, together with the further sentence(s), total 6 months or less (s 19AC(2), (3)(b)). In either of these cases, the discretion whether to impose a straight sentence (rather than a RRO) is not fettered by statutory criteria.

991. If the offender is *not serving or subject to a federal sentence*, or is serving or subject to such a sentence but is *not already subject to a RRO or NPP*, the court has a discretion to decline to make a NPP (s 19AB(3)) or RRO (s 19AC(4)), as the case may be. The criteria in each provision are the same. In either case, the court may decline to make the order (RRO or NPP) if either:

- the court is satisfied that it is not appropriate having regard to the nature and circumstances of the offence or offences concerned and to the antecedents of the person, or
- the person is expected to be serving a State/Territory sentence on the day after the end of the federal sentence.

992. If the offender is already *serving an existing NPP* for a federal offence (s 19AD(2)) or is *subject to an existing RRO and has not been released* when sentenced for a further federal offence (s 19AE(2)), the court may cancel the existing NPP or RRO, as the case may be, and decline to make a NPP or RRO in relation to the previous offence and the further offence. The court may do so if, after considering the relevant circumstances, including the existing RRO/NPP, the nature and circumstances of the offence or offences concerned and the antecedents of the person, it decides that a RRO/NPP is not appropriate.

993. A court which sentences an offender to a term of imprisonment for 3 months or more for a State or Territory offence which was committed while on federal parole or while released on federal licence must ordinarily fix a new NPP for the original federal offence if any of it remains to be served. A court which sentences an offender to a term of imprisonment for 3 months or more for a federal offence which was committed while on federal parole or while released on federal licence must ordinarily fix a single new NPP for the original federal offence (if any of it remains to be served) and the breaching offence. (See

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1438 The term "straight sentence" seems to have been coined by prisoners. For the history of the use of straight sentences (where a non-parole period was available), see *R v Butler* [1971] VR 892; *R v Currey* [1975] VR 647; *Fox & Freiberg's Sentencing – State and Federal Law in Victoria* (Thomson Reuters, third ed, 2014), [14.95]. The term "straight sentence", rather than "fixed-term sentence" is used in this guide, to avoid confusion with the very different practice under NSW law, by which a "fixed-term sentence" may be equated with a non-parole period (see *Lipchin v R* [2013] NSWCCA 77, [16]) rather than with the term of a head sentence (or total effective sentence where two or more sentences are imposed).

1439 A prisoner serving a straight sentence may, in exceptional circumstances, be released on licence at the discretion of the Attorney-General under s 19AP of the *Crimes Act 1914* (Cth): see "4.11.8 Release on licence".

"4.11.11 Automatic revocation of parole or licence".) In either of these circumstances the court has a discretion under s 19AR(4) to decline to fix a NPP. It may do so if either:

- the court is satisfied that it is not appropriate having regard to the nature and circumstances of the offence or offences and to the antecedents of the person, or
- the person is expected to be serving a State/Territory sentence on the day after the end of the federal sentence, or the last to be served of the federal sentences.[1440]

994. If a court declines to make a RRO or a NPP under any of these provisions it must state its reasons for so deciding and cause the reasons to be entered into the records of the court.[1441] The reasons must reveal the process of reasoning, by reference to the statutory criteria and any other applicable principles and the facts of the case, which led the court to conclude that a RRO or NPP (as the case may be) was inappropriate.[1442] The absence of such reasons may demonstrate a miscarriage of the sentencing discretion.[1443] For example, in *Waterstone*,[1444] the New South Wales Court of Criminal Appeal held that justifying the imposition of a straight sentence merely on the basis of the length of the individual sentences and the fact that the offences were both State and Commonwealth offences did not explain why an effective sentence of 3 years and 1 month without parole for a sex offender assessed as having a medium to low risk of re-offending was warranted.

Exercise of the discretion

995. The statutory discretion to decline to fix a NPP or to decline to make a RRO was introduced in 1990. The Explanatory Memorandum for the relevant bill said that the provision was "*intended for those cases where the crime is so serious or where there is a history of repeated offences which would require the offender to serve the full sentence*".[1445]

996. The discretion has been exercised where the federal offender would be required to serve a significant State or Territory sentence cumulatively on the federal sentence[1446] or where the federal sentence is to be served concurrently with a long State or Territory sentence imposed at the same time.[1447] In such circumstances a RRO or NPP would be inappropriate because it would be futile.[1448]

997. Circumstances relevant to the exercise of the discretion may include other offences committed by the offender contemporaneously with the federal offences.[1449] However the absence of acceptable evidence as to antecedents cannot properly warrant a conclusion that a NPP should not be fixed. The

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1440 Prior to the commencement of the *Crimes Amendment (Remissions of Sentences) Act 2021* (Cth) (the amending Act) on 9 December 2021, the relevant circumstance in s 19AR(4) was that person was expected to be serving a State/Territory sentence on the day after the end of the federal sentence, or the last to be served of the federal sentences "*as reduced by any remissions or reductions under s 19AA*". The amending Act repealed s 19AA and abolished remissions or reductions on federal sentences.

1441 *Crimes Act 1914* (Cth), ss 19AB(4), 19AC(5), 19AD(5), 19AE(5), 19AR(5).

1442 *Spreitzer v R* (1991) 58 A Crim R 114, 120.

1443 *Spreitzer v R* (1991) 58 A Crim R 114, 120.

1444 *Waterstone v R* [2020] NSWCCA 117, [80].

1445 *Crimes Legislation Amendment Bill (No 2) 1989* (Cth), Explanatory Memorandum (House of Representatives), 17 (regarding proposed new section 19AE).

1446 *Carroll v R* [2011] VSCA 150, [54]-[56].

1447 *Hancock v R* [2012] NSWCCA 200, [45]-[51]; *Hudson v R* [2020] ACTCA 46, [57]-[59].

1448 *Hancock v R* [2012] NSWCCA 200, [50].

1449 *Hancock v R* [2012] NSWCCA 200, [47].

nature and circumstances of the offence should not dominate the consideration of the question of whether or not to fix a NPP.[1450]

998. The possibility of deportation does not preclude the fixing of a NPP[1451] or a RRO[1452] (that is, it does not require that a court impose a straight sentence).

999. In *Spreitzer*,[1453] the Full Court of the Supreme Court of Western Australia observed that (despite the contrary indication in the passage from the Explanatory Memorandum quoted above) the discretion could also be exercised to effect rehabilitation of the offender. In that case it was held that the rehabilitation of an offender who was a foreign national who spoke little English and had no ties with, or future prospects in, Australia warranted a short straight sentence rather than a sentence with a RRO, so as to permit the offender to return to his home country.

1000. *Spreitzer* was an unusual case and should not be taken as reflecting a general principle.[1454] It is implicit in the scheme of Part IB of the *Crimes Act 1914* that the determination of the appropriate length of the head sentence should be made independently of the determination of the period of imprisonment (if any), or the minimum period of imprisonment, to be served.[1455] It would seem wrong in principle to reduce a head sentence merely because all of it would be required to be served, just as it would be wrong in principle to increase a head sentence merely because none of it would be required to be served.[1456]

4.10.8 The three-quarters rule in fixing a NPP for certain national security offences

1001. Section 19AG of the *Crimes Act 1914* (Cth) (introduced in 2004) creates what has become known as "the three-quarters rule". In *Alou,*[1457] the New South Wales Court of Criminal Appeal rejected a challenge to the constitutional validity of s 19AG.

1002. Subject to an exception for young offenders (described at [1008] below), the three-quarters rule applies whenever a person is convicted and sentenced (that is, to a term of imprisonment[1458]) for a "*minimum non-parole offence*", which is defined in s 19AG(1) to mean:[1459]

- a terrorism offence, as defined in s 3(1) of the Act (see "7.1.1 Definition of "terrorism offence"");
- an offence against Division 80 (other than Subdivision CA) of the *Criminal Code* (Cth) (treason, urging violence, advocating terrorism, etc); or

1450 *Wangsaimas v R* (1996) 6 NTLR 14.

1451 *Crimes Act 1914* (Cth), s 19AK. See also *R v Shrestha* (1991) 173 CLR 48 (although decided before s 19AK was enacted, the decision is still relevant to the principles applicable). As to the relevance of the prospect of deportation as a factor in sentencing generally, see "3.5.14 Prospect of cancellation of a visa and deportation".

1452 *Spreitzer v R* (1991) 58 A Crim R 114.

1453 *Spreitzer v R* (1991) 58 A Crim R 114.

1454 Contrast the principled approach taken by the Court of Appeal in *R v Fati* [2021] SASCA 99, [61], [71]-[73]; see [534] above.

1455 See "4.8.8 Period or minimum period to be served is not a consideration in fixing a head sentence".

1456 Cf *R v Currey* [1975] VR 647, 651, 655; *R v Zamagias* [2002] NSWCCA 17, [26]-[29]; *De Hollander v R* [2012] WASCA 127, [86]. See also *Waterstone v R* [2020] NSWCCA 117, [74]-[79].

1457 *Alou v R* (2019) 101 NSWLR 319 (special leave refused: *Alou v R* [2020] HCATrans 83).

1458 See the applicable definition of "*sentence*" in s 16(1) of the *Crimes Act 1914* (Cth).

1459 The definition was amended by the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth), with effect from 30 June 2018. Prior to the amendments, "minimum non-parole period offence" also included other offences against Division 91 of the *Criminal Code* (espionage, etc) and an offence against s 24AA of the *Crimes Act 1914* (treachery).

- an offence against s 91.1(1) or 91.2(1) of the *Criminal Code* (intentional espionage offences).

By virtue of s 11.6 of the *Criminal Code*, the reference to each of these offences includes a reference to an offence of attempt (s 11.1), incitement (s 11.4) or conspiracy (s 11.5) that relates to that offence. Therefore the reference in the definition of "terrorism offence" in s 3(1) of the *Crimes Act* to an offence against a particular provision of the *Criminal Code* and the reference in s 19AG(1) to a "terrorism offence" includes a reference to an offence of conspiracy to commit that offence.[1460]

1003. Under the three-quarters rule, in sentencing such a person, the court must fix a single NPP of at least three-quarters of the sentence for the minimum non-parole offence. (For this purpose, a sentence of life imprisonment is taken to be a sentence of 30 years' imprisonment.) For example, if the offender is sentenced to 10 years' imprisonment for the offence, the court must fix a NPP of at least 7 years and 6 months.

1004. If two or more sentences have been imposed on the person for minimum non-parole offences (whether or not at the same sitting), the court must fix a single NPP of at least three-quarters of the aggregate of those sentences. For example, if the offender is sentenced to 8 years' imprisonment on each of two minimum non-parole period offences, and 2 years of the second sentence is effectively cumulative on the first sentence, the aggregate (total effective sentence) will be taken as 10 years' imprisonment, and the court must fix a NPP of at least 7 years and 6 months.

1005. If the offender has been sentenced for a federal offence which is not a minimum non-parole period offence as well as one or more minimum non-parole period offences, the minimum non-parole period applies to that offence also (s 19AG(2) and (3)), but is calculated only by reference to the minimum non-parole period offence or, if more than one, the aggregate of them. Suppose, for example, an offender is sentenced to 6 years' imprisonment for each of two terrorism offences (which are minimum non-parole period offences), with 2 years of the sentence for the second offence to be cumulative on the first, and 2 years' imprisonment for an offence of possession of a forged document (*Criminal Code (Cth)*, s 145.2(1)) (which is not a minimum non-parole period offence), with 12 months of that sentence to be served cumulatively on the second terrorism sentence. Although the total effective sentence is 9 years, in calculating the application of the three-quarters rule, the sentence for possession of a forged document must be disregarded. The aggregate sentence for the terrorism offences is 8 years, so the minimum NPP is 6 years. That minimum NPP is a single period applicable to the sentences for all the offences (s 19AG(2)), including the sentence for the offence which is not a minimum non-parole period offence (s 19AG(3)(b)(iii)).

1006. The single NPP must be fixed in respect of all federal sentences the person is to serve or complete (s 19AG(2)), whether or not they are imposed at the same sitting (s 19AG(3)(b)), and supersedes any existing RRO (s 19AG(4)). Other provisions relating to the fixing of a NPP or RRO are made subject to the requirements of s 19AG (see s 19AG(5)).

1007. Options under s 20AB(1) that involve detention or imprisonment may not be made for a minimum non-parole offence under s 19AG (s 20AB(6)). See "7.1.3 Sentences and orders under s 20AB(1) for the service of a sentence not available for minimum non-parole offence".

1460 *DPP (Cth) v Fattal* [2013] VSCA 276, [202]-[212].

1008. Following amendments in 2019,[1461] an exception to the three-quarters rule applies to the sentencing of an offender who is under 18 years of age for a minimum non-parole period offence. The effect of the amendments is that the court must apply the three-quarters rule in such a case "*unless the court is satisfied that exceptional circumstances exist to justify fixing a shorter single non-parole period*" (s 19AG(4A)). In determining whether exceptional circumstances exist, the court must have regard to "*the protection of the community as the paramount consideration; and … the best interests of the person as a primary consideration*" (s 19AG(4B)). This requirement does not limit other matters that the court may have regard to (s 19AG(4B)); so, for example, the court may have regard to relevant matters in s 16A(2), such as the need for specific deterrence (s 16A(2)(j)), the age and physical or mental condition of the offender (s 16A(2)(m)) and the offender's prospects of rehabilitation (s 16A(2)(n)). However, such other considerations, and the best interests of the offender, are subordinate to the protection of the community as the paramount consideration.

1009. Section 19AG produces a number of anomalous consequences:

- Under s 19AG(3)(a), a life sentence for a minimum non-parole offence is taken to be a sentence of imprisonment for 30 years for the offence, for the purposes of s 19AG(2). Accordingly, the minimum NPP for such an offence is three-quarters of 30 years, that is, 22 years and 6 months. Although this gives a court flexibility to take into account the age or health of the offender in fixing the NPP, the incongruous result is that an offender who is sentenced to a term of imprisonment of more than 30 years but less than life imprisonment is subject to a higher minimum NPP than an offender who is sentenced to life imprisonment.[1462] This incongruity does not affect the clear meaning and effect of s 19AG; nor is it permissible for a court to impose a life sentence (rather than a determinate sentence of more than 30 years) simply for the purpose of attracting the lower minimum NPP.[1463]
- The sentencing court must impose a NPP even if it would otherwise have had a discretion to make or confirm a RRO, or to decline to fix a NPP (see the legislative note to s 19AG(5)). This means, amongst other things, that s 19AG may result in a short NPP being fixed when a RRO would otherwise have been made.
- The court cannot impose a straight sentence when it could otherwise have done so under s 19AB(3), s 19AC(1) or (2) or s 19AD(2)(f).

1461 The relevant amendments to s 19AG were made by the *Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Act 2019* (Cth), s 3 and Schedule 1, item 13 and came into effect on 11 December 2019. The Second Reading speech of the relevant Minister on the bill for the amending Act (*Commonwealth Parliamentary Debates*, Senate, 1 August 2019, 1424) said that the relevant amendment "*addresses issues raised by*" a report of the Independent National Security Legislation Monitor (INSLM). In that report, *Report to the Prime Minister: The prosecution and sentencing of children for terrorism* (2018), Recommendation #1, the INSLM recommended that s 19AG be amended so that it no longer applies to offenders who were under 18 at the time of the offending. The amendment does not implement that recommendation but instead provides for an exemption for young offenders from the operation of the three-quarters rule in exceptional circumstances.

1462 *Alou v R* (2019) 101 NSWLR 319, [185]-[188].

1463 *Alou v R* (2019) 101 NSWLR 319, [188], [194].

1010. It is not permissible for a sentencing court to discount the head sentence to compensate for, or offset, the effect of s 19AG. Section 19AG does not detract in any way from the obligation of a sentencing judge to first impose a proportionate sentence before considering the non-parole period.[1464]

1011. If the three-quarters rule applies, the court is not required to determine the period or minimum period which would have been required to be served but for the requirements of s 19AG before fixing a NPP in accordance with s 19AG.[1465]

1012. Under s 19ALB of the *Crimes Act*, an offender who has been sentenced to imprisonment for a terrorism offence may be granted federal parole on or after 11 December 2019 only in exceptional circumstances. The provision also covers any federal offender who is subject to a control order under Part 5.3 or who the Attorney-General is satisfied has made statements or carried out activities supporting, or advocating support for, terrorist acts within the meaning of that Part. See "4.11.2 Terrorism-related restrictions on parole".

4.10.9 No power to fix a single NPP for both federal and State/Territory offences

1013. In sentencing an offender for both federal offences and for State/Territory offences, a court may not fix a single NPP for both types of offences, even if under State/Territory law a single NPP may be fixed for multiple offences.[1466] Separate non-parole orders must be made where a NPP is to be imposed for both federal and State/Territory sentences.[1467] The purported fixing of a single NPP for both Commonwealth and State offences is an error of law which cannot be corrected by the sentencing court under s 19AHA of the *Crimes Act 1914* (Cth), because it requires the fresh exercise of the sentencing discretion.[1468]

4.10.10 Obligation on court to explain NPP

1014. A court which fixes a NPP must explain or cause to be explained to the offender, in language likely to be readily understood by them, the purpose and consequences of fixing that NPP (*Crimes Act 1914*, s 16F(1)), including an explanation:

- that service of the sentence will entail a period of imprisonment of not less than the non-parole period and, if a parole order is made, a period of service in the community, called the parole period, to complete service of the sentence; and
- that if a parole order is made, the order will be subject to conditions; and
- that the parole order may be amended or revoked; and
- of the consequences that may follow if the person fails, without reasonable excuse, to fulfil those conditions.

1464 *Lodhi v R* [2007] NSWCCA 360, [255]–[262]; *Alou v R* (2019) 101 NSWLR 319, [181]. See "4.8.8 Period or minimum period to be served is not a consideration in fixing a head sentence".

1465 *Alou v R* (2019) 101 NSWLR 319, [165]-[167], [182]-[183].

1466 *Crimes Act 1914* (Cth), s 19AJ; *Street v Tasmania Police* [2016] TASSC 52, [8].

1467 *Crimes Act 1914* (Cth), s 19AJ; *R v Fulop* [2009] VSCA 296, [9]; *Colbourn v R* [2009] TASSC 108, [21]. Section 19AJ "*must be understood as a prohibition on "mixing" federal and State sentences of imprisonment, whether in an aggregate sentence or by taking offences into account*": *Ilic v R* (2020) 103 NSWLR 430, [41].

1468 *R v Perrey* [2022] SASCA 51, [25].

1015. Failure of a court to comply with the requirements of s 16F does not invalidate a sentence[1469] and may be corrected by the court on an application under s 19AH of the Act: see "6.12.3 Power to correct error in fixing NPP or making RRO: Crimes Act 1914, s 19AH".

4.10.11 Duration of pre-release period of a RRO

1016. In making a RRO, the court must direct, by order, that the person be released, upon giving security by recognizance or otherwise, either immediately or after they have served a specified period of imprisonment for the offence(s): *Crimes Act 1914* (Cth), s 20(1)(b).

1017. If a period of imprisonment is specified under s 20(1)(b), it must be less than the whole period of the sentence: that is, there is no power to order that the offender be released on recognizance only at the completion of the sentence of imprisonment.[1470] A court may, in some circumstances, impose a straight sentence of imprisonment instead ("4.10.7 Discretion to decline to fix a NPP or RRO (straight sentence)"); there is then no provision for release on a recognizance (or parole).

1018. The period of imprisonment to be served is referred to in the Act as the pre-release period (see the definition of "*pre-release period*" in s 16(1)). The maximum duration of the pre-release period, whenever a court is required to make a RRO, is set by s 19AF(1). That subsection requires that the pre-release period must end not later than the end of the sentence, or the last to be served of the sentences.[1471]

1019. Although the duration of a *pre-release period* is limited by the duration of the head sentence(s), the *duration of a recognizance* is not. That is, a recognizance entered into under a RRO may extend beyond the completion of the sentence: see "4.10.15 Maximum length of the recognizance under a RRO".

4.10.12 Immediate release under RRO

1020. Whenever a sentencing court has power to make a RRO under s 20(1)(b) of the *Crimes Act 1914* (Cth) in relation to a sentence of imprisonment for a federal offence **committed before 23 June 2020**, the court may (in accordance with that paragraph as then in force[1472]) make a RRO which directs that the offender be released either "forthwith" (that is, immediately) or after the offender has served a specified period of imprisonment in respect of that offence or those offences.

1469 *R v Hutton* [2004] NSWCCA 60, [17]-[28]; *Tu v R* [2011] NSWCCA 31, [111]-[112]. See also *Crimes Act 1914,* s 19AH(1)(a).

1470 *R v Hung* [2001] NSWCCA 233, [10]-[12].

1471 Prior to the commencement of the *Crimes Amendment (Remissions of Sentences) Act 2021* (Cth) (the amending Act) on 9 December 2021, the relevant requirement in s 19AF(1) was that the pre-release period must end not later than the end of the sentence, or the last to be served of the sentences, "*as reduced by any remissions or reductions under s 19AA*". The amending Act repealed s 19AA and abolished remissions or reductions on federal sentences.

1472 Prior to amendments made by s 3 and Sch 11 of the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), s 20(1)(b) provided: "*Where a person is convicted of a federal offence or federal offences, the court before which he or she is convicted may, if it thinks fit: … (b) sentence the person to imprisonment in respect of the offence or each offence but direct, by order, that the person be released, upon giving security of the kind referred to in paragraph (a) either forthwith or after he or she has served a specified period of imprisonment in respect of that offence or those offences that is calculated in accordance with subsection 19AF(1).*" The amendments which replaced this paragraph do not apply to a court sentencing a person to imprisonment in respect of an offence committed before the commencement of the amendment (Sch 11, Item 4 of the amending Act), that is, before 23 June 2020 (see s 2(1) of the amending Act).

1021. If a court makes a RRO in relation to a sentence of imprisonment for a federal offence **committed on or after 23 June 2020**,[1473] the discretion to order immediate release depends upon whether one or more of the offences is a Commonwealth child sex offence.[1474] If it is, the court may order the immediate release of the person if the court is satisfied that there are exceptional circumstances,[1475] but must otherwise order the release of the person after a specified period (s 20(1)(b)(ii) and (iii)). (There is no specified minimum period; the period must be fixed in accordance with general sentencing principles. See "4.10.1 Determining the length of the period of incarceration".) If none of the offences is a Commonwealth child sex offence, the court may order the release of the person either immediately or after the person has served a specified period of imprisonment (s 20(1)(b)(i)).

1022. The effect of an order (by RRO) that an offender be released immediately is akin to that of a wholly suspended sentence of imprisonment. Any such order must (like any other RRO) provide for the offender to be released on the offender "*giving security, with or without sureties, by recognizance or otherwise, to the satisfaction of the court*" that the offender will comply with specified conditions (s 20(1)(a)). The core condition is that the offender "*will be of good behaviour for such period, not exceeding 5 years, as the court specifies in the order*" (s 20(1)(a)(i)).[1476] Other conditions referred to in s 20(1)(a) may also be imposed.[1477]

1023. If the offender is to be released immediately in relation to two or more federal sentences of imprisonment, a single order in the prescribed form releasing the offender should be made.

1473 Pursuant to amendments made by s 3 and Sch 11 of the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth). The amendments apply in relation to an order made on or after the commencement of Sch 11 (that is, on 23 June 2020 – see s 2(1) of the amending Act), when sentencing the person to imprisonment in respect of an offence committed on or after that commencement: see Sch 11, Item 4 of the amending Act. As amended, s 20(1)(b) uses the term "immediately" instead of "forthwith".

1474 "Commonwealth child sex offence" is defined in s 3(1) of the Act. It means an offence against any of the following provisions of the *Criminal Code* (Cth): (i) Division 272 (Child sex offences outside Australia); (ii) Division 273 (Offences involving child abuse material outside Australia); (iia) Division 273A (Possession of child-like sex dolls etc.); (iii) Subdivisions B and C of Division 471 (which create offences relating to use of postal or similar services in connection with child abuse material and sexual activity involving children); (iv) Subdivisions D and F of Division 474 (which create offences relating to use of telecommunications in connection with child abuse material, sexual activity involving children and harm to children). It also includes an offence against s 11.1, 11.4 or 11.5 of the *Criminal Code* that relates to any of these offences and an offence against one of the specified Divisions or Subdivisions which is taken to have been committed because of section 11.2, 11.2A or 11.3 of the *Criminal Code*.

1475 "Exceptional circumstances" is not defined. In *R v Tootell; Ex parte Attorney-General (Qld)* [2012] QCA 273, [18], the Queensland Court of Appeal, in construing a cognate provision under State law, adopted the following observation from *R v Kelly (Edward)* [2000] QB 198, 208: "*We must construe "exceptional" as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional, a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered*". See also *R v Thompson* [2019] QCA 245, [17], and *R v Jones* [2022] SASCA 105, [39]-[45], which (in analogous circumstances) emphasise the need for a considered exercise of discretion and not a mechanistic approach. The meaning of "exceptional circumstances" in s 20(1)(b)(iii) was discussed in *R v Bredal* [2024] NSWCCA 75, [58]-[64].

1476 The good behaviour period may extend beyond the duration of the head sentence: "4.10.15 Maximum length of the recognizance under a RRO".

1477 The available conditions are the same as those for a bond with conviction under s 20(1)(a). See the discussion of the various conditions in "4.5 Bond with conviction – *Crimes Act* 1914".

1024. The process of consideration as to whether to release a federal offender immediately under s 20(1)(b) has been described as involving three steps:[1478]

- All the relevant sentencing factors (notably those in s 16A) must be taken into account in deciding whether to impose a sentence of imprisonment and, if so, the length;
- It may be necessary for the court to consider whether, pursuant to s 19AC(4), the court should decline to make a RRO; and
- In deciding whether to release the offender immediately the court must consider the same factors applicable to the imposition and fixing of the term of imprisonment. However, the weight to be accorded to these factors and the manner in which they are relevant will differ as a result of the different purpose underlying each function.

4.10.13 Single RROs required for two or more federal offences

1025. Each of the provisions of the *Crimes Act 1914* (Cth) relating to the making of a RRO contemplates the making of a single order in respect of multiple federal sentences of imprisonment. For example:

- Section 20(1)(b) provides for the making of a RRO where a person is convicted before a court of "*a federal offence or federal offences*". The court may "*sentence the person to imprisonment in respect of the offence or each offence"* but direct, by order, that the person be released, upon giving security, either immediately or after the person has served a specified period of imprisonment *"in respect of that offence or those offences"* [emphasis added].
- If a court sentences an offender for two or more federal offences to imprisonment which in the aggregate is for more than 6 months but not exceeding 3 years, and the offender is not already serving or subject to a federal sentence, s 19AC requires that "*the court must make a recognizance release order in respect of that sentence or sentences and must not fix a non-parole period*" [emphasis added].
- If at the time of sentence for one or more federal offences, an offender is subject to an existing RRO, and the offender is sentenced to a term of imprisonment, one of four courses of action provided for by s 19AE(2) (depending on the circumstances) is for the court to "*make a new recognizance release order in respect of all federal sentences the person is to serve or complete*" [emphasis added].

1026. That is, whenever a RRO is made in respect of more than one federal sentence of imprisonment, a single RRO must be made in respect of all of those sentences. It is an error to make separate RROs in respect of each sentence of imprisonment.[1479]

4.10.14 Can a RRO be combined with a sentence or order under s 20AB(1) for the same offence(s)?

1027. In *Tran*,[1480] the sentencing judge sentenced a federal offender to imprisonment for one year and eight months, to be served on a home detention order (HDO) for the first ten months and thereafter to be released on a RRO. The Full Court of the Supreme Court of South Australia held that the judge was not empowered to make that order.

1478 *De Hollander v R* [2012] WASCA 127, [86]; *Larkin v R* [2012] WASCA 238 [75]-[76].

1479 *R v Schultz* [2008] NSWCCA 199, [13]; *DPP (Cth) v Couper* (2013) 41 VR 128, [122]–[129]; *R v Hutchinson* [2018] NSWCCA 152, [65].

1480 *R v Tran* [2019] SASCFC 5.

1028. Although a HDO was an order which fell within s 20AB(1AA) of the *Crimes Act 1914* (Cth), the Court held that such an order could not be combined with a RRO because the enforcement provisions governing breaches of orders made pursuant to ss 20(1) and 20AB(1) of the Act suggest that the exercise of those powers are mutually exclusive.[1481] For example, one of the sanctions for breach of an order under s 20AB(1) is resentencing for the original offence (s 20AC(6)(b)); it was unlikely that it was intended that a prisoner who had served the entirety or part of a term of imprisonment would be resentenced in the event of a subsequent breach.[1482] The power to resentence would appear anomalous, and would impose what may be considered to be double punishment, if a s 20AB(1) order is imposed in addition to a sentence of imprisonment which is actually served in prison.[1483]

1029. The implication of this construction is that a standalone order under s 20AB(1) could never be made in conjunction with a sentence of imprisonment for a federal offence, if the offender was required to serve part of the sentence in prison.

1030. Moreover, under the State legislation as then in force,[1484] a HDO could only be imposed for the whole of a term of imprisonment or, if a NPP was fixed, for that period. It could not be made in circumstances which corresponded to release on a RRO, that is, as a means of serving that part of a suspended sentence before the release of the offender on a bond. Therefore, the Court held, a HDO could not be imposed in "corresponding cases" to cases in which an offender was released on a RRO after serving a period of imprisonment.[1485]

1031. In *Medalian*,[1486] the Full Court considered the position which applied in relation to a HDO following the passage of the *Sentencing Act 2017* (SA). Under that Act, a HDO could not be imposed in conjunction with a suspended sentence bond (the State counterpart of a RRO). Bampton J (with whom Kourakis CJ and Parker J agreed) concluded, "*[a]pplying the reasoning in Tran, the sentence imposed by the Judge on Mr Medalian, comprising both the HDO and the RRO, was not authorised by law*".[1487]

1032. Notably, Bampton J said that "*HDOs and RROs are each standalone sentencing options*"[1488] and that the "*RRO regime prescribed in Part IB of the Crimes Act is exhaustive and leaves no scope for any State sentencing options to be imposed in addition to a RRO.*"[1489] This conclusion was broader than that in *Tran*, in that observations in *Tran* appeared to leave open the possibility that a HDO (under the State law then in force) could have been made under s 20AB(1) in conjunction with an order for the *immediate release* of an offender on a RRO, that is, for the whole term of the sentence of imprisonment.[1490]

1481 *R v Tran* [2019] SASCFC 5, [54]-[57].
1482 *R v Tran* [2019] SASCFC 5, [57].
1483 *R v Tran* [2019] SASCFC 5, [51].
1484 *Criminal Law (Sentencing) Act 1988* (SA), s 33BB.
1485 *R v Tran* [2019] SASCFC 5, [59]-[62].
1486 *R v Medalian* (2019) 133 SASR 50.
1487 *R v Medalian* (2019) 133 SASR 50, [18].
1488 *R v Medalian* (2019) 133 SASR 50, [17].
1489 *R v Medalian* (2019) 133 SASR 50, [16].
1490 *R v Tran* [2019] SASCFC 5, [48], [54]-[57]. The observations, *obiter dicta*, in *Tran* appear to be inconsistent with the ratio of the decision in *Atanackovic v R* (2015) 45 VR 179, especially at [82]-[87]. Contrary to the dicta in *Tran*, the basis for the decision in *Atanackovic* was not merely that the State scheme under consideration was directly inconsistent with the federal scheme, but that, consistently with *Hili v R* (2010) 242 CLR 520, the scheme of Div 4 of Part IB was to make comprehensive provision for the conditions which could be imposed on an offender when released as part of a sentence that includes a term of imprisonment and left no room for the application of different provisions.

1033. In support of the broader proposition in *Medalian*, Bampton J cited the decision of the Victorian Court of Appeal in *Atanackovic*,[1491] in which the Court held that the option under the *Sentencing Act 1991* (Vic) of imposing a community correction order (CCO) in addition to a term of imprisonment was not made available by s 20AB in the sentencing of a federal offender because it was inconsistent with Part IB of the *Crimes Act*. In particular the Court held that the comprehensive regime in Division 4 of Part IB for conditional release of an offender who is sentenced to a term of imprisonment for a federal offence (which applies to the exclusion of State or Territory law) leaves no room for the application of *any State or Territory sentence or order by which conditions are imposed on an offender when released as part of a sentence that includes a term of imprisonment*.[1492] See "4.7.15 Whether sentence or order can be combined with a term of imprisonment for the same offence".

4.10.15 Maximum length of the recognizance under a RRO

1034. Although s 19AF of the *Crimes Act 1914* (Cth) makes it clear that *the pre-release period* under a RRO must end not later than the end of the head sentence, or the last of the head sentences, to which it relates, the legislation does not specify the maximum period which *a recognizance (or other security) under a RRO may remain in force* following the release of the offender.

1035. In *O'Brien*[1493] (which was followed in *Walsh*[1494]), the Victorian Court of Criminal Appeal proceeded on the basis that a recognizance under a RRO can extend beyond the completion of the sentence (or, if more than one, the total effective sentence). However in *Selimoski v Picknoll*,[1495] the Full Court of the Supreme Court of Western Australia held that it could not.

1036. Under s 20(1) of the Act, a recognizance (or other security) under a RRO may be subject to a condition that the offender will be of good behaviour for such period, not exceeding 5 years, as the court specifies in the order. Given that the duration of the head sentence or total effective sentence in relation to which a RRO may be fixed will usually be no more than 3 years, if that period limited not only the duration of the pre-release period but the duration of the entire RRO, a good behaviour period would be so constrained as to be of little value in many cases.

1037. Nevertheless, the Court in *Selimoski v Picknoll* concluded that, despite the provision for a good behaviour condition to extend for up to 5 years, a recognizance under s 20(1)(b) could not extend beyond the sentence. It based that conclusion on s 20A of the Act. On the Court's interpretation of that section, proceedings for breach of a RRO could not be commenced after the completion of the sentence. By contrast, the Court in *O'Brien* did not construe s 20A as imposing such a limitation.

1038. Whatever the correct construction of s 20A as then in force, following later amendments (with effect from 16 January 1995) it is now clear that proceedings for breach of a RRO can be brought after the completion of the head sentence or total effective sentence, and indeed in some cases after the good

1491 *Atanackovic v R* (2015) 45 VR 179 (Weinberg, Kyrou and Kaye JJA).

1492 *Atanackovic v R* (2015) 45 VR 179, [85]-[87].

1493 *R v O'Brien* (1991) 57 A Crim R 80. In *O'Brien*, for practical reasons the court did not in fact extend the bond beyond the end of the federal sentence.

1494 *R v Walsh* (1993) 69 A Crim R 579. See also *Edwards v Pregnell* (1994) 74 A Crim R 509, 511–513 and *R v Woods* [1999] ACTSC 60, [92], in which the decisions in *O'Brien* and *Walsh* were followed.

1495 *Selimoski v Picknoll* (WA SC (Full Court), 9 October 1992, unreported).

behaviour period under the RRO.[1496] In light of those amendments, there is no reason to read the power to impose a RRO as subject to the implied limitation referred to in *Selimoski v Picknoll*.

1039. In *Smith*,[1497] the Queensland Court of Appeal distinguished *Selimoski v Picknoll* on the basis of the amendments, and held that a recognizance (or other security) under a RRO may be conditional on the offender being of good behaviour for up to 5 years, and that the RRO may continue in force for the whole of that period. That approach has been adopted in a number of other cases following the amendments.[1498] The issue now appears to be settled, in accordance with the decision in *Smith*.[1499]

4.10.16 Core condition of a RRO: good behaviour

1040. The conditions which may be imposed under a RRO are set out in s 20(1)(a) of the Act. A core condition is that the offender "*will be of good behaviour for such period, not exceeding 5 years, as the court specifies in the order*" (s 20(1)(a)(i)).[1500]

1041. As noted above ("4.10.15 Maximum length of the recognizance under a RRO"), it is now clear that such a good behaviour period may extend beyond the completion of the sentence of imprisonment. If the recognizance takes effect from the date of release of the offender, the good behaviour period may extend for up to 5 years from that date.

1042. The good behaviour period fixed under s 20(1)(a)(i) should be at least as long as (and preferably longer than) the period of any condition under s 20(1)(a)(iv), because proceedings for breach of a condition (except a breach constituted by the commission of an offence) cannot be brought after the good behaviour period (s 20A(1A)).

4.10.17 Other conditions which may be imposed under a RRO

1043. Section 16A(3) of the *Crimes Act 1914* (Cth) requires that, in determining whether an order under s 20(1) is the appropriate sentence, the court must have regard to the nature and severity of the conditions that may be imposed on, or may apply to, the offender under that sentence or order.

1496 See "4.10.25 Breach of RRO – s 20A".

1497 *R v Smith* [2004] QCA 417, [3]-[9].

1498 *R v Campbell* (1997) 95 A Crim R 391, 397-8; *Fowler v Gualberto* [2006] ACTSC 106, [12]-[16]; *R v MB* [2014] ACTSC 399, [32]; *New South Wales v NW* [2019] NSWSC 415, [19]-[22]; *Walshe v R* [2020] ACTCA 5. See also *Johnsson v R* [2007] NSWCCA 192, [30].

1499 In *Mourtada v R* [2021] NSWCCA 211, [7], Basten JA referred to *Selimoski v Picknoll* and doubted whether the good behaviour period of a RRO could extend beyond the end of the sentence. His Honour reiterated those doubts in *Spinks v R* [2021] NSWCCA 308, [54]. The issue does not appear to have been the subject of submissions in either case. His Honour did not refer to the prior authorities contrary to *Selimoski v Picknoll*, or to the subsequent material amendments, or to the decision in *Smith* or to *Johnsson v R* [2007] NSWCCA 192, [30], where *Smith* was cited with approval. The observations of Basten JA must therefore be regarded as *per incuriam*.

1500 In *Veale v R* [2022] NSWCCA 154, [66], the Court, in resentencing the offender, declined to impose a good behaviour condition and said that "*such a condition is not required in relation to an order made under s 20(1)(b)*". That view was formed without the issue having been raised with the parties and without the benefit of submissions. In the view of the CDPP, a good behaviour condition under s 20(1)(a)(i) (as applied by s 20(1)(b)) is a mandatory condition of a RRO. A requirement to be of good behaviour is, and has always been, of the very essence of any s 20 recognizance, whether a good behaviour bond under s 20(1)(a) or a RRO under s 20(1)(b). The requirement in relation to a RRO also corresponds to the mandatory condition of a parole order (s 20AN(a)). The sentence imposed by the Court in *Veale*, like any other sentence, is not a precedent, and is not authority for the proposition that a good behaviour condition is optional.

1044. Other conditions which may be imposed are:

- the payment of reparation, restitution, compensation or costs (s 20(1)(a)(ii)–- see "4.5.4 Other conditions: reparation, restitution, compensation or costs (s 20(1)(a)(ii))");
- the payment to the Commonwealth of a pecuniary penalty (s 20(1)(a)(iii)), the maximum of which is fixed by s 20(5) (generally the maximum fine applicable to the offence – see "4.5.5 Other conditions: pecuniary penalty (s 20(1)(a)(iii))"); or
- that the offender will, during a period not exceeding 2 years, comply with such other conditions (if any) as the court thinks fit to specify (s 20(1)(a)(iv)).

1045. Although the court is empowered to order payment of reparation, restitution, compensation or costs as a condition of a recognizance, the offender is not to be imprisoned for failure to comply with the condition (s 20(2A)). It will therefore generally be more appropriate to make a separate order for such a payment, pursuant to s 21B of the Act or other applicable power, rather than make payment a condition of a recognizance.[1501]

1046. The residual power to impose other conditions applicable for up to 2 years (s 20(1)(a)(iv)) is broad but not unlimited(see the discussion of permissible and impermissible conditions of a s 20 bond in "4.5 Bond with conviction – Crimes Act 1914, s 20(1)(a)"). It probably does not permit an order for the payment of money (for example, to a charity), since the circumstances in which such payments may be ordered are exhaustively dealt with in sub-paragraphs (ii) and (iii) (see "4.5.13 Other conditions: payment of money to charity"). As to whether unpaid work may be required, see "4.5.10 Other conditions: unpaid community service as a condition of a bond". A condition imposed must not be inconsistent with the release of the person, and must be reasonably capable of compliance.[1502] A condition must also "*be expressed in unambiguous and definitive language, so that the person submitting to it is left in no doubt as to what are the precise obligations to be satisfied*".[1503]

1047. It is implicit that a condition under s 20(1)(a)(iv) may specify that the person "*be subject to the supervision of a probation officer appointed in accordance with the order*" and "*obey all reasonable directions of the probation officer*", because such a condition is referred to in s 20(1A). Under that subsection, if the court imposes such a condition it "*must also specify the condition that the person will not travel interstate or overseas without the written permission of the probation officer.*"

1048. The legislation itself gives, as an example of a condition which may be specified under s 20(1)(a)(iv), a condition that "*the person will undertake a specified counselling, education or treatment program during a specified part of, or throughout, the specified period*". By way of example, the following conditions has been used in Victoria (by agreement with State authorities) to require participation in the State sex offenders program:

> *To be under the supervision of the Deputy Commissioner, Community Correctional Services and Sex Offender Management or his or her nominee; and*
>
> *To attend, undertake and complete the Sex Offender's Program within a period of 2 years; or*

1501 *Hayes v R* [2014] VSCA 309, [9], [26]. As to the general power to make a reparation order, see "5.3 Reparation – Crimes Act 1914, s 21B".

1502 *R v Keur* (1973) 7 SASR 13, 15.

1503 *Temby v Schulze* (1991) 57 A Crim R 284, 289. As to the other requirements for a valid condition of a bond, see *Dunn v Woodcock* [2003] NTSC 24, [7].

To attend for assessment and, if assessed as suitable, treatment for sex offender programs or programs to reduce re-offending as directed by Deputy Commissioner, Community Correctional Services and Sex Offender Management or his or her nominee.

1049. If one or more of the offences for which the offender is sentenced is a Commonwealth child sex offence committed on or after 23 June 2020, mandatory conditions are required to be specified in the RRO: see "4.10.18 Required condition of RRO for Commonwealth child sex offence".

4.10.18 Required condition of RRO for Commonwealth child sex offence

1050. If at least one of the offences of which the offender is convicted (and for which a RRO is made) is a Commonwealth child sex offence committed on or after 23 June 2020, the court must specify particular conditions in a RRO (*Crimes Act 1914* (Cth), s 20(1B)). The required conditions (under s 20(1)(b), as mentioned in s 20(1)(a)(iv)) are conditions that the person will, during the specified period:

(a) be subject to the supervision of a probation officer appointed in accordance with the order; and
(b) obey all reasonable directions of the probation officer; and
(c) not travel interstate or overseas without the written permission of the probation officer; and
(d) undertake such treatment or rehabilitation programs that the probation officer reasonably directs.

1051. An example of RRO conditions imposed under s 20(1)(a)(iv) on a person convicted of a Commonwealth child sex offence (including the conditions required by s 20(1B)) can be found in the orders of the New South Wales Court of Criminal Appeal in resentencing the offender in *Veale*,[1504] which included the following conditions:

1. *the appellant be subject to the supervision of a probation officer, namely the Commissioner of Corrective Services NSW or his or her nominee (the "probation officer"), until 15 October 2023;*
2. *obey all reasonable directions of the probation officer;*
3. *not travel interstate or overseas without the written permission of the probation officer;*
4. *undertake such treatment or rehabilitation programs that the probation officer reasonably directs;*
5. *if directed, the appellant be assessed for psychological counselling, and attend psychological counselling if it is recommended as result of the assessment, or if it is considered necessary by the probation officer;*
6. *if directed, the appellant be assessed for psychiatric counselling, and attend psychiatric counselling if it is recommended as a result of the assessment, or if it is considered necessary by the probation officer;*
7. *the appellant authorise and direct all medical, psychiatric, psychological, and other professional advisers or counsellors to make available to the probation officer a report on his medical and/or other conditions on request;*
8. *the appellant be assessed for drug counselling, and attend drug counselling if it is recommended as a result of the assessment, or if it is considered necessary by the probation officer;*

1504 *Veale v R* [2022] NSWCCA 154, [65] and Annexure A.

9. *the appellant continue taking his prescribed medication and/or comply with treatment as directed by his psychiatrist/general practitioner until the psychiatrist/general practitioner informs the probation officer in writing that it is no longer necessary;*
10. *the appellant not communicate or attempt to communicate with the complainant (being the person in relation to whom the offences charged by counts 2 and 3 and the s 16BA offence were committed) either directly or indirectly, including by telephone or other electronic means or through another person;*
11. *the appellant not approach the complainant or the complainant's place of residence or work;*
12. *report to the Newcastle Community Corrections Office upon release from custody and in any event by 5pm on 20 July 2022; and*
13. *notify the probation officer of any change of residential address or employment within three working days after the change.*

4.10.19 Travel restriction orders

1052. A court which makes a RRO for a serious drug offence or certain passport-related offences may, at the same time or a later time, make certain travel restriction orders under s 22 of the *Crimes Act 1914* (Cth). See "5.2 Travel restriction orders – Crimes Act 1914, s 22".

4.10.20 Form of RRO

1053. There is a prescribed form of RRO in the *Crimes Regulations 2019* (Cth).[1505] The prescribed form is applicable whether the offender is to be released immediately or after serving a specified period of imprisonment. A State/Territory bond form is ineffective and should not be used.[1506]

1054. Although the prescribed form requires that the offences to which the RRO relates be specified in the form, the omission or misdescription of such an offence will not necessarily render the RRO invalid or unenforceable.[1507]

1055. A RRO, like any other s 20 order, must specify the monetary amount of security to be given by the offender.[1508] The section does not limit the amount. A bond can also involve a surety but this is rarely, if ever, required.

1056. If the offender is to be released under a RRO after serving a period of imprisonment, it seems clear from the terms of s 20(1)(b) that the bond imposed as part of the RRO commences on the release of the person and not on the making of the order. On that construction, an offence committed before the offender is released would not be a breach of the condition to be of good behaviour.

4.10.21 Obligation on court to explain RRO

1057. A court which makes a RRO must explain or cause to be explained to the offender, in language likely to be readily understood by them, the purpose and consequences of making that RRO (*Crimes Act 1914*, s 16F(2)), including an explanation:

1505 Form 12 of Schedule 1 of the *Crimes Regulations 2019* (Cth).
1506 *DPP (Cth) v Cole* (2005) 91 SASR 480; *R v Woods* (2009) 24 NTLR 77.
1507 Cf *Chatterton v Police* (2020) 136 SASR 431.
1508 *R v Chapman* [2001] NSWCCA 457, [17]; *Assafiri v R (No.2)* [2007] NSWCCA 356, [1]; *R v Donald (No 2)* [2013] NSWCCA 290.

- that service of the sentence will entail a period of imprisonment equal to the pre-release period (if any) specified in the order and a period of service in the community equal to the balance of the sentence; and
- of the conditions to which the order is subject; and
- of the consequences that may follow if the person fails, without reasonable excuse, to fulfil those conditions; and
- that any recognizance given in accordance with the order may be discharged or varied under section 20AA.

1058. Failure of a court to comply with the requirements of s 16F does not invalidate a sentence[1509] and may be corrected by the court on an application under s 19AH of the Act: see "6.12.3 Power to correct error in fixing NPP or making RRO: Crimes Act 1914, s 19AH".

4.10.22 Release under a RRO

1059. If an offender is sentenced to a term of imprisonment for a federal offence and a recognizance release order (RRO) under s 20(1)(b) of the *Crimes Act 1914* (Cth) is made, the offender must be released from custody immediately upon the completion of the pre-release period, unless there is some other lawful basis for the continuing detention of the offender,[1510] provided the security required by the court (usually by recognizance) has been given.

1060. Once released, the offender must comply with a condition under the RRO to be of good behaviour and with any other applicable conditions. The offender is not, by reason of the sentence or the RRO, subject to control or supervision, except as required by a condition of the RRO.

1061. A court may discharge or vary a RRO: see "4.10.24 Discharge or variation of RRO".

1062. As to the consequences of a breach of a RRO, see "4.10.25 Breach of RRO – s 20A".

4.10.23 Correction of error in fixing NPP/RRO

1063. Section 19AH of the *Crimes Act 1914* (Cth) provides that where a court fails to fix, or properly to fix, a NPP, or to make, or properly to make, a RRO, under the Act, "*that failure does not affect the validity of any sentence*". The section also empowers the court to correct the error upon application to it. See "6.12.3 Power to correct error in fixing NPP or making RRO: Crimes Act 1914, s 19AH".

1064. Section 19AHA confers an additional power for a sentencing court to rectify an error of a technical nature made by the court or a defect of form or an ambiguity in an order imposing a sentence of imprisonment, an order fixing a NPP or a RRO. The section also preserves the validity of the order despite the error, defect or ambiguity. See "6.12.2 Power to correct error in sentence of imprisonment: Crimes Act 1914, s 19AHA".

1509 *R v Hutton* [2004] NSWCCA 60, [17]-[28]; *Tu v R* [2011] NSWCCA 31, [111]-[112]. See also *Crimes Act 1914,* s 19AH(1)(a).

1510 *Selimoski v Picknoll* (WA SC (Full Court), 9 October 1992, unreported).

4.10.24 Discharge or variation of RRO

1065. Section 20AA provides a mechanism for an application to be made to the court which made a RRO for (amongst other things) discharge of a recognizance pursuant to a RRO or for variation of its terms. An application may be made by:

- an authorised person (defined in s 20AA(12) to mean "*the Attorney-General, the Director of Public Prosecutions or a person appointed under section 69 of the Judiciary Act 1903 to prosecute indictable offences against the laws of the Commonwealth*"),
- the person who entered into the recognizance,
- a surety or
- a probation officer.

1066. On such an application, the court may, amongst other things, reduce the duration of the recognizance, extend it (up to 5 years from when the recognizance was entered into), alter the conditions, insert conditions or reduce an amount to be paid under it (s 20AA(3)).

4.10.25 Breach of RRO – s 20A

Proceedings for breach of a RRO

1067. The procedure for dealing with a breach of a RRO is governed by s 20A of the *Crimes Act 1914* (Cth).

1068. Breach action is initiated by information laid before a magistrate alleging that the person has, without reasonable cause or excuse, failed to comply with a condition of the order (s 20A(1)).[1511] The magistrate may issue a summons directing the person to appear, on a date and at a time and place fixed in the summons, before the court by which the order was made (s 20A(1)(a)).

1069. If the information is laid on oath and the magistrate is satisfied that proceedings by summons might not be effective, the magistrate may issue a warrant for the apprehension of the person (s 20A(1)(b)). Provision is made for bail or remand of the person following their arrest (s 20A(4)).

1070. If the person fails to attend before the court as required, the court may issue an arrest warrant (s 20A(2)).

Time for commencement of breach proceedings

1071. The time limit for commencing proceedings for breach of a RRO depends upon whether the breach is constituted by the commission of an offence:

- If the breach is not constituted by the commission of an offence, the information must be laid before the end of the period for which the person is required by the order to give security to be of good behaviour (s 20A(1A)). (The good behaviour period is not limited to the term of the head sentence(s) to which the RRO relates: see "4.10.15 Maximum length of the recognizance under a RRO".)
- If the breach is constituted by the commission of an offence, proceedings for breach may be commenced at any time.[1512]

1511 There is no prescribed form of information. The CDPP has developed a form of information and summons.
1512 Cf *DPP (Cth) v Fabri* [2008] NSWSC 655.

Disposition options if a breach is proven

1072. If the court which made the RRO is satisfied that the person has without reasonable cause or excuse failed to comply with a condition of the order, the options available to the court are set out in s 20A(5)(c) (read in conjunction with s 20A(5A) and (5B)). They are:

- *impose a monetary penalty* not exceeding $1,000 (s 20A(5)(c)(ia));[1513] or
- amend the order to *extend the good behaviour period* (s 20A(5)(c)(ib)), but not so as to be more than 5 years (s 20A(5A));[1514] or
- revoke the order and *make an order under s 20AB* (s 20A(5)(c)(ic)); or
- revoke the order and deal with the person for the offence or offences in respect of which the order was made by *ordering that the person be imprisoned* for that part of each sentence of imprisonment fixed under s 20(1)(b) that the person had not served at the time of their release (s 20A(5)(c)(i));[1515] or
- *take no action* (s 20A(5)(c)(ii)).

1073. While it is clear that the options in s 20A(5)(c)(ib), (ic), (i) and (ii) are necessarily mutually exclusive, it is unclear whether the court may impose a monetary penalty under sub-paragraph (ia) in conjunction with extension of the good behaviour period under sub-paragraph (ib) or with the exercise of the options under s 20A(5)(c)(ic) or s 20A(5)(c)(i).[1516] As a general principle, in the view of the CDPP, a court may not impose two sanctions for a single offence, in the absence of statutory authority;[1517] the same principle may be applicable to the options under s 20A(5)(c).

No power to reduce the period of imprisonment

1074. Where a court exercises the power under s 20A(5)(c)(i) the court does not have the power to reduce the period of imprisonment which stands to be served.[1518] If the court proceeds under that sub-paragraph, the offender must be ordered to serve the whole of the unserved portion of the sentence.

1075. In some cases,[1519] upon making an order under s 20A(5)(c)(i), the sentencing court has backdated the commencement of the order to allow credit for a period in custody for the offences which constituted the breach, with the result that the offender was not required to serve the whole of the unserved period of imprisonment. The basis of the court's power to do so has not been addressed in those cases and the

1513 Such a penalty falls within the definition of a "fine" (s 3(2)) and is therefore enforceable in the same way: see "4.6.10 Enforcement of fines – Crimes Act 1914, s 15A".

1514 If the order is so extended, security given under the RRO is taken to be security to be of good behaviour for the amended period: s 20A(5B).

1515 However imprisonment cannot be imposed for failure to pay reparation, restitution, compensation or costs that were a condition of the RRO: s 20(2A).

1516 Powers to impose a fine in conjunction with another sentence (e.g. *Crimes Act 1914*, ss 4B(2), (2A), (3), 4J(3), (5)) would appear to be inapplicable.

1517 See "4.12.4 Combinations of sentences".

1518 *R v Campbell* (1997) 95 A Crim R 391, 398; *Kay v Hickey* [2002] TASSC 108, [5]; *Sweeney v Corporate Security Group* (2003) 86 SASR 425, [163]; *Ferenczfy v DPP* [2004] SASC 208; *R v Pishdari* [2018] SASCFC 94, [381] fn 56; *Oatley v DPP (Cth)* [2021] SASCA 108, [23].

1519 E.g. *Tabacco v Police* [2008] SASC 77, [13]; *R v Walshe (No 2)* [2019] ACTSC 137 (upheld on appeal by the offender: *Walshe v R* [2020] ACTCA 5).

authority to do so is open to doubt.[1520] In the analogous circumstance in which a federal parole order or licence is revoked as a result of the parolee or licensee being sentenced to imprisonment for more than 3 months, there is no power to backdate the commencement of the unserved portion of the sentence which falls to be served.[1521]

Revoking the RRO and making an order under s 20AB

1076. Under s 20A(5)(c)(ic), the court may "*revoke the order and make an order under section 20AB*". Section 20AB makes available certain State and Territory sentencing options to the sentencing of a federal offender: see "4.7 Sentences and orders made available by Crimes Act 1914, s 20AB".

1077. The power in s 20A(5)(c)(ic) has been subject to different interpretations by inferior courts. Some courts have treated it as, in effect, a power to resentence the offender. The view of the CDPP is that s 20A(5)(c)(ic) does not empower a court to resentence the offender or otherwise to interfere with the sentence of imprisonment. Paragraph (c) applies "*in the case of a person who has been released by an order made under paragraph 20(1)(b)*". That paragraph provides that where a person is convicted of a federal offence or federal offences, the court before which they are convicted may, if it thinks fit, "*sentence the person to imprisonment in respect of the offence or each offence but direct, by order, that the person be released*" upon giving security. The paragraph distinguishes between the sentencing of the offender to imprisonment (the head sentence) and the making of an order that the offender be released (either immediately or after a specified period) upon giving security of the required kind (a RRO). The power in s 20A arises where the court is satisfied that the offender "*has, without reasonable cause or excuse, failed to comply with a condition of the order*" – that is, the RRO pursuant to which the offender is released. Sub-paragraph s 20A(5)(c)(ic) empowers a court in such a case to revoke only "*the order*" (that is, the RRO for the offender's release). It does not confer, either expressly or by implication, any power to revoke or vary in any way the sentence of imprisonment imposed on the offender. As is the case with the power in s 20A(5)(c)(i), the power in sub-paragraph (ic) to revoke the RRO leaves the sentence of imprisonment in place. The power to revoke the RRO and make an order under s 20AB provides an alternative consequence to the immediate service of the unserved portion of the sentence.

1078. This construction is supported by the following observation in *Oatley*:[1522]

> *Section 20A(5)(c)(ic) of the Crimes Act 1914 (Cth) empowers the Court to revoke the recognizance release order and make an order pursuant to s 20AB. The revocation of the recognizance release order would mean that the sentence of imprisonment remains and the Court has no power to set that sentence aside.*

1520 Section 16E(1) of the *Crimes Act 1914* (Cth) provides that "*the law of a State or Territory relating to the commencement of sentences and of non-parole periods applies to a person who is sentenced in that State or Territory for a federal offence*" applies in the same way as it applies to a State or Territory offender. See "4.8.10 Allowance for pre-sentence custody for the offence". Even assuming that the relevant State or Territory law is expressed in terms that are capable of applying upon activation of a sentence of imprisonment and not merely upon the initial imposition of a sentence, a question might arise whether s 16E applies such a law to the making of an order under s 20A(5)(c)(i). Such an order does not amount to passing or imposing a sentence of imprisonment: *Kay v Hickey* [2002] TASSC 108, [10]; *Oatley v DPP (Cth)* [2021] SASCA 108, [20]. The deeming provision in s 20A(8), and the contrast with s 20A(5)(b)(ii), may be said to support this.

1521 *Crimes Act 1914*, s 19AS. The court sentencing for the breaching offence may make orders which ameliorate this position: see "4.11.11 Automatic revocation of parole or licence".

1522 *Oatley v DPP (Cth)* [2021] SASCA 108, [66].

1079. Under s 20AB, a State or Territory order may be made in relation to a federal offender in a particular case only if two conditions are met. First, the order must be an order of a kind described in, or prescribed under, s 20AB(1AA). Second, a court must be empowered, under the law of the State or Territory, to make such an order "*in corresponding cases*". The result is that a State or Territory order can be made under s 20A(5)(c)(ic) only if it falls within s 20AB(1AA) and if, under the law of that State or Territory, such an order could made in cases corresponding to the instant case. If, under the law of the relevant State or Territory, the order is not one which can be made alongside a sentence of imprisonment or cannot be made in the corresponding case of the breach of a bond it will not be available under s 20A(5)(c)(ic).[1523]

Extension of the period of the bond

1080. The power in s 20A(5)(c)(ib) to extend the period of the good behaviour bond applies even if the good behaviour period has expired.[1524]

Exercise of the discretion in s 20A(5)

1081. The options in s 20A(5) are not expressed in language which suggests that activating that part of the sentence of imprisonment which has not been served is necessarily the predominant option, or the starting point in considering the course to be followed. The court should simply select whichever of the options available to it seems to be appropriate, having regard to all relevant circumstances of the particular case.[1525]

1082. In dealing with the offender under s 20A(5), the court must take into account (a) the fact that the order was made, (b) anything done under the order and (c) any other order made in respect of the offence or offences (s 20A(6)). A breach of the recognizance which is not alleged in the information may be taken into account in a general way, but cannot form a basis for the exercise of the discretion in s 20A(5); the court cannot act on breaches of the recognizance which were neither charged nor proved.[1526]

1083. The length of the period to be served if the sentence were to be activated in full is a relevant consideration. If the breach consists of the commission of a further offence, the court should also take into account:

- the character of the breaching offence compared with the original offence, and
- the interaction between the sentence imposed for the breaching offence and the imposition of one of the options available under s 20A(5).[1527]

1084. The court should give adequate reasons for its decision.[1528]

Other orders upon breach

1085. The court may also order that any recognizance or surety be estreated, or that any other security be enforced (s 20A(7)).

1523 *Oatley v DPP (Cth)* [2021] SASCA 108, [69].
1524 *Oatley v DPP (Cth)* [2021] SASCA 108, [69].
1525 *Sweeney v Corporate Security Group* (2003) 86 SASR 425, [159]-[160]; *Oatley v DPP (Cth)* [2021] SASCA 108, [19]-[20], [32].
1526 *Oatley v DPP (Cth)* [2021] SASCA 108, [47]-[48], [55]-[57].
1527 *Sweeney v Corporate Security Group* (2003) 86 SASR 425, [162], [170].
1528 *Oatley v DPP (Cth)* [2021] SASCA 108, [19]-[32].

4.11 Imprisonment: federal parole, leave and licence

4.11.1 Parole decisions

1086. The release of a federal offender on parole, or on leave or licence, is governed by Division 5 of Part IB of the *Crimes Act 1914* (Cth). State or Territory laws which restrict the availability of parole or which specify consequences for breaches of parole do not apply to federal offenders.[1529]

1087. An offender who is sentenced to a term or terms of imprisonment for a federal offence may be released on parole only if a non-parole period (NPP) has been fixed in respect of that sentence or those sentences. An offender sentenced to a "straight sentence" cannot be released on parole (although they may be released on licence: see "4.11.8 Release on licence").

1088. An offender has no entitlement to parole, even if their NPP has expired.[1530] Federal parole is granted at the discretion of the Commonwealth Attorney-General or their delegate,[1531] pursuant to s 19AL of the *Crimes Act*.[1532] Special restrictions apply to the grant of parole to terrorism offenders, offenders subject to a control order and offenders who have supported, or advocated support for, terrorist acts: see "4.11.2 Terrorism-related restrictions on parole". The likelihood or unlikelihood that the offender will be released on parole is not a relevant matter for consideration by a court sentencing a federal offender.[1533]

1089. Before the end of a NPP fixed for one or more federal sentences, the Attorney-General must make (or refuse to make) an order directing that the person be released from prison on parole.[1534] However, if the person would still be in prison under a State or Territory sentence after the expiry of the federal NPP, the Attorney-General is not required to make a decision about parole until the time of the person's release (or expected release) from prison under the State or Territory sentence.[1535] If the Attorney-General does not make the relevant decision within time, they must make the decision as soon as practicable thereafter.[1536]

1529 However State or Territory law may provide that a conviction or finding of guilt for a federal offence can result in the cancellation of parole for a State or Territory offender: e.g. *Corrections Act 1986* (Vic), s 77(6).

1530 *R v Hatahet* [2024] HCA 23, [20], [22] (Gordon A-CJ, Gleeson and Steward JJ), [68] (Beech-Jones J).

1531 See *Duxerty v Minister for Justice and Customs* [2002] FCA 1518, [10]-[15]; *Jackson v Minister for Justice* [2011] FCA 831, [4]. See also *Law Officers Act* 1964 (Cth), s 17(2). References in this part of the guide to the Attorney-General are, unless the context requires otherwise, references to the Commonwealth Attorney-General or their delegate.

1532 The power to grant or refuse parole must be exercised with procedural fairness, and is subject to judicial review: see *Duxerty v Minister for Justice and Customs* [2002] FCA 1518, [22].

1533 *R v Hatahet* [2024] HCA 23. See "4.8.8 Period or minimum period to be served is not a consideration in fixing a head sentence".

1534 *Crimes Act 1914* (Cth), s 19AL(1). Prior to 4 October 2012, federal parole was automatically granted if the federal sentence was more than 3 years but less than 10 years, unless the prisoner was serving a State sentence when the federal NPP expired: see *Crimes Act 1914* (Cth), ss 19AL(1) and 19AM. Under the transitional provision in clause 12 of Schedule 7 of the amending Act, the Act as amended applies to persons for whom a non-parole period was fixed whether sentenced before, at, or after the commencement date, unless a parole order had been made under s 19AL.

1535 *Crimes Act 1914* (Cth), s 19AL(5)-(6).

1536 *Crimes Act 1914* (Cth), s 19AL(1A), (2A), (7). These provisions commenced on 28 November 2023 and apply in relation to a non-parole period fixed before, on or after commencement, whether or not that non-parole period ended before that commencement: *Crimes and Other Legislation Amendment (Omnibus No. 2) Act 2023*, ss 2 and 3 and Schedule 1. The amendments were intended to "*clarify the Attorney-General's duty in relation to consideration or reconsideration of making or refusing to make a parole order after the non-parole period has*

1090. A prisoner cannot be released on federal parole if still serving a State or Territory sentence, although they can still be granted federal parole ahead of time.[1537] A prisoner who is granted federal parole, but is still serving a State or Territory sentence, must be released on parole (for the federal offence) on the same day they are released from prison (including on parole) for the State/Territory offence.[1538]

1091. If a community safety detention order (under Part 9.10 of the *Criminal Code* (Cth)) has been made in relation to a person, they are not eligible to be released on parole until the order ceases to be in force (*Code*, s 395.50(1)).

1092. If parole is refused, the Attorney-General must give the prisoner written notice of refusal within 14 days, including a statement of reasons, and advising that parole will be reconsidered within 12 months.[1539]

1093. Merits review of a parole decision is not available, but judicial review is available under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth).[1540]

1094. Federal parole is administered by the Commonwealth Parole Office (CPO) in the Commonwealth Attorney-General's Department. In practice, when a federal offender's parole eligibility date is approaching, the CPO requests a report from the relevant State or Territory parole service and considers the matters in that report in order to provide advice to the Attorney, to assist them to exercise the discretion to grant or refuse parole. Practical supervision of federal parolees is performed by duly authorised State or Territory officers.[1541]

4.11.2 Terrorism-related restrictions on parole

1095. Following amendments to the *Crimes Act 1914* (Cth) in 2019,[1542] strict limitations apply to the grant of federal parole to terrorism offenders, offenders subject to a control order and offenders who have supported, or advocated support for, terrorist acts. The limitations are set out in s 19ALB of the Act. They cover the following persons (s 19ALB(2)):

(a) a person who has been convicted of a terrorism offence,[1543] including a person currently serving a sentence for a terrorism offence;

(b) a person who is subject to a control order within the meaning of Part 5.3 of the *Criminal Code* (Cth); and

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ended" and "*address circumstances where it is not possible for a parole decision to be made by the Attorney-General prior to the end of a non-parole period, such as where the non-parole period is reduced on appeal*": *Crimes and Other Legislation Amendment (Omnibus No. 2) Bill 2023* (Cth), *Explanatory Memorandum (House of Representatives)*, [3].

1537 *Crimes Act 1914* (Cth), s 19AM.

1538 *Crimes Act 1914* (Cth), s 19AM(2).

1539 *Crimes Act 1914* (Cth), s 19AL(2).

1540 *Duxerty v Minister for Justice and Customs* [2002] FCA 1518.

1541 *Crimes Act 1914* (Cth), s 21F.

1542 The relevant amendments to the *Crimes Act 1914* (Cth) were made by the *Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Act 2019* (Cth), s 3 and Schedule 1, items 14-16 and came into effect on 11 December 2019. The amendments apply in relation to a decision in relation parole made on or after 11 December 2019: Schedule 1, item 17 of the amending Act. The purpose and effect of the amendments were summarised in *R v Hatahet* [2024] HCA 23, [18] (Gordon A-CJ, Gleeson and Steward JJ).

1543 "*Terrorism offence*", for this purpose, is defined in s 3(1) of the *Crimes Act 1914* (Cth). See "7.1.1 Definition of "terrorism offence"".

(c) a person who the Attorney-General is satisfied has made statements or carried out activities supporting, or advocating support for, terrorist acts within the meaning of that Part.

1096. The Attorney-General must not make a parole order in relation to a person covered by s 19ALB(2) unless the Attorney-General is satisfied that exceptional circumstances exist to justify making a parole order (s 19ALB(1)). That is, to make a parole order, the Attorney-General would need to reach a positive state of satisfaction that the prisoner's circumstances in some way had a character that was, or was akin to, being out of the ordinary course, unusual, special, uncommon, or going beyond what is regularly, routinely, or normally encountered, but not necessarily unique, unprecedented, or very rare.[1544]

1097. In determining whether exceptional circumstances exist in relation to a person to whom s 19ALB applies and who is under 18 years of age, the Attorney-General must have regard to "*the protection of the community as the paramount consideration; and … the best interests of the person as a primary consideration*" (s 19ALB(3)).

4.11.3 Purposes of parole

1098. The purposes of parole are protection of the community, rehabilitation of the offender, and reintegration of the offender into the community.[1545]

4.11.4 Relevant considerations in parole decision

1099. When deciding whether a federal offender should be released on parole, the Attorney-General may consider any of the matters (where known and relevant) in the following non-exhaustive list:[1546]

(a) the risk to the community of releasing the person on parole;
(b) the person's conduct while serving his or her sentence;
(c) whether the person has satisfactorily completed programs ordered by a court or recommended by the relevant State or Territory corrective services or parole agency;
(d) the likely effect on the victim, or victim's family, of releasing the person on parole;
(e) the nature and circumstances of the offence to which the person's sentence relates;
(f) any comments made by the sentencing court;
(g) the person's criminal history;
(h) any report or information in relation to the granting of parole that has been provided by the relevant State or Territory corrective services or parole agency;
(i) the behaviour of the person when subject to any previous parole order or licence;
(j) the likelihood that the person will comply with the conditions of the parole order;

1544 *Lodhi v Attorney-General (Cth)* [2020] FCA 1383, [24] (Bromwich J), paraphrasing what Lord Bingham of Cornhill CJ said about the meaning of "exceptional circumstances" in *R v Kelly (Edward)* [2000] QB 198, 208. The decision in *Lodhi* illustrates the high degree of difficulty in challenging, in judicial review proceedings, a decision to refuse parole under s 19ALB. In *AH v R* [2023] NSWCCA 230, [119], the Court observed that the inevitable consequence of the policy applied under s 19ALB is that terrorism offenders will complete their sentences without the benefit of supervision under parole.

1545 *Crimes Act 1914* (Cth), s 19AKA.

1546 *Crimes Act 1914* (Cth), s 19ALA(1). Sub-s (2) makes clear that the Attorney-General is not limited by the matters listed in sub-s (1). Section 19ALA was introduced by Schedule 7 of the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act* 2015 (Cth). The relevant Explanatory Memorandum states that the purposes of these changes are to: support procedural fairness of decisions; support production of reasons for decisions; inform the community at large of the roles and responsibilities of parole authorities; and promote consistent and transparent parole-related outcomes.

(k) whether releasing the person on parole is likely to assist the person to adjust to lawful community life;
(l) whether the length of the parole period is sufficient to achieve the purposes of parole;
(m) any special circumstances, including the likelihood that the person will be subject to removal or deportation upon release.

1100. The reference to "the community" means the community into which the parolee would be released. This may include the community in another country, if the parolee is likely to be deported. In any event, nothing in s 19ALA precludes the Attorney-General from having regard to the risk to the community in another country.[1547]

4.11.5 Procedural fairness requirement in parole decision

1101. In *Khazaal*,[1548] Wigney J made the following observations about the procedural requirements for federal parole decisions:

> *[U]nlike the statutory schemes for the grant of parole in many of the States and Territories, there is no prescribed procedure that the Attorney must follow in considering and determining whether to make a parole order. There is certainly no requirement for a hearing, no express requirement for the Attorney to notify the person affected by the decision concerning parole … of any particular information, and no express requirement that the person be given the opportunity to make submissions. There is no doubt, however, that the Attorney must afford procedural fairness to the person affected by the parole decision. As the statutory scheme does not prescribe any procedure, it is entirely a matter for the Attorney to determine a procedure that will afford procedural fairness to the person and avoid any unfairness or injustice.*
>
> *The terms of subs 19ALA(1) of the Crimes Act would suggest that procedural fairness would require, at a minimum, that the Attorney advise the person affected by the decision of any information known to the Attorney in respect of any of the matters referred to in that subsection which are, or might be, relevant to the parole decision. Of course, as the list of matters in subs 19ALA(1) is non-exhaustive, the Attorney would also be required to advise the person of any other information known to the Attorney which fell outside the list but was nevertheless relevant to the decision. That would include, in particular, any adverse information which was credible, relevant and significant to the decision.*
>
> *Procedural fairness would also require that the person affected by the parole decision be given an opportunity to address the information notified to him or her by the Attorney and to advance any submissions that the person may wish to make in support of the making of a parole order. The opportunity afforded to the person in that regard must undoubtedly be real and meaningful. It follows that the relevant information disclosed to the person must be expressed in terms which are sufficiently clear and comprehensive that the person is able to provide a real and meaningful response. The level of detail which will be required to ensure that the person has a real and meaningful opportunity to respond and make submissions will depend on the nature of the information in question and the particular circumstances of the case. As will be seen, there may*

1547 *Chukwuma v Attorney General* [2022] FCA 948.
1548 *Khazaal v Attorney-General* [2020] FCA 448, [66]-[68].

be cases where the circumstances are such that the disclosure of information or issues in only broad and general terms will not suffice.

4.11.6 Nature and conditions of parole order

1102. A parole order must be in writing and must specify whether or not the person is to be released subject to supervision.[1549] If the supervision period is to end before the end of the parole period, the order must specify the day when supervision ends.[1550]

1103. The Attorney-General may, if they consider it appropriate, specify in a parole order that the offender is to be released up to 30 days before the end of the NPP.[1551]

1104. A parole order is subject to the conditions that the offender must, during the parole period:
(a) be of good behaviour and not violate any law,
(b) be subject to supervision (if ordered), and
(c) be subject to any other conditions specified in the order.[1552]

1105. At any time before the end of the parole period, the Attorney-General may, by written order, impose additional conditions on a parole order, vary or revoke a condition, or (if the supervision period has not ended) change the day on which the supervision period ends (s 19APA(1)). Such an amendment takes effect when notice in writing is given to the parolee (s 19APA(3)). The Attorney-General may also amend a parole order to rectify a technical error, a defect of form or an ambiguity (s 19APA(2)); such an amendment is taken to have had effect from the date of effect of the parole order (s 19APA(4)).

4.11.7 Duration of parole period

1106. For an offender sentenced to life imprisonment, the parole period ends 5 years after release from prison, or any later day specified in the parole order.[1553]

1107. For non-life sentences,[1554] the parole period ends at the end of the last day of any federal sentence being served or to be served.[1555]

1549 A supervision condition is not mandatory, but is almost invariably included in a parole order.
1550 *Crimes Act 1914* (Cth), s 19AL(3).
1551 *Crimes Act 1914* (Cth), s 19AL(3A). This subsection came into effect on 27 November 2015, and applies only to parole orders made on or after that date: *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015*, ss 2 and 3, Sch 7, items 32 and 34. The Explanatory Memorandum for the amending Bill refers to this provision reinstating the previous legislative basis for early release.
1552 *Crimes Act 1914* (Cth), s 19AN.
1553 *Crimes Act 1914* (Cth), s 19AMA(3)(b).
1554 Prior to 4 October 2012 the maximum period to be served on federal parole was 5 years except if the federal prisoner was serving a life sentence. The definition of *'parole period'* was amended so as to abolish that restriction for offenders not sentenced to life imprisonment: *Crimes Legislation Amendment (Powers and Offences) Act 2012* (Cth).
1555 *Crimes Act 1914* (Cth), s 19AMA(3)(a). Prior to the commencement of the *Crimes Amendment (Remissions of Sentences) Act 2021* (Cth) (the amending Act) on 9 December 2021, s 19AMA(3)(a) provided that the parole period ends at the end of the last day of any federal sentence being served or to be served "*after deducting any remission or reduction that is applicable*". The amending Act abolished remissions or reductions on federal sentences.

4.11.8 Release on licence

1108. A prisoner serving a federal sentence may be released from prison on licence under s 19AP of the *Crimes Act 1914* (Cth). This is a form of discretionary conditional release exercised by the Commonwealth Attorney-General or their delegate in exceptional circumstances. A person may be released on licence whether or not a non-parole period has been fixed, or a recognizance release order made, in relation to that sentence (s 19AP(1)).

1109. The prisoner, or another person acting on their behalf, may apply to the Attorney-General for the prisoner to be released on licence (s 19AP(2)). The application must be in writing and must specify the exceptional circumstances relied on to justify the grant of the licence (s 19AP(3)). The Attorney-General is not required to consider the application if an application has been made in respect of the prisoner within one year before the application (s 19AP(5)).

1110. The Attorney-General must not grant a licence unless satisfied that exceptional circumstances exist which justify the grant of the licence (s 19AP(4)). Under s 19AP(4A), the Attorney-General may have regard to:

- any extensive cooperation by the person with law enforcement agencies before sentencing that the sentencing court did not take into account;
- any extensive cooperation by the person with law enforcement agencies after sentencing; or
- any serious medical condition the person has that cannot adequately be treated or managed within the prison system.

1111. The grounds do not appear to be exhaustive. For example, prisoners have been released on licence where a serious doubt has arisen about their conviction or sentence.[1556]

1112. In *Hasim*,[1557] applications for release on licence were made largely on the basis of a change of policy (the rescission of a direction by the Attorney-General to the CDPP about prosecutions for people-smuggling offences) under which persons who engaged in the relevant offending would have been eligible for prosecution for lesser offences, which were not subject to the mandatory minimum sentences imposed on the applicants. On judicial review, the Court held that the delegate of the Attorney-General did not err in refusing the applications. The Court considered it was open to the delegate to conclude that "*the differential position of offenders at one point in time, as compared with another, was a function of the orthodox application of the law and the exercise of the prosecutorial discretion under the regimes prevailing at the relevant time*".[1558]

1113. A licence sets out the conditions that must be complied with. A mandatory condition is that the offender must, during the licence period, be of good behaviour and not violate any law (s 19AP(7)).

1114. At any time before the end of the licence period, the Attorney-General may, by written order, impose additional conditions on a licence, vary or revoke a condition, or (if the supervision period has not ended) change the day on which the supervision period ends (s 19APA(1)). Such an amendment takes effect when notice in writing is given to the licensee (s 19APA(3)). The Attorney-General may also amend a

1556 See, for example, *Gogo v Attorney-General (Cth)* [2022] FCA 70, [4]-[6].
1557 *Hasim v Attorney-General* (Cth) (2013) 218 FCR 25.
1558 *Hasim v Attorney-General* (Cth) (2013) 218 FCR 25, [73]; see also [81]-[85].

licence to rectify a technical error, a defect of form or an ambiguity (s 19APA(2)); such an amendment is taken to have had effect from the date of effect of the licence (s 19APA(4)).

1115. In *Ng*,[1559] Bromwich J said,

> *It will generally be very difficult to challenge by way of judicial review a decision to impose, vary or decline to vary any particular licence condition for such reasons as the decision-maker sees fit. That is the very essence of a largely unfettered executive decision-making process of the kind provided for by s 19APA(7)(c) of the Crimes Act.*

4.11.9 Parolees and licensees are still under sentence

1116. A federal prisoner who is released on parole is taken to be still under sentence and not to have served the balance of the sentence owing upon release unless the parole order ends without being revoked.[1560] The same is true of a federal prisoner who is released on licence.[1561] This means that where the parole order or licence is revoked (including by automatic revocation following a sentence imposed after the end of the parole period, for an offence committed during the parole period), the parolee or licensee becomes liable to serve that part of the sentence or each sentence for a federal offence that had not been served at the time of their release under the parole order or licence.

1117. This rule operates subject to significant qualifications (discussed in more detail below):

(a) If a federal parole order or licence is revoked by the Attorney-General, a magistrate generally fixes a new federal NPP.[1562] The magistrate must have regard to time spent in the community before revocation of the parole or licence.[1563]

(b) If a parole order or licence is revoked automatically, as a result of the commission of an offence (whether federal, State or Territory) during the parole or licence period, the court sentencing the person for the breaching offence may reduce the new NPP for the outstanding sentence by the period of clean "street time". The totality principle also applies.[1564]

4.11.10 Revocation of parole or licence

1118. A federal parole order or licence may be revoked in either of two ways:

(a) automatically when a further sentence of more than 3 months' imprisonment (other than a wholly suspended sentence) is imposed following the commission of an offence by the parolee or licensee during the parole or licence period: ss 19AQ and 19AR (automatic revocation); or

(b) at the discretion of the Attorney-General, where the parolee or licensee fails to comply with a condition of the parole order or licence: s 19AU (discretionary revocation).

1559 *Ng v Attorney-General* (Cth) [2017] FCA 1392, [22].

1560 *Crimes Act 1914* (Cth), s 19APB(1).

1561 *Crimes Act 1914* (Cth), s 19AZC(1).

1562 *Crimes Act 1914* (Cth), s 19AW.

1563 *Crimes Act 1914* (Cth), s 19AW(3A). Prior to the commencement of the *Crimes Amendment (Remissions of Sentences) Act 2021* on 9 December 2021, reductions for "street time" on parole or licence in New South Wales, Queensland, South Australia and Western Australia were credited under relevant State laws applied by s 19AA of the *Crimes Act 1914*: see Appendix 2, "A2.5 Credit for "street time" following revocation of parole or licence by the Attorney-General: Crimes Act 1914, s 19AA, as in force prior to 9 December 2021". The relevant transitional provisions are described in Appendix 2, "A2.7 Repeal of Crimes Act 1914 (Cth), s 19AA: transitional provisions".

1564 *R v Piacentino* (2007) 15 VR 501, [105]-[108].

1119. In either case, if a parole order or licence has been revoked in relation to a particular offence, an offender can still be granted another parole order or licence in relation to that same offence.[1565]

4.11.11 Automatic revocation of parole or licence

1120. The legislative regime which governs revocation of federal parole or licence by operation of law (Subdivision B of Division 5 of Part IB of the *Crimes Act 1914* (Cth)) was significantly revised by amendments which came into operation on 20 July 2020.[1566] This section of the guide describes the law which applies following the amendments.[1567]

1121. The Act as amended applies in relation to the revocation, on or after 20 July 2020, of a parole order or licence relating to a sentence, regardless of when the sentence was imposed.[1568]

Summary of the scheme for revocation for an offence committed on parole or licence

1122. Every federal parole order is subject to the condition that the offender must, during the parole period, be of good behaviour and not violate any law (s 19AN). A licence for the release of an offender under s 19AP is subject to a similar condition for the licence period (s 19AP(7)(a)). The commission of any offence (whether against federal, State or Territory law) during the parole or licence period is therefore a breach of the parole or licence.

1123. In the case of serious violations during the parole or licence period (the commission of an offence for which the person is sentenced to a term of imprisonment of more than 3 months, not wholly suspended), the Act provides that the parole or licence is taken to be revoked, by force of the statute (s 19AQ). The breaching offence may be a federal offence or a State or Territory offence. The automatic revocation operates upon the imposition of such a term of imprisonment, but is taken to have effect from the revocation time – that is, the time of commission of the breaching offence (or when that offence is most likely to have been committed or to have begun to have been committed), as determined by the court which sentences the offender for the breaching offence (s 19AQ(1)-(3)). The deemed retrospective revocation operates even if the parole or licence period has expired by the time of sentence for the breaching offence (s 19APB(2)).

1124. Upon revocation, the period on parole or licence is not credited towards service of the balance of the sentence that remained to be served at the beginning of the parole period or licence period (s 19APB(1)), unless the court sentencing for the breaching offence considers it appropriate to reduce the balance that the person is liable to serve by the period between release and the revocation time (the "clean street period") (s 19AQ(4)). The court must issue a warrant for the imprisonment of the person for the unserved part of the outstanding sentence or sentences (s 19AS).

1565 *Crimes Act 1914* (Cth), s 19AZB.

1566 *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), s 2 and Schedule 13.

1567 For a description of the regime which existed immediately prior to the amendments, see Appendix 2, "A2.4 Automatic revocation of federal parole or licence prior to 20 July 2020".

1568 *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), s 2 and Schedule 13, item 21(1). In *Nweke v R (No 2)* [2020] NSWCCA 227, [6]-[7], the New South Wales Court of Criminal Appeal held that the effect of the transitional provision was that the Act as amended did not apply to revocation of the applicant's parole consequent upon the resentencing of the applicant by that Court on appeal after 20 July 2020, because the revocation was taken to have occurred on 22 March 2019, when the applicant was sentenced at first instance (even though that sentence was set aside on appeal).

1125. The court must also fix a new NPP for the outstanding sentence(s). If the breaching offence is a federal offence, the court must fix a single NPP for the outstanding sentence(s) and the new sentence(s).

1126. The legislation has been criticised for conferring these functions on courts rather than on the Attorney-General or other parole authority.[1569] Presumably the reason for doing so is that these functions involve (or may involve) the exercise of the judicial power of the Commonwealth, which (under Chapter III of the Constitution) can only be conferred on a court (see "1.1.3 Defining and investing federal jurisdiction").

Revocation for an offence committed on parole or licence

1127. A federal parole order or licence will be taken to be revoked if:

- the parolee or licensee commits a further offence (whether federal, State or Territory) during the parole or licence period (the new offence) and
- the person to whom the parole order or licence relates is sentenced to life imprisonment or to a sentence of, or sentences aggregating, more than 3 months in respect of the new offence.[1570] (The only exception is if the sentence is, or all of the sentences are, wholly suspended (s 19AQ(6).)

1128. The court that sentences the person for the new offence must determine the time (the revocation time) when the parole order or licence is taken to have been revoked (s 19AQ(1) and (2)).

1129. The revocation time must be one of the following (s 19AQ(3)):

- the time at which the court determines the new offence was committed;
- the time at which the court determines the new offence was most likely to have been committed; or
- the time at which the court determines the new offence was most likely to have first begun to have been committed.

1130. If this determination is made after the end of the parole or licence period, the person is taken to have been still under sentence, as if the parole or licence period had not ended (s 19APB(2)). The consequence is that the person is taken not to have served any part of the sentence that remained to be served at the beginning of the parole or licence period (s 19APB(1)). However, as described below, this is subject to any allowance made by the court for a "clean street period" prior to the commission of the new offence.

1131. When the parole or licence period is taken to have been revoked under s 19AQ(1) or (2), the person then becomes liable to serve:

- that part of the sentence or of each sentence for a federal offence that the person had not served at the time of their release under that parole order or licence (s 19AQ(4)(a)); or
- if the court (that is, the court sentencing the offender for the new offence) considers it appropriate, taking into account the good behaviour of the person during the "clean street period" (that is, the period between the person's release and the revocation time), the

1569 *Nweke v R (No 2)* [2020] NSWCCA 227, [5], [11].

1570 *Crimes Act 1914* (Cth), s 19AQ(1) (parolee) and (2) (licensee). The reference to the period of 3 months is to the head sentence or total effective sentence, not the period to be served: see the definitions of "aggregate" and "sentence" in s 16(1) of the Act.

sentence or aggregate federal sentence that the person had not served at the time of release reduced by the clean street period (s 19AQ(4)(b)).[1571]

1132. The effect of s 19AQ(4)(b) is significant. It permits the court sentencing the offender for the new offence to determine whether the person should be given credit for good behaviour during the period between their release on parole or licence and the revocation time. The paragraph seems to permit either *the whole of that period* to be credited in reduction of the period of the outstanding sentence which the offender is liable to serve or *none of the period* to be so credited; it does not appear to allow for part of the period to be credited. This determination, together with the court's finding as to the revocation time, could have a substantial effect on the period remaining to be served.

Fixing a new NPP following automatic revocation of parole

1133. If the person is sentenced for one or more **federal offences** committed during the parole or licence period (the new sentence(s)) and becomes liable to serve a part of a federal sentence or sentences under s 19AQ (the outstanding sentence(s)), the court imposing the new sentence(s) must fix a single new NPP in respect of the new sentence(s) and the outstanding sentence(s) (s 19AR(1)). In doing so, the court must have regard to the total period of imprisonment that the person is liable to serve (s 19AR(1)); this is a statutory acknowledgement that the totality principle applies.[1572]

1134. If the person is sentenced for one or more **State or Territory offences** committed during the parole or licence period (the new sentence(s)) and becomes liable to serve a part of a federal sentence or sentences under s 19AQ (the outstanding sentence(s)), the court imposing the new sentence(s) must fix a single new NPP in respect of the outstanding sentence(s), having regard to the total period of imprisonment that the person is liable to serve (s 19AR(3)).

1135. The court cannot fix a single NPP in respect of both federal and State/Territory sentences of imprisonment. Any NPP for a State or Territory sentence must be fixed separately.[1573]

1136. The court may decline to fix a new NPP under s 19AR(1) or (3) if:

- the court is satisfied that doing so is inappropriate, having regard to the serious nature and circumstances of the offence and the antecedents of the person; or
- the person is expected to be serving a State or Territory sentence on the day after the end of the federal sentence or the last of the federal sentences (s 19AR4)).[1574]

If the court does so, it must state its reasons and cause them to be entered in the records of the court (s 19AR(5)).

1137. Contrary to the regime which applied before 20 July 2020, there is no power for a court to make a recognizance release order (rather than to fix a NPP) in respect of an outstanding federal sentence following a deemed revocation of parole under s 19AQ.

1571 State or Territory laws relating to the calculation of, or credit for, "clean street time" do not apply for this purpose.

1572 Cf *R v Arico (No 2)* [2002] VSCA 230, [8]-[11]; *R v Piacentino* (2007) 15 VR 501, [106]-[108].

1573 *Crimes Act 1914* (Cth), s 19AJ and s 19AR(6).

1574 Prior to the commencement of the *Crimes Amendment (Remissions of Sentences) Act 2021* (Cth) (the amending Act) on 9 December 2021, the relevant circumstance in s 19AR(4) was that person was expected to be serving a State/Territory sentence on the day after the end of the federal sentence, or the last to be served of the federal sentences "*as reduced by any remissions or reductions under s 19AA*". The amending Act repealed s 19AA and abolished remissions or reductions on federal sentences.

1138. The court's judicial function, in relation to the outstanding sentence, is confined to fixing a new NPP (or determining whether to decline to do so).[1575] The court must also determine whether the period which the offender is liable to serve for the outstanding sentence(s) should be reduced for a "clean street period". It is not part of the function of the court to reimpose or to alter the head sentence(s), or the commencement time(s) of the sentence(s), for the offence(s) for which the offender was on parole or licence and it is an error to do so[1576] (except pursuant to a statutory power to correct errors in sentencing – see "6.12 Power of sentencing court to correct error in sentence").

Warrant of detention

1139. Under s 19AS(1), if a person becomes liable under s 19AQ to serve the outstanding federal sentence or sentences, the court which imposes the new sentence or sentences must issue a warrant of detention.[1577] The warrant authorises the person to be detained in prison to undergo imprisonment in that State/Territory for the unserved part of the outstanding sentence (s 19AS(1)(d)). The CDPP can apply for a warrant if the court fails to issue one (s 19AS(2)).

1140. The requirement for the issue of a warrant applies whether or not the parole or licence period has ended; its purpose is to authorise the general manager of the prison to detain the person in accordance with the earlier sentence (with any credit for clean street time).[1578]

Service of the outstanding sentence

1141. The person must begin to serve the unserved part of the outstanding sentence, or of the first to be served of the outstanding sentences, on the day the new sentence is (or sentences are) imposed (s 19AS(1)(e)). The unserved part must be served in the State or Territory where the new sentence is (or sentences are) imposed (s 19AS(1)(f)).

1142. One effect of s 19AS(1)(e) is to prevent a court from backdating the commencement of the unserved part of the sentence to allow for a period in custody on remand.[1579] This creates difficulties in a jurisdiction (such as New South Wales) which relies upon this mechanism to provide credit for pre-sentence detention.[1580] The sentencing court is not prevented from backdating the sentence for the breaching offence to allow for pre-sentence detention,[1581] but cannot backdate the service of the balance of the outstanding sentence.[1582]

1575 *Nweke v R (No 2)* [2020] NSWCCA 227, [23].
1576 *Nweke v R (No 2)* [2020] NSWCCA 227, [23], [25].
1577 See the form of warrant in form 2 of Schedule 1 of the *Crimes Regulations 2019* (Cth).
1578 *Nweke v R (No 2)* [2020] NSWCCA 227, [21].
1579 *Nweke v R (No 2)* [2020] NSWCCA 227, [9]-[10].
1580 See "4.8.10 Allowance for pre-sentence custody for the offence". It is unclear whether, but for s 19AS(1)(e), a NSW court sentencing for the new offence would have had power to backdate the commencement of the unserved part of the outstanding sentence. It may be doubted whether such a power is included in the power to backdate the *commencement of a sentence* (under s 47(2)(a) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), as applied by s 16E(2) of the *Crimes Act 1914* (Cth)).
1581 *Nweke v R (No 2)* [2020] NSWCCA 227, [31].
1582 This produces significant distortions in providing for appropriate cumulation and concurrency with the new sentence, and in applying the principles of proportionality and totality, and may lead the court to reduce the sentence for the new offence, or to make artificial orders for the backdating of that sentence, to produce an appropriate total effective sentence: see *Nweke v R (No 2)* [2020] NSWCCA 227, [29]-[41].

If the conviction for the new offence is quashed

1143. Section 19AT provides for the consequences if the conviction of the person for the new offence is quashed on appeal.

Correcting an omission or error in fixing NPP or making RRO

1144. If the court sentencing the offender for the new offence fails to fix a NPP in accordance with the requirements of s 19AR, it may be possible to correct the error or omission under s 19AH or s 19AHA of the *Crimes Act*: see "6.12 Power of sentencing court to correct error in sentence". (Section 19AH is expressly applied to the failure of a court to fix, or properly to fix, a NPP under s 19AR: s 19AR(7).)

4.11.12 Discretionary revocation of parole or licence by the Attorney-General

When the Attorney-General may revoke a parole order or licence

1145. The Attorney-General may (at any time before the end of the parole or licence period) revoke a parole order or licence where the offender has failed to comply with a parole or licence condition, or there are reasonable grounds to suspect the offender has failed to comply (*Crimes Act 1914* (Cth), s 19AU).[1583] The revocation must be in writing and must specify the condition breached, or suspected to have been breached (s 19AU(1)).

Notice of proposed revocation of parole or licence

1146. Ordinarily the parolee or licensee must be given 14 days' notice in writing of the proposed revocation of parole or licence. The notice must advise the parolee or licensee of the condition alleged to have been breached and that the Attorney-General proposes to revoke the order unless the parolee or licensee, within 14 days, gives the Attorney-General written reasons why the order should not be revoked and those reasons are accepted by the Attorney-General (s 19AU(2)).

1147. The notice requirement does not apply in any of the following circumstances (s 19AU(3)):

- if the parolee's or licensee's whereabouts are unknown to the Attorney-General (despite reasonable inquiries);
- if there are circumstances of urgency that (in the opinion of the Attorney-General) require revocation without notice;
- if the person has left Australia;
- if (in the opinion of the Attorney-General) revocation without notice is necessary in the interests of the administration of justice; or
- if (in the opinion of the Attorney-General) revocation without notice is necessary in the interests of ensuring the safety and protection of the community or of another person.[1584]

1148. The terms of s 19AU(3) expressly exclude the duty to afford procedural fairness in advance of revocation in the circumstances identified and reflect that the circumstances in which parole can be revoked without notification, apart from where the offender's whereabouts are unknown or where they

1583 As to what is required to challenge, in judicial review proceedings, the validity of such a notice, see *Ahmad v Attorney-General (Cth)* [2022] FCA 1270, [75]-[102].

1584 The last of these circumstances is set out in s 19AU(3)(ba), which was inserted by *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), s 3 and Schedule 1, item 1. The amendment applies in relation to a revocation made on or after 23 June 2020, whether the parole order was made before, on or after that date: see s 2(1) and Schedule 1, item 2 of the amending Act.

have left the jurisdiction, are circumstances of urgency.[1585] Procedural fairness is accommodated after the decision is made in these circumstances by s 19AX, with the federal offender retaining the opportunity to make submissions after notice of revocation (see [1161] et seq below).[1586]

Arrest and appearance before magistrate

1149. If the Attorney-General revokes parole or licence, a constable may arrest the parolee or licensee without warrant (or the Attorney-General or CDPP may apply for an arrest warrant) and the parolee or licensee must be brought before a "prescribed authority" for a hearing as soon as practicable (s 19AV). "Prescribed authority" means a magistrate of a State or Territory.[1587]

1150. If the magistrate cannot complete the hearing immediately, they must issue a warrant to remand the parolee or licensee pending completion of the hearing (s 19AW(2)).[1588]

1151. Section 19AW details the relevant procedure at the hearing. If the magistrate is satisfied that the person before them is the person named in the revocation order, that the person was duly notified by the Attorney-General of the proposal to make the revocation order and that the revocation order is still in force, the magistrate must issue a warrant of detention in the prescribed form.[1589] A warrant of detention authorises a constable to take the parolee or licensee to a specified prison in the State or Territory where they were arrested to undergo imprisonment for the unserved part of the sentence the person was serving or had yet to serve at the time of their release ('the outstanding sentence') (s 19AW(1)(e)).

1152. The nature of a hearing under s 19AW and the function of the magistrate were considered by Wilson J in *Ahmad v DPP (Cth)*.[1590] Her Honour held that it was clear from the structure and text of the legislation that the power of a magistrate under s 19AW is personal rather judicial, and is unconnected with the sentencing power exercised by a sentencing court. Division 5 of Part IB is concerned with the administration of the parole scheme. It is the Attorney who exercises the power to determine whether an offender will be released to parole and, where parole has been granted, who exercises the power provided by s 19AU to revoke parole. Parole may be revoked by the Attorney where "*there are reasonable grounds for suspecting*" that there has been a breach of parole. The process, and the power exercised concerning revocation of parole, is then at an end. The power exercised by a prescribed authority to issue a warrant is a later step under the statutory framework. Section 19AW does not require or permit review of the Attorney's decision; the decision is a statutory fact.

Calculation by the magistrate of the unserved part of each outstanding sentence

1153. The magistrate must specify in the warrant the particulars of the unserved part of each outstanding sentence (s 19AW(4)). This will require a calculation of the period which the parolee or licensee is liable to serve.

1585 *Ahmad v Attorney-General (Cth)* [2022] FCA 1270, [35].
1586 *Ahmad v Attorney-General (Cth)* [2022] FCA 1270, [37].
1587 See the definition of "prescribed authority" in *Crimes Act 1914* (Cth), s 16(1).
1588 Prior to an amendment which took effect on 20 July 2020, the magistrate had a discretion whether to issue a warrant in this circumstance. The amendment was made by the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), s 3 and Schedule 13, item 18. It applies in relation to hearings begun on or after 20 July 2020: see s 2 and Schedule 13, item 21(3) of the amending Act.
1589 Form 5 in Schedule 1 to the *Crimes Regulations 2019* (Cth).
1590 *Ahmad v DPP (Cth)* [2023] NSWSC 736, [33]-[57].

1154. The calculation will be affected by any period of remand pending the completion of the hearing under s 19AW, as the unserved part of any outstanding sentence or sentences that the person was serving or had yet to serve at the time of their release is to be reduced by any such period of remand (s 19AW(6)).

Fixing a new NPP by the magistrate

1155. Once the unserved part of each outstanding sentence is calculated, the magistrate must fix a NPP in respect of the outstanding sentence, unless either the magistrate considers it "*inappropriate to do so because of the serious*[1591] *nature of the breach of the conditions of the order … that led to its revocation*" or the unserved part of the outstanding sentence is, or aggregates, 3 months or less (s 19AW(3)). The task is not to fix a NPP relevant to the sentence as it was originally imposed, but with respect to what remains of it to be served.[1592]

1156. What is required of the magistrate under s 19AW(3)(a) is an assessment of the seriousness of the breach of parole as decided by the Attorney General.[1593] The discretion under s 19AW(3)(a) not to fix a NPP is apt to be exercised if the nature of the relevant breach of the conditions of the parole order or licence is so serious that the magistrate considers that the offender should not be released on parole.[1594] However the decision proceeds from a relatively low bar: the authority need only consider it "*inappropriate*" to fix a NPP because of the seriousness of the breach, the breach being that determined by the Attorney to have met the statutory criteria provided by s 19AU(1).[1595]

1157. In fixing a new NPP under s 19AW, a magistrate "*must have regard to*" the period of time spent by the person on parole or licence before that parole order was revoked (s 19AW(3A)). The requirement is only that the court or magistrate "*have regard to*" the period on parole or licence. The parolee or licensee has no entitlement to any specific numerical deduction. Circumstances which may be relevant in determining the extent of any allowance to be made for the period spent on parole or licence may include the duration and seriousness of any offending or other conduct in breach of parole or licence conditions. For example, the allowance to be made may be reduced to the extent that the offender has used the period on parole or licence to engage in serious offending or other serious breaches of the parole order or licence.

1158. In fixing a new NPP, the magistrate may also have regard to any delay between the revocation of the parole or licence and the issuing of the warrant.[1596]

1159. If the magistrate fixes a new NPP, it must also be specified in the warrant of detention (s 19AW(4)).

1160. The effect of fixing a non-parole period is that the Attorney-General may (by operation of ss 19AL and 19AW(5)), make a parole order.

1591 The adjective "serious" was inserted by the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), s 3 and Schedule 13, item 19. The amendment applies in relation to hearings begun on or after 20 July 2020: see s 2 and Schedule 13, item 21(3) of the amending Act.

1592 *Ahmad v DPP (Cth)* [2023] NSWSC 736, [56].

1593 *Ahmad v DPP (Cth)* [2023] NSWSC 736, [42].

1594 *Dobie v Commonwealth* (2013) 216 FCR 300, [40].

1595 *Ahmad v DPP (Cth)* [2023] NSWSC 736, [49].

1596 *Dobie v Commonwealth* (2013) 216 FCR 300, [75].

Procedure where Attorney-General revokes parole or licence without notification

1161. Where the person on parole or licence was not notified of the revocation, s 19AX details the relevant procedure. If the parolee or licensee is brought before the magistrate, and the magistrate is not satisfied that the person was notified by the Attorney-General of the proposal to make the revocation order, the magistrate must:

- immediately notify the Attorney-General that the person has been brought before the magistrate; and
- order that the person be detained in custody.

The period of detention in custody is until:

- the Attorney-General orders that the revocation order be rescinded (in which case the person is to be released), or
- the completion of a hearing of the type detailed in s 19AW (in circumstances where the Attorney-General had decided, after hearing any relevant submissions from the parolee, not to rescind the revocation order).

1162. Where the Attorney-General is notified, the Attorney-General must, as soon as practicable: notify the person in writing of the conditions of the parole order alleged to have been breached; and request the person give the Attorney-General, within 14 days of notification, a written submission stating why that parole order should not have been revoked (s 19AX(2)). If no submission is made, the Attorney-General must notify the prescribed authority as soon as practicable, of the decision not to rescind (s 19AX(3)). If a submission is made, within 14 days of it being received, the Attorney-General must decide as soon as practicable, on the basis of that submission and any other material the Attorney-General considers to be relevant, whether or not to rescind the revocation. If the decision is to rescind, the prescribed authority and federal offender must be informed, and on being informed the federal offender must be immediately released (ss 19AX(4)-(5)). If, however, the decision is not to revoke, the matter proceeds according to s 19AW. That is also the situation where a federal offender does not make written submissions (s 19AX(6)).

Appeal rights

1163. Where a magistrate issues a warrant under s 19AW, the parolee or licensee may appeal to the Supreme Court of the State or Territory in which the person was arrested. The person may appeal against the issue of the warrant, the calculation of the unserved part of the outstanding sentence, or the fixing of (or refusal to fix) a NPP (s 19AY).

1164. On appeal, the court may have regard to any evidence given before the prescribed authority (s 19AY(3)). The appeal is by way of rehearing, not a hearing de novo.[1597]

1597 *Cant v DPP (Cth)* [2014] QSC 62, [16]-[19] (affirmed in *R v Cant* [2014] QCA 334, [29]); *Lergou v DPP (Cth)* [2020] NSWSC 1461, [6]-[30]. In *Lergou*, in dealing with a complaint that the NPP fixed was too long, the court ([51]-[57]) applied the principles of manifest excess.

4.11.13 No credit for "street time" following revocation of parole or licence by the Attorney-General

1165. If a parole order or licence is revoked by the Attorney-General, the parolee or licensee is generally liable to serve the balance of the sentence that was outstanding at the time of their release on parole or licence (see s 19APB of the *Crimes Act 1914* (Cth)). The period between release and the return of the person to custody is not credited towards the service of the sentence.

1166. However a magistrate fixing a NPP under s 19AW "*must have regard to the period of time spent by the person on parole or licence before that parole order or licence was revoked under subsection 19AU(1)*" (s 19AW(3A)).

1167. This is significantly different from the regime which applied before 9 December 2021, under which State laws providing credit for "clean street time" in New South Wales, Queensland, Western Australia and South Australia applied to federal offenders in those States. For a description of the previous regime, see Appendix 2, "A2.5 Credit for "street time" following revocation of parole or licence by the Attorney-General: Crimes Act 1914, s 19AA, as in force prior to 9 December 2021". The previous regime applies to a person who was serving a federal sentence immediately before 9 December 2021: see Appendix 2, "A2.7 Repeal of Crimes Act 1914 (Cth), s 19AA: transitional provisions".

4.11.14 Pre-release and leave of absence

1168. In general, State/Territory laws relating to leave of absence and pre-release apply to federal prisoners.[1598]

1169. The Commonwealth Attorney-General has a discretion to release an offender up to 30 days before the end of the NPP.[1599]

1598 *Crimes Act 1914* (Cth), s 19AZD.
1599 *Crimes Act 1914* (Cth), s 19AL(3A).

4.12 Options not generally available in sentencing a federal offender

1170. A number of options which are commonly available for sentencing State or Territory offenders are not generally available in sentencing a federal offender. Examples are:

- convicting and discharging;
- fine without conviction;
- community correction order and the like without conviction; and
- combinations of sentences.

1171. These options may, however, be picked up and applied to the sentencing of a child or young person for a federal offence pursuant to s 20C of the *Crimes Act 1914* (Cth), provided they are not inconsistent with other provisions of the *Crimes Act* or other Commonwealth laws. See "7.4 Children and young persons".

4.12.1 Convicting and discharging

1172. Upon conviction of a federal offender something more than the conviction itself must occur (such as a s 20(1)(a) bond or a fine). Options under State or Territory law for convicting and discharging an offender, without more, are not available in respect of a federal offender.[1600]

4.12.2 Without conviction, imposing a fine

1173. This option is not available in respect of a federal offender.[1601] Powers to impose a fine for a federal offence apply only on conviction.[1602] Section 19B of the *Crimes Act 1914* (Cth), which provides for non-conviction dispositions, only permits the imposition of certain types of payments as a condition of a non-conviction bond – namely, reparation, restitution, compensation or costs – and not fines.

4.12.3 Without conviction, ordering a community correction order or like order

1174. The State and Territory sentencing options which fall within s 20AB(1AA) of the *Crimes Act 1914* (Cth) are only available in sentencing a federal offender on conviction.[1603]

4.12.4 Combinations of sentences

1175. A number of federal laws permit a court to impose both a fine and a sentence of imprisonment on a federal offender for a single offence.[1604] A fine can also be combined with a sentence or order under s 20AB(1) of the *Crimes Act 1914* (Cth).[1605] However, apart from such specific provisions, there is (in the view of the CDPP) no power to combine different sentencing options, as there is in some circumstances under State or Territory laws.[1606]

1600 See *Lanham v Brake* (1983) 34 SASR 578, 580 (Cox J); *Mulcahy v Clark* [1991] Tas R 115 (Zeeman J), applying the reasoning in *Walsh v Giumelli* [1975] WAR 114.

1601 *Commissioner of Taxation v Doudle* [2005] SASC 442, [26].

1602 See particularly *Crimes Act 1914* (Cth), ss 4B and 4E.

1603 *DPP v Meyers* (Vic SC (Balmford J), 26 April 1996, unreported).

1604 E.g. *Crimes Act 1914* (Cth), ss 4B, 4J and 4JA.

1605 *Crimes Act 1914* (Cth), s 20AB(4).

1606 In *Atanackovic v R* (2015) 45 VR 179, [55]-[58], [79]-[80]. [88]-[93], the Court left open the question whether (absent statutory authority) two sentencing options could be imposed for a single offence. See also *R v Tran* [2019] SASCFC 5, [48], [54].

5 OTHER ORDERS ON SENTENCING

5.1 Citizenship cessation order – Australian Citizenship Act 2007 (Cth), s 36C

5.1.1 Overview

1176. In *Alexander*,[1607] the High Court held that a previous provision of the *Australian Citizenship Act 2007* (Cth) which purported to allow the Minister for Home Affairs to cancel the Australian citizenship of a "foreign fighter" was invalid because it reposed in the Minister "*the exclusively judicial function of punishing criminal guilt*". In *Benbrika (No 2)*,[1608] the Court held that another provision of the Act which purported to allow the Minister to cancel the Australian citizenship of a person who had been convicted of a specified federal offence was invalid for the same reason. Following these decisions, new s 36C was inserted in the Act in 2023 to confer a similar power of cancellation on a court upon conviction of a person for a specified federal offence.[1609]

1177. Section 36C of the Act (as inserted in 2023) permits a court, on the application of the relevant Minister, to make an order (a citizenship cessation order) cancelling the Australian citizenship of a person who has been convicted of one or more specified serious offences and sentenced to a term of imprisonment of 3 years or more, or terms which sum to 3 years or more, for the offence(s), if the offending conduct "*is so serious and significant that it demonstrates that the person has repudiated their allegiance to Australia.*" The order is part of the sentence(s) imposed for the offence(s). An order may not be made if the offender would become stateless as a result.

5.1.2 The power to make an order

1178. Section 36C(1) empowers a court upon convicting a person of a "*serious offence*" listed in s 36C(3) to make a citizenship cessation order, upon application by the relevant Minister under s 36D. An order is made as "*part of the sentence or sentences*" upon conviction (s 36C(1)). The effect of such an order is that the person ceases to be an Australian citizen at the time the order is made (s 36B(1)).

1179. The preconditions for the making of an order (s 36C(1)) are that:

(a) the person is convicted of one or more serious offences; and

(b) the court has decided to impose on the person, in respect of the conviction or convictions, a period of imprisonment that is at least 3 years or periods of imprisonment that total at least 3 years ("the triggering sentence"); and

(c) the Minister has made an application under s 36D(1) for an order in relation to the person; and

(d) the court is satisfied of the matters specified in s 36C(4).

5.1.3 "Serious offence"

1180. In accordance with s 36C(3), a "serious offence", for the purposes of s 36C(1), is an offence against any of the following provisions of the *Criminal Code* (Cth):[1610]

(a) a provision of Subdivision A of Division 72 (explosives and lethal devices);

1607 *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560.

1608 *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899.

1609 *Australian Citizenship Amendment (Citizenship Repudiation) Act 2023* (Cth), s 3, Sch 1, Part 1.

1610 The prescribed maximum penalties for these offences range from 5 years' imprisonment (*Code*, s.105A.18A(1) or (2)) to life imprisonment (e.g. *Code*, s.101.1), plus a fine calculated in accordance with s 4B of the *Crimes Act*.

(b) a provision of Subdivision B of Division 80 (treason);
(c) section 83.1 (advocating mutiny);
(d) a provision of Division 91 (espionage);
(e) a provision of Division 92 (foreign interference);
(f) a provision of Part 5.3 (terrorism), other than the following provisions:
    (i) section 102.8;
    (ii) Division 104;
    (iii) Division 105;
    (iv) section 105A.7D;
    (v) section 105A.18B;
(g) a provision of Part 5.5 (foreign incursions and recruitment).

1181. In accordance with s 11.6 of the *Criminal Code*, the reference to an offence in s 36C(3) of the *Australian Citizenship Act 2007* must be taken to include a reference to an offence against s 11.1 (attempt), s 11.4 (incitement) or s 11.5 (conspiracy) of the *Criminal Code* that relates to the offence.[1611]

5.1.4 Application under s 36D

1182. An application under s 36D may be made by the Minister before or after the person is convicted but must be made before the person is sentenced (s 36D(2)). Notice of the application must be given to the person as soon as practicable (s 36D(6)). The application must include information about the person's age, Australian citizenship and nationality or citizenship of other countries (s 36D(4)).

5.1.5 Citizens susceptible to an order

1183. It does not matter how the person became an Australian citizen; the power applies to a person who became an Australian citizen at birth (ss 36C(10), 36D(8)). Indigenous Australians are not excluded.

1184. However, the court must not make an order if it is satisfied that the person would, if it were to make the order, become a person who is not a national or citizen of any country (s 36C(2)). The effect of this is that an order may be made only against a person who had dual citizenship or nationality at the time of making the order.

5.1.6 A triggering sentence

1185. The triggering sentence under s 36C(1) may be a single sentence of imprisonment of 3 years or more for a serious offence listed in s 36C(3).

1186. Alternatively, the triggering sentence may consist of two or more concurrent sentences for such an offence, the sum of which is 3 years or more (s 36C(8)). So, for example, if the person is sentenced to 6 months' imprisonment for each of six offences, to be served concurrently, it would be a triggering sentence even though the total effective sentence is only 6 months.

1187. A reference to a period of imprisonment also includes a single sentence for one or more serious offences and for one or more other offences (s 36C(9)). This would appear to have the effect that an aggregate sentence of 3 years or more for one relevant serious offence and a series of other offences

1611 Cf *DPP (Cth) v Fattal* [2013] VSCA 276, [202]-[212].

would be a triggering sentence, even though the indicative sentence for the serious offence was only, say, 6 months' imprisonment.

1188. A reference to a period of imprisonment in s 36C(1) does not include a period that is suspended.[1612]

5.1.7 Considerations in making an order

1189. Pursuant to s 36C(4), the court must be satisfied that the person is aged 14 or over (s 36C(4)(a)) and is an Australian citizen (s 36C(4)(b)) and that "*the person's conduct to which the conviction or convictions relate is so serious and significant that it demonstrates that the person has repudiated their allegiance to Australia*" (s 36C(4)(c)).

1190. In deciding whether the court is satisfied of the matters in s 36C(4)(c), the court must have regard to whether the conduct "*demonstrates a* repudiation *of the values, democratic beliefs, rights and liberties that underpin Australian society*", the degree, duration or scale of the person's commitment to, or involvement in, the conduct, the intended scale of the conduct, the actual impact of the conduct, and whether the conduct caused, or was intended to cause, harm to human life or a loss of human life (s 36C(5)).

1191. In deciding whether to make the order, the court must have regard to: the best interests of the person, if they are a child aged under 18; the best interests of any dependent children of the person in Australia; and the person's connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person (s 36C(6)). However s 36C(6) does not limit the matters to which the court may have regard (s 36C(7)).

1192. Part 1B of the *Crimes Act* does not apply in relation to an order under s 36C (s 36C(11)). This includes the sentencing factors in s 16A of the *Crimes Act*. However, common law sentencing factors, such as the principle of proportionality, are not excluded.

5.1.8 Retrospective effect of the amendments

1193. New s 36C applies in relation to a conviction of a person if the conviction occurs after the commencement of new s 36C (8 December 2023) and "*the person engaged in the conduct to which the conviction relates on or after 12 December 2015*".[1613]

5.2 Travel restriction orders – *Crimes Act 1914*, s 22

1194. Section 22 of the *Crimes Act 1914* (Cth) permits a court sentencing a federal offender (or a Territory offender) in certain circumstances to order the person:

- to remain in Australia;
- to refrain from applying for, or obtaining, an Australian travel document;
- to surrender possession of any Australian travel document held by the person.

1195. The order may be made, at the same time or later, where a court makes a relevant order or passes a relevant sentence for a serious drug offence or a prescribed offence (s 22(1)). Serious drug offence means an offence involving, or relating to, controlled substances and punishable by a maximum penalty of imprisonment for 2 years or more (s 22(7)). Prescribed offences are indictable offences against the

1612 There is no general provision in the law of the Commonwealth for suspended sentences.

1613 *Australian Citizenship Amendment (Citizenship Repudiation) Act 2023* (Cth), Sch 1, item 18.

Australian Passports Act 2005 (Cth) or the *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth) (*Crimes Regulations 2019* (Cth), reg. 16). Relevant sentences or orders (defined in s 22(7)) include:

- a sentence of imprisonment (other than a suspended sentence),
- a sentence under s 20AB, or
- an order releasing the person on conditions under s 20(1) (that is, either a s 20 bond or a recognizance release order).

1196. An order under s 22(1) has effect during such reasonable period as is specified by the court in the order (s 22(2)). The court may revoke or vary the order as it sees fit (s 22(3)). Provision is made in s 22(5) for the custody and retention of a travel document surrendered under the order.

5.3 Reparation – *Crimes Act 1914*, s 21B

1197. If a person is convicted of a federal offence or placed on a bond under s 19B, s 21B of the *Crimes Act 1914* (Cth) enables the court to make a reparation order in respect of any loss suffered or expenses incurred "*by reason of the offence*". A similar provision deals specifically with offences under s 217 of the *Social Security (Administration) Act 1999* (Cth): see s 218 of that Act. A court may also make a reparation order in relation to an offence which is taken into account under s 16BA of the *Crimes Act 1914*: s 16BA(5).

1198. A reparation order may be made in favour of the Commonwealth or a public authority under the Commonwealth, by way of money payment or otherwise (s 21B(1)(c)). A court may also order reparation to any person, by way of money payment or otherwise (s 21B(1)(d)). That is, a court has power to order reparation to the Commonwealth or a public authority of the Commonwealth or to any other person.

1199. Prior to amendments in 2013,[1614] an order could only be made under s 21B(1)(d) (that is, to any person not being a Commonwealth authority) "*in respect of any loss suffered by the person as a direct result of the offence*". This criterion was held to require "*a close or significant connection*" between the loss and the offence which caused it, and would not be made out where a "*secondary loss occurs by way of a ripple effect*".[1615]

1200. The 2013 amendments removed this limitation.[1616] Whether the reparation order is made in favour of the Commonwealth or a public authority under the Commonwealth (s 21B(1)(c)) or any person (s 21B(1)(d)), the criterion is now the same. The power is very broad. In either case, the court may order reparation *"in respect of any loss suffered, or any expense incurred … by reason of the offence*". This requires "*a cause and effect relationship, although there might be a number of steps along the way, and more than one cause might contribute*".[1617]

1201. If the Commonwealth is deprived of tax revenue which it would have been paid had it not been for the commission of the offence, the loss is reparable under s 21B.[1618]

1614 The amendment was made by the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth), s 3 and Sch 2, item 2, and took effect on 8 March 2013.

1615 *R v Foster* [2009] 1 Qd R 53, [74].

1616 The relevant Explanatory Memorandum described the amendment as ensuring that "*reparation could be made in respect of individual victims of any federal offence for loss suffered by reason of the criminal conduct, even if the loss was not a direct result of that conduct*": *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012* (Cth), *Explanatory Memorandum (House of Representative)*, Schedule 2, item 2.

1617 *Liaver v Errington* [2003] QCA 5, [49].

1618 *Hookham v R* (1994) 181 CLR 450.

1202. A court has a discretion whether to make a reparation order and as to the amount of the order.[1619]

1203. Although the legislative intention is to provide a simple and cost-effective method for those who have suffered loss arising from an offence to recover the loss from the offender,[1620] this does not place a restriction on the discretion to make a reparation order.[1621] A reparation order may be made irrespective of whether there was a prior civil liability to make reparation.[1622]

1204. However because the procedure is ancillary to sentencing, and is intended to be expeditious, a court may decline to make an order if proof or quantification of any loss or expense is likely to be complex and time-consuming.[1623]

1205. In the case of joint offenders, each offender may be regarded as severally responsible for the whole of any resulting loss or damage, and a reparation order for the whole of the loss or damage may be made against one of the offenders.[1624]

1206. Reparation is not part of the punishment for the offence but a means of making an order for compensation.[1625]

1207. A person cannot be imprisoned for failing to pay a reparation order (s 21B(2); cf *Social Security (Administration) Act 1999* (Cth), s 218(2)). A reparation order is enforceable as a final judgment of the court (s 21B(3)). An order may found a bankruptcy notice.[1626]

1208. Since an order for reparation is not a penalty, a person cannot be imprisoned for failing to pay and an order for reparation is recoverable as a civil debt,[1627] courts historically treated the capacity or incapacity of the offender to pay as irrelevant to the exercise of the discretion whether to make such an order.[1628] However in *Vlahov*,[1629] the Full Court of the Supreme Court of Western Australia (without referring to contrary authorities) held that, in deciding whether to make an order under s 21B and in determining the amount of any such order, the court may have regard to the personal circumstances and means of the offender. In *Hookham*,[1630] the Crown sought to challenge that aspect of the decision in *Vlahov*, but the High Court considered that the issue was outside the scope of the case stated. While the

1619 *Hookham v R* (1994) 181 CLR 450.
1620 *R v Foster* [2009] 1 Qd R 53, [72]; cf *Kaplan v Lee-Archer* (2007) 15 VR 405, [25].
1621 *Vlahov v Commissioner of Taxation* (1993) 26 ATR 49, 54.
1622 *Gould v Commissioner of Taxation* (1998) 147 FLR 173.
1623 *R v Braham* [1977] VR 104, 110; *R v Landolt* (1992) 63 A Crim R 220, 223; *R v Watt* [2021] ACTSC 20, [39]-[49].
1624 *R v Theodossio* [2000] 1 Qd R 299, [24]; *R v Melrose* [2016] QCA 202, [16]-[17].
1625 *R v Braham* [1977] VR 104; *Re Lenske; Ex parte Lenske* (1986) 9 FCR 532; *R v Allen* (1989) 41 A Crim R 51, 56; *Customs v Labrador Liquor Wholesale Pty Ltd* [2006] QCA 558, [103]; *R v Foster* [2009] 1 Qd R 53, [72].
1626 *Re Barnes; Ex parte Deputy Commissioner of Taxation* [1995] FCA 1133; *Gaffney v Commissioner of Taxation* (1998) 81 FCR 574.
1627 *R v Foster* [2009] 1 Qd R 53, [72].
1628 See *R v Braham* [1977] VR 104, in which previous authorities in relation to orders for compensation or reparation were reviewed. A powerful reason for disregarding the means of the offender was given in *R v Ironfield* [1971] 1 WR 90: "*A victim who wishes to assert his rights need not be put to the additional trouble and expense of independent proceedings, and certainly cannot be required to forgo his rights in order the facilitate the rehabilitation of the man who has despoiled him.*"
1629 *Vlahov v Commissioner of Taxation* (1993) 26 ATR 49. See also *Liaver v Errington* [2003] QCA 5, [4], [8], [51]-[52].
1630 *Hookham v R* (1994) 181 CLR 450.

approach adopted in *Vlahov* has been criticised,[1631] the decision has been followed by appellate courts in other cases.[1632] It should be noted, however, that *Vlahov* establishes only that an offender's financial circumstances may be relevant to the exercise of the discretion. A court is not necessarily precluded from making an order because it is beyond the present means or assets of the offender as disclosed to the court.[1633]

1209. The making of reparation may be relevant to sentencing. In particular, in sentencing a federal offender the court is required to take into account:

- any injury, loss or damage resulting from the offence (see "3.4.5 Injury, loss or damage resulting from the offence – s 16A(2)(e)"); and
- the degree to which a person has shown contrition for the offence by, amongst other things, taking action to make reparation for any injury, loss or damage resulting from the offence (see "3.4.7 Degree to which contrition is shown – s 16A(2)(f)").

5.4 Forfeiture of property

1210. Some Commonwealth statutes empower a court, upon convicting a person of a particular offence, to order forfeiture of property. An example is s 106 of the *Fisheries Management Act 1991* (Cth), which permits a court which convicts a person of a specified offence against the Act to order the forfeiture of a fishing boat or fishing equipment used in the commission of the offence, and fish on board the boat, or the proceeds of sale of such fish.

1211. In addition, there are broad powers for a court to order forfeiture following conviction, pursuant to Part 2-2 of the *Proceeds of Crime Act 2002* (Cth).[1634] As a matter of practice, however, applications for such forfeiture are usually dealt with separately from a sentencing hearing.

5.5 Orders for banning, licence cancellation and disqualification

1212. Some Commonwealth statutes empower a court, upon convicting a person of a particular offence, to make ancillary orders for banning or disqualifying a person from particular conduct, or for cancelling a licence or permit. An example is s 98 of the *Fisheries Management Act 1991* (Cth), which permits a court which convicts a person of a specified offence against the Act:

- to ban the offender from being on a boat in the Australian Fishing Zone (AFZ) with the intention of engaging in commercial fishing,
- to ban the offender from being on any Australian-flagged boat outside the AFZ for the purposes of commercial fishing, or
- to cancel or suspend a fishing concession.

1631 See Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006), [8.26]-[8.35]. The ALRC recommended ([8.33]) that federal sentencing legislation should preclude a court from considering an offender's financial circumstances when making a reparation order. That recommendation has not been acted upon.

1632 *Davies v Taylor* (1997) 7 Tas R 265; *Vadasz v DPP (Cth)* [1999] SASC 255, [41]; *Liaver v Errington* [2003] QCA 5, [4], [8], [51]-[52]. Cf *Gould v Commissioner of Taxation* [1998] WASCA 260.

1633 *R v Knight* (1990) 51 A Crim R 323; *Davies v Taylor* (1997) 7 Tas R 265; *Customs v Labrador Liquor Wholesale Pty Ltd (No 2)* [2006] QSC 40, [59] (affirmed in *Customs v Labrador Liquor Wholesale Pty Ltd* [2006] QCA 558, [103]). Cf *Cooper v Sinnathamby* [2007] WASCA 32, [24].

1634 Court-ordered forfeiture under Part 2-2 of the Act is distinct from forfeiture which occurs by operation of law following a conviction, pursuant to Part 2-3 of the Act.

Authority is divided on whether such an order may be backdated.[1635]

1213. Many State and Territory laws permit a court, following a conviction or finding of guilt, to make orders relating to the suspension or cancellation of a licence or permit, or disqualification of a person from an office, or from seeking or obtaining some licence, permit or authority. The most commonly used examples are provisions relating to licences and permits to drive a motor vehicle. Such powers are usually triggered by a conviction for, or finding of guilt of, a specified offence against the law of the particular jurisdiction; but in some instances, the power may arise where the offence is of a kind described more generically, or which involves conduct of a particular type. For example, s 55 of the *Sentencing Act 1997* (Tas) empowers a court that convicts an offender of a "motor vehicle offence" to order that the offender be disqualified from driving; "motor vehicle offence" is defined to include (amongst other things) "*an indictable offenI. in the commission of which a vehicle was used or the commission of which was facilitated by a motor vehicle*". It is unclear whether such a power would be picked up and applied by the provisions of the *Judiciary Act 1903* (Cth) to the sentencing of a federal offender in the relevant jurisdiction.

1635 *Stevenson v Dix* (1995) 81 A Crim R 167.

6 SOME PROCEDURAL ISSUES

6.1 Role of the prosecution in a sentence hearing

6.1.1 Prosecution not permitted or obliged to submit range of sentences

1214. In *Barbaro*,[1636] the High Court overruled the decision of the Victorian Court of Appeal in *R v MacNeil-Brown*,[1637] which had required that, upon request by a sentencing court, the prosecution was obliged to provide a submission about the bounds of the available range of sentences (e.g. by submitting that a head sentence of between x and y years with a non-parole period of between a and b years is appropriate). The plurality in *Barbaro* deprecated the practice required by the decision in *MacNeil-Brown.* The plurality held that the prosecution is not required, and should not be permitted, to make such a statement of bounds to a sentencing judge, as it was not a submission of law but merely a statement of opinion. The plurality said that it was "*neither the role nor the duty of the prosecution to proffer some statement of the specific result which … should be reached or a statement of the bounds within which that result should fall.*"[1638]

1215. Subsequent decisions have strictly confined the application of the decision in *Barbaro*.

1216. The High Court has held that its decision in *Barbaro* does not preclude a court from receiving a submission (agreed or otherwise) as to penalty in a civil penalty proceeding.[1639] The Court has also affirmed (by reference to its earlier decision in *Everett*[1640]) that a prosecutor has a duty to assist a sentencing court to avoid appealable error.[1641]

1217. In *Castle*,[1642] the Queensland Court of Appeal held that a submission by the prosecutor that the sentencing court should make a serious violent offence declaration, or should declare a later date for parole eligibility, would not have been inconsistent with the decision in *Barbaro*.

1218. In *Holder*,[1643] the Victorian Court of Appeal held that the prohibition on a prosecutor making submissions on a sentence range did not relieve the prosecutor from their obligation to assist the court, and that the failure of the prosecutor to offer appropriate assistance to a sentencing judge may be determinative of the result of a Crown sentence appeal. The prosecutor was not precluded from submitting to a sentencing court that sentences imposed on co-offenders were so low as to reduce or negate the operation of the principle of parity, and in that case the failure of the prosecutor to do so precluded the Crown from so submitting on appeal.[1644]

1219. In *Garcia-Godos*,[1645] the sentencing judge asked the prosecutor whether a particular nominated sentence was "within range"; the prosecutor responded that it was not and referred to the sentence which had been imposed on a co-offender on appeal. The New South Wales Court of Criminal Appeal

1636 *Barbaro v R* (2014) 253 CLR 58.
1637 *R v MacNeil-Brown* (2008) 20 VR 677.
1638 *Barbaro v R* (2014) 253 CLR 58, [39].
1639 *Commonwealth v Fair Work Building Industry Inspectorate* (2015) 258 CLR 482.
1640 *Everett v R* (1994) 181 CLR 295.
1641 *CMB v Attorney-General (NSW)* (2015) 256 CLR 356, [38], [64].
1642 *R v Castle; Ex parte Attorney-General* [2014] QCA 276, [20].
1643 *DPP v Holder* (2014) 41 VR 467, [32], [34].
1644 *DPP v Holder* (2014) 41 VR 467, [27]-[34].
1645 *Garcia-Godos v R* [2021] NSWCCA 229. Cf *Anderson v R* (2022) 109 NSWLR 272, [45]-[58].

held that there was no breach of the principle in *Barbaro*, because the prosecutor had not expressed an opinion but made a proper submission which was designed to assist the sentencing judge. Moreover, as the plurality had confirmed in *Barbaro*, the Crown was both entitled and obliged to draw the sentencing judge's attention to "comparable cases" and there could no more relevant case than an appellate judgment on a sentence imposed on a co-offender.[1646]

1220. In *Matthews*,[1647] the Victorian Court of Appeal reaffirmed that *Barbaro* did not change the pre-existing practice regarding the duties of the Crown, other than by proscribing the submission of a quantified sentencing range. In particular, the Court held that nothing said in *Barbaro* detracts from the Crown's obligation to make clear what type of sentencing disposition, whether imprisonment or otherwise, it contends is necessary or appropriate.[1648]

1221. A majority of the Court in *Matthews* also held that the prohibition on counsel contending for a sentence within a particular range did not apply to defence counsel.[1649] The majority held that if defence counsel does make such a submission, it is permissible for the Crown to respond by telling the judge whether in the Crown's submission it would be open to sentence with that range; if the Crown contends that it would not, it may rely on comparative cases, current sentencing practice and other relevant considerations in support of that contention. However the Crown may not respond to a defence range by putting an alternative range. In *Gordon*,[1650] the Australian Capital Territory Court of Appeal saw no reason to depart from this aspect of the decision in *Matthews*, but added that a submission by defence counsel as to the appropriate length of the sentence to be imposed is rarely likely to be of any assistance to a judge.

1222. In *Haynes*,[1651] the Victorian Court of Appeal said that *Barbaro* made clear that, although the prosecution should not express an 'opinion' as to the numerical terms of the appropriate sentencing range, it has a duty to assist the sentencing court to avoid appealable error. That duty includes identifying the kind of sentence disposition that is appropriate or inappropriate, such as a suspended sentence of imprisonment.[1652] In the instant case the prosecutor on the plea hearing failed to submit that a recognizance release order (RRO) under s 20(1)(b) of the *Crimes Act 1914* (Cth) was not a disposition reasonably open to the sentencing judge; the Court held that the Director was not permitted to contend on appeal that the period to be served was manifestly inadequate.[1653]

1223. The effect of the decision in *Haynes* is that if the prosecution considers that the making of a RRO would be inappropriate or unavailable, it has a duty to make such a submission to the sentencing court. A RRO is generally unavailable if the head sentence or total effective sentence (TES) for a federal offence or offences is more than 3 years' imprisonment.[1654] The logic of the decision in *Haynes* is that if the prosecution considers that a RRO is not available because a head sentence or TES of more than 3 years

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1646 *Garcia-Godos v R* [2021] NSWCCA 229, [80]-[82] (Adamson J, Simpson JA and Lonergan J agreeing).
1647 *Matthews v R* (2014) 44 VR 280.
1648 *Matthews v R* (2014) 44 VR 280, [27].
1649 *Matthews v R* (2014) 44 VR 280, [22]-[25] (Warren CJ, Nettle and Redlich JJA). It is arguable that this part of the majority judgment was *obiter dicta*. Priest JA and Lasry AJA ([162]) found it unnecessary to decide the point.
1650 *R v Gordon* [2022] ACTCA 48, [70]-[72].
1651 *DPP (Cth) v Haynes* [2017] VSCA 79.
1652 *DPP (Cth) v Haynes* [2017] VSCA 79, [58]-[59], referring to *Malvaso v R* (1989) 168 CLR 227 and *Everett v R* (1994) 181 CLR 295.
1653 *DPP (Cth) v Haynes* [2017] VSCA 79, [60]-[62].
1654 See "4.10.4 Non-parole period (NPP), recognizance release order (RRO) or straight sentence?".

is required for the federal offence(s), the prosecutor has a duty to make that submission to the sentencing court. It is implicit in *Haynes* that the Court considered that *Barbaro* does not preclude – and indeed requires – such a submission.[1655]

1224. In some jurisdictions, legislation has also affected the application of the decision in *Barbaro*. In Queensland and the Australian Capital Territory, the effect of *Barbaro* has been reversed by statute for State/Territory offences. A sentencing court is now specifically empowered to receive a sentencing submission made by a party stating the sentence, or range of sentences, the party considers appropriate for the court to impose.[1656]

6.1.2 Duties of the prosecution on a plea hearing

1225. The duties of the prosecution in relation to the sentencing of a federal offender are a manifestation of its wider duties. Those general duties are succinctly summarised in the *Prosecution Policy of the Commonwealth* as follows:[1657]

> *[T]hroughout a prosecution the prosecutor must conduct himself or herself in a manner which will maintain, promote and defend the interests of justice. In the final analysis the prosecutor is not a servant of government or individuals - he or she is a servant of justice.*
>
> *It is also important not to lose sight of the fact that prosecutors discharge their responsibilities in an adversarial context and seek to have the prosecution case sustained. Accordingly, while that case must at all times be presented to the Court fairly and justly, the community is entitled to expect that it will also be presented fearlessly, vigorously and skilfully.*

1226. The performance of the prosecution's duty to the court ensures that the defendant knows the nature and extent of the case against them, and thus has a fair opportunity of meeting it.[1658]

1227. In relation to a plea hearing, aspects of these duties may be conveniently grouped under these headings: disclosure; fact-finding; submissions generally; comparable cases; and submissions relating to sentencing dispositions.

1228. **Disclosure:** The prosecution has continuing obligations of disclosure. In particular, subject to recognised exceptions, the prosecution must disclose to an offender (usually by disclosure to the offender's legal representatives) matters that may be reasonably regarded as relevant to sentencing. These may include, for example, full details relating to the known antecedents of the offender, details of charges and dispositions in relation to co-offenders or other persons where the dispositions may raise

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1655 See also "6.1.2 Duties of the prosecution on a plea hearing".

1656 *Penalties and Sentences Act* 1992 (Qld), s 15; *Crimes (Sentencing) Act 2005* (ACT), s 34AA. The position of the CDPP is that these provisions are not picked up by the terms of the *Judiciary Act 1903* (Cth) as surrogate federal law and are therefore not applicable to the sentencing of federal offenders.

1657 *Prosecution Policy of the Commonwealth* (2005 revision), p 2. See also the ethical duties imposed on legal practitioners by the rules of conduct for barristers and for solicitors in each jurisdiction, as they relate to the conduct of a prosecution. In jurisdictions which have adopted the uniform national rules, the applicable rules are the *Legal Profession Uniform Conduct (Barristers) Rules 2015* and the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*, as applied by laws in each participating jurisdiction.

1658 *R v Tait* (1979) 24 ALR 473, 477. The Court there added, "*A failure by the Crown to discharge that duty may not only contribute to appealable error affecting the sentence, but may tend to deprive the defendant of a fair opportunity of meeting a case which might ultimately be made on appeal.*"

issues of parity, and any information or material that may affect an assessment of the moral culpability of the offender.

1229. Disclosure obligations are dealt with in detail in the CDPP's "*Statement on Disclosure*" (March 2017), which is published on the CDPP's web site.

1230. **Fact-finding:** Fact-finding is a crucial aspect of sentencing, which may greatly affect the sentence to be imposed.[1659] In summary, the duties of the prosecution in relation to fact-finding include making an adequate presentation of the facts, identifying any aggravating features and admitting any mitigating features, fair testing of the offender's case, correcting any error of fact which emerges in the course of the plea and drawing attention to the offender's antecedents, including any sentence of imprisonment currently being served.[1660]

1231. What constitutes "an adequate presentation of the facts" depends on what is fair, reasonable and practical in the circumstances of the particular case.[1661] The duty is not limited to the facts of the offence; the court must be given a balanced view of the facts relevant to sentencing generally.[1662]

1232. In plea hearings, the rules of evidence usually do not apply and courts commonly receive and act on evidence that would not be admissible if they did. This approach is consistent with s 16A of the *Crimes Act 1914* (Cth).[1663] But that does not mean that a sentencing court must accept or act upon all assertions from the bar table or all material put forward on a plea hearing.[1664] If an assertion or evidence of a fact is challenged by an opposing party, the position at common law is that it can only be established by admissible evidence.[1665] Therefore if an assertion or evidence is put forward by the offender which the prosecution wishes to contest or put in issue, the prosecutor has a responsibility to object to it. A common example is hearsay evidence relating to the offender's state of mind on a matter of significance[1666] that the prosecution does not concede, when the offender has not given, and will not give, evidence. If the offender seeks to put forward such material, in relation to a matter that is disputed or not conceded by the prosecution, the prosecutor should object to its reception. Similarly if a self-serving statement by an offender (whether in the form of a letter to the court, a statement or an affidavit) on a matter in issue is sought to be tendered on a plea hearing, the prosecutor should object to its reception, in the absence of viva voce evidence by the offender; or if it is received should seek to cross-

1659 *R v Olbrich* (1999) 199 CLR 270, [1].

1660 *R v Tait* (1979) 24 ALR 473, 477; *R v Rumpf* [1988] VR 466, 476; *Matthews v R* (2014) 44 VR 280, [27], [153]. The duty to correct any error of fact which might have emerged in the course of the plea must be applied in a common sense way; it does not mean that the prosecutor is obliged to traverse every proposition put on behalf of an accused person in a lengthy sentencing hearing: *DPP v Bulfin* [1998] 4 VR 114, 123.

1661 *R v Rumpf* [1988] VR 466, 472.

1662 *R v Rumpf* [1988] VR 466, 472.

1663 *Weininger v R* (2003) 212 CLR 629, [21].

1664 *GAS v R* (2004) 217 CLR 198, [30]-[31].

1665 *R v Rumpf* [1988] VR 466, 471. Under s 4 of the Uniform Evidence Acts, while the rules of evidence do not apply to a sentencing hearing, the court may apply them. For an example of a case in which the rules of evidence were applied on the application of the prosecutor see *DPP (Cth) v Besim* [2017] VSCA 158, [74].

1666 Such as the existence and extent of contrition, the motive for the offending, whether the offender was affected by duress, or, in a terrorism case, the offender's renunciation of the ideology which motivated the offending. See "2.1.6 Hearsay assertions and untested statements about an offender's state of mind".

examine the offender (at least if the evidence is in the form of an affidavit).[1667] In either circumstance (that is, whether hearsay or self-serving material is tendered), if the material is received in evidence, and the offender is not called to give evidence, the prosecutor should make clear that the matter is not conceded, and should contend (if appropriate) that no weight should be given to the material in the absence of evidence by the offender from the witness box.[1668]

1233. The prosecution should make any submissions necessary to assist the court in fact-finding.[1669] This may include identifying which facts are agreed or undisputed and which asserted facts are contested or not conceded. In relation to the latter, the prosecution should assist the court by identifying the evidence relevant to those facts, and by making clear and cogent submissions about what factual findings should or should not be made, and about whether (and if so how) the asserted facts are or are not relevant or significant.

1234. **Submissions generally:** The Crown has a duty to assist the sentencing judge to avoid appealable error.[1670] Errors which may cause the sentencing discretion to miscarry include acting upon a wrong principle, mistaking the facts, failing to take into account some material consideration or being guided or affected by extraneous or irrelevant matters.[1671] The breadth of the range of errors which may cause the sentencing discretion to miscarry provides guidance as to the nature of the assistance which the prosecution must give the court.

1235. The prosecutor must make appropriate submissions on relevant questions of law, including statutorily prescribed maximum penalties[1672] or minimum penalties,[1673] and by an appropriate reference to any legislation[1674] or special principles of sentencing which might reasonably be thought to be relevant to the case in hand[1675] (except to the extent that the legislation or principles are trite[1676] or well-known to the sentencing judge[1677]).

1236. **Comparable cases:** The prosecution must assist the court to fulfil its duty to give proper consideration to previous sentencing decisions.[1678] A court sentencing a federal offender has a duty "*to*

1667 The importance of the prosecutor objecting to such evidence is illustrated by *Van Zwam v R* [2017] NSWCCA 127 (a case involving a federal offence), in which it was held (by majority) that the sentencing judge was not entitled to disregard entirely evidence in an affidavit by the offender, when the prosecutor neither objected to its reception nor sought to cross-examine the offender. In *Imbornone v R* [2017] NSWCCA 144, [3]-[9], [57], the Court emphasised that the error in *Van Zwam* was that the sentencing judge disregarded the affidavit entirely, and that a sentencing court properly may give such evidence (especially when served late) little weight; but the decision in *Van Zwam* highlights the need for prosecutors to be effective contradictors in plea hearings. See also *R v Succarieh; Ex parte DPP (Cth)* [2017] QCA 85, [104]-[124].

1668 See the summary of relevant principles in *Imbornone v R* [2017] NSWCCA 144, [57].

1669 *Barbaro v R* (2014) 253 CLR 58, [39].

1670 *R v Tait* (1979) 24 ALR 473, 477; *CMB v Attorney-General (NSW)* (2015) 256 CLR 356, [38]. This duty is a corollary of the conferral of appeal rights on the prosecution: *R v Tait* (1979) 24 ALR 473, 477; *DPP v Bulfin* [1998] 4 VR 114, 134. A material failure to fulfil the duty may lead an appellate court to dismiss a prosecution appeal, despite error being shown.

1671 *House v R* (1936) 55 CLR 499, 505.

1672 *R v Travers* (1983) 34 SASR 112, 115-6.

1673 *R v Ireland* (1987) 49 NTR 10, 21.

1674 *R v Travers* (1983) 34 SASR 112, 115-6.

1675 *R v Tait* (1979) 24 ALR 473, 477.

1676 *Matthews v R* (2014) 44 VR 280, [153] (Priest JA and Lasry AJA).

1677 *R v Travers* (1983) 34 SASR 112, 115-6.

1678 *R v Ogden* [2014] QCA 89, [7]; *DPP (Cth) v Thomas* (2016) 53 VR 546, [179].

have regard to what has been done in comparable cases throughout the Commonwealth".[1679] Consistency in sentencing for federal offenders is achieved through the work of the intermediate appellate courts (ie not first instance decisions).[1680] Reference to comparable cases has two purposes. First, it "*can and should provide guidance as to the identification and application of relevant sentencing principles*".[1681] Second, it "*may yield discernible sentencing patterns and possibly a range of sentences against which to examine a proposed … sentence*";[1682] that is, examination of comparable cases may provide a "*yardstick*".[1683] However sentences are not binding precedents, and do not necessarily disclose the correct range or otherwise determine the upper and lower limits of sentencing discretion.[1684] These principles must underlie prosecution references to comparable cases.

1237. The prosecution must ensure that the sentencing court is "*properly informed*" about comparable sentences. The authorities provide guidance on how that duty is, and is not, to be fulfilled. In *Pham*, the plurality emphasised that "*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.*"[1685] This precept is directed to the use of "*bare statistics*" about sentences passed, which tell the sentencing judge "*very little that is useful if the sentencing judge is not also told why those sentences were fixed as they were*".[1686] A table of sentences imposed in other cases "*is useful if, but only if, it is accompanied by an articulation of what are seen as the unifying principles which those disparate sentences may reveal*".[1687]

1238. A table or schedule of previous sentencing decisions can be of great assistance to judges, but only if it offers considerably more than numerical information.[1688] It must be accurate[1689] and it must contain sufficient information about the features of each case to enable useful comparisons to be drawn.[1690] Its function is to provide a sound basis from which the judge may determine whether there is a relevant sentencing pattern to be discerned from the history of sentences available.[1691] In sentencing for quantity-based drug offences, reference to the relevant quantities in other cases by use of a common denominator (such as the proportion of a commercial quantity) is essential for meaningful comparisons.[1692]

1679 *R v Pham* (2015) 256 CLR 550, [24]. In *Pham*, the High Court held that it is an error for a State court sentencing a federal offender to sentence in accordance with the sentencing practices of that State to the exclusion of sentencing practices in other Australian jurisdictions. However in *R v Nakash* [2017] NSWCCA 196, [18], Simpson JA observed that nothing in the judgment of the plurality in *Pham* prevents reference to sentences imposed in respect of comparable offences under State law, and that such reference may be particularly necessary where there is no relevant pattern of sentencing in respect of the Commonwealth offence.

1680 *R v Pham* (2015) 256 CLR 550, [29], [50]; *R v Mitric* [2017] SASCFC 178, [32]; *R v Burtt* [2018] SASCFC 5, [64]-[65].

1681 *R v Pham* (2015) 256 CLR 550, [27].

1682 *R v Pham* (2015) 256 CLR 550, [27].

1683 *Hili v R* (2010) 242 CLR 520, [54]; *R v Pham* (2015) 256 CLR 550, [29].

1684 *R v Pham* (2015) 256 CLR 550, [27].

1685 *R v Pham* (2015) 256 CLR 550, [28]. This echoes what was previously said in *Hili v R* (2010) 242 CLR 520, [48].

1686 *Wong v R* (2001) 207 CLR 584, [59] (emphasis in original). See the analysis in *DPP (Cth) v Thomas* (2016) 53 VR 546, [179].

1687 *DPP (Cth) v Thomas* (2016) 53 VR 546, [179], referring to *Wong v R* (2001) 207 CLR 584, [59].

1688 *DPP (Cth) v Thomas* (2016) 53 VR 546, [179]. See also *Noble v R* [2018] NSWCCA 253, [56].

1689 *DPP (Cth) v Thomas* (2016) 53 VR 546, [181].

1690 *DPP (Cth) v Thomas* (2016) 53 VR 546, [180].

1691 *DPP (Cth) v Thomas* (2016) 53 VR 546, [182].

1692 *DPP (Cth) v KMD* [2015] VSCA 255, [54]-[57]. However, care must be taken not to treat the quantity as if it were the chief factor in fixing the sentence: see *Wong v R* (2001) 207 CLR 584, [67]-[78].

1239. For a table of decisions provided by the prosecution to be of assistance, the prosecution must, in addition to providing necessary information about the cases, make clear how each case is relied upon:[1693] that is, whether it is comparable,[1694] or whether its relevance is that it is so different that the sentence imposed there would not lie within a sound exercise of the discretion in the present case.[1695]

1240. The mere fact that the number of relevant comparable cases is limited does not lessen the need for the prosecution to make clear its position as to where the sentencing range fell; that could be done by reference to broadly 'like' or 'unlike' cases.[1696] If there are no directly comparable cases, courts adopt "*the conventional common law method of reasoning by analogy and extrapolation from the available sentencing information … and applying established sentencing principles*".[1697] If there is no established pattern of sentences for the instant offence, guidance may be obtained from sentencing for another offence which carries the same maximum penalty and involves similar conduct.[1698]

1241. Tables summarising decisions of intermediate appellate courts on sentencing for the subject offence (or related offences) may be particularly helpful, if they provide sufficient information about the features of each case to enable useful comparisons to be drawn.[1699] If there are decisions of intermediate appellate courts which summarise sentences imposed in other cases for the relevant offence (or related offences), those decisions should be referred to.[1700]

1242. **Submissions relating to sentencing dispositions:** Since the decision of the High Court in *Barbaro*,[1701] the prosecution is precluded from stating to a sentencing court the bounds of an "*available range*" of sentences, or from proffering "*some statement of the specific result*" of the exercise of sentencing discretion. However subsequent decisions have clarified that *Barbaro* does not limit the scope of the

1693 *DPP (Cth) v Thomas* (2016) 53 VR 546, [186].

1694 In *Nguyen v R* [2016] VSCA 198, [73], Redlich JA (with whom Tate and Whelan JJA agreed) observed, "*Cases are likely to be comparable where the objective seriousness of the offender's conduct is similar to that of the subject offence. … [A]ppellate courts … may seek to identify the applicable range by characterising the objective seriousness of the offence as falling within the low, mid or the high range of seriousness of the offence*". As to the danger of inappropriate use of such categorisation, see *DPP v Weybury* [2018] VSCA 120, [33]-[34], [54]. See also "2.5.2 Categorising the objective seriousness".

1695 *DPP (Cth) v Thomas* (2016) 53 VR 546, [180]. Although in *Thomas*, the Victorian Court of Appeal said (at [182]) that the table will be of limited assistance if it "*does not <u>on its face</u> illuminate the relevance of the cases listed*" (emphasis added), in *DPP (Cth) v Haynes* [2017] VSCA 79, [35], the Court cited *Thomas* as authority for the proposition that "*statistics and tables of cases can only be of assistance to a sentencing judge <u>if they are spoken to by counsel</u>; that is, if their precise relevance for the sentencing task is actually explained*" (emphasis added). Similarly, in *DPP (Cth) v Masange* [2017] VSCA 204, [49], the Court said, "*In order to discharge its duty to assist the sentencing judge to avoid appealable error, <u>the prosecution must speak to such a schedule</u> and articulate the unifying principles revealed by the cases referred to*" (emphasis added). There does not seem to be any reason in principle why the prosecution could not explain the relevance or significance of a case cited in a table either in written or oral submissions, rather than only in the table itself.

1696 *DPP (Cth) v Haynes* [2017] VSCA 79, [35].

1697 *DPP (Cth) v KMD* [2015] VSCA 255, [127]. The absence of comparable authorities does not leave open a wider range of permissible sentences than otherwise would be the case: *R v Goodwin; Ex parte Attorney-General (Qld)* [2014] QCA 345, [5].

1698 *Schanker v R* [2018] VSCA 94, [224].

1699 *DPP (Cth) v Brown* [2017] VSCA 162, [71]. The table provided by the prosecution in that case is attached as an Appendix to the judgment.

1700 See *DPP (Cth) v KMD* [2015] VSCA 255, [67]-[81].

1701 *Barbaro v R* (2014) 253 CLR 58.

Crown's pre-existing duties in relation to submissions concerning the exercise of the sentencing discretion. See "6.1.1 Prosecution not permitted or obliged to submit range of sentences".

1243. The obligations of the prosecution include the following:

(a) The prosecution must make clear what type of sentencing disposition, whether imprisonment or otherwise, it contends is necessary or appropriate.[1702]

(b) If it is submitted for an offender that they should receive a non-custodial disposition or a suspended term of imprisonment, or if the sentencing judge indicates that they are considering such a course, the prosecution should make clear whether it contends, and if so why, a disposition of the kind proposed would not be a proper exercise of sentencing discretion.[1703] For example, opposition to a wholly-suspended sentence may be expressed by submitting that, for specified reasons, an immediate custodial sentence is the only appropriate option.[1704]

(c) If the prosecution contends that a sentence of imprisonment is the only appropriate option, the prosecution should also make clear (if applicable) that the appropriate head sentence or aggregate sentence should be such that a recognizance release order is not available, or that a recognizance release order is presumptively required (as the case may be).[1705]

(d) If it is submitted for an offender that an aggregate penalty should be imposed for two or more offences, or if the sentencing judge indicates that they are considering such a course, the prosecution should make clear whether it contends, and if so why, such an aggregate penalty would not be a proper exercise of sentencing discretion.[1706]

1702 *Matthews v R* (2014) 44 VR 280, [27]. The reference to "*necessary or appropriate*" appears to countenance a submission in every case that a particular sentence type would be appropriate, or would be more appropriate than another sentence type. That is, the prosecution is not restricted to submitting in terms that imposing a sentence of another particular type would constitute appealable error. See also *Matthews* at [22]-[25]; *R v Malvaso* (1989) 50 SASR 503, 509. The submission may be expressed by reference to the requirements of the *Crimes Act 1914* (Cth), s 16A(1) (sentence or order must be "*of a severity appropriate in all the circumstances of the offence*"), s 16A(2)(k) (the need to ensure that the offender is "*adequately punished*") or s 17A (sentence of imprisonment to be imposed only if the court is satisfied, after having considered all other available sentences, that "*no other sentence is appropriate*" in all the circumstances of the case).

1703 *Malvaso v R* (1989) 168 CLR 227; *Everett v R* (1994) 181 CLR 295. See also *R v Jermyn* (1985) 2 NSWLR 194, 197-8, 203-5; *DPP v Waack* (2001) 3 VR 194. This principle continues to apply after *Barbaro*: *Matthews v R* (2014) 44 VR 280, [27]; *DPP (Cth) v Haynes* [2017] VSCA 79, [58]-[59]. In *CMB v Attorney-General (NSW)* (2015) 256 CLR 356, [64], Keifel, Bell and Keane JJ said, "*Where the sentencing judge indicates the form of proposed sentencing order and the prosecutor considers that such a penalty would be manifestly inadequate, the prosecutor discharges his or her duty to the court by so submitting.*"

1704 *DPP v Gany* [2006] VSCA 148, [24]. The submission may be expressed by reference to the requirements of s 17A of the *Crimes Act 1914*.

1705 *DPP (Cth) v Haynes* [2017] VSCA 79. As to when a sentencing court has an open discretion to impose, or is presumptively required to impose, a RRO, or conversely when it is precluded from doing so, see "4.10.4 Non-parole period (NPP), recognizance release order (RRO) or straight sentence?". In most cases a RRO is *optional* if the sentence of imprisonment, or total effective sentence (or total period including other unserved periods of imprisonment for a federal offence) for federal offences, is 6 months or less, is *presumptively required* if it is more than 6 months but not more than 3 years, and *precluded* (in favour of a non-parole period) if it is more than 3 years. Therefore the implication of the decision in *Haynes* is that the prosecution should consider into which of the relevant bands the sentence or total effective sentence (or total including other unserved periods) should fall, or below which it should not fall, and should frame its submission in relation to a RRO, straight sentence or non-parole period accordingly, by reference to the applicable legislation. Failure to do so may preclude such a submission being made on appeal.

1706 *DPP v Frewstal Pty Ltd* (2015) 47 VR 660, [113]-[124]. As to when an aggregate penalty is appropriate, see "1376

(e) If defence counsel contends for a particular sentence, or for a sentence within a particular range, it is permissible for the prosecution to respond by telling the judge whether in its submission it would be open to sentence within that range; if the prosecution contends that it would not, it may rely on comparative cases, current sentencing practice and other relevant considerations in support of that contention. However the prosecution may not respond to a defence range by putting an alternative range.[1707]

1244. The prosecution is required to make its submissions as to sentence fairly and in an even-handed manner; the Crown does not, as an adversary, press for a heavy sentence.[1708]

6.2 Deferring a sentence

1245. Some State or Territory laws permit a sentencing court to defer sentencing an offender for a period of time.[1709] Since there is no express or implicit Commonwealth provision to the contrary, and since such powers can be characterised as matters of procedure, such State or Territory laws are probably picked up and made applicable to the sentencing of federal offenders by s 68 or s 79 of the *Judiciary Act 1903* (Cth) or (if the offender is "a child or young person") by s 20C of the *Crimes Act 1914* (Cth).

1246. In addition, subject to any statutory requirement, a court has power to defer sentencing for any proper purpose affecting the sentencing task.[1710]

6.3 Diversion

1247. Statutory diversion programs under State or Territory law (for example, s 59 of the *Criminal Procedure Act 2009* (Vic)) which do not involve the imposition of a sentence are also probably picked up and applied to the sentencing of federal offenders by ss 68 and 79 of the *Judiciary Act 1903* (Cth) or (if the offender is "a child or young person") by s 20C of the *Crimes Act 1914* (Cth). There does not appear to be any express or implied contrary provision in Commonwealth law, thus leaving room for State procedural law to be picked up and applied.

1248. A successfully completed diversion does not form part of a person's criminal history or antecedents.

1249. A diversion regime under State or Territory law is incapable of being applied to federal offenders if it involves the exercise of judicial power by a person or body other than a court under Chapter III of the Constitution.[1711]

6.4 Court-supervised restorative justice schemes

1250. A number of States and Territories have schemes by which offenders may participate in meetings with victims of the offence or their families in a supervised setting. Such schemes are generally known as restorative justice schemes.

1251. The schemes vary in relation to:

1707 *Matthews v R* (2014) 44 VR 280, [22]-[25].
1708 *R v Tait* (1979) 24 ALR 473, 477.
1709 E.g. *Sentencing Act 1991* (Vic), s 83A, which permits a court to defer sentencing for up to 12 months.
1710 *R v Togias* [2001] NSWCCA 522, [6].
1711 *Newman v A (A Child)* (1992) 9 WAR 14.

- The classes of offenders who are eligible for the scheme. Some schemes are available only to young offenders, or to indigenous offenders. Some schemes are unavailable for particular types of offences.
- The procedures for entry into the scheme.
- Whether admission to the offending is a precondition for entry into the scheme.
- Whether participation in the scheme affects criminal charges against the offender.
- Whether participation or non-participation in the scheme affects any sentence imposed for the offence, and if so in what way.

1252. Given the variety of State and Territory schemes it is not possible to generalise about whether they apply in relation to federal offences. Consideration must be given to whether the particular scheme is applied by a law of the Commonwealth (such as s 68 or s 79 of *the Judiciary Act 1903* (Cth)[1712] or s 20C of the *Crimes Act 1914* (Cth)) or (if not) whether the law of the State or Territory applies in its own terms to a federal offence. In the latter case, a question may arise whether any such law is to that extent invalid (pursuant to s 109 of the Constitution) due to inconsistency with Part IB of the *Crimes Act 1914* or another law of the Commonwealth, or whether the law is within the power of the State or Territory legislature.[1713]

1253. The CDPP has considered whether the restorative justice scheme of the ACT (*Crimes (Restorative Justice) Act 2004* (ACT)) applies in relation to federal offences. The view of the CDPP is that the legislation does not apply in its own terms and that it is not picked up and applied as surrogate federal law by a law of the Commonwealth.

6.5 Taking other offences into account

6.5.1 Taking a federal offence into account in sentencing a federal offender - *Crimes Act 1914*, s 16BA

An overview of taking offences into account

1254. Section 16BA of the *Crimes Act 1914* (Cth) enables other federal offences (but not State/Territory offences) to be taken into account in sentencing a federal offender.[1714]

1255. The essence of the procedure is that, in sentencing for a federal offence (the primary offence), the offender may be asked whether they admit guilt of another specified federal offence (whether or not of the same type, and whether or not they have been charged with the offence) and whether they wish to have that other offence taken into account in sentencing for the primary offence. If they do, the court may take the offence into account. The person is not sentenced for the offence taken into account and the maximum sentence which may be imposed for the primary offence is unchanged. However a more severe sentence (including a more severe type of sentence) may (and usually will) be imposed for the primary offence, taking into account the other offending. If an offence is taken into account, the offender

1712 See "1.7 The application of State and Territory laws by Judiciary Act 1903, ss 68 and 79".

1713 State and Territory laws cannot, of their own force, bind a court exercising federal jurisdiction: *Solomons v District Court (NSW)* (2002) 211 CLR 119, [21]; *R v Gee* (2003) 212 CLR 230, [100]; *Hili v R* (2010) 242 CLR 520, [21]; *Rizeq v Western Australia* (2017) 262 CLR 1, [15], [21], [57], [60]-[61], [103].

1714 This provision, originally numbered s 21AA, was inserted by the *Crimes Amendment Act 1982*, s 10, and came into operation on 1 November 1982. It was renumbered as s 16BA by the *Crimes Legislation Amendment Act (No. 2) 1989*, s 35(2).

is not liable to be prosecuted for that offence (unless the conviction for the primary offence is quashed or set aside) and it is not to be regarded as an offence of which the person has been convicted.

1256. The procedure allows for other outstanding federal offending to be resolved expeditiously.

1257. The provision applies only where the person is convicted of the primary offence (and not if a non-conviction order is made, such as a s 19B bond[1715]).

What is the procedure for taking offences into account?

1258. The procedural steps necessary for exercising this power are set out in s 16BA. The statutory requirements are mandatory; failure to comply will vitiate the sentence.[1716]

1259. The procedure begins with the CDPP preparing, filing and serving a document in the prescribed form which lists the offence(s) which it seeks to have taken into account (s 16BA(1)).[1717] There is no requirement that the offender has been charged with the offence(s).[1718] The document must be signed by:

- the CDPP, or
- for and on behalf of the CDPP, by a person authorized by the CDPP, by instrument in writing, to sign documents under s 16BA(1); or
- by a person appointed under s 69 of the *Judiciary Act 1903* (Cth) to prosecute indictable federal offences (s 16BA(1)(c)).

The document must also be signed by the offender (s 16BA(1)(c)) and a copy must be given to them (s 16BA(1)(d)).

1260. If the court is satisfied that in all the circumstances it is proper to do so (s 16AB(1)(e)), the court may, with the consent of the prosecutor and before passing sentence, ask the offender whether they admit guilt in respect of all or any of the offences specified in the list and wishes them to be taken into account by the court in passing sentence for the primary offence or offences (s 16BA(1)). An offence may not be taken into account unless the offender admits guilt to the offence and wishes to have it taken into account (s 16BA(2)). If the offender is represented, the request and the admission of guilt may be made through their counsel.[1719]

1261. The court may take the offence or offences into account if it thinks fit (s 16A(2)); that is, the court has a discretion whether to do so.

1262. The maximum penalty for the primary offence on which the offender is sentenced is not affected by taking into account another offence (s 16BA(4)).[1720]

1263. If an offence is taken into account under s 16BA, the court may make such orders with respect to reparation, restitution, compensation, costs and forfeiture as it would have been empowered to make if

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1715 *R v Boulos* (1988) 37 A Crim R 461; *Dreezer v Duvnjak* (1996) 6 Tas R 294.

1716 *McMillan v Bierwirth* (1987) 49 SASR 403; *Purves v R* [2019] NSWCCA 227.

1717 The prescribed form is Form 1 in the *Crimes Regulations 2019* (Cth).

1718 When first enacted, the provision contained such a requirement, but it was removed by an amendment made by the *Crimes Legislation Amendment Act (No. 2) 1989*, s 16.

1719 *Kabir v R* [2020] NSWCCA 139, [47]-[50].

1720 The reference to the maximum penalty must be taken as a reference to the maximum penalty provided by statute, not the maximum that could properly be imposed having regard to the circumstances of the offending: cf *Abbas v R* [2013] NSWCCA 115, [46]-[48].

the person had been convicted before the court of the offence, but the court must not otherwise impose any separate punishment for the offence (s 16BA(5)).

1264. It is an error for a sentencing court to record a conviction for an offence which is taken into account.[1721]

1265. The court is not required to specify or indicate the sentence which would otherwise have been imposed for the primary offence.[1722] See "3.4.2 Other offences taken into account – s 16A(2)(b)".

1266. If an offence is taken into account under s 16BA, the court must certify upon the document filed in the court the offence taken into account and the conviction or convictions in respect of which the offence was taken into account (s 16BA(8)).

1267. If an offence is taken into account under s 16BA, the consequences are that:

- no proceeding may be taken or continued in respect of that offence, unless the conviction for the primary offence is quashed or set aside (s 16BA(8));
- the offender's admission of guilt to the offence taken into account is not admissible in proceedings for that offence or another offence listed in the form (s 16BA(9)); and
- the offence taken into account is not to be regarded for any purpose as an offence of which a person has been convicted (s 16BA(10)).

What federal offences can be taken into account?

1268. Subject to the limitation imposed by s 16BA(3) (relating to indictable offences), on its face s 16BA allows any federal offence to be taken into account in sentencing an offender for any other federal offence.

1269. However s 16BA(3) precludes a court from taking into account any indictable offence that it would not have jurisdiction to try (even if the defendant consented to the court hearing and determining proceedings for the offence or the prosecutor requested the court to hear and determine those proceedings). For example, if the District Court or County Court of a State did not have jurisdiction to try an indictable federal offence punishable by life imprisonment (even if the prosecutor requested and the defendant consented to that course), such an offence could not be taken into account by that court. Similarly, a court of summary jurisdiction would be precluded from taking into account an indictable offence which is not triable summarily. Nor could a court take into account an indictable federal offence which could not be tried on indictment in that State because of the geographical constraint imposed by s 80 of the Constitution (which provides that the trial on indictment of any offence against any law of the Commonwealth shall be held in the State where the offence was committed).

1270. But s 16BA(3) is itself subject to an exception. It does not prevent a court from taking into account an indictable offence where the court has jurisdiction to *sentence* a person charged with that offence (s 16BA(3A)), even if the court would not have jurisdiction to *try* the offence. This exception allows, for example, a superior court in one State to take into account an indictable federal offence committed in another State, if the court has jurisdiction (under the *Judiciary Act 1903* (Cth)) to sentence for the offence. The exception would also apply if the court otherwise had jurisdiction to sentence for the offence although it could not try the offence.

1721 *R v Cook* [2018] TASCCA 20, [6]-[7], [27], [80].
1722 *Martellotta v R* [2021] NSWCCA 168, [72].

1271. Subject to s 16BA(3), there is no limit on the seriousness of an offence which may be taken into account by a court sentencing an offender on indictment.[1723]

Is taking an offence into account a sentencing factor under s 16A?

1272. By s 16A(2)(b) of the *Crimes Act 1914* (Cth), in sentencing for the primary offence, the sentencing court must have regard to offences taken into account, to the extent that they are relevant and known to the court.

1273. As the authorities discussed below make clear, the offences taken into account will always be relevant in assessing the weight to be given to specific deterrence (s 16A(2)(j)) and to the need to ensure that the person is adequately punished for the primary offence (s 16A(2)(k)). They will also usually be relevant to the offender's character and antecedents (s 16A(2)(m)). But, depending on the circumstances of the case, offences taken into account may also be relevant to sentencing for the primary offence in a variety of other ways. To mention a few examples, in a particular case an offence taken into account might:

- reveal something of the nature and circumstances of the primary offence (s 16A(2)(a)) (e.g. by putting the offending in context, or by showing that it was not isolated or out of character, or by showing a motive, or by showing the degree of planning or premeditation);
- show that the primary offence was part of a course of conduct (s 16A(2)(c)) (e.g. that the offender engaged in a series of other similar sexual offences against the same victim);
- show the extent of the injury, loss or damage from the primary offence (s 16A(2)(e)) (e.g. if it consists of laundering the proceeds of the primary offence);
- undermine the offender's claim to contrition (s 16A(2)(f)); or
- affect the assessment of the offender's prospects of rehabilitation (s 16A(2)(n)).

How does taking an offence into account affect sentencing for the primary offence?

1274. In a guideline judgement on the New South Wales counterpart of s 16BA,[1724] Spigelman CJ (with whom Wood CJ at CL, Grove, Sully and James JJ agreed) set out a number of propositions and principles about how taking an offence into account affects sentencing for the primary offence. Although the guideline judgment related to the NSW provision, it has been repeatedly adopted and applied in relation to s 16BA.[1725]

1275. Spigelman CJ described the following propositions as "*well established and … uncontroversial*": [1726]

> *First, the entire point of the process is to impose a longer sentence (or to alter the nature of the sentence) than would have been imposed if the primary offence had stood alone. Second, it is wrong to suggest that the additional penalty should be small. Sometimes it will be substantial.*

1723 In *R v Nguyen* [2010] NSWCCA 238 two federal offences, each punishable by life imprisonment, were taken into account in sentencing the offender for another offence punishable by life imprisonment.

1724 *Attorney General's Application Under s37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146.

1725 *R v Lamella* [2014] NSWCCA 122, [48]; *DPP (Cth) v KMD* [2015] VSCA 255, [82]-[88]; *Soyke v R* [2016] NSWCCA 112, [67]; *Le v R* [2017] NSWCCA 26; *Atai v R* [2020] NSWCCA 302, [123]; *Holt v R* [2021] NSWCCA 14, [49], [52]; *Lai v R* [2021] NSWCCA 217, [75]; *Elzein v R* [2021] NSWCCA 246, [253].

1726 *Attorney General's Application Under s37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, [18].

1276. His Honour said,[1727]

> *[A]lthough a court is sentencing for a particular offence, it takes into account the matters for which guilt has been admitted, with a view to increasing the penalty that would otherwise be appropriate for the particular offence. The Court does so by giving greater weight to two elements which are always material in the sentencing process. The first is the need for personal deterrence, which the commission of the other offences will frequently indicate, ought to be given greater weight by reason of the course of conduct in which the accused has engaged. The second is the community's entitlement to extract retribution for serious offences which there are offences for which no punishment has in fact been imposed. These elements are entitled to greater weight than they may otherwise be given when sentencing for the primary offence. There are matters which limit the extent to which this is so. The express provision in s33(3) referring to the maximum penalty for the primary offence [that is, the counterpart of s 16BA(4)] is one. The principle of totality is another.*
>
> *… The important point is that the focus throughout must be on sentencing for the primary offence.*

1277. In *Azari*,[1728] in which these principles were applied to s 16BA, the court emphasised that, since no sentence is imposed for an offence taken into account, specific deterrence and punishment (or retribution) can only be reflected in the sentence imposed for the primary offence; that is, the offender is 'punished' (that is, retribution is extracted) for the offence taken into account, although the offender can only ever be sentenced for the primary offence.

In what circumstances is it inappropriate to take an offence into account?

1278. It is generally inappropriate to take into account offences which are more serious than the primary offence.[1729] A particular problem arises where the maximum sentence available for the primary offence would be insufficient to allow for the total criminality revealed by the whole course of the offender's conduct (including the offences taken into account) to be appropriately reflected in the sentence.[1730] It would normally be inappropriate to take the offences into account in such circumstances.[1731]

1279. Courts have also often expressed concern about the difficulty in sentencing for the primary offence that may arise when the judge is asked to take into account a range of unrelated and incomparable offences.[1732] But it may be proper to take into account offending of a different type if it is related to the offending for which the offender is to be sentenced: for example, in relation to sentencing for a drug offence, a money laundering offence committed as part of the same criminal enterprise.[1733]

1727 *Attorney General's Application Under s37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, [42]-[43].

1728 *Azari v R* [2021] NSWCCA 199, [49], [53]-[58] (special leave refused: *Azari v R* [2022] HCASL 55).

1729 *Attorney General's Application Under s37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, [49]-[50].

1730 *Attorney General's Application Under s37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, [50], [57]; *Holt v R* [2021] NSWCCA 14, [47]-[54].

1731 *Attorney General's Application Under s37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, [50]; *C-P v R* [2009] NSWCCA 291, [8]; *Holt v R* [2021] NSWCCA 14, [48], [109].

1732 *Attorney General's Application Under s37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, [51]-[56].

1733 E.g. *R v Nakash* [2017] NSWCCA 196. Another example is *R v Lamella* [2014] NSWCCA 122, in which corruption offences were taken into account in sentencing a Customs officer for his participation in a drug importation.

Can an offence be taken into account in sentencing for more than one primary offence?

1280. There is no question that more than one offence may be taken into account in sentencing for the primary offence. Whether the converse is true – that is, whether an offence may be taken into account for more than one primary offence – has not been authoritatively resolved.

1281. In *Assafiri*,[1734] Howie J (with whom Basten JA and Grove J agreed) observed that, although the terms of s 16BA "*might suggest*" that matters can be taken into account when sentencing for more than one federal offence, it could not have been the intention of the legislature that more than one sentence could be increased by taking into account the same offences, as that would result in double counting the matters being taken into account. It would clearly be unfair to do so, his Honour said, when some or all of the sentences are being served cumulatively.

1282. The observations in *Assafiri* were *obiter dicta*: the grounds of appeal raised no issue about s 16BA, and the sentence was set aside on other bases. A court might find those observations unpersuasive for a number of reasons. First, the terms of s 16BA do not merely "suggest" that an offence may be taken into account in relation to more than one primary offence: the provision unambiguously permits this course (see s 16BA(1), (2), (7), (8) and (12)). The offender must be asked whether they wish all or any of the offences specified in the list to be taken into account by the court in passing sentence "*for the offence or offences*" (s 16BA(1)). The court may, if it thinks fit, in passing sentence on the offender "*for the offence or offences*", take into account all or any of the offences in respect of which the person has admitted guilt (s 16BA(2)). An order made under s 16BA(5) in respect of an offence taken into account lapses, by force of s 16BA(7), "*if the conviction or each conviction, as the case may be, in respect of which the offence was taken into account is quashed or set aside.*" The sentencing judge is required to certify "*the offence taken into account and the conviction or convictions in respect of which the offence was taken into account*" (s 16A(8)). The fact that an offence was taken into account under s 16BA may be proved in the same manner "*as the conviction or any of the convictions, as the case may be, in relation to which it was taken into account*" may be proved (s 16AB(12)). Second, to read down s 16BA as suggested in *Assafiri* would be to ignore the presence of the underlined words. A basic principle of statutory construction is that all the words of a statute must be given effect; a statute should not be construed as if words were omitted from it.[1735] Third, if the statute is unambiguous (as s 16BA is in this regard), there is limited scope for inferring that Parliament must have intended something other than what the statute says.[1736] The task of statutory construction must begin with a consideration of the text itself; the language which has actually been employed in the text of legislation is the surest guide to legislative intention.[1737] Here the context provides no reason to displace the text. Section 16BA makes detailed provision for taking offences into account and for the consequences of doing so. It provides safeguards against coercion or taking an offence into account inappropriately. It preserves judicial discretion. In those circumstances, it may go too far to subordinate the unambiguous terms of s 16BA to inchoate notions of "fairness". It is one thing for a court to say that the adoption of a course expressly permitted by statute would be unfair in a particular case; it is another to say that the statute should not

1734 *Assafiri v R* [2007] NSWCCA 159, [8]-[9].

1735 *Commonwealth v Baume* (1905) 2 CLR 405, 414 (Griffith CJ), 419 (O'Connor J). This decision has been followed and applied in many subsequent decisions of the High Court.

1736 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [78].

1737 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, [47].

be construed according to its clear and express terms because to do so would, in the court's view, be unfair.

1283. Under the procedure in s 16BA, before asking the offender the questions required by s 16BA(1), a sentencing court must be "*satisfied that … in all the circumstances it is proper to do so*". The court may take the admitted offence(s) into account "*if it thinks fit*" (s 16BA(2)). Therefore in each case in which an offence is sought to be taken into account, the application must be considered on its merits.

1284. It might be considered appropriate to take an offence into account for more than one primary offence in a number of circumstances. An obvious example is where aggregate sentencing is available, that is, where one penalty is imposed for two or more convictions (see "6.10.7 Aggregate penalty for charges on indictment"). Another example is where the penalty applicable to one primary offence alone is insufficient to allow for the effect of taking the offence into account, or to do so without the sentence for the primary offence becoming disproportionate to the offending. In such a case, it may be more appropriate for the additional punishment warranted for the offence taken into account to be, in effect, distributed across the sentences for two or more primary offences, so that none of the individual sentences was disproportionate. Another example is where the offending represented by two or more primary offences embraces a single course of conduct (such as a series of frauds of the same character), which might otherwise have been represented by a single rolled-up charge, and where the offending to be taken into account is related to that course of conduct (such as dealing with the proceeds of those frauds). In such a case, taking the offence into account on all of the primary offences would be a more realistic way of dealing with it, allowing the judge to make an appropriate allowance across the sentences for all of the primary offences. These examples are merely illustrative and do not purport to be exhaustive.

1285. A practical illustration is provided by *Walters*.[1738] In sentencing for ten offences of defrauding the Commonwealth, the sentencing judge (Sully J) took into account under s 16BA five offences of breaching or attempting to breach a restraining order under the *Proceeds of Crime Act 1987* (Cth) (described by the judge as "contumelious" breaches). The restraining order appears to have made in consequence of the offender being charged with the frauds. His Honour took the offences into account "*as adding to the overall culpability of the prisoner; and by structuring sentences to be passed for the ten indicted offences in a way that reflects the combined overall culpability of those ten offences and of the five additional matters*". No complaint was made about this sentence. While it has no precedent value, it may be said to demonstrate how offences may properly be taken into account for a number of primary offences, to better reflect the offender's "overall culpability".

Can taking an offence into account affect the degree of cumulation of sentences of imprisonment?

1286. In *Sparos*,[1739] a majority of the New South Wales Court of Criminal Appeal (Beazley P and Fullerton J; Beech-Jones J contra) held, in relation to the NSW counterpart of s 16BA, that an offence which is taken into account in sentencing cannot be used as a basis for wholly or partly cumulating a sentence of imprisonment for the primary offence upon another sentence, as that would involve "double counting" of the offence being taken into account.

1738 *R v Walters* [2001] NSWSC 640, [32]-[33].

1739 *Sparos v R* [2013] NSWCCA 223, [4]-[7] (Fullerton J, Beazley P agreeing; Beech-Jones J contra).

1287. It remains to be determined whether a similar limitation applies in taking an offence into account under s 16BA.[1740] The decision in *Sparos* may be distinguishable in view of the difference between the terms of s 16BA and of the State provision and the difference in the means of fixing cumulation of sentences of imprisonment under federal and State law.[1741] *Sparos* might also be distinguishable because, unlike the NSW provision, s 16BA explicitly provides for an offence to be taken into account for more than one offence; this might also be said to accommodate a degree of cumulation between the sentences for those offences if the offence is taken into account on both. Alternatively, a court might prefer the reasoning of Beech-Jones J in *Sparos*[1742] to that of the majority. For similar reasons to those of Beech-Jones J, it is difficult to see why the reference to "*passing sentence*" in s 16BA should be read down to apply only to fixing the duration of the head sentence. The objectives of taking the offence into account might properly be achieved by fixing the duration of the sentence or by the degree of cumulation, or both, subject always to the limitation that the sentence for the primary offence must be "*of a severity appropriate in all the circumstances of the offence*" (s 16A(1)).

Does the De Simoni principle apply?

1288. The *De Simoni* principle[1743] does not apply in relation to an offence which is taken into account under s 16BA.[1744] That is, in assessing the seriousness of an offence taken into account under s 16BA, a sentencing court may have regard to circumstances of aggravation which (had the offender been charged with that offence) would have warranted conviction for a more serious offence.[1745]

6.5.2 Can a State or Territory offence be taken into account in sentencing a federal offender?

1289. Nothing in s 16BA permits a State or Territory offence to be taken into account in sentencing a federal offender.

1290. A number of jurisdictions have counterparts of s 16BA, which allow an offence to be taken into account in the sentencing of a State or Territory offender. It has not been determined whether s 16BA implicitly precludes such a State or Territory law from being applied (by s 68 or s 79 of the *Judiciary Act*

1740 In *Azari v R* [2021] NSWCCA 199, the applicant argued ([53]) that the sentencing judge had erred by breaching the principle in *Sparos v R* [2013] NSWCCA 223. Adamson J (with whom Bathurst CJ and Bellew J agreed) rejected the contention ([61]-[62]) on the basis that there was no indication that the s 16BA offences had been taken into account in determining the degree of cumulation or that there was any aspect of double-counting in the approach taken by the sentencing judge. The Court did not consider whether the principle in *Sparos* was applicable to taking an offence into account under s 16BA.

1741 Under the NSW legislation considered in *Sparos v R* [2013] NSWCCA 223, a sentencing court could take an offence into account in "*dealing with the offender for the principal offence*". Fullerton J (with whom Beazley P agreed) considered ([5]) that that power was "*intended to operate at the time that the sentence for that offence is imposed and not at the next stage in the sentencing process, when questions of accumulation or concurrency are considered and before the sentencing order is ultimately made.*" By contrast, s 16BA(2) provides that a court sentencing a federal offender may, if it thinks fit, take the offence or offences into account "*in passing sentence on him or her for the offence or offences of which he or she has been convicted*". In the context of Part 1B of the *Crimes Act 1914* (Cth), "*passing sentence*" may be taken to include not only fixing the individual head sentences but also making orders for the commencement of each sentence, which is the means by which the degree of cumulation of a sentence (if any) is fixed.

1742 *Sparos v R* [2013] NSWCCA 223, [26]-[60] (Beech-Jones J).

1743 *R v De Simoni* (1981) 147 CLR 383. See "2.1.5 Finding of other uncharged offences".

1744 *Huang v R* (2018) 96 NSWLR 743, [8] (Bathurst CJ), [54] (Beazley P; Hoeben CJ at CL and Bellew J agreeing), [98] (McCallum J).

1745 *Huang v R* (2018) 96 NSWLR 743, [8] (Bathurst CJ), [54] (Beazley P; Hoeben CJ at CL and Bellew J agreeing).

1903 (Cth)) to the sentencing of a federal offender.[1746] However the reasoning in *Ilic*[1747] and *Hildebrand*[1748] suggests that s 16BA (and other aspects of Commonwealth law) would be construed as precluding such a State or Territory law being applied as surrogate federal law.

6.5.3 Can a federal offence be taken into account in sentencing for a State or Territory offence?

1291. State or Territory laws which permit an offence to be taken into account in sentencing for a State or Territory offence do not, in their own terms, purport to allow a federal offence to be taken into account. For example, the New South Wales provisions, in Division 3 of Part 3 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), permit only a State offence to be taken into account in sentencing a State offender.[1749]

1292. In *Ilic*,[1750] the question then arose whether those State provisions were applied by s 68 or s 79 of the *Judiciary Act 1903* (Cth) so as to permit a federal offence to be taken into account in the sentencing of a State offender. The Court held they were not, because such an application of State law would be inconsistent with three aspects of the Commonwealth legislative scheme relating to federal offences: (1) s 16BA of the *Crimes Act 1914*; (2) s 19AJ and other provisions of Part IB of the Act which implicitly preclude the intermixing of Commonwealth and State sentences of imprisonment; and (3) implicit requirements in the *Crimes Act 1914* and the *Director of Public Prosecutions Act 1983* (Cth) that a Commonwealth offence should not be disposed of contrary to the determination of a Commonwealth prosecutor.[1751]

1293. This limitation could not be overcome by an amendment to State legislation to permit it, as such legislation would (on the analysis in *Ilic*) be invalid (under s 109 of the Constitution) by virtue of inconsistency with Commonwealth laws.[1752]

6.6 Dealing with summary offences in a superior court

1294. There is no general provision in Commonwealth law which deals with the power of a superior court to impose a sentence for a summary offence. However some State and Territory laws provide for circumstances in which a superior court can determine a summary offence.[1753] Whether such a law applies to the sentencing of a federal offender depends upon the provisions of the *Judiciary Act 1903* (Cth).

1746 See "1.7 The application of State and Territory laws by Judiciary Act 1903, ss 68 and 79". Relevant authorities are collected in *Adams* v *Western Australia* [2014] WASCA 191.

1747 *Ilic v R* (2020) 103 NSWLR 430. See "6.5.3 Can a federal offence be taken into account in sentencing for a State or Territory offence?".

1748 *Hildebrand v R* [2021] NSWCCA 9.

1749 References in the relevant provisions of the State Act to an "offence" being taken into account mean only a NSW offence: *Ilic v R* (2020) 103 NSWLR 430, [21]-[22].

1750 *Ilic v R* (2020) 103 NSWLR 430.

1751 *Ilic v R* (2020) 103 NSWLR 430, [33]-[44] (McCallum JA; Wright J agreeing). Garling J ([60]-[61]), who reached a similar conclusion, rested his decision on inconsistency with s 16BA. *Illic* was followed in *Hildebrand v R* [2021] NSWCCA 9.

1752 It is also arguable that such a State law would be beyond the legislative power of the State, on the basis that it would purport to affect the exercise of the judicial power of the Commonwealth: cf *Rizeq v Western Australia* (2017) 262 CLR 1, [15], [21], [23] (Kiefel CJ); [57]-[61], [103] (Bell, Gageler, Keane, Nettle and Gordon JJ).

1753 For example, s 145 of the *Criminal Procedure Act 2009* (Vic) requires a magistrate, on committing an accused for trial, to order that all related charges for summary offences be transferred to the court that the accused has been committed to. Section 243 of the Act also permits the Supreme Court and County Court to hear and determine an unrelated summary offence under certain circumstances.

1295. Prior to 13 October 1999, s 68(3) of the *Judiciary Act 1903* (Cth) conferred the power to exercise summary jurisdiction in respect of federal offenders only on magistrates. This had the effect of precluding superior court judges from exercising jurisdiction over a Commonwealth summary offence. However, following an amendment to s 68(3),[1754] a judge before whom a person appears on an indictable Commonwealth offence can also hear and determine a Commonwealth summary offence (apart from *Corporations Act* offences).

1296. In *Adams*,[1755] the majority (Buss and Newnes JJA; Mazza JA contra on this point) held that a State law which permitted a pending charge to be dealt with summarily was procedural in nature, and did not conflict with s 16BA of the *Crimes Act 1914* (Cth). The Court held that the State law was applied by s 68 and s 79 of the *Judiciary Act 1903* (Cth) as surrogate federal law in relation to the sentencing of a federal offender.

1297. It should also be noted that where the summary offence is against the *Corporations Act 2001* (Cth), only a magistrate, rather than a judge, can exercise summary jurisdiction.[1756] The result is that summary offences against the *Corporations Act 2001* (Cth) cannot be transferred to a superior court.

1298. The Victorian Court of Appeal has doubted whether an uplifted summary charge can be dealt with as part of an aggregate sentence imposed on indictment.[1757]

6.7 Specifying a reduction for undertaking to cooperate in future - *Crimes Act 1914* s 16AC

6.7.1 The requirements of *Crimes Act 1914*, s 16AC

1299. If a federal offender has undertaken to cooperate with law enforcement agencies in future proceedings (including confiscation proceedings) relating to any offence (defined as a federal, State or Territory offence), and the severity of the sentence is reduced as a result of that undertaking, the court sentencing the offender is required by s 16AC(2) of the *Crimes Act 1914* (Cth):

- to state that the sentence is being reduced for that reason and
- to specify what the sentence would have been but for that reduction.[1758]

1300. The requirements of s 16AC(2) apply regardless of whether the reduction is reflected in the severity of the sentence or order or a reduction in the non-parole period (s 16AC(1)). That is, the section applies whether the sentence type is reduced (e.g. from imprisonment to an order under s 20AB(1) of the *Crimes Act*), the length of a sentence of imprisonment is reduced, or the length of the period, or minimum period, of imprisonment to be served is reduced. The "but for" sentence must specify all the reductions given.

1301. Where a sentence of imprisonment would have been imposed but for the undertaking under s 16AC, and both the head sentence and period or minimum period to be served have been reduced (as would usually be the case), the judge should specify both what the head sentence would have been and what

1754 *Law and Justice Amendment Act 1999;* Item 3 of Schedule 10.

1755 *Adams* v *Western Australia* [2014] WASCA 191.

1756 *Corporations Act 2001* (Cth), s 1338B(2) which is of the same effect as the *Judiciary Act 1903* (Cth), s 68(3) prior to its amendment in 1999. Consequently summary offences against the *Corporations Act* cannot be dealt with by a judge of a District Court, the County Court or a Supreme Court.

1757 *Fitzpatrick v R* [2016] VSCA 63, [51].

1758 See *R v Hodgson* (2002) 84 SASR 168, regarding s 21E of the *Crimes Act 1914* (Cth), as then in force. Section 21E was repealed with effect from 27 November 2015 and replaced by s 16AC, which is in similar terms.

the non-parole period (or pre-release period of a recognizance release order) would have been but for the undertaking.[1759]

1302. If the offender fails to cooperate in accordance with the undertaking, the CDPP may appeal against the inadequacy of the reduced sentence (s 16AC(3)). The appeal court may increase the sentence up to the "but for" sentence stated by the sentencing court (s 16AC (4)).[1760]

1303. Section 16AC is predicated on the granting of a designated benefit in consideration of a promise which is sufficiently certain in its terms that a breach of it can be the subject of an appeal. While the promise or undertaking does not have to be expressed in a particular fashion, it must be given in clear terms and be given in contemplation of the possible institution of some proceeding.[1761] The CDPP practice in most jurisdictions is to require the offender to sign a written undertaking and then give the undertaking orally under oath at the plea hearing.

1304. The statement of the "but for" sentence has two purposes: first, to identify, explicitly and discretely, the discount on sentence which the court was allowing by reason of the undertaking to cooperate; and second, to set the parameters within which, if the promised cooperation did not eventuate, the sentence must or might be adjusted on appeal. In the "but for" sentence, the court is required to ignore all other sentencing considerations which had played a part in the instinctive synthesis, including (where applicable) the guilty plea.[1762]

6.7.2 Distinction between cooperation prior to sentence and future cooperation

1305. The position under s 16AC is to be contrasted with, and kept separate from, taking into account past cooperation in accordance with s 16A(2)(h) of the *Crimes Act 1914*.

1306. **Any cooperation with authorities prior to sentence** is required to be taken into account in sentencing under s 16A(2)(h).[1763] Nothing in the *Crimes Act* requires a court to quantify the effect of taking such cooperation into account, and it is generally taken into account as simply one of the matters to be considered as part of the instinctive synthesis of relevant considerations in arriving at the appropriate sentence.[1764]

1307. By contrast, if a person sentenced for a federal offence has **undertaken to cooperate with law enforcement authorities in future proceedings**, the extent of the reduction in sentence consequent upon such future cooperation must be specifically stated and exclusively linked to that undertaking, in accordance with s 16AC.

1308. If both past and future cooperation give rise to a two-fold basis for mitigation of penalty, the sentencing judge should not combine them to produce a global reduction for "cooperation with authorities".[1765] Instead, any reduction in the penalty consequent upon *cooperation prior to sentencing*

1759 *Mason (a pseudonym) v R* [2023] VSCA 75, [56]-[59]. The Court said ([57]) that the cases in which only the head sentence or only the period to be served is reduced will be rare.

1760 See "6.7.7 Consequences of breach of an undertaking to cooperate".

1761 *R v Burns* (Vic CCA, 9 November 1992, unreported); *R v Gangelhoff* [1998] VSCA 20; *DPP (Cth) v Parsons* (1992) 74 A Crim R 172.

1762 *DPP (Cth) v Wang* [2019] VSCA 250, [79].

1763 See "3.4.9 Cooperation with law enforcement agencies (cooperation prior to sentencing) – s 16A(2)(h)".

1764 Note however that in NSW the practice of the courts is to specify the discount given.

1765 *R v McGee* (Vic CCA, 25 November 1994, unreported); *R v Ngui* [2000] 1 VR 579.

must be taken into account generally in fixing the sentence or making any order. Any *additional* reduction referrable to an undertaking for *future assistance* must be specifically quantified in accordance with s 16AC.[1766]

6.7.3 Determining the reduction to be given under s 16AC

1309. Promised future cooperation ought not be wholly disregarded simply because the authorities are not able to immediately use the testimony. The discount is not just a price fixed by the value of the information or testimony that can be given, as the existence of a discount serves to encourage those charged with criminal offences to give as much information as they can to implicate other offenders. It should not be considered that the aim is best served by always requiring tangible results before a discount is given. The fact that it is unlikely that the authorities will call upon the offender's promise of cooperation does not preclude a discount, although it might reduce it.[1767]

1310. An undertaking for future cooperation may be taken into account even if there is no link at all between the instant offence and the offences in respect of which cooperation has been promised.

6.7.4 Sentencing for both federal and State/Territory offences

1311. If a federal offender undertakes to give evidence in criminal proceedings for a State/Territory offence as well as for a Commonwealth offence, the offender's promise of cooperation in respect of the related State/Territory offence may be taken into account in determining the appropriate sentence for the Commonwealth offence.[1768]

6.7.5 Specifying a s 16AC discount and a discount for a guilty plea

1312. In some jurisdictions a sentencing court is required by law to specify the extent of the reduction of sentence for a guilty plea (usually by specifying what the sentence would have been but for the plea).[1769] If such a requirement is applied as surrogate federal law to the sentencing of a federal offender, the task for a sentencing court will be more complex if the court is also required by s 16AC of the *Crimes Act 1914* (Cth) to specify the sentence reduction that follows from the offender's undertaking to cooperate. For a discussion of the appropriate procedure to be followed in such a case, see "6.9 Interaction between sentencing discount for guilty plea and discount for undertaking to cooperate".

6.7.6 Failure to comply with s 16AC in sentencing

1313. The authorities are not consistent as to whether failure to comply with s 16AC vitiates the exercise of the sentencing discretion.

1314. In *Tae*,[1770] the New South Wales Court of Criminal Appeal held that such an error does not, by itself, invalidate the sentence imposed. However in *Dagher*,[1771] in which no reference was made to *Tae*, the Court held that the failure of the sentencing judge to comply with s 16AC "*had the effect that the*

1766 *R v Tan* (1995) 78 A Crim R 300; *DPP (Cth) v AB* (2006) 94 SASR 316.
1767 *R v Kokkinos* [1998] 4 VR 574.
1768 *R v Kokkinos* [1998] 4 VR 574.
1769 See "2.3.2 Statutory requirements to specify a sentence reduction for a plea of guilty".
1770 *R v Tae* [2005] NSWCCA 29, [20].
1771 *Dagher v R* [2017] NSWCCA 258, [5]-[11].

sentence had not been imposed according to law" and was "*an error of law which requires correction*", and that for that reason alone it was necessary to resentence the applicant.

1315. In *Mason (a pseudonym)*,[1772] the sentencing judge had specified the head sentence that would have been imposed but for the undertaking, but had failed to specify a "but for" non-parole period. The Victorian Court of Appeal held that the failure to do so did not constitute "an error in the sentence"; it did not materially affect the actual sentence imposed. Therefore under the relevant provisions of the *Criminal Procedure Act 2009* (Vic), as applied by s 68(1) of the *Judiciary Act 1903* (Cth), the Court of Appeal, upon leave to appeal being granted, had no power to make any order to correct the error.[1773] The Court referred to and distinguished *Dagher* on this basis.[1774] The Court had a power to make "any other order" upon refusing leave to appeal, but said that it would not be an appropriate exercise of the discretion to refuse leave for that purpose where the appeal is arguable.[1775]

1316. The Court also said that the construction that "*the failure to specify a hypothetical non-parole period is a vitiating error affecting the sentence, does not sit well with s 19AH of the Crimes Act which provides that a failure to specify the actual non-parole period does not invalidate a sentence and provides for a mechanism by which a non-parole period can later be set by applying to the sentencing court.*"[1776] The Court also drew an analogy with the position under s 6AAA of the *Sentencing Act 1991* (Vic), which requires a court to specify the sentence that would have been imposed but for an offender's plea of guilty.[1777] These observations tend to support the conclusion in *Tae* rather than that in *Dagher*.

6.7.7 Consequences of breach of an undertaking to cooperate

1317. Section 16AC(3) permits the CDPP to appeal against the inadequacy of the reduced sentence if the offender, without reasonable excuse, does not cooperate in accordance with the undertaking and the Director is of the opinion that appealing is in the interests of the administration of justice.

1318. In the absence of an admission by the offender, the CDPP must prove beyond reasonable doubt that the offender failed to fulfil the undertaking[1778] and that the failure was without reasonable excuse.[1779]

1772 *Mason (a pseudonym) v R* [2023] VSCA 75.

1773 *Mason (a pseudonym) v R* [2023] VSCA 75, [54]-[78]. In *DPP (Cth) v Couper* (2013) 41 VR 128, [132]-[149], the Court upheld a ground of appeal which alleged an error by the sentencing judge in failing to specify the period which the offender would have been required to serve but for the undertaking. The question whether this was an error which could be corrected on appeal did not arise, as the Court upheld the appeal on other grounds, resentenced the offender and specified the "but for" sentence in relation to the undertaking.

1774 *Mason (a pseudonym) v R* [2023] VSCA 75, [82]. The Court did not refer to *Tae*, but that decision may be taken to support the construction in *Mason*.

1775 *Mason (a pseudonym) v R* [2023] VSCA 75, [86].

1776 *Mason (a pseudonym) v R* [2023] VSCA 75, [79]. That is, if the failure to specify the actual non-parole period is not a vitiating error in a sentence (because its validity is preserved by s 19AH(1)(a)), it is unlikely that failure to specify the hypothetical non-parole period under s 16AC would be.

1777 *Mason (a pseudonym) v R* [2023] VSCA 75, [80]. See "6.8.1 Specifying the sentence reduction for a guilty plea, pursuant to State or Territory laws".

1778 *DPP (Cth) v Carey* [2012] VSCA 15, [37]. The court held (at [39]-[41]) that, in determining whether the offender had failed to fulfil the undertaking when giving evidence in a trial, an appellate court is entitled to take into account the view of the trial judge.

1779 *R v YZ* [1999] NSWCCA 48; *R v Springer* [2009] NSWCCA 144, [45]; *R v Minh Cheun* [2011] NSWCCA 5.

1319. Fear or apprehension about the consequences (for the offender or perhaps for others) of giving evidence cannot by itself be treated as a reasonable excuse.[1780]

1320. If the appeal court finds that the offender has, without reasonable excuse, *entirely failed to cooperate in accordance with the undertaking*, the court must substitute for the reduced sentence, reduced order or reduced non-parole period the sentence, order or non-parole period that would have been imposed, made or fixed but for that reduction (that is, the "but for" sentence) (s 16AC(4)(a)). Section 16AC does not empower a court resentencing an offender, following a successful CDPP appeal under s 16AC(3), to consider the appropriateness of the original sentence.[1781]

1321. If the appeal court finds that the offender has, without reasonable excuse, *failed in part to cooperate in accordance with the undertaking*, the court may substitute any sentence, order or non-parole period (as the case may be) not exceeding in severity the "but for" sentence (s 16AC(4)(b)). In other words, the court has a discretion as to the sentence to be substituted, up to the sentence which the sentencing judge would have imposed but for the undertaking.[1782] The court's discretion is to restore to the appropriate degree the sentence which would have been imposed had the offer of cooperation not been made, and not to punish an offender for failing to cooperate.[1783] The court is required to make a value judgment, and to strike a balance, in order to determine what sentence is appropriate in the light of the relevant events that have happened since the imposition of the original sentence.[1784] Whether or not the offender's failure to cooperate has resulted in the acquittal of another person is beside the point.[1785]

1322. If, by the time of the determination of the appeal, the offender has been released from custody, the discretionary sentencing consideration that ordinarily applies to work against the re-imprisonment of the offender does not apply.[1786]

6.8 Specifying a discount for a guilty plea

1323. Although s 16A(2) requires that the fact of a plea of guilty be taken into account in sentencing, nothing in s 16A requires a sentencing court to quantify any reduction given in sentence for a plea of guilty.[1787]

6.8.1 Specifying the sentence reduction for a guilty plea, pursuant to State or Territory laws

1324. The laws of some jurisdictions require a court sentencing an offender to specify the extent to which a sentence has been reduced as a result of a plea of guilty. These provisions have been regarded as statutory exceptions to the general preference for an "instinctive synthesis" of relevant considerations, rather than a two-tier or staged approach to sentencing under which the weight given to individual factors is quantified.[1788] The application of these laws to the sentencing of federal offenders is discussed above: see "2.3 Where a two-stage approach is required by statute".

1780 *DPP (Cth) v Parsons* (1992) 74 A Crim R 172.
1781 *DPP (Cth) v Haunga* (2001) 4 VR 285.
1782 *R v YZ* [1999] NSWCCA 48; *DPP (Cth) v Haunga* (2001) 4 VR 285; *DPP (Cth) v Johnson* [2012] VSCA 38, [22]-[23].
1783 *DPP (Cth) v Johnson* [2012] VSCA 38, [24]; *DPP (Cth) v Wang* [2019] VSCA 250, [38], [42].
1784 *DPP (Cth) v Haunga* (2001) 4 VR 285, [14]; *DPP (Cth) v Wang* [2019] VSCA 250, [42].
1785 *DPP (Cth) v Wang* [2019] VSCA 250, [42].
1786 *DPP (Cth) v Johnson* [2012] VSCA 38.
1787 *Charkawi v R* [2008] NSWCCA 159, [14]; *Xiao v R* (2018) 96 NSWLR 1, [280].
1788 *Scerri v R* [2010] VSCA 287, [23].

1325. The relevant laws differ in their scope and their precise requirements.

1326. **Western Australia:** Under s 9AA(2) of the Sentencing Act 1995 (WA), a sentencing court is permitted to reduce a sentence "in order to recognise the benefits to the State, and to any victim of or witness to the offence, resulting from the plea". The permissible extent of any such reduction is capped by s 9AA(4). If a court reduces a sentence under s 9AA(2), the court is required, under s 9AA(5), to state the fact and the extent of the reduction.

1327. The Court of Appeal of Western Australia has held that the requirements of s 9AA (including the requirement to specify the extent of any reduction given under s 9AA(2)) are, because of their prescriptive nature, inconsistent with the *Crimes Act 1914* (Cth) and therefore inapplicable to the sentencing of Commonwealth offenders.[1789]

1328. **Australian Capital Territory:** Section 35 of the *Crimes (Sentencing) Act 2005* (ACT) permits a sentencing court to impose a lesser penalty on an offender who has pleaded guilty (s 35(3)) and requires the court to consider (amongst other things) the fact, timing and circumstances of the plea (s 35(2). Section 35 applies only if, "*based on the information currently available to the court, the court considers that there is a real likelihood that it will sentence the offender to imprisonment*" (s 35(1)). If the court imposes a lesser penalty under s 35, it must state the penalty (including any shorter non-parole period) it would otherwise have imposed (s 37). However failure to do so does not itself invalidate the sentence,[1790] nor does it necessarily indicate error in fixing the sentence.[1791]

1329. It has not yet been determined whether the requirements under s 37 to specify the sentence reduction for a guilty plea apply to the sentencing of a federal offender.[1792]

1330. **Victoria:** Under the *Sentencing Act 1991* (Vic), s 6AAA, if a court imposes a less severe sentence than it would otherwise have imposed because the offender pleaded guilty to the offence, and the sentence is either a sentence of imprisonment or other custodial order, or a community correction order for two years or more, or a fine exceeding 10 penalty units, or an aggregate fine exceeding 20 penalty units, the court must state the sentence and the non-parole period, if any, that it would have imposed but for the plea of guilty.[1793] If the offender is sentenced for more than one offence, the court must state the total effective sentence and non-parole period (if any) it would have imposed, and need not state the sentence in respect of each offence.[1794]

1331. Failure to comply with a requirement to specify the sentence that would have been imposed but for the guilty plea does not invalidate the sentence.[1795]

1789 *Ngo v R* [2017] WASCA 3.

1790 *Miles v R* [2016] ACTCA 54, [89].

1791 *Blundell v R* [2019] ACTCA 34, [19]-[26].

1792 The practice of the Australian Capital Territory Court of Criminal Appeal in resentencing a federal offender following a successful appeal has varied. In *Manyathela v R* [2015] ACTCA 13, the Court specified the sentence it would have imposed but for the offender's plea of guilty, but in other cases it has not done so (e.g. *R v TW* (2011) 6 ACTLR 18; *Nantahkum v R* [2013] ACTCA 40; *Ojielumhen v R* [2014] ACTCA 28; *R v Harrington* (2016) 11 ACTLR 215).

1793 *Sentencing Act 1991* (Vic), s 6AAA(1) and (2). If any other sentence is imposed, it may do so: s 6AAA(4).

1794 *Sentencing Act 1991* (Vic), s 6AAA(3).

1795 *Scerri v R* [2010] VSCA 287; *Mokbel v R* [2011] VSCA 34, [20]-[35].

1332. It is wrong in principle to use a statement of a "but for" sentence as some kind of benchmark in sentencing a co-offender who has been convicted after pleading not guilty.[1796] A s 6AAA declaration is not a relevant consideration for the fixing of a sentence relating to a co-accused; taking it into account in that way is an error of principle and would be sufficient to vitiate the sentence.[1797]

1333. A statement under s 6AAA of the *Sentencing Act 1991* (Vic) is a "notional sentence" only; it is not itself appellable.[1798] The difference between the notional sentence and the actual sentence is not examinable for specific error,[1799] except possibly in the rare case where it reveals an error in principle.[1800] The notional sentence may be relied upon in support of a contention that a sentence is manifestly inadequate or manifestly excessive; but it can never be conclusive of the issue, since a complaint of manifest excess or manifest inadequacy falls to be considered only in relation to the sentence actually imposed.[1801]

1334. It has not been authoritatively determined whether the requirements of s 6AAA of the *Sentencing Act 1991* (Vic) apply to the sentencing of a federal offender. However in a number of decisions, the Court of Appeal has proceeded on the assumption that they do.[1802]

1335. **Where discounts for both guilty plea and an undertaking to cooperate must be specified:** Additional complexities arise where the sentencing court is required to specify not only the sentence reduction for a plea of guilty but also the reduction for giving an undertaking to cooperate, under s 16AC of the *Crimes Act 1914* (Cth). The interaction of these requirements is discussed below: see "6.9 Interaction between sentencing discount for guilty plea and discount for undertaking to cooperate".

6.8.2 Discretion to specify reduction for guilty plea

1336. Since sentencing should usually be undertaken by an instinctive synthesis of all relevant factors, it has been said that isolating the reduction in sentence which is attributable to a particular factor (including a guilty plea) should only be undertaken when a statute so requires.[1803]

1337. Nevertheless it is common practice in some jurisdictions for courts to do so, even in the absence of any statutory requirement, where the reduction is attributable to utilitarian considerations such as the encouragement of early pleas and the public interest in saving the community the expense of a contested hearing,[1804] rather than subjective factors such as contrition or willingness to facilitate the course of justice. In *Markarian*,[1805] McHugh J said that awarding a quantified discount for an early plea of guilty or assistance to authorities was not inconsistent with the instinctive synthesis approach, because it related to a non-sentencing (that is, utilitarian) purpose.

1796 *Waugh v R* (2013) 38 VR 66, [23].
1797 *Perri v R* [2016] VSCA 89, [14]-[15]; *Nipoe v R* [2020] VSCA 137, [28]-[31].
1798 *R v Burke* (2009) 21 VR 471.; *Kalofolias v R* [2017] VSCA 308, [44].
1799 *Scerri v R* [2010] VSCA 287; *R v Burke* (2009) 21 VR 471, [30]–[31]; *Saab v R* [2012] VSCA 165, [58]; *Gosland v R* [2013] VSCA 269, [10]; *Zogheib v R* [2015] VSCA 334, [62]-[64]; *Tran v R* [2022] VSCA 44, [34]-[36].
1800 *Saab v R* [2012] VSCA 165, [44]-[62].
1801 *Scerri v R* [2010] VSCA 287, [24]; *Saab v R* [2012] VSCA 165, [34]-[43]; *Cummins (a pseudonym) v R* (2013) 40 VR 319, [41]-[48].
1802 See the authorities cited in fn 194.
1803 *Wong v R* (2001) 207 CLR 584, [74]-[78] (Gaudron, Gummow and Hayne JJ); *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194, [24].
1804 *R v Sharma* (2002) 54 NSWLR 300; *R v Place* (2002) 81 SASR 395; *DPP (Cth) v AB* (2006) 94 SASR 316.
1805 *Markarian v R* (2005) 228 CLR 357, [74].

1338. In *Xiao*,[1806] the New South Wales Court of Criminal Appeal expressed the view that it is desirable, in the interests of transparency, that any discount given for a guilty plea in the sentencing of a federal offender be specified. The Court added that there was no obligation on the sentencing judge to do so, and that a failure to do so would not of itself amount to error.[1807]

1339. If a sentencing judge does so, the extent of the discount should be specified with precision; for a sentencing judge to indicate the degree of discount by reference to a percentage range may constitute appellable error.[1808] Moreover if the sentencing judge specifies in the sentencing remarks a discount that is to be applied, that discount must be arithmetically applied to the sentence that would otherwise have been imposed.[1809]

1340. Any such specification of a discount given for a guilty plea (that is, in the absence of a statutory requirement to do so) should refer only to the utilitarian value of the plea; its subjective value should be assessed as part of the process of instinctive synthesis.[1810] The court should guard against double-counting of these aspects.[1811]

1341. If separate sentence reductions are given both for a guilty plea and for cooperation prior to sentence, the sentencing judge must be mindful of the combined effect of the two discounts; there may be less scope for reduction for cooperation, lest the sentence fail to be of a severity appropriate in all the circumstances.[1812] The inter-connectedness between the sentencing considerations underpinning a plea of guilty, cooperation and contrition may result in a lower combined discount for the plea and cooperation where there was a separate and significant allowance for mitigating circumstances that include contrition and remorse.[1813]

6.9 Interaction between sentencing discount for guilty plea and discount for undertaking to cooperate

1342. In some jurisdictions, State/Territory legislation requires a court sentencing an offender who has pleaded guilty to specify the sentence which would have been imposed but for the guilty plea.[1814]

1806 *Xiao v R* (2018) 96 NSWLR 1, [279]-[280].

1807 *Xiao v R* (2018) 96 NSWLR 1, [280]; applied in *R v KAT* [2018] QCA 306, [61], and *Dunning v Tasmania* [2018] TASCCA 21, [22]-[25]. Cf *Clarkson v Western Australia* [2006] WASCA 250, [31]. In NSW, although the sentencing court is not required to quantify the reduction given for a guilty plea, failure to refer at all to the plea as a factor in sentencing has been treated as necessarily constituting error: see "2.4 Whether failure to refer to a sentencing consideration necessarily evinces error".

1808 *Huang v R* (2018) 96 NSWLR 743.

1809 *Holt v R* [2021] NSWCCA 14, [67]-[69].

1810 *Bae v R* [2020] NSWCCA 35, [57]; *Zaugg v R* [2020] NSWCCA 53, [72]; *Khalid v R* (2020) 102 NSWLR 160, [88]-[89]; *Betka v R* [2020] NSWCCA 191, [62]; *Kaurasi v R* [2020] NSWCCA 253, [3], [5]. In *Chuang v R* [2020] NSWCCA 60, Basten JA observed ([17]) that it was apt to lead to confusion to describe a subjective consideration (such as willingness to facilitate the administration of justice or contrition or remorse) as involving a "discount" and that ([19]) a staged reduction for most mitigating factors was not appropriate, absent statutory authority.

1811 *Bae v R* [2020] NSWCCA 35, [57]; *Zaugg v R* [2020] NSWCCA 53, [72]; *Khalid v R* (2020) 102 NSWLR 160, [88].

1812 *DGF v R* [2021] WASCA 4, [65]-[66], [74].

1813 *DGF v R* [2021] WASCA 4, [80].

1814 Such requirements exist in Victoria (*Sentencing Act 1991* (Vic), s 6AAA), the ACT (*Crimes (Sentencing) Act 2005* (ACT), ss 35 and 37) and Western Australia (*Sentencing Act 1995* (WA), s 9AA(5)). In *Ngo v R* [2017] WASCA 3, the Western Australian Court of Appeal held that (because of the terms of the section) s 9AA(5) of the WA Act was not applicable to the sentencing of a federal offender. Courts in Victoria have proceeded on the assumption that the (less prescriptive) provision in Victoria is applied to the sentencing of a federal offender pursuant to s 68 or s 79 of *the Judiciary Act 1903* (Cth). See "2.3 Where a two-stage approach is required by statute" and "6.8 Specifying a discount for a guilty plea".

1343. In *DPP (Cth) v Couper*[1815] the Victorian Court of Appeal considered the interaction of the separate requirements to specify a sentencing reduction for a plea of guilty (pursuant to s 6AAA of the *Sentencing Act 1991* (Vic), applied as surrogate federal law pursuant to the *Judiciary Act 1903* (Cth)), and a sentence reduction for an undertaking to cooperate (then s 21E and now s 16AC of the *Crimes Act 1914* (Cth)). Tate JA (with whom Harper JA and Williams AJA agreed) held that the sentencing judge in that case had erred in failing to indicate how the discount for the undertaking related to the discount for the guilty plea, and in failing to specify what period, if any, of the head sentence would have been suspended and for what period, but for the undertaking.

1344. Tate JA observed (at [138]) that although each statutory provision required only separate specification of the sentence that would have been imposed but for the relevant factor, merely to do so would fail to indicate to an offender the full extent of the reduction given by reason of both factors and could be potentially misleading. What is significant to an offender and provides guidance for future cases is the actual reduction from which the offender has benefited as a result of having given an undertaking to cooperate, and, separately, the actual reduction from which the offender has benefited as a result of having given a plea of guilty. For this purpose, her Honour considered (at [141]), a sentencing judge should identify the number of months (or days, weeks, or years) from which an offender has benefited both by cooperating and by pleading guilty. That is, a sentencing judge should not only specify what sentence would have been imposed but for the undertaking to cooperate and the plea of guilty, but also identify what specific reduction has been given with respect to each of those matters. (In subsequent cases, however, the Court has discouraged this practice: see below.)

1345. Tate JA observed (at [144]) that the statutory requirements could be complied with either by specifying the reduction for the undertaking first, or by specifying the reduction for the guilty plea first; whatever sequence is adopted, it is important that the actual sentence imposed reflects the fact that the offender has had the benefit of both forms of reduction.

1346. In resentencing the respondent in *Couper*, Tate JA specified (at [153]-[154]), in addition to the actual sentence, the sentence that would have been imposed but for both the plea of guilty and the undertaking, the sentence that would have been imposed but for the plea of guilty alone, and the sentence that would have been imposed but for the undertaking alone.

1347. In *Wang*,[1816] the Court observed (without deciding the question), "*It might be thought that Tate JA's resolution of the problem in Couper did not sit altogether comfortably with the approach in … Bui*". In *Bui*, [1817] the Court, on resentencing the offender, specified the sentence that would have been imposed but for the undertaking to cooperate, and the sentence that would have been imposed but for the plea of guilty (and making no allowance for the undertaking). The Court did not engage in the additional exercise of formulating a hypothetical sentence that would have been imposed had the offender undertaken to cooperate but not pleaded guilty.

1348. In *Mason (a pseudonym)*,[1818] the Court said:

1815 *DPP (Cth) v Couper* (2013) 41 VR 128, [132]–[149].
1816 *DPP (Cth) v Wang* [2019] VSCA 250, [88].
1817 *DPP (Cth) v Bui* (2011) 32 VR 149, [97], [99].
1818 *Mason (a pseudonym) v R* [2023] VSCA 75, [88]-[90].

[T]he process of attempting to assimilate the s 6AAA statement and the s 16AC specification, which may have been encouraged by what was said in Couper, is unnecessary and only leads to confusion, further compounding the problems that are already apparent by the hypothetical processes that are contemplated. Assuming that s 6AAA applies to Commonwealth offences, including where the Crimes Act requires a particular form of specification, the two processes are better kept separate.

That requires the judge to assess what he or she would have done in the absence of the undertaking and make the appropriate specification.

Separately the judge should declare what would have been the case had there been no plea of guilty. The fact of the undertaking, which does not form a part of the s 6AAA declaration which is confined to the plea of guilty, will likely render the s 6AAA statement even more divorced from the actual facts of the case.

6.10 Aggregate penalty

6.10.1 Overview

1349. The common law does not permit aggregate sentences.[1819] If an offender is found guilty of more than one offence, a sentencing court must impose a separate sentence for each offence, except to the extent that aggregation of sentences is authorised or required by statute.

1350. A court has the power, pursuant to statute, to impose an aggregate penalty in respect of two or more federal offences in some circumstances. In summary, the circumstances are as follows:

- **A single bond without conviction under s 19B** of the *Crimes Act 1914* (Cth) may be ordered in relation to any number of Commonwealth offences.
- **A single bond with conviction under s 20(1)(a)** of the *Crimes Act 1914* may be ordered in relation to any number of Commonwealth offences.
- **A sentence or order under 20AB(1)** of the *Crimes Act 1914* may be imposed in relation to more than one Commonwealth offence if the law of that State/Territory so permits.
- **Particular Commonwealth Acts** permit the imposition of a single aggregate penalty for two or more offences against the particular Act. The most significant example is s 219 of the *Social Security (Administration) Act 1999* (Cth), which permits a single penalty to be imposed for more than one offence against s 217 of that Act.
- If charges for more than one offence against the same provision of a law of the Commonwealth are joined in a single "information, complaint or summons" (but not indictment) under s 4K(3) of the *Crimes Act 1914* (Cth), a court may, upon conviction, impose one penalty in respect of those offences, pursuant to **s 4K(4) of the *Crimes Act***.
- If **the law of the particular State or Territory permits a court sentencing an offender summarily to impose a single penalty for more than one offence**, the law can (so far as it is applicable) be picked up and applied to the sentencing of a federal offender by ss 68 and 79 of the *Judiciary Act 1903* (Cth). The specific power in s 4K(4) of the *Crimes Act 1914* (Cth) probably does not preclude the application of such a law. (The reason for hesitation about this conclusion is that the only supporting authority for it appears to be *obiter dicta*.)
- If **the law of the particular State or Territory permits a court sentencing an offender on indictment to impose a single penalty for more than one offence**, the law will (so far as it is applicable) be picked up and applied to the sentencing of a federal offender by ss 68 and 79 of the *Judiciary Act 1903* (Cth). The specific power in s 4K(4) of the *Crimes Act 1914* (Cth) (which does not apply to a proceeding by indictment) does not preclude the application of such a law.[1820]

1351. Neither in summary proceedings nor in proceedings on indictment can a single penalty be imposed for a Commonwealth offence and a State or Territory offence.[1821]

1352. These points will be described in more detail.

1819 *Ryan v R* (1982) 149 CLR 1, 4, 25.
1820 See *Putland v R* (2004) 218 CLR 174.
1821 *Fasciale v R* (2010) 30 VR 643, [27]; *Ilic v R* (2020) 103 NSWLR 430, [41].

6.10.2 Single s 19B or s 20(1)(a) bond for multiple offences

1353. In its own terms, each of s 19B and s 20(1)(a) of the *Crimes Act 1914* permits a single order to be made under that provision in relation to more than one offence.

1354. There is no explicit requirement (as there is in other provisions permitting aggregate penalties, such as s 4K(4) of the *Crimes Act 1914*) that the charges be for the same offence, or for offences against the same provision of the Commonwealth law, or for offences of the same or similar nature, or that they be contained in the same charge-sheet or information. There does not appear to be any reason to read the power to make a single order under s 19B or s 20(1)(a) as being subject to the more limited power in s 4K, or subject to any other implied limitations.

6.10.3 Single sentence or order under *Crimes Act 1914*, s 20AB(1)

1355. Section 20AB(1) of the *Crimes Act 1914* (Cth), which makes available certain State or Territory sentencing options in the sentencing of a federal offender, does not specify whether or not a single such sentence or order may be made in relation to more than one offence. However some State laws specifically authorise the imposition of a single sentence or order of a kind which fall within s 20AB(1AA) in relation to two or more offences.[1822]

1356. Courts have proceeded on the basis that a single sentence or order under s 20AB(1) may be made for more than one federal offence, if the law of the State or Territory permits the making of a single such sentence or order in relation to two or more offences.[1823] If the offender is a child or young person, the relevant State or Territory law would also be applied by s 20C of the *Crimes Act 1914*.

1357. In addition, whether or not State or Territory law permits the making of a single sentence or order for more than one offence under an option applied by s 20AB, a single sentence or order may be imposed if any specific Commonwealth law (such as s 4K(4) of the *Crimes Act 1914* or s 219 of the *Social Security (Administration) Act 1999*) so permits.

6.10.4 Aggregate penalties permitted for particular Commonwealth offences

1358. A number of Commonwealth Acts contain a provision which permits the imposition of an aggregate penalty upon conviction for two or more offences against that Act.[1824] The most commonly-used of these provisions is s 219 of the *Social Security (Administration) Act 1999* (Cth).[1825] Typical of such provisions is s 219(2), which provides that a single penalty imposed under that section must not exceed

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1822 For example, s 40 of the *Sentencing Act 1991* (Vic) permits a single community correction order to be imposed for two or more offences "*which are founded on the same facts or form or are part of a series of offences of the same or a similar character*". See also *Crimes (Sentencing Procedure) Act 1999* (NSW), s 53A.

1823 An example is *Wilkinson v Morrissey* [2000] WASCA 241. In *Watson v R* [2020] NSWCCA 215, [25], Adamson J (with whom Johnson and Davies JJ agreed) observed that the power to impose an aggregate sentence of a kind applied by s 20AB derived not from s 20AB itself but from State or Territory procedural law applied by s 68(1) of the *Judiciary Act 1903*.

1824 Examples are: *A New Tax System (Family Assistance) (Administration) Act 1999,* s 179; *Commonwealth Electoral Act 1918*, s 315(10); *Veterans' Entitlements Act 1986*, s 209. See also s 1338B of the *Corporations Act 2001* (Cth), which picks up State and Territory legislation which provides for aggregate sentences, and applies these in relation to offences against the *Corporations Act*.

1825 Similar powers existed under the ancestor to the current Act, namely the *Social Security Act 1991* (Cth), ss 1353 and 1354, which was in force until 20 March 2000.

the sum of the maximum penalties that could be imposed if a separate penalty were imposed for each offence.

1359. Although s 220 of the *Social Security (Administration) Act 1999* (Cth) enables the joinder of charges for offences against s 217 of the Act "*in one complaint, information or declaration*" in certain circumstances, the power in s 219 of the Act to impose a single penalty is not conditioned on such joinder. The power to impose an aggregate penalty arises whenever a person is convicted of more than one offence against s 217 of the Act, regardless of whether or not the charges are joined in a single complaint or information. Also, since the offence in s 217 consists of contravention of a provision of Division 2 of Part 6 of the Act (that is, any of ss 212-216), the aggregate penalty may be imposed for offences of quite a different nature.

1360. The following are examples of the operation of s 219:

Example 1: Two offences contrary to s 217 Social Security (Administration) Act 1999

An offender is to be sentenced in the Magistrates' Court on two social security offences contrary to s 217 of the *Social Security (Administration) Act 1999*. The maximum penalty for each offence is 12 months and/or 60 penalty units [s 4B(2) *Crimes Act 1914*]. Accordingly, the maximum aggregate penalty which would apply for the two offences is 24 months imprisonment and/or a fine of 120 penalty units.

Example 2: Community Correction Order (CCO) for two offences

In the above example should a magistrate in Victoria wish to impose a CCO s 219 could be used to impose one CCO with a maximum number of 500 hours of unpaid community work over 2 years. For one offence a CCO with a maximum number of 250 hours over 6 months could be imposed.

6.10.5 Aggregate penalty for offences dealt with summarily – *Crimes Act 1914*, s 4K

1361. Section 4K of the *Crimes Act 1914* makes more general provision for the joinder of charges for similar offences and the imposition of an aggregate penalty in relation to charges for such offences. Subsections (3) and (4) of s 4K provide:

> *(3) Charges against the same person for any number of offences against the same provision of a law of the Commonwealth may be joined in the same information, complaint or summons if those charges are founded on the same facts, or form, or are part of, a series of offences of the same or a similar character.*
>
> *(4) If a person is convicted of 2 or more offences referred to in subsection (3), the court may impose one penalty in respect of both or all of those offences, but that penalty shall not exceed the sum of the maximum penalties that could be imposed if a separate penalty were imposed in respect of each offence.*

1362. The following points should be noted about these provisions:

- An aggregate penalty is only authorised by s 4K(4) if a person is convicted of two or more offences referred to in s 4K(3). The two subsections must be read together.[1826]

1826 *Putland v R* (2004) 218 CLR 174, [14].

- The offences must be against "*the same provision of a law of the Commonwealth*". If the charges are for different offences, s 4K(4) has no application.[1827] So, for example, s 4K(4) does not apply if the offender is sentenced for an offence against s 217 of the *Social Security (Administration) Act 1999* and an offence against the *Criminal Code* (Cth).
- Subsection 4K(3) only permits charges for offences to be joined if they are "*founded on the same facts, or form, or are part of, a series of offences of the same or a similar character*". So not only must the charges be for offences against the same provision, but they must also have a factual connection of the kind described.
- The joinder power in s 4K(3) only relates to the joinder of charges in "*the same information, complaint or summons*". It does not empower the joinder of charges in an indictment,[1828] even in jurisdictions such as South Australia and the ACT in which an "*information*" was traditionally one of the means of commencing proceedings on indictment.[1829] That is, s 4K(3) applies only to proceedings in summary jurisdiction (whether for summary or indictable offences).
- The power in s 4K(4) to impose an aggregate penalty has been construed as being limited in the same way as s 4K(3) to sentencing in summary proceedings.[1830] It does not apply to proceedings on indictment,[1831] even if an "information" is a permissible means by which proceedings on indictment may be commenced in the particular jurisdiction.[1832]
- If a single aggregate penalty is imposed under s 4K(4), the penalty may not exceed the sum of the maximum penalties that could be imposed if each offence were to be penalised separately.

1363. The following examples illustrate the operation of s 4K.

Example 3: Two summary offences

An offender is to be sentenced in the Magistrates' Court on two summary charges of obtaining financial advantage by deception contrary to s 135.2 of the *Criminal Code***.** These summary offences carry a maximum penalty of 12 months and/or 60 penalty units. Accordingly, the maximum aggregate penalty which could be imposed by a Magistrate for the two offences is 24 months imprisonment and/or a fine of 120 penalty units.

1827 *Cady v Smith* (1993) 117 FLR 132.

1828 *R v Bibaoui* [1997] 2 VR 600; *Putland v R* (2004) 218 CLR 174. It has been explained that there was no need for s 4K(3) to apply to proceedings on indictment, as joinder of counts on an indictment was permissible in all Australian jurisdictions: *Putland v R* (2004) 218 CLR 174, [14], [47]-[50].

1829 *R v Jackson* (1998) 72 SASR 490.

1830 *R v Bibaoui* [1997] 2 VR 600; *Putland v R* (2004) 218 CLR 174.

1831 *R v Bibaoui* [1997] 2 VR 600; *R v Pearce* [2001] NSWCCA 447; *R v Thompson* [2002] NSWCCA 149, [66]-[68]; *Johnsson v R* [2007] NSWCCA 192, [32]-[37]. In *Putland v R* (2004) 218 CLR 174 the Court affirmed the correctness of the decision in *Bibaoui*.

1832 *R v Jackson* (1998) 72 SASR 490.

Example 4: State/Territory order applied by s 20AB for two summary offences

In the above example, should a Magistrate wish to impose a Community Correction Order, or another State or Territory order applied by s 20AB of the *Crimes Act 1914* (Cth), in relation to both offences, a single order could be made, pursuant to s 4K (whether or not State/Territory law would permit it to be done for a State/Territory offence).

Example 5: Two indictable charges proceeding summarily

An offender is to be sentenced in the Magistrates' Court on two indictable charges of obtaining property by deception contrary to s 134.1 of the *Criminal Code*. When dealt with summarily, the maximum penalty for each offence is 2 years imprisonment or a fine not exceeding 120 penalty units or both – s 4J(3)(b) *Crimes Act 1914* (Cth).

1364. Although the question has not been authoritatively settled, if a law of a State or Territory which allows for the imposition of an aggregate penalty in summary proceedings in other circumstances, the better view appears to be that s 4K(4) does not preclude the State/Territory law from being picked up and applied to the sentencing of a federal offender by s 69 or s 79 of the *Judiciary Act 1903* (Cth): see "6.10.6 State/Territory provisions permitting aggregate sentences in matters determined summarily".

1365. With regard to proceedings on indictment, it has been authoritatively determined by the High Court in *Putland*[1833] that s 4K(4) does not preclude the application to the sentencing of a federal offender of a State or Territory law which permits the imposition of an aggregate penalty for two or more offences: see "6.10.7 Aggregate penalty for charges on indictment".

1366. However nothing in s 4K, or any other law of the Commonwealth, permits a single aggregate penalty to be imposed for a federal offence and a State or Territory offence.[1834]

6.10.6 State/Territory provisions permitting aggregate sentences in matters determined summarily

1367. In all States and Territories provision is made for the joinder of charges in summary proceedings or proceedings determined summarily. Such provisions are generally wider than s 4K(3) of the *Crimes Act 1914*, in that joinder is not restricted to charges for the same offence. A number of State and Territory laws permit the making of a single order, or the imposition of a single sentence, where charges are so joined, or in other circumstances.[1835]

1368. Such State or Territory procedural laws are capable of being picked up and applied to the sentencing of federal offenders by s 68 or s 79 of the *Judiciary Act* 1903 (Cth).[1836] The only impediment to them doing so would be if s 4K of the *Crimes Act 1914* (Cth) were regarded as rendering the State or Territory laws inapplicable.

1833 *Putland v R* (2004) 218 CLR 174.

1834 *Fasciale v R* (2010) 30 VR 643, [27]; *Ilic v R* (2020) 103 NSWLR 430, [41].

1835 For example, under the *Sentencing Act 1991* (Vic), if a person is convicted of two or more offences which are founded on the same facts or form or are part of a series of offences of the same or similar character the court may impose an aggregate sentence of imprisonment (s 9), a single community correction order (s 40), or an aggregate fine (s 51). This provision applies to sentencing in summary proceedings or on indictment.

1836 See also s 1338B of the *Corporations Act 2001* (Cth), in relation to offences against that Act.

1369. Although the point has not been authoritatively decided, it has been accepted, *obiter dicta*, that s 4K does not preclude the application of such State or Territory laws to sentencing in summary proceedings.[1837] The better view appears to be that such State or Territory laws permitting aggregate penalties do apply to the sentencing of a federal offender in summary proceedings in circumstances in which s 4K(4) of the *Crimes Act 1914* (Cth) is inapplicable (e.g. if the offender is charged with different offences).

1370. It is not permissible to impose a single aggregate penalty for a federal offence and a State or Territory offence.[1838]

6.10.7 Aggregate penalty for charges on indictment

1371. It is well-established that s 4K of the *Crimes Act 1914* (Cth) (which permits the imposition of an aggregate penalty in certain circumstances) has no application to proceedings on indictment.[1839]

1372. In *Putland*,[1840] the High Court held that nothing in s 4K, or in Part IB of the *Crimes Act*, precluded a Territory law which permitted a court, in sentencing an offender on indictment, to impose one penalty for two or more offences from being picked up and applied (pursuant to the provisions of the *Judiciary Act 1903* (Cth)) to the sentencing of a federal offender.

1837 *Janssen v McShane* [1992] TASSC 99 (Zeeman J); *R v Jackson* (1998) 72 SASR 490, [64]-[66] (Millhouse J). In *Jackson*, at [139], Perry J (with whom Nyland J agreed), *obiter dicta*, doubted whether a magistrate had power to impose a single sentence for different Commonwealth offences when the preconditions for joinder in s 4K(3) of the *Crimes Act 1914* were not met. However his Honour did not develop the point and did not refer to the possibility that a single sentence may be justifiable under State law which could be applied by the provisions of the *Judiciary Act 1903 (Cth)*. With respect, the approach taken by Zeeman J and Millhouse J appears to be the better view.

1838 *Fasciale v R* (2010) 30 VR 643, [27]; *Ilic v R* (2020) 103 NSWLR 430, [41].

1839 *R v Bibaoui* [1997] 2 VR 600, *R v Jackson* (1998) 72 SASR 490; *R v Pearce* [2001] NSWCCA 447, [152]; *R v Thompson* [2002] NSWCCA 149, [64]-[68]; *Johnsson v R* [2007] NSWCCA 192, [32]-[37]; *Mertell v R* [2022] ACTCA 69, [31]. In *Putland v R* (2004) 218 CLR 174, [9], [14] (Gleeson CJ), [44]-[46] (Gummow and Heydon JJ, Callinan J agreeing), [86] (Kirby J, dissenting in the result), the Court unanimously affirmed the correctness of the decision in *Bibaoui*. Observations in *Ozgen v R* [2021] NSWCCA 252, [53]-[54] (Leeming JA, Price and Hamill JJ agreeing), made without the benefit of submissions ([42], [58]), which suggest that s 4K(3) applies to proceedings on indictment are, with respect, plainly contrary to authority.

1840 *Putland v R* (2004) 218 CLR 174.

1373. Therefore, if State or Territory law permits an aggregate sentence to be imposed on indictment (as currently is the situation in New South Wales,[1841] Victoria,[1842] South Australia,[1843] Tasmania[1844] and the Northern Territory[1845]), the law is picked up by s 68(1) of the *Judiciary Act 1903* (and s 1338B(2) of the *Corporations Act* in relation to charges under that Act), and is generally made applicable to the sentencing of federal offenders.[1846]

1374. This is, however, subject to contrary statutory provision. In the view of the CDPP, an aggregate sentence cannot be imposed where the court is required by statute to impose a sentence of not less than a particular length for one or more of the offences: "6.10.8 Is an aggregate term of imprisonment permissible where a mandatory sentence applies?".

1375. It is not permissible to impose a single aggregate penalty for a federal offence and a State or Territory offence.[1847]

1841 *Crimes (Sentencing Procedure) Act 1999* (NSW), s 53A; see *DPP (Cth) v Beattie* [2017] NSWCCA 301, [141]-[146]; *Waterstone v R* [2020] NSWCCA 117, [126]. The court must indicate to the offender, and make a written record of the sentence that would have been imposed for each offence (after taking into account relevant matters in Pt 3 or any other provision of the Act) had separate sentences been imposed: s 53A(2)(b). See also *JM v R* [2014] NSWCCA 297, [35]-[41]; *Aryal v R* [2021] NSWCCA 2, [38]-[51]; *R v Walker* [2023] NSWCCA 219, [76].

1842 *Sentencing Act 1991* (Vic), ss 9 (imprisonment), 40 (CCO) and 51 (fines), which apply to sentencing in all courts in Victoria, if an offender is convicted by a court of two or more offences which are founded on the same facts, or form, or are part of, a series of offences of the same or a similar character. Since 2012, restrictions on the availability of an aggregate term of imprisonment where charges are "rolled-up" or representative charges have been removed: see now s 9(4A). The 2012 amendment also removed a previous requirement that the court in imposing an aggregate sentence must articulate the individual terms and the extent of concurrency and cumulation: see now s 9(4); *Saxon v R* [2014] VSCA 296. Prior to the amendments in 2012, these restrictions frequently led to error: see, e.g., *DPP (Vic) v Felton* (2007) 16 VR 214; *R v Wong* (2007) 178 A Crim R 192; *R v Rout* [2008] VSCA 87; *R v Grossi* (2008) 23 VR 500.

1843 *Sentencing Act 2017* (SA), s 26. An example of an appellate court applying s 26 is *Awkar v R* [2023] SASCA 118, [60]-[61] and [72]-[74]. Under s 26(2a) (which was inserted by the *Statutes Amendment (Child Sexual Abuse) Act* 2021, s 19, which came into effect on 1 June 2022), the court must, when setting a single sentence for an offence involving different victims or one committed on different occasions, indicate the sentence that would have been imposed in respect of each offence. (Prior to this amendment, the South Australian Court of Appeal held that it was not an invariable requirement for a court which imposes an aggregate sentence under s 26 to indicate the notional individual sentences which would otherwise have been imposed, and that it was undesirable to do so if it would lead to an air of unreality: *Modra v R* [2021] SASCA 88, [18]-[23].)

1844 *Sentencing Act 1997* (Tas), s 11; see *DPP (Tas) v BRL* [2023] TASCCA 8 at [59]-[72].

1845 *Sentencing Act 1995* (NT), s 52(1); see *Tomlins v R* [2013] NTCCA 18.

1846 In *Patel v R* [2022] NSWCCA 93, Brereton JA ([71]-[74]) and N Adams J ([79], [82]-[86]), while acknowledging a body of authority to the contrary, doubted whether s 53A of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which permits an aggregate sentence of imprisonment to be imposed for two or more offences, was applied by s 68(1) of the *Judiciary Act 1903* (Cth), on the basis that it was inconsistent with s 19(2) of the *Crimes Act 1914* (Cth) (and, in the view of N Adams J, s 19AB of the Act). In *Tenenboim v R* [2024] NSWCCA 1, [57]-[58], N Adams J also contrasted the requirement in s 53A that the sentencing court, when arriving at the appropriate indicative sentences, take into account such matters *"as are relevant under Part 3 or any other provision of the Act*" with the requirement to sentence a federal offender in accordance with the provisions of Part IB of the *Crimes Act*. However *DPP (Cth) v Beattie* [2017] NSWCCA 301 remains authority for the application of relevant State law in NSW: *R v Delzotto* [2022] NSWCCA 117, [2] (Beech-Jones CJ at CL); *Ensor v R* [2022] NSWCCA 278, [51] (Wilson J); *Ibrahim v R* [2022] NSWCCA 161, [121] (Davies J); *Tenenboim v R* [2024] NSWCCA 1, [52] (N Adams J).

1847 *Fasciale v R* (2010) 30 VR 643, [27]; *Ilic v R* (2020) 103 NSWLR 430, [41].

6.10.8 Is an aggregate term of imprisonment permissible where a mandatory sentence applies?

1376. Mandatory minimum terms of imprisonment apply to sentencing for certain people-smuggling and other migration-related offences ("7.2 Migration offences") and for certain child sex offences and child sexual abuse offences ("7.3.3 Mandatory terms of imprisonment for high-level Commonwealth child sex offences and for repeat child sexual abuse offences").

1377. In the view of the CDPP, these provisions implicitly preclude a court from imposing an aggregate sentence of imprisonment (that is, a head sentence) for two or more federal offences, if one or more of the offences is subject to one of these mandatory provisions.

1378. The requirement to impose a sentence of not less than the specified length applies to *the sentence for each offence* of the relevant kind, or which was committed in the relevant circumstances (a mandatory minimum sentence offence). For example, for an offence against s 272.8(1) of the *Criminal Code* (engaging in sexual intercourse with a child outside Australia), the court must impose a sentence of imprisonment of at least six years (*Crimes Act 1914* (Cth), s 16AAA, subject to s 16AAC). An aggregate sentence of imprisonment is not a sentence for a particular offence but a single sentence for two or more offences. Even if only one of the offences for which an offender is sentenced is a mandatory minimum sentence offence, and an aggregate sentence were to be imposed which exceeded the applicable minimum, the statutory mandate would not have been complied with, as *no specific sentence would have been imposed for the mandatory minimum sentence offence*.[1848] This would be so even if the sentencing judge were to give an indication of the notional sentence for the mandatory minimum sentence offence; such an indication is not part of the actual sentence for the offence.

6.10.9 When an aggregate penalty is or is not appropriate

1379. Aggregate sentencing is not antithetical to the provisions of Part IB of the *Crimes Act 1914* (Cth).[1849] However the imposition of an aggregate penalty for two or more offences is an exception to the general principle that a separate sentence should be imposed for each offence.

1380. Where a court has a discretion to impose an aggregate penalty, the discretion must be exercised consistently with general sentencing principles.[1850]

1381. The approach to the use of aggregate sentences in sentencing federal offenders, where the option is available, varies considerably between jurisdictions. The practice in a State or Territory generally reflects that in relation to offenders against the law of that State or Territory. In some States (such as New South

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1848 In *R v Delzotto* [2022] NSWCCA 117, in resentencing the offender, the Court imposed an aggregate sentence of 4 years and 6 months' imprisonment with a non-parole period of 3 years for two offences, one of which was an offence to which a mandatory minimum sentence applied. The decision is not authority that it is permissible to impose an aggregate sentence where one or more of the offences is subject to a mandatory minimum sentence, as the question was not adverted to in that case. Beech-Jones CJ at CL ([2]), responding to doubts expressed in *Patel v R* [2022] NSWCCA 93 about whether an aggregate sentence can be imposed in sentencing for Commonwealth offences on indictment generally (see fn 1846 above), referred to *DPP (Cth) v Beattie* [2017] NSWCCA 301 as authority for the proposition that it can. His Honour was addressing only that broader question, the narrower question about mandatory minimum sentence offences not having been raised. *Beattie* did not concern an offence which was subject to a mandatory minimum sentence.

1849 *Putland v R* (2004) 218 CLR 174, [15] (Gleeson CJ), cf [51]-[57] (Gummow and Heydon JJ). In the view of the CDPP, this general proposition is now subject to qualification, where mandatory minimum head sentences apply: see "6.10.8 Is an aggregate term of imprisonment permissible where a mandatory sentence applies?".

1850 *R v Nixon* (1993) 66 A Crim R 83, 85-86; *DPP v Rivette* [2017] VSCA 150, [85]-[86], [89].

Wales and South Australia), aggregate sentences are commonly used. In others (such as Victoria), their use is less common. Appendix 6 contains a description of authorities and practices in particular jurisdictions.

6.11 Requirement to warn certain offenders about the possibility of a continuing detention order or extended supervision order

1382. Division 105A of the *Criminal Code* (Cth) provides for a court, on the application of the Attorney-General, to make a continuing detention order (CDO) in relation to a person who has been convicted of certain terrorism or foreign incursion and recruitment offences. A CDO requires the offender to be detained in a prison after the end of their sentence.

1383. Since 7 June 2017, a court sentencing a terrorist offender (as defined in ss 105A.2(1) and 105A.3(1) of the *Criminal Code*) has been required by s 105A.23 of the *Criminal Code* to give a warning that an application may be made under Division 105A for a CDO requiring the person to be detained in a prison after the end of the person's sentence for the offence. The requirement applied the regardless of when the offence was committed.[1851]

1384. Amendments which came into effect on 9 December 2021[1852] introduced into Division 105A provision for the making of an extended supervision order (ESO) in relation to an offender against certain national security laws. An ESO imposes conditions on the person after the end of the person's sentence. Contravention of the conditions is an offence. A CDO or a ESO is referred to in the amended provisions as a post-sentence order (PSO). The amendments also extended the warning requirements in s 105A.23 of the *Code* to include a warning about an ESO. The warning requirements, as amended, apply in relation to any sentence imposed after the commencement of the amendments, that is, on 9 December 2021 (*Criminal Code*, s 106.11(12)).

1385. The warning requirements, as amended, apply to a court sentencing a person who has been convicted of:

- a specified terrorism or foreign incursion offence or offence relating to an ESO or interim supervision order;[1853] or

1851 *Criminal Code* (Cth), s 106.8(8), inserted by the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth), and which came into operation on 7 June 2017. See *DPP (Cth) v Besim; DPP (Cth) v MHK (No 3)* (2017) 52 VR 303. In that case, the Court of Appeal, in resentencing the respondents, gave the warning orally on their attendance by video link; however it is arguable that a warning may be given by including it in the orders of the Court: compare *ZZ v R* [2013] NSWCCA 83, [149].

1852 *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021*.

1853 There are two classes of specified offence. The first is an offence referred to in s 105A.3(1)(a) of the *Code*, that is: (i) an offence against Subdivision A of Division 72 of the *Code* (international terrorist activities using explosive or lethal devices); (ii) a serious Part 5.3 offence (that is, an offence against Part 5.3 of the *Code* (Terrorism), for which the maximum penalty is 7 or more years of imprisonment: s 105A.2(1)); an offence against Part 5.5 of the *Code* (Foreign incursions and recruitment), except an offence against s 119.7(2) or (3) (publishing recruitment advertisements); or (iv) an offence against the repealed *Crimes (Foreign Incursions and Recruitment) Act 1978*, except an offence against s 9(1)(b) or (c) of that Act (publishing recruitment advertisements). The second class of specified offence is an offence against s 105A.18A (contravening an ESO or interim supervision order) or s 105A.18B(1) (offences relating to monitoring devises required under an ESO or interim supervision order) of the *Code* if s 105A.3A(4)(b) applies in relation to the person (that is, the person was charged with the offence while the relevant order was in force, or within 6 months after the conduct constituting the offence).

- a relevant offence relating to a control order,[1854] if the CDPP informs the court that a warning must be given (*Criminal Code*, s 105A.23(1)).

1386. The court must warn the offender that an application may be made under Division 105A for:
- a CDO requiring the person to be detained in custody in a prison after the end of the person's sentence; or
- an ESO imposing conditions on the person after the end of the person's sentence, a contravention of which is an offence (*Criminal Code*, s 105A.23(1A)(a)).

1387. In the case of a person convicted of a specified terrorism or foreign incursion offence or offence relating to an ESO or interim supervision order, the court must warn the person that the application may be made before the end of the sentence for that offence, or before the end of any later sentence if the person is continuously detained in custody in a prison (*Criminal Code*, s 105A.23(1A)(b)(i)). In the case of a person convicted of a relevant offence relating to a control order, the court must inform the person that the application may be made before the end of the sentence for the offence (*Criminal Code*, s 105A.23(1A)(b)(i)).

1388. Failure to give a warning under s 105A.23 does not affect the validity of a sentence or prevent an application from being made for a CDO or ESO: s 105A.23(2).

6.12 Power of sentencing court to correct error in sentence

6.12.1 *Functus officio* principle

1389. Once a judgment or final order of a court has passed into record, subject to contrary statutory provision, the court is *functus officio* – that is, its powers in relation to the matter have expired. The principle applies to criminal proceedings as well as to civil proceedings and to both superior courts and inferior courts.[1855] The only qualification at common law was the "slip rule" by which the record of a sentence or order could be corrected, pursuant to the court's implied or inherent jurisdiction, to reflect what the court intended to do.[1856]

1390. In *Edwards*,[1857] the sentencing judge had mistakenly imposed a suspended sentence without power to do so and, upon discovering the error (after the sentence had passed into record), had purported to substitute a different sentence. The Court of Appeal (Weinberg JA and Williams AJA; Warren CJ dissenting) held that the sentencing court had no power to correct the original sentence, as the sentencing judge was then *functus officio*. The majority held that the fact that a sentencing court had acted without power in imposing a sentence did not operate as an exception to the principle of *functus officio*. The error could only be corrected on appeal.

1391. The *functus officio* principle is subject to statutory exceptions. The *Crimes Act 1914* (Cth) creates two powers to correct errors in relation to a sentence of imprisonment imposed on a federal offender:
- s 19AHA: see "6.12.2 Power to correct error in sentence of imprisonment: Crimes Act 1914, s 19AHA"

1854 The specified offences are an offence referred to in s 104.27 (contravening a control order) or s 104.27A(1) (offences relating to monitoring devices required under a control order).
1855 See *DPP v Edwards* (2012) 44 VR 114 and the authorities cited there.
1856 *R v De Zylva* (1988) 33 A Crim R 44; *R v Saxon* [1998] 1 VR 503.
1857 *DPP v Edwards* (2012) 44 VR 114.

- s 19AH: see "6.12.3 Power to correct error in fixing NPP or making RRO: Crimes Act 1914, s 19AH"

1392. Wider powers to recall and correct errors in sentences under State and Territory laws may also be picked up and applied as surrogate federal law: see "6.12.4 Statutory powers to correct or recall a sentence under State or Territory law".

6.12.2 Power to correct error in sentence of imprisonment: *Crimes Act 1914*, s 19AHA

1393. Section 19AHA of the *Crimes Act* (which was inserted with effect from 27 November 2015) applies if "*a sentencing order*" made by a court under Part IB of the Act in relation to a person "*reflects an error of a technical nature made by the court … or … has a defect of form … or … contains an ambiguity*" (s 19AHA(1)). "Sentencing order" is defined to mean an order imposing, or purporting to impose, a sentence (that is, a sentence of imprisonment: see the definition of "sentence" in s 16(1)), an order fixing a NPP or a RRO (s 19AHA (3)).

1394. Such an error does not affect the validity of any sentence imposed on the person (s 19AHA(2)).

1395. The section empowers the court, on its own initiative, at any time, by order, to amend the sentencing order to rectify the error, defect or ambiguity (s 19AHA(3)).

1396. Section 19AHA also provides for an application by the Attorney-General, the CDPP or the offender to the court to correct the error (s 19AHA(4)). Such an application may be made at any time. On such an application, the court must, by order, amend the sentencing order to rectify the error, defect or ambiguity (s 19AHA(4)).

1397. The court which hears the application may be differently constituted (s 19AHA(5)).

1398. An amendment made under s 19AHA is taken to have had effect from the date of effect of the sentencing order unless the court orders otherwise (s 19AHA(7)). An amendment does not affect any right of appeal against a sentence (s 19AHA(6)).

1399. A provision such as s 19AHA should not be unduly circumscribed by restrictive interpretation, but does not permit the re-opening of the sentencing discretion or the making of changes arising from further consideration of the appropriateness of the sentence.[1858] It does not, for example, permit the substitution of one sentence type for another because the original sentence was not authorised by law for the particular offence.[1859] It could not be used to correct an error which consisted of failing to fix separate non-parole periods for Commonwealth and State offences, because the error could not be cured without the fresh exercise of the sentencing discretion.[1860]

1858 Cf *DPP v Green* (2007) 17 VR 293, [12], referring to a similar power in s 104A of the *Sentencing Act 1991* (Vic).
1859 Cf *DPP v Edwards* (2012) 44 VR 114.
1860 *R v Perrey* [2022] SASCA 51, [25].

1400. The legislation was plainly intended to allow the correction of an arithmetical error.[1861] For example, a sentencing order which is based upon a miscalculation of a period of pre-sentence custody[1862] or the total effective length of a series of sentences[1863] may be said to reflect *"an error of a technical nature made by the court*" within s 19AHA(1). The power would also extend to the correction of the good behaviour period of a recognizance release order which did not reflect the order as pronounced in the judge's sentencing remarks.[1864]

6.12.3 Power to correct error in fixing NPP or making RRO: *Crimes Act 1914*, s 19AH

1401. Section 19AH(1)(a) of the *Crimes Act* (which was inserted with effect from 17 January 1990) provides that where a court fails to fix, or properly to fix, a NPP, or to make, or properly to make, a RRO, under the Act, that failure does not affect the validity of any sentence.

1402. The section also provides for an application by the Attorney-General or the CDPP to the court to have the order corrected (s 19AH(1)(b)). Such an application may be made at any time. The court which hears the application may be differently constituted (s 19AH(3)). On such an application, the court must, by order, set aside any NPP or RRO that was not properly fixed or made and fix a NPP or make a RRO under the Act (s 19AH(1)(b)).

1403. The effect of s 19AH is to preserve from total invalidity a sentence affected by the failure to fix, or properly fix, a NPP or to make, or properly make, a RRO, so that when that failure is corrected the whole sentence is and remains valid.[1865]

1404. The power in s 19AH has been used to correct a failure to explain the conditions of a RRO (as required by s 16F(2) of the Act),[1866] the use of the wrong form for a RRO,[1867] the imposition of a NPP when a RRO was required[1868] or vice versa,[1869] a failure to specify correctly the time for release on a RRO[1870] or a failure to comply with s 19AD of the Act.[1871]

1861 The Explanatory Memorandum for the Bill which inserted s 19AHA said that the new section "*clarifies the powers of courts to correct Commonwealth sentencing orders in situations where, for example, an arithmetical mistake has been made in calculating a sentence commencement date or expiry date or a sentencing order has been made using the incorrect form*": *Crimes Legislation Amendment (Powers, Offences And Other Measures) Bill 2015* (Cth), Replacement Explanatory Memorandum (House of Representatives), [445].

1862 Such an error may be corrected under the *Sentencing Act 1991* (Vic), s 104A: *DPP v Green* (2007) 17 VR 293. But it should be noted that that provision, unlike s 19AHA, specifically permits correction of "*a material miscalculation of figures*".

1863 *Nguyen v R* [2023] NSWCCA 240, [64]-[68]. Such an error might also be correctable under s 19AH.

1864 E.g. *R v Perrey* [2022] SASCA 51, [12], [22].

1865 *R v Suarez-Mejia* [2002] WASCA 187, [74].

1866 *Weinert v DPP (Cth)* [1999] SASC 34; *DPP (Cth) v Cole* (2005) 91 SASR 480, [44]-[53] (although, without references to these cases, the power to do so was doubted in *Veale v R* [2022] NSWCCA 154, [18]).

1867 *DPP (Cth) v Cole* (2005) 91 SASR 480, [44]-[53].

1868 *Smith v Elliot* [2007] ACTSC 65.

1869 *Minehan v R* [2010] NSWCCA 140, [12].

1870 *R v Hung* [2001] NSWCCA 233, [11]-[15].

1871 *Betka v R (No 3)* [2021] NSWCCA 121, where a single NPP was fixed in substitution for separate NPPs which had been fixed for different federal sentences which had been imposed at different times. The substitution did not affect the period that the offender was required to serve.

6.12.4 Statutory powers to correct or recall a sentence under State or Territory law

1405. The laws of most states and territories confer wider powers on courts to recall a sentence or to correct error, even though the sentence has passed into record.[1872]

1406. Powers under State or Territory laws which permit a sentencing court to correct errors in relation to sentences may be picked up and applied to the sentencing of a federal offender by s 68 or s 79 of the *Judiciary Act 1903* or by s 20AB(3) of the *Crimes Act 1914*. The existence of specific powers in ss 19AH and 19AHA of the *Crimes Act* in relation to sentences of imprisonment will not necessarily preclude other powers under State or Territory law from being applied as surrogate federal law.[1873]

1407. But in relation to a sentence of imprisonment, the power in s 19AH or s 19AHA, if applicable, should be invoked before resorting to any power under State or Territory law to recall or correct a sentence.[1874]

6.13 Post-sentence monitoring and detention of offenders under State laws

1408. Laws in some jurisdictions establish a regime for the monitoring or detention of certain classes of offenders upon the completion of a sentence of imprisonment. For example, the *Crimes (High Risk Offenders) Act 2006* (NSW) and the *Serious Offenders Act 2018* (Vic) each provides for court-ordered post-sentence detention or supervision of offenders who have served a term of imprisonment for a serious sexual offence or offence of violence. Each of those Acts lists Commonwealth offences amongst the offences which render an offender subject to the making of an order. The New South Wales Act provides for orders to be made upon an application by the State of NSW. The Victorian Act provides for an application to be made by the Director of Public Prosecutions (Victoria) or (in some circumstances) by the Secretary to the relevant Department (Victoria).

1409. The view of the CDPP is that these regimes are not picked up and applied as federal law by s 68 or s 79 of the *Judiciary Act 1903* (Cth) or by s 20AB(3) of the *Crimes Act 1914* (Cth). Nor, in the view of the CDPP, does any federal law operate to confer on the CDPP or any other Commonwealth authority power to make an application for an order under the State Acts. The State Acts apply to Commonwealth offenders according to their own terms.[1875]

6.14 Costs certificates

1410. A State regime for costs certificates does not apply to federal prosecutions.[1876]

1872 E.g. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 43; *Penalties and Sentences Act 1992* (Qld), s 188; *Sentencing Act 1995* (WA), s 37; *Sentencing Act 1997* (Tas), s 94; *Crimes (Sentencing) Act 2005* (ACT), s 61; *Sentencing Act 1995* (NT), s 112. These powers have been construed broadly: see the extensive review of the authorities in *Achurch v R (No 2)* (2013) 84 NSWLR 328.

1873 *DPP (Cth) v Wallace* (2011) 43 WAR 61, [25]-[34]. Martin CJ held that the limited power in s 19AH to correct the failure to fix, or to properly fix, a NPP or RRO did not prevent the more general power under State law from being applied by the provisions of the *Judiciary Act 1903 (Cth)*. It seems unlikely that the later insertion of s 19AHA was intended to reverse that position.

1874 See *R v Hudson* (2016) 125 SASR 171, [25].

1875 As to whether a State Parliament can validly make such a law, see *Re Macks; Ex parte Saint* (2000) 204 CLR 158, [25] (Gleeson CJ), [59]–[60] (Gaudron J), [107] (McHugh J), [208] (Gummow J) and [347]–[348] (Hayne and Callinan JJ); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, [73]-[74] (Gummow J); *D151 v New South Wales Crime Commission* (2017) 94 NSWLR 738, [16]-[26], [35]-[42] (Basten JA, with whom Beazley ACJ and Simpson JA agreed on this point).

1876 *Solomons v District Court (NSW)* (2002) 211 CLR 119; *DPP (Cth) v Hunter (No 2)* (2003) 7 VR 119.

6.15 Levy on offenders

1411. Some States or Territories impose a levy on offenders generally, or certain offenders, the proceeds of which are used to fund compensation schemes for victims of crime.[1877] In the view of the CDPP, a State or Territory law providing for such a levy is not picked up and applied in relation to federal offenders as surrogate federal law, either by s 68 or s 79 of the *Judiciary Act 1903* (Cth) or by any other Commonwealth law. Whether the relevant State or Territory law applies to federal offenders depends on the terms of the law itself.

1877 E.g. *Victims of Crime Act 2001* (SA); *Victims of Crime Compensation Act 1994* (Tas); *Victims of Crimes (Financial Assistance) Act 2016* (ACT).

7 SPECIFIC SENTENCING SITUATIONS

7.1 Terrorism and other national security offences

7.1.1 Definition of "terrorism offence"

1412. Various particular restrictions and requirements apply to the sentencing of an offender for a terrorism offence or other offence related to national security.

1413. "Terrorism offence" is defined in s 3(1) of the *Crimes Act 1914* (Cth)[1878] to mean:

(a) an offence against Subdivision A of Division 72 of the *Criminal Code* (Cth); or

(aa) an offence against Subdivision B of Division 80 of the *Criminal Code*; or

(b) an offence against Part 5.3 or 5.5 of the *Criminal Code*; or

(ba) an offence against Subdivision HA of Division 474 of the *Criminal Code*; or

(c) an offence against either of the following provisions of the *Charter of the United Nations Act 1945* (Cth):

(i) Part 4 of that Act;

(ii) Part 5 of that Act, to the extent that it relates to the *Charter of the United Nations (Sanctions—Al-Qaida) Regulations 2008* (Cth).

7.1.2 Minimum non-parole period: the three-quarters rule

1414. Section 19AG of the *Crimes Act 1914* (Cth) (introduced in 2004) creates what is known as "*the three-quarters rule*". It requires a court which sentences an offender to imprisonment for a "*minimum non-parole offence*" to fix a single non-parole period which is at least three-quarters of the head sentence (or the aggregate sentence for those offences, if more than one). "*Minimum non-parole period offence*" is defined in s 19AG(1) to mean:[1879]

- a terrorism offence (as defined in s 3(1) of the Act);
- an offence against Division 80 (other than Subdivision CA) of the *Criminal Code* (Cth) (treason, urging violence, advocating terrorism, etc); or
- an offence against s 91.1(1) or 91.2(1) of the *Criminal Code* (Cth) (intentional espionage offences).

(This includes a reference to an offence of attempt, incitement or conspiracy that relates to that offence: *Code*, s 11.6.)

1878 The definition was inserted by the *Anti-Terrorism Act 2004* (Cth), s 3, Sch 1, item 1A, which came into effect on 1 July 2004. The definition then contained only paragraphs (a) and (b); paragraph (b) referred only to Part 5.3 of the *Criminal Code*. Paragraphs (aa) and (c), and the reference in paragraph (b) to Part 5.5 of the *Criminal Code*, were inserted by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth), Sch 1, items 35-37, which came into effect on 1 December 2014, but applied in relation to any terrorism offence, whether the offence occurs before, on or after commencement (item 38). Paragraph (ba) was inserted by the *Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Act 2023* (Cth), Sch 2, item 1, which came into effect on 8 January 2024.

1879 The definition was amended by the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth), with effect from 30 June 2018. Prior to the amendments, "minimum non-parole period offence" also included other offences against Division 91 of the *Criminal Code* (espionage, etc) and an offence against s 24AA of the *Crimes Act 1914* (treachery).

1415. Section 19AG applies only if the offender is sentenced to imprisonment. It does not affect the availability of other sentencing options. Nor does it affect the obligation of the court in fixing the head sentence to impose a sentence "*that is of a severity appropriate in all the circumstances of the offence*" (*Crimes Act 1914*, s 16A(1)). It is not permissible for a sentencing court to discount the head sentence to compensate for, or offset, the effect of s 19AG.[1880]

1416. In *Alou,*[1881] the New South Wales Court of Criminal Appeal held that s 19AG was within the legislative power of the Commonwealth.

1417. For more detail about the operation of the three-quarters rule, see "4.10.8 The three-quarters rule in fixing a NPP for certain national security offences".

7.1.3 Sentences and orders under s 20AB(1) for the service of a sentence not available for minimum non-parole offence

1418. A court is not permitted to pass a sentence or make an order under s 20AB(1) that involves detention or imprisonment in respect of a conviction for a minimum non-parole offence mentioned in s 19AG (s 20AB(6)), that is, an offence to which the three-quarters rule applies (see "7.1.2 Minimum non-parole period: the three-quarters rule"). The Explanatory Memorandum for the Bill which introduced s 20AB(6) said that the intention of the provision is to "*ensure that a person sentenced to serve detention in custody or imprisonment cannot be ordered to serve that sentence of imprisonment or detention by way of the additional sentencing alternatives under section 20AB(1) of the Crimes Act 1914.*"[1882]

1419. In *Homewood*,[1883] the New South Wales Court of Criminal Appeal rejected a submission that s 20AB(6) should be read as operating only to preclude the passing of a sentence or making or an order under s 20AB(1) which involved "actual imprisonment", not an intensive correction order by which a sentence of imprisonment would be served in the community. The Court held (consistently with the intention stated in the Explanatory Memorandum) that the effect of s 20AB(6) is that, in sentencing an offender for a minimum non-parole offence, a court cannot make an order of a type identified in s 20AB(1AA) if it first determines that a sentence of detention or imprisonment is the appropriate sentence.[1884]

1420. A court is not otherwise precluded from making an order under s 20AB in relation to a minimum non-parole offence (or any other national security offence). That is, the court could, if appropriate, make an order which is available under s 20AB, such as a community service order, as an alternative to a sentence of imprisonment for such an offence.

7.1.4 Requirement to warn about possible continuing detention order or extended supervision order

1421. A court sentencing an offender for a terrorism offence, or for certain other national security offences, is required to warn the offender about the possibility that a post-sentence order may be made under Division 105A of the *Criminal Code* (Cth): see "6.11 Requirement to warn certain offenders about the possibility of a continuing detention order or extended supervision order". Courts have held that the

1880 *Lodhi v R* [2007] NSWCCA 360, [255]–[262].
1881 *Alou v R* (2019) 101 NSWLR 319 (special leave refused: *Alou v R* [2020] HCATrans 83).
1882 *Anti-Terrorism Bill 2004* (Cth), *Supplementary Explanatory Memorandum (Senate)*, 15-16.
1883 *Homewood v R* [2023] NSWCCA 159.
1884 *Homewood v R* [2023] NSWCCA 159, [6] (Beech-Jones CJ at CL), [69]-[70] (Ierace J), [86] (Cavanagh J).

prospect that a CDO may be made is not a relevant factor in sentencing: see "3.5.21 Control orders, extended supervision orders and continuing detention orders".

7.1.5 Parole only in exceptional circumstances

1422. Terrorism offenders, offenders subject to a control order and offenders who have supported, or advocated support for, terrorist acts can only be granted federal parole in exceptional circumstances: see "4.11.2 Terrorism-related restrictions on parole".

7.2 Migration offences

1423. Mandatory sentences of imprisonment apply to offenders convicted of certain migration-related offences, as described in this section of the guide. For specified people-smuggling offences, a mandatory minimum head sentence and a mandatory minimum non-parole period apply. For a specified offence relating to breaches of conditions of a bridging visa, or a specified offence relating to a community safety supervision order, a sentence of imprisonment of at least one year must be imposed.

1424. As to the principles to be applied where the court is required to impose a sentence of imprisonment of not less than a specified length, see "4.8.5 Mandatory imprisonment".

7.2.1 People-smuggling offences

1425. Section 236B of the *Migration Act 1958* (Cth) provides for a mandatory term of imprisonment, a mandatory minimum duration of that term, and a mandatory minimum non-parole period for certain specified people-smuggling offences. The only exception to the mandatory requirements is if it is established on the balance of probabilities that the offender was aged under 18 years when the offence was committed (s 236B(2)).

1426. The mandatory requirements apply if a person is convicted of an offence against any of the following provisions of the *Migration Act*:

- s 233B (aggravated people smuggling, involving cruel, inhuman or degrading treatment, or conduct giving rise to a danger of death or serious harm to the person);[1885]
- s 233C (aggravated people smuggling, involving a group of at least 5 unlawful non-citizens); or
- s 234A (offence relating to forged or false documents, or false or misleading statements or documents, relating to a group of 5 or more non-citizens or a member of such a group).

1427. Each offence is punishable by 20 years' imprisonment or a fine of 2,000 penalty units or both.

1428. If a person is convicted of an offence against s 233B, or a repeat offence for a relevant people smuggling offence,[1886] the court is required to impose a sentence of imprisonment of at least 8 years (s 236B(3)(a) and (b)), with a non-parole period of at least 5 years (s 236B(4)(a)). If a person is convicted of an offence against s 233C or s 234A (other than a repeat offence) the court must impose a sentence of imprisonment of at least 5 years (s 236B(3)(c)) with a non-parole period of at least 3 years (s 233B(4)(b)).

1429. In addition, a court may not make an order under s 19B of the *Crimes Act 1914* (Cth) (dismissal of a charge or a non-conviction bond) in respect of a charge for an offence against s 233B, 233C or 234A unless the offender was aged under 18 years at the time of the offence (*Migration Act*, s 236A).

1885 On 27 August 2012, the then Attorney-General issued a direction to the CDPP, pursuant to s 8 of the *Director of Public Prosecutions Act 1983* (Cth), which limited the circumstances in which the CDPP should institute, carry on or continue to carry on a prosecution for an offence against s 233B of the *Migration Act 1958* (Cth). On 4 March 2014, the direction was revoked by the then Attorney-General.

1886 "*Repeat offence*" is defined in s 236B(5) of the *Migration Act 1958* (Cth). It refers to a conviction for an offence against s 233B, s 233C or s 234A of the Act by a person who, in the same proceedings or previous proceedings, has been convicted of or found to have committed another such offence or who has, after 27 September 2001, been convicted of or found to have committed an offence against s 232A or s 233A of the Act.

1430. In imposing a sentence of imprisonment or fixing a non-parole period for an offence against Part 2, Division 12, Subdivision A of the *Migration Act* (that is, ss 229–236), the court must take into account any period that the person has spent in immigration detention during the period starting when the offence was committed; and ending when the person is sentenced for the offence (*Migration Act*, s 236C): see "4.8.11 Taking into account immigration detention in sentencing for certain offences against the *Migration Act 1958* (Cth)".

7.2.2 Bridging visa offences

1431. Section 76DA of the *Migration Act 1958* (Cth) provides for a mandatory term of at least one year's imprisonment if a person is convicted of a specified offence relating to failure to comply with the requirements of conditions attached to Subclass 070 (Bridging (Removal Pending)) visas (bridging visa offences). Unlike some other offences to which mandatory requirements attach, there are no exceptions to the mandatory minimum term specified in s 76DA.

1432. The mandatory minimum provision applies if a person is convicted of an offence against any of the following provisions of the *Migration Act*:

- s 76B (offence relating to monitoring conditions of certain bridging visas);
- s 76C (offence relating to requirement to remain at notified address);
- s 76D (offences relating to monitoring device and related monitoring equipment);
- s 76DAA (offence relating to requirement not to perform certain work etc.);
- s 76DAB (offence relating to requirement not to go within certain distance of a school etc.); and
- s 76DAC (offence relating to requirement not to contact victim of offence etc.).

1433. Each offence is punishable by 5 years' imprisonment or a fine of 300 penalty units or both. Each offence is capable of being dealt with summarily, but if it were so dealt with, the minimum term of imprisonment the court would be required to impose (one year) would be the same as the maximum term of imprisonment which the court would have power to impose under s 4J of the *Crimes Act 1914* (Cth) (12 months): see "1.8.3 Limits on penalties on summary disposition of an indictable offence – *Crimes Act 1914*, ss 4J and 4JA".

1434. No mandatory minimum period of imprisonment to be served is specified. The period to be served (if any) falls to be determined in the same way as for any other offence (see "4.10 Imprisonment: period to be served").

7.2.3 Offences relating to community safety supervision order

1435. Part 9.10 of the *Criminal Code* (Cth) (inserted in 2023[1887]) provides for the making of community safety orders in relation to a non-citizen, aged 18 years or older, who has been convicted of a serious violent or sexual offence where there is no real prospect of removal of the person from Australia becoming practicable in the reasonably foreseeable future.

1887 Part 9.10 was inserted by the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* (Cth), and came into operation on 8 December 2023 (s 2). That Act was a response to the decision of the High Court in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005, which held that the continuing detention of a non-citizen where there was no real prospect of their removal from Australia becoming practicable in the reasonably foreseeable future was unlawful as it contravened Chapter III of the Constitution.

1436. Part 9.10 provides for two types of community safety order: a community safety supervision order and a community safety detention order. An order may be made by the Supreme Court of a State or Territory, for a period of up to 3 years (s 395.12(5); s 395.13(5)(d)). The effect of a community safety detention order is to commit the person to detention in a prison for the period the order is in force (s 395.5(3)). (If a Court makes a community safety detention order, the person is not eligible to be released on bail or parole until the order ceases to be in force (s 395.50(1)).) The effect of a community safety supervision order is to impose on the person, for the period the order is in force, conditions contravention of which is an offence (s 395.5(4)). Amongst the conditions which may be imposed under a community safety supervision order is a condition that the person be subject to electronic monitoring (for example, by wearing a monitoring device at all times), and comply with directions given by a specified authority in relation to electronic monitoring (s 395.14(7)(d)). Obligations in relation to such devices are set out in s 395.17(1).

1437. Section 395.38 creates offences relating to contravention of a community safety supervision order. Section 395.39 creates offences relating to interference with, or disruption or loss of, a function of the monitoring device or any related monitoring equipment, where a person is required to wear a monitoring device under a community safety supervision order. Each offence is punishable by imprisonment for 5 years or a fine of 300 penalty units or both.

1438. Section 395.40 provides that if a person is convicted of an offence against s 395.38 or 395.39, the court must impose a sentence of imprisonment of at least one year.

1439. Each offence is capable of being dealt with summarily, but if it were so dealt with, the minimum term of imprisonment the court would be required to impose (one year) would be the same as the maximum term of imprisonment which the court would have power to impose under s 4J of the *Crimes Act 1914* (12 months): see "1.8.3 Limits on penalties on summary disposition of an indictable offence – *Crimes Act 1914*, ss 4J and 4JA".

1440. No mandatory minimum period of imprisonment to be served is specified. The period to be served (if any) falls to be determined in the same way as for any other offence (see "4.10 Imprisonment: period to be served").

7.3 Child sex offences and child sexual abuse offences

7.3.1 The 2020 amendments

1441. Amendments to the *Crimes Act 1914* (Cth) and the *Criminal Code* (Cth) in 2020[1888] introduced a set of requirements relating to sentencing for Commonwealth child sex offences and child sexual abuse offences. The main components are:

- **Mandatory sentences for specified high-level Commonwealth child sex offences:** A mandatory sentence of imprisonment of at least a specified minimum length applies upon conviction for such an offence in relation to conduct engaged in on or after 23 June 2020.
- **Mandatory sentences for repeat child sexual abuse offending:** A mandatory sentence of imprisonment of at least a specified minimum length applies upon conviction for a specified Commonwealth child sexual abuse offence in relation to conduct engaged in on or after 23 June 2020, if the offender has previously been convicted (at any time) of a child sexual abuse offence (whether Commonwealth, State or Territory).
- **Presumption of cumulation for Commonwealth child sex offences:** A sentence of imprisonment for a Commonwealth child sex offence committed on or after 23 June 2020 must presumptively be ordered to be served wholly cumulatively upon an uncompleted term of imprisonment for another Commonwealth child sex offence or a State or Territory registrable child sex offence.
- **Immediate release under recognizance release order (RRO) only in exceptional circumstances:** An offender must not be released immediately on a RRO other than in exceptional circumstances, if at least one of the offences for which the offender is sentenced is a Commonwealth child sex offence committed on or after 23 June 2020.
- **Conditions on RRO for Commonwealth child sex offence:** If a RRO is made in relation to a term of imprisonment imposed for at least one Commonwealth child sex offence committed on or after 23 June 2020, the RRO must be subject to specified conditions (for supervision, prohibiting interstate or overseas travel without permission and for undertaking treatment or rehabilitation).
- **Additional sentencing factors:** A court sentencing for a Commonwealth child sex offence is required to have regard to additional factors.

1442. These requirements are described in detail below (or in other parts of this guide which are linked below).

7.3.2 Meaning of "Commonwealth child sex offence"

1443. "Commonwealth child sex offence" is defined in s 3(1) of the *Crimes Act 1914* (Cth). It means an offence against any of the following provisions of the *Criminal Code*):

(i) Division 272 (Child sex offences outside Australia);

(ii) Division 273 (Offences involving child abuse material outside Australia);

(iia) Division 273A (Possession of child-like sex dolls etc.);

1888 *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth).

(iii) Subdivisions B and C of Division 471 (offences relating to use of postal or similar services in connection with child abuse material and sexual activity involving children);

(iv) Subdivisions D and F of Division 474 (offences relating to use of telecommunications in connection with child abuse material, sexual activity involving children and harm to children).

It also includes:

- an offence against s 11.1 (attempt), 11.4 (incitement) or 11.5 (conspiracy) of the *Criminal Code* that relates to any of these offences and
- an offence against one of the specified Divisions or Subdivisions which is taken to have been committed because of section 11.2 (complicity and common purpose), 11.2A (joint commission) or 11.3 (commission by proxy) of the *Criminal Code*.

7.3.3 Mandatory terms of imprisonment for high-level Commonwealth child sex offences and for repeat child sexual abuse offences

1444. **Overview:** Sections 16AAA and 16AAB of the *Crimes Act 1914* (Cth) provide for mandatory sentences of imprisonment upon conviction for certain Commonwealth child sex offences and child sexual abuse offences in relation to conduct engaged in on or after 23 June 2020,[1889] unless the offender was aged under 18 years at the time of the offence (s 16AAC(1)).

1445. The mandatory penalties apply in two circumstances:

- *High-level offences:* if the offence is a specified high-level Commonwealth child sex offence (the specified offences carry maximum penalties between 20 years' imprisonment and life imprisonment) (s 16AAA); or
- *Repeat child sexual abuse offence:* if the offence is a specified Commonwealth child sexual abuse offence (the specified offences carry maximum penalties between 5 and 15 years' imprisonment) and the offender has been convicted at an earlier sitting (at any time[1890]) of a federal, State or Territory child sexual abuse offence (s 16AAB).

1446. The provisions specify the minimum length of the sentence (that is, the head sentence), depending on the particular offence. For example, for an offence against s 272.8(1) of the *Criminal Code* (Cth) (sexual intercourse with a child outside Australia), which carries a maximum penalty of 25 years' imprisonment, the specified minimum sentence of imprisonment is 6 years.

1447. The court may reduce the sentence, if the court considers it appropriate, by up to 25% below the specified minimum to take into account either a plea of guilty or cooperation with law enforcement authorities in the investigation of the offence or a Commonwealth child sex offence, or by up to 50% if both circumstances apply (s 16AAC).

1448. **Transitional:** The mandatory minimum terms of imprisonment required by ss 16AAA and 16AAB apply in relation to conduct engaged in on or after 23 June 2020.[1891] The reference in the transitional provision to "*conduct … engaged in*" reflects the provisions of s 4.1 of the *Criminal Code*, relating to a

1889 *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), Sch 6, Item 3(1).

1890 The provision applies regardless of whether the previous conviction occurred before, on or after 23 June 2020: *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), Sch 6, Item 3(2).

1891 *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), Sch 6, Item 3(1).

physical element of conduct in a Commonwealth offence. For an offence against s 427.22A of the *Criminal Code* (possession or control of child abuse material in the form of data obtained or accessed by a carriage service), the relevant "conduct" is the physical element of possession or control in s 427.22A(1)(a) (which is an element of conduct). If the offence of which the person is convicted consists of possession or control of the material on or after 23 June 2020, the relevant amendments apply. It does not matter that the person obtained or accessed the data before 23 June 2020. The element in s 427.22A(1)(c), that the person used a carriage service to obtain or access the material, is a physical element of a circumstance in which conduct occurred, not a physical element of conduct.[1892]

1449. **Specified high-level offences:** Fifteen child sex offences under the *Criminal Code*, and the corresponding mandatory minimum sentence for each offence, are specified in s 16AAA. The offences are listed in Appendix 5 to this guide: see "A5.1 Mandatory minimum sentences for high-level child sex offences (s 16AAA)". The mandatory minimum sentences range from 5 years' imprisonment (for offences with a maximum penalty of 20 years) to 7 years' imprisonment (for offences with a maximum penalty of 30 years' or life imprisonment). A reference in s 16AAA to an offence includes a reference to an offence against s 11.1 (attempt), s 11.4 (incitement) or s 11.5 (conspiracy) of the *Criminal Code* that relates to that particular offence.[1893]

1450. **Second or subsequent conviction for child sexual abuse offence:** Mandatory minimum sentences apply under s 16AAB to the sentencing of an offender upon conviction for a Commonwealth child sexual abuse offence specified in s 16AAB(2) (referred to in s 16AAB(1)(a) as "*the current offence*"), if it is a second or subsequent conviction for a child sexual abuse offence (whether Commonwealth, State or Territory).

1451. Thirty-seven Commonwealth child sexual abuse offences under the *Criminal Code* are specified in s 16AAB(2), together with the corresponding mandatory minimum sentence for each offence. The offences are listed in Appendix 5 to this guide: see "A5.2 Mandatory minimum sentences for repeat child sexual abuse offender (s 16AAB)". The mandatory minimum sentences range from 1 year's imprisonment (for an offence with a maximum penalty of 5 years) to 4 years' imprisonment (for offences with a maximum penalty of 15 years). A reference in s 16AAB(2) to an offence includes a reference to an offence against s 11.1 (attempt), s 11.4 (incitement) or s 11.5 (conspiracy) of the *Criminal Code* that relates to that particular offence.[1894]

1892 *Hurt v R; Delzotto v R* (2024) 98 ALJR 485, [4]-[24] (Gageler CJ and Jagot J); [79]-[84] (Edelman, Steward and Gleeson JJ).

1893 *Criminal Code* (Cth), s 11.6(2); *ABC (a pseudonym) v R* [2023] VSCA 280, [43]-[49]. In the case of other forms of complicity, the person is taken to have committed the substantive offence: see s 11.2 (complicity and common purpose), s 11.2A (joint commission) and s 11.3 (commission by proxy) of the *Criminal Code*.

1894 *Criminal Code* (Cth), s 11.6(2); *ABC (a pseudonym) v R* [2023] VSCA 280, [43]-[49]. In the case of other forms of complicity, the person is taken to have committed the substantive offence: see s 11.2 (complicity and common purpose), s 11.2A (joint commission) and s 11.3 (commission by proxy) of the *Criminal Code*.

1452. The mandatory sentencing requirement in s 16AAB is triggered if the offender has been convicted[1895] at a previous sitting at any time[1896] of a "child sexual abuse offence", which is defined in s 3(1) of the *Crimes Act* to mean:

- a Commonwealth child sex offence (see "7.3.2 Meaning of "Commonwealth child sex offence""); or
- an offence against section 273.5, 471.16, 471.17, 474.19 or 474.20 of the *Criminal Code* (as in force at any time before the commencement of Schedule 7 to the *Combatting Child Sexual Exploitation Legislation Amendment Act 2019* (Cth)); or
- an offence against Part IIIA of the *Crimes Act* (as in force at any time before the commencement of Schedule 1 to the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010*); or
- a State or Territory registrable child sex offence (described below).

1453. "State or Territory registrable child sex offence" is defined in s 3(1) of the *Crimes Act* to mean an offence:

- that a person becomes, or may at any time have become, a person whose name is entered on a child protection offender register (however described) of a State or Territory for committing; and
- in respect of which–
  - (i) a child was a victim or an intended victim; or
  - (ii) the offending involved child abuse material.

1454. It must be stressed that the term "State or Territory registrable child sex offence" describes *a class of offences*; it is not concerned with whether the particular offender's name was actually placed on a register, or was liable to be placed on a register, as a child sex offender in a State or Territory as a result of the commission of the particular offence. It need not be, or have been, a registrable offence at the relevant time.[1897] What is required is that it be an offence that a person (that is, any person, not the particular defendant) becomes or may at any time have become registered on a child protection offender register, and in respect of which a child was the victim or intended victim or the offending involved child abuse material.

1455. Moreover the class of "State or Territory registrable child sex offences" does not appear to be confined to State or Territory offences. It appears to include a Commonwealth offence which, under the law of any State or Territory (not necessarily the State or Territory in which the offence was committed in the particular case), was or became a registrable offence. That is, it appears to be sufficient that *the offence was or became registrable, in any State or Territory, at any time*. For a list of Commonwealth offences which are registrable offences under State or Territory laws, see "Appendix 3: Federal offences

1895 No extended meaning is given to "convicted", so a previous guilty plea or finding of guilt which results in a non-conviction disposition will not trigger the application of s 16AAB.

1896 The relevant transitional provision makes this clear. It provides that s 16AAB applies "*in relation to a conviction for a Commonwealth child sexual abuse offence where the relevant conduct was engaged in on or after the commencement of this Part (regardless of whether the relevant previous conviction of the person for a child sexual abuse offence occurred before, on or after that commencement)*": *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), Sch 6, Item 3(2). See *Hurt v R; Delzotto v R* (2024) 98 ALJR 485, [12] (Gageler CJ and Jagot J).

1897 *R v Delzotto* [2022] NSWCCA 117, [67]-[70].

triggering registration under State and Territory sex offender legislation". This list includes offences which would not otherwise fall within the definition of "child sexual abuse offence": for example, an offence against s 233BAB of the *Customs Act 1901* (Cth) (importing Tier 2 goods) involving items that are child pornography or child abuse material. A conviction at any time for this offence (whether or not the offence is, or was at the time, a registrable offence in the State or Territory in which the person is convicted) would appear to trigger the mandatory sentencing requirement in s 20AAB of the *Crimes Act 1914*, if the person is convicted of a Commonwealth child sexual abuse offence specified in s 16AAB(2) in relation to conduct engaged in on or after 23 June 2020.

1456. There is no requirement that the triggering offence (a child sexual abuse offence) must have been *committed* before the current offence, only that the offender "*has, at an earlier sitting, been convicted previously*" of the triggering offence (s 16AA(1)(a). That is, the triggering offence might have been committed after the current offence, provided that the conviction for the triggering offence occurred before the conviction for the current offence, and occurred at an earlier sitting; if that temporal sequence is satisfied then, on the conviction of the person for the current offence, the specified minimum sentence provision is engaged.[1898] It is irrelevant that the requirement may act in an arbitrary manner on one or other offender depending on the timing of the charge, the hearing, and the conviction of the child sexual abuse offence.[1899]

1457. **Offender aged under 18 at the time of the offence:** Mandatory minimum sentences under s 16AAA or s 16AAB do not apply if the offender was aged under 18 years at the time of the offence (s 16AAC(1)). However a previous conviction for a child sexual abuse offence committed when the offender was aged under 18 years can trigger the mandatory minimum sentence for a specified Commonwealth child sexual abuse offence under s 16AAB.

1458. **Fixing a sentence when a mandatory minimum head sentence applies:** The approach to be taken by a court in sentencing an offender who is subject to a mandatory minimum head sentence for a Commonwealth offence has been authoritatively determined by the High Court in *Hurt*.[1900] The minimum term of imprisonment serves the double function of generally restricting sentencing power as well as providing a yardstick, corresponding with the maximum term of imprisonment, for the exercise of the sentencing discretion.[1901] See "4.8.5 Mandatory imprisonment".

1459. **Reduction below the specified minimum:** Under s 16AAC(2), a court may impose a sentence of imprisonment of less than the period specified in s 16AAA or s 16AAB (as the case may be) only if the court considers it appropriate to reduce the sentence because of either or both of the following:

- the court is taking into account, under s 16A(2)(g), the person pleading guilty; or
- the court is taking into account, under s 16A(2)(h), the person having cooperated with law enforcement agencies in the investigation of the offence or of a Commonwealth child sex offence.

1460. The maximum reduction below the specified minimum for either a guilty plea or relevant cooperation is 25%, or 50% for both (s 16AAC(3)).

1898 *Hurt v R; Delzotto v R* (2024) 98 ALJR 485, [25] (Gageler CJ and Jagot J).
1899 *Hurt v R; Delzotto v R* (2024) 98 ALJR 485, [26] (Gageler CJ and Jagot J).
1900 *Hurt v R; Delzotto v R* (2024) 98 ALJR 485.
1901 *Hurt v R; Delzotto v R* (2024) 98 ALJR 485, [57] (Edelman, Steward and Gleeson JJ).

1461. Section 16AAC does not permit any reduction below the specified minimum for cooperation in the investigation of any offence other than the offence to which the mandatory minimum sentence applies or another Commonwealth child sex offence. Nor does it permit a reduction below the specified minimum for an undertaking under s 16AC of the *Crimes Act 1914* (Cth) to cooperate in future proceedings in relation to any offence (including proceedings against a co-offender in relation to the same offence).

1462. The discretion to impose a sentence which is less than the specified minimum does not arise if the offender has not pleaded guilty and has not cooperated with law enforcement agencies as specified in s 16AAC(2), or if the judge does not consider it appropriate to reduce the sentence for either of those reasons.[1902]

1463. Because of the practical benefits to the legal system of an offender pleading guilty and/or assisting authorities in the investigation of their own offending or child sexual offending generally, an offender who has done one or both of those things may, but not must, receive a sentence less than the statutory minimum.[1903] Reduction below the mandatory minimum, in accordance with s.16AAC, is not confined to a case in which the objective seriousness was at the bottom of the range.[1904] The reduction in s 16AAC(2) and (3) is available to all offenders who have pleaded guilty or who have cooperated with law enforcement agencies whether that reduction would decrease the sentence below the statutory minimum or not.[1905]

1464. In *Hurt*,[1906] the plurality observed:

> *The exceptional circumstances in which a discount can lead to a sentence of imprisonment below the minimum prescribed sentence do not detract from the role of the minimum sentence as a yardstick. Rather, the process contemplated by s 16AAC reinforces the yardstick role of the minimum sentence. The discretion in s 16AAC(2) applies where it is "appropriate to reduce the sentence", implying that a legitimate procedure will involve determining a prima facie sentence with the use of the prescribed minimum sentence as a yardstick, prior to considering the discount. The subsequent and transparent consideration of the discounts in s 16A(2)(g) (plea of guilty) and s 16A(2)(h) (co-operation with law enforcement agencies) reinforces the utilitarian goals underlying those considerations.*

1465. That is, the sentencing court may determine, as a notional starting point ("a prima facie sentence"), the sentence which would be imposed. Doing so will involve (amongst other things) consideration of the offending measured against the yardstick minimum term which is for the 'least worst possible case' deserving of imprisonment.[1907] The court may then give "transparent consideration" to the discounts.

1466. In *Trinh*,[1908] Taylor JA (with whom Priest and Kaye JJA agreed) said that the sentencing judge would then–

1902 *Trinh v R* [2024] VSCA 61, [44].
1903 *Trinh v R* [2024] VSCA 61, [44].
1904 *R v Delzotto* [2022] NSWCCA 117, [3]-[4]; *Glasheen v R* [2022] NSWCCA 191.
1905 *Hurt v R; Delzotto v R* (2024) 98 ALJR 485, [39] (Gageler CJ and Jagot J).
1906 *Hurt v R; Delzotto v R* (2024) 98 ALJR 485, [104] (Edelman, Steward and Gleeson JJ).
1907 *Trinh v R* [2024] VSCA 61, [44].
1908 *Trinh v R* [2024] VSCA 61, [44].

overtly consider whether the fact and quality of either the plea or cooperation or both renders it 'appropriate' in all the circumstances to impose a sentence less than the prescribed minimum. This does not involve 'double counting' of a guilty plea and/or cooperation. Rather, it requires a sentencing judge to separately and expressly consider whether the instinctive synthesis of all relevant sentencing considerations has given adequate expression to those matters if the sentence remains at or above the statutory minimum. In all cases an offender who has pleaded guilty and/or cooperated with law enforcement agencies will receive a benefit for the plea and cooperation. In only some cases will that benefit extend to a sentence of imprisonment of less than the minimum term.

1467. The Court in that case found the sentence for the relevant offence to be manifestly excessive. In resentencing, the Court imposed a sentence which was less than the mandatory minimum, having regard to the guilty plea and cooperation, but did not find it necessary to specify a notional starting point or to quantify the allowance for the guilty plea or cooperation. That is, the sentencing process (including a reduction below the specified minimum, in accordance with s 16AAC) was accomplished without departing from the preferred approach of "instinctive synthesis" of all relevant sentencing factors (see "2.2 "Instinctive synthesis" not the "two-stage approach""), albeit without the "transparent consideration" of the discounts suggested by the plurality in *Hurt*.

1468. By contrast, in a previous case, the Victorian Court of Appeal, while recognising that "*the sentencing provisions of the Act are founded on the judicial application of instinctive synthesis*", had said that "*the provisions that seek to impose a mandatory minimum sentence push that concept* [instinctive synthesis] *close to, if not past, breaking point*".[1909] That is, the two-stage process of specifying a notional starting point, and quantifying the extent of any reduction for the two factors, is implicitly permitted by the statutory requirements. In some appellate court decisions in which an offender has been resentenced, the court has nominated an "undiscounted" starting point (using the mandatory minimum as a yardstick), and specified a quantified reduction (by a nominated percentage) from that point.[1910]

1469. These contrasting approaches were anticipated in *Stiller*,[1911] in which counsel for the offender advocated the two-stage approach taken in *Delzotto* and *Glasheen*, and counsel for the Crown advocated the "instinctive synthesis" approach later taken in *Trinh* (and which, it would seem, had been taken by the sentencing judge in *Stiller*). The Court in *Stiller* observed, "*Whatever approach is adopted, it must be apparent from the sentencing remarks that the reductions did not exceed those permitted by s 16AAC … It is not an error not to state the exact reductions but it is desirable to do so*".[1912] While the (subsequent) observations of the plurality in *Hurt* (referring to "*transparent consideration of the discounts*") may be taken to point to the former, they do not purport to be prescriptive, as they refer to this only as "*a legitimate procedure*".

1909 *ABC (a pseudonym) v R* [2023] VSCA 280, [54].

1910 For example, in resentencing the offender in *R v Delzotto* [2022] NSWCCA 117, the Court began with a "pre-discount sentence" of 6 years (compared with the mandatory minimum of 4 years) and specified a reduction by 25% for a guilty plea and 5% for cooperation. In resentencing the offender in *Glasheen v R* [2022] NSWCCA 191, the Court began with an undiscounted head sentence of 4 years and 6 months (compared with the mandatory minimum of 4 years) and specified a combined reduction of 30% for a guilty plea and cooperation, resulting in a sentence of 3 years and one month.

1911 *R v Stiller* (2023) 14 QR 38.

1912 *R v Stiller* (2023) 14 QR 38, [32].

1470. The important point is that s 16AAC does not operate to set a new lower yardstick for cases in which a guilty plea or relevant cooperation (or both) is found. As the plurality made clear in *Hurt*, it is the relevant minimum sentence in s 16AAA or s 16AAB (as the case may be) which provides the yardstick by which the severity of the sentence is to be assessed (at least on a prima facie basis), with a reduction below that minimum permitted only to the extent appropriate to take into account a guilty plea or relevant cooperation or both.

1471. As to the weight to be given to a plea of guilty under s 16A(2)(g), see "3.4.8 Guilty plea to the charge – s 16A(2)(g)".

1472. As to the weight to be given to any relevant cooperation with law enforcement agencies, see "3.4.9 Cooperation with law enforcement agencies (cooperation prior to sentencing) – s 16A(2)(h)".

1473. In *ABC (a pseudonym)*,[1913] the Victorian Court of Appeal said:

> *Cooperation with authorities, where it occurs, is often regarded as an important mitigating factor in sentence. The nature and extent of the cooperation and its utility will be fact and context specific. For example some forms of cooperation will not merely advance an investigation and thereby serve the administration of justice, but it may also imperil the person who cooperates or make any term of imprisonment more burdensome by reason of protective measures taken by prison authorities. In other cases, cooperation will involve no more than admissions. … Whatever form the cooperation takes, the impact which it has in sentencing, including under s 16AAC, cannot be reduced to a mathematical formula. Although s 16AAC refers to a percentage reduction of the minimum sentence in the table in s 16AAA, it does not follow that a person who cooperates to the extent they can must qualify for the maximum reduction. There remains a degree of judgment for the sentencing judge.*

1474. In that case the Court held that it was open to the sentencing judge to make a "*somewhat qualified assessment*" of the value of the offender's cooperation where the relevant offending conduct had been recorded and the offender lied to police about his belief as to the age of the child with whom he believed he was dealing.

1475. **Aggregate sentence not available where mandatory minimum sentence applies:** In the view of the CDPP, it is not open to a court to impose a single aggregate sentence of imprisonment for two or more offences, if a mandatory minimum sentence requirement applies to one or more of the offences. See "6.10.8 Is an aggregate term of imprisonment permissible where a mandatory sentence applies?".

1476. **Sentencing discretion preserved in fixing non-parole period (NPP) or RRO period:** In contrast to the mandatory sentencing requirements for certain people-smuggling offences (see "7.2.1 People-smuggling offences"), the legislation does not specify mandatory minimum periods which the offender must be required to serve. Nor must the period to be served bear any particular relationship to the head sentence, as is the case in relation to certain national security offences (see "4.10.8 The three-quarters rule in fixing a NPP for certain national security offences").

1913 *ABC (a pseudonym) v R* [2023] VSCA 280, [59]-[60] (citations omitted).

1477. The court must fix a NPP or RRO in the same way as for any other offence which is not subject to mandatory requirements,[1914] except that, for a Commonwealth child sex offence committed on or after 23 June 2020, immediate release under a RRO is only available in exceptional circumstances (see "7.3.5 Immediate release on RRO for Commonwealth child sex offence only in exceptional circumstances"). Discretionary judgments about the period, or minimum period, to be served must be made according to the same general principles that govern other aspects of the sentencing of a federal offender: see "4.10.1 Determining the length of the period of incarceration".

7.3.4 Presumption of cumulation in sentencing for Commonwealth child sex offences

1478. In general, in sentencing a federal offender, whether a sentence of imprisonment for a federal offence is to be served concurrently with, or wholly or partly cumulatively upon, another sentence of imprisonment (whether for a federal offence or a State or Territory offence) must be determined by the sentencing court pursuant to s 19 of the *Crimes Act 1914* (Cth). Cumulation or concurrency is effected by orders directing when the sentence commences: see "4.9.1 The mechanism for cumulation or concurrency of sentences on a federal offender: Crimes Act 1914, s 19". There is no general presumption in favour of either cumulation or concurrency. The discretion whether to order concurrency or total or partial cumulation must be exercised in each case in accordance with the principle of totality: see "4.9.2 Whether sentences should be concurrent or cumulative".

1479. However amendments made to s 19 in 2020[1915] introduced an exception to the general principle, by creating a presumption that a term of imprisonment imposed on a person for a Commonwealth child sex offence[1916] committed on or after 23 June 2020[1917] must be ordered to be served wholly cumulatively upon an uncompleted term of imprisonment that is, or has been, imposed on the person for another Commonwealth child sex offence or for a State or Territory registrable child sex offence[1918] (s 19(5)).

1480. This requirement does not apply if the sentencing court is satisfied that imposing the sentence in a different manner would still result in sentences that are of a severity appropriate in all the circumstances (s 19(6)). If the court is so satisfied, it must state its reasons for imposing the sentence in that manner and cause the reasons to be entered in the records of the court (s 19(7)).

1481. See "4.9.3 Presumption of cumulation in sentencing for Commonwealth child sex offences".

7.3.5 Immediate release on RRO for Commonwealth child sex offence only in exceptional circumstances

1482. If a person is sentenced to a term of imprisonment for a Commonwealth child sex offence[1919] committed on or after 23 June 2020,[1920] or for offences which include such an offence, the sentencing

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1914 As to whether a NPP, a RRO or a straight sentence is to be imposed, see "4.10.4 Non-parole period (NPP), recognizance release order (RRO) or straight sentence?".

1915 *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), s 3 and Sch 10.

1916 See "7.3.2 Meaning of "Commonwealth child sex offence"".

1917 *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), Sch 10, Item 3.

1918 The meaning of this term is described at [1453] et seq above.

1919 "Commonwealth child sex offence" is defined in s 3(1) of the *Crimes Act 1914* (Cth). See the list of offences in fn 1916.

1920 *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), Sch 11, Item 4.

court cannot order that the person be released immediately on a RRO, other than in exceptional circumstances (*Crimes Act 1914* (Cth), s 20(1)(b)(ii) and (iii)). That is, if the court makes a RRO in relation to such a sentence,[1921] it must order that the person serve a period of imprisonment before release, unless the court is satisfied that there are exceptional circumstances. See "4.10.12 Immediate release under RRO".

7.3.6 Mandatory conditions on RRO for Commonwealth child sex offence

1483. If a RRO is made in relation to a term of imprisonment imposed for at least one Commonwealth child sex offence committed on or after 23 June 2020, the RRO must be subject to specified conditions for supervision, prohibiting interstate or overseas travel without permission and for undertaking treatment or rehabilitation. See "4.10.18 Required condition of RRO for Commonwealth child sex offence".

7.3.7 Additional considerations in sentencing for Commonwealth child sex offence

1484. **Rehabilitation:** Under s 16A(2AAA),[1922] a court sentencing an offender for a Commonwealth child sex offence is required to have regard to the objective of rehabilitating the person by considering whether it is appropriate:

- when making an order, to impose any conditions about rehabilitation or treatment options; and
- in determining the length of any sentence or NPP, to include sufficient time for the person to undertake a rehabilitation program.

These requirements are discussed in "3.4.15 Prospects of rehabilitation – s 16A(2)(n)".

1485. **Circumstances of the victim:** By amendments to the *Criminal Code* (Cth), a court sentencing an offender for a specified child sexual offence (an offence against Subdivision B of Division 272, Subdivision C of Division 471 or Subdivision F of Division 474 of the *Code*) committed on or after 23 June 2020[1923] is required to take into account additional matters relating to the circumstances of the victim. In particular, if the victim was aged under 10 at the time of the offence, that fact is to be treated as an aggravating factor. See "3.4.4 Circumstances of any victim – s 16A(2)(d)".

7.3.8 Other relevant sentencing factors

1486. Other amendments to sentencing factors which were made in 2020 will commonly apply to sentencing for Commonwealth sexual offences against children, but are not confined to those offences. See:

- 3.4.8 Guilty plea to the charge – s 16A(2)(g)

1921 For an outline of the circumstances in which a court may, or must, make a RRO in relation to a sentence of imprisonment, see "4.10.4 Non-parole period (NPP), recognizance release order (RRO) or straight sentence?".

1922 S 16A(2AAA) was inserted by the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), s 3 and Schedule 8, item 3. The amendment applies in relation to determining, on or after 20 July 2020, a sentence to be passed, or an order to be made, in respect of a person for a federal offence that the person was charged with, or convicted of, on or after that date: see s 2(1) and Schedule 8, item 7 of the amending Act.

1923 Pursuant to amendments made by s 3 and Sch 9 of the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth). The amendments apply in determining the sentence to be passed, or the order to be made, in respect of a person for an offence committed on or after 23 June 2020: see Sch 9, Item 5 of the amending Act.

- 3.4.14 Standing in the community – s 16A(2)(ma)

7.3.9 Intensive correction order in NSW not available for certain Commonwealth child sexual abuse offences

1487. Under s 67 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), an intensive correction order is not available in relation to a sentence of imprisonment for certain specified Commonwealth child sexual abuse offences. See "Appendix A4.1 New South Wales: Intensive Correction Order (ICO) not available for specified Commonwealth offences".

7.4 Children and young persons

1488. Section 20C of the *Crimes Act 1914* (Cth) makes general provision for dealing with young offenders against Commonwealth law. It provides:

> *A child or young person who, in a State or Territory, is charged with or convicted of an offence against a law of the Commonwealth may be tried, punished or otherwise dealt with as if the offence were an offence against a law of the State or Territory.*

1489. The provision was inserted by the *Crimes Act 1960* (Cth). The purpose of s 20C was "*to enable a Court hearing a charge against a child or young person for an offence against Commonwealth law to deal with that defendant in the same way as it would deal with a young person if the offence were an offence against a law of the State or Territory in which the Court is sitting.*"[1924] Courts have also characterised the provision as enabling.[1925]

1490. The most significant effect of s 20C is that State or Territory sentencing or disposition options which would not otherwise be available are made applicable to the sentencing of a child or young person for a Commonwealth offence.[1926] These options may include, for example, orders relating to probation or supervision, or detention in a juvenile facility, including orders without conviction,[1927] whether provided for under State or Territory legislation relating specifically to children,[1928] or provided for in relation to young offenders more generally under State or Territory sentencing legislation.[1929]

1491. There is no applicable definition of "*child*" or "*young person*" for the purposes of s 20C.[1930] The provision is intended to be ambulatory in applying State or Territory laws. Those laws differ in their application to offenders of a particular age. The breadth of the terms used in s 20C is more apt to allow for the application of State or Territory laws in their own terms.

1924 Sir Garfield Barwick (Attorney-General), Second Reading speech on the *Crimes Bill 1960*, *Commonwealth Parliamentary Debates, House of Representatives*, 8 September 1960, 1022. The Attorney-General went on to say (at 1024) that the relevant clause of the amending bill "*provides for special treatment for juvenile offenders, by courts officials and institutions of the States similar to the treatment afforded under State law to offenders against the laws of the States. This Parliament cannot, of course, directly impose some of these obligations upon State officials. The new provisions in these respects will be merely enabling, and the concurrence of the States will have to be obtained for their implementation. But I anticipate no difficulties in this regard, the degree of ready co-operation between this Government and those of the States being notable and significant.*"

1925 *Newman v A (A Child)* (1992) 9 WAR 14, 18; *R v Lovi* [2012] QCA 24, [21].

1926 In substance, s 20C applies State or Territory law as surrogate federal law. The form of such provisions is not fixed (*Mok v DPP (NSW)* (2016) 257 CLR 402, [84]) but, subject to clear contrary provision, State or Territory laws so applied will not operate to exclude or override other Commonwealth laws. Section 20C does not purport to so operate. Many provisions in the *Crimes Act 1914* render one provision of the Act subject to another, or exclude the operation of a particular provision if another applies; s 20C does neither of those things. This is consistent with its evident purpose of operating merely as an enabling provision.

1927 E.g. *R v HCC* [2020] QCA 178.

1928 E.g. *Children, Youth and Families Act 2005* (Vic), Part 5.3.

1929 E.g. *Sentencing Act 1991* (Vic), s 32.

1930 "*Child*" is defined in ss 3(1) and 15YA of the *Crimes Act 1914* (Cth), but neither of those definitions is applicable to the term as it is used in s 20C. The omission of a definition of "*child*" or "*young person*" must be taken to be intentional. As originally enacted, the references to "child" and "young person" in s 20C(1) (now s 20C) stood in contrast to s 20C(2), which ensured that the death penalty did not apply to "*a person under the age of 18 years*". (Subsection 20C(2) was repealed as obsolete by the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2018* (Cth), with effect from 25 August 2018, and s 20C(1) was re-numbered as s 20C.)

1492. Section 20C applies State or Territory law to a child or young person who is *"charged with or convicted of an offence"*. That is, the application of State or Territory law depends upon the person being a "*child or young person*" when charged or convicted. This is consistent with the approach under State or Territory law in most jurisdictions. However in some jurisdictions the relevant age is the age of the person *at the time of the offending* and an offender who is dealt with many years later for a serious offence committed while under 18 years old still falls to be sentenced as a "child".[1931] It is doubtful whether s 20C would operate to apply State or Territory laws if, when charged or convicted, the offender is no longer a "*child or young person*" within the meaning of s 20C.

1493. Nothing in s 20C purports to exclude or override the application of other provisions of Part IB of the *Crimes Act 1914* which apply to the sentencing of federal offenders generally; nor are those other provisions expressed to be subject to s 20C. The provisions must therefore be read together, so far as possible.[1932] So, for example, sentencing options under s 19B (discharges and bonds without conviction)[1933] and s 20(1)(a) (bond with conviction) are equally available in sentencing a child or young person as they are in sentencing any other federal offender. If a Commonwealth statute prescribes that an offence is punishable by imprisonment or by a fine, those penalties also apply.[1934] Provisions of the *Crimes Act* which govern sentencing factors (e.g. s 16A), the procedures relating to taking other offences into account (s 16BA), provisions relating to undertakings to cooperate (s 16AC), and many other matters which apply generally to the sentencing of federal offenders also apply in the sentencing of children or young persons for Commonwealth offences, whether under State or Territory law they are sentenced as a child or as an adult.[1935] There is no room for the application of State or Territory laws under s 20C to the extent that they are inconsistent with Commonwealth laws which apply generally to the sentencing of federal offenders.[1936]

1494. The range of sentencing options available in sentencing a young offender may be significantly affected by whether or not the proceedings are heard and determined in a State or Territory court with

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1931 See, e.g., *Children's Court of Western Australia Act 1988* (WA), s 19; *Young Offenders Act 1993* (SA), ss 4(1) (definition of "youth"), 16; *Youth Justice Act 2005* (NT), s 52.

1932 *Ross v R* (1979) 141 CLR 432, 448.

1933 Section 19B was also introduced by the *Crimes Act 1960* (Cth). Since neither provision is expressed to be subject to the other, their simultaneous enactment strengthens the inference that ss 19B and 20C must be read together. Each can be given effect according to its terms, by accepting that s 19B applies to the sentencing of a young federal offender, and that s 20C enables a court to apply additional options under State law.

1934 See, e.g., *R v Lovi* [2012] QCA 24, [35].

1935 See, e.g., *IM v R* (2019) 100 NSWLR 110, [43].

1936 In particular, to the extent that Part IB of the *Crimes Act 1914* (Cth) expressly or by implication provides for sentencing considerations which are different from otherwise applicable State and Territory sentencing considerations, the *Crimes Act* is exclusive: *R v Pham* (2015) 256 CLR 550, [22]. Some State and Territory laws specify that in sentencing a child or young person, a court *must not have regard* to particular considerations, such as the need for general or specific deterrence (see, e.g., *R v QTV* (2003) 87 SASR 378, [47]-[58]; *CNK v R* (2011) 32 VR 641). Such provisions may be irreconcilable with the requirements in s 16A of the *Crimes Act 1914* that in sentencing a federal offender the court *must have regard* to those factors, to the extent that they are relevant and known to the court. Moreover to the extent that such State and Territory laws operate as a self-contained code, directed exclusively at consideration of the effect of the proposed sentence on the child (compare *Poutai v R* [2011] VSCA 382, [20]-[26]; *Webster (a pseudonym) v R* [2016] VSCA 66, [23]-[28]), they may also be inconsistent with s 16A. In most cases, applying s 16A rather than contrary State or Territory provisions would have little practical significance, because in determining the weight to be given to such matters as general and specific deterrence and rehabilitation, the sentencing court would take into account (as it is required to do under s 16A(2)(m)) the age of the offender.

specialist jurisdiction in relation to children and young offenders. Such courts typically have no power, or very limited power, to sentence an offender to imprisonment, and may only sentence an offender to a form of detention for a limited period and in limited circumstances. Limitations of this kind may, in serious cases, warrant the offender being dealt with as an adult. State or Territory laws relating to young offenders typically provide for serious charges to be dealt with on indictment in specified circumstances.[1937] In addition, Commonwealth law provides powers of direct indictment that override any contrary limitations imposed by State or Territory laws.[1938]

1495. As to the significance of youth and immaturity in sentencing a federal offender, see "3.4.13 Character, antecedents, age, means, physical/mental condition – s 16A(2)(m)".

1937 See, e.g., *K v Children's Court of Victoria* [2015] VSC 645. In that case, at the age of 17 years, K was charged with a terrorism offence punishable by life imprisonment. Under the applicable State legislation, because of his age, K was a "child". The State legislation required the Children's Court of Victoria to hear and determine summarily a charge against a child for an indictable offence (other than a specified State offence), unless by reason of exceptional circumstances the charge was unsuitable to be determined summarily. The Children's Court held that the charge was unsuitable to be determined summarily. On judicial review, the Supreme Court found no error in the decision of the Children's Court. T Forrest J held that the nature and gravity of the offending, the insufficiency of the penalties available on summary determination, and the fact that the offender was aged 17 (and was therefore close to the threshold for prosecution as an adult) all warranted, and even "demanded", that determination. Ultimately the offender was sentenced by the Supreme Court, and resentenced by the Court of Appeal on an appeal by the CDPP, to a substantial term of imprisonment: *DPP (Cth) v MHK* (2017) 52 VR 272.

1938 E.g. *Judiciary Act 1903* (Cth), s 71A; *Director of Public Prosecutions Act 1983* (Cth), s 6. See *Duffield v R* (1992) 28 NSWLR 638.

7.5 Applied State offences committed on Commonwealth places

1496. The Commonwealth Parliament has exclusive power to make laws with respect to "*all places acquired by the Commonwealth for public purposes*" (Constitution, s 52(i)), which are commonly referred to as Commonwealth places. This includes a number of Australia's major airports. Decisions of the High Court in 1970 disclosed a hiatus in the law applicable to Commonwealth places.[1939] In response, Parliament enacted the *Commonwealth Places (Application of Laws) Act 1970* (Cth) (the CPAL Act). The CPAL Act provides for the application of State laws in Commonwealth places in the relevant State. State laws so applied are referred to in the Act as the "*applied provisions*". Those laws are applied as surrogate federal law.[1940] State courts are invested with federal jurisdiction in all matters arising under the applied provisions in relation to a Commonwealth place (CPAL Act, s 7(1)).

1497. A State law is not applied by the CPAL Act to the extent that if it did it would otherwise be invalid or inoperative in its application to a Commonwealth place (CPAL Act, s 4(2)(a)). So, for example, a State law would not be applied in relation to a Commonwealth place to the extent that it conferred judicial power on a body other than a court (within the meaning of Chapter III of the Constitution), as the application of such a law as surrogate federal law would be unconstitutional.

1498. Section 6 of the CPAL Act provides for arrangements with a State for the performance of powers, duties or functions by State authorities in relation to applied provisions. Each State (other than Tasmania) has a corresponding law providing for such arrangements. Arrangements (pursuant to s 6 of the CPAL Act and the corresponding State law) were made in 1971 between the Commonwealth and each State other than Tasmania.[1941] Those arrangements are still in force.

1499. Amongst the State laws applied by the CPAL Act as surrogate federal law are State offences. That is, State offences in Commonwealth places are given effect as offences against the laws of the Commonwealth.[1942] However where an arrangement under s 6 of the CPAL Act is in place (as is the case in each State other than Tasmania), the operative provisions of the *Crimes Act 1914* (Cth) which affect the sentencing of federal offenders do not apply to offences against the applied provisions.[1943] This leaves the sentencing for such offences to be dealt with under State laws, which are applied by the CPAL Act as surrogate federal law.[1944]

1939 *Worthing v Rowell and Muston Pty Ltd* (1970) 123 CLR 89; *R v Phillips* (1970) 125 CLR 93.

1940 *Cameron v R* (2002) 209 CLR 339, [46]; *Pinkstone v R* (2004) 219 CLR 444, [34].

1941 The arrangements were published in *Commonwealth of Australia Gazette*, No.91, 30 September 1971, 6159-62.

1942 State offences applied by the CPAL Act are therefore subject to s 80 of the Constitution; accordingly, a jury verdict must be unanimous: *Pinkstone v R* (2004) 219 CLR 444, [38]. This position may be contrasted with the exercise by State courts of the federal "diversity" jurisdiction under s 75(iv) of the Constitution in relation to a State offence; in such a case, a State offence is not to be regarded as an offence against a law of the Commonwealth for the purposes of s 80 of the Constitution: *Rizeq v Western Australia* (2017) 262 CLR 1.

1943 By virtue of s 5(3) and the Schedule to the CPAL Act, the following provisions of the *Crimes Act 1914* do not apply: Part IAA (other than section 3Z); ss 9, 13, 15, 15A, 15B and 15C; all the provisions of Divisions 1 to 9 (inclusive) of Part IB; sections 20C and 21B; and Part ID. In addition, s 5(2) of the CPAL Act excludes the following provisions of the *Crimes Act 1914*: ss 4A, 4AA, 4AB, 4B, 4D to 4K (inclusive) and 6: CPAL Act, s 5(2). Also, by s 5(2A) of the CPAL Act, Part IC of the *Crimes Act 1914* does not apply to a member of the police force of a State in relation to, or in relation to matters arising under, the applied provisions.

1944 As to the functions and powers of the CDPP in relation to such offences, see CPAL Act, s 5(3) and Schedule, item 3; CPAL Act, s 5(4); *R v Porter* (2001) 53 NSWLR 354; *Santos v DPP (WA)* [2016] WASCA 230.

1500. Therefore, in practice, in all States except Tasmania, offenders against State laws applied by the CPAL Act are dealt with as if those laws were State offences.[1945] However in any particular case, consideration needs to be given to:

- whether any potentially relevant Commonwealth laws apply, or whether their operation is excluded; and
- whether any relevant provision of State law is not applied because if it were applied as surrogate federal law it would be invalid or inoperative (CPAL Act, s4(2)(a)). For example, a State law which provides for a sentence to be determined other than by a Chapter III court would not be applied.

1945 The operation of the CPAL Act is sometimes misunderstood or overlooked by sentencing courts. A striking example is *Oatley v DPP (Cth)* [2021] SASCA 108, in which the courts both at first instance (in the original sentencing and in breach proceedings) and on appeal proceeded on the erroneous assumption that the sentencing of the offender for an offence against an applied State law in a Commonwealth place in South Australia was governed by the *Crimes Act 1914* (Cth).

7.6 Fitness to be Tried

7.6.1 Unfitness in committal proceedings and on indictment

1501. Division 6 of Part IB of the *Crimes Act 1914* (Cth) sets out the consequences of a preliminary finding that a person is unfit to be tried or unfit to plead.[1946] ("Fit to be tried", the term used in Division 6, is defined in s 16 of the Act to include fit to plead.) However, Division 6 does not prescribe a procedure for empanelling a jury to determine the preliminary question of fitness.

1502. In *Kesavarajah,*[1947] Mason CJ, Toohey and Gaudron JJ observed that, where a question whether the accused was fit to be tried arose during the course of a trial on indictment for a federal offence, State law regulated the mode of determining the initial question and s 20B of the *Crimes Act* regulated the consequences that flowed from a finding of fitness or unfitness.

1503. When the question whether a person is fit to be tried for a Commonwealth offence is first raised during a committal or trial, s 79 of the *Judiciary Act 1903* (Cth) has the effect of picking up any applicable State or Territory procedure to determine that fact. This appears to include the State/Territory test to be applied in determining whether an accused is fit to plead or to be tried.[1948]

1504. However, s 79 of the *Judiciary Act 1903* (Cth) only picks up the State or Territory procedural law to the extent that it is not inconsistent with the Constitution or other Commonwealth legislation, including Division 6 of Part IB of the *Crimes Act*.[1949]

1505. Various State and Territory laws[1950] provide for the determination of a person's fitness to be tried in a proceeding on indictment. In most jurisdictions, the question is determined by a jury empanelled specifically for that purpose.[1951]

1946 For a detailed outline see Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006), Chapter 28.

1947 *Kesavarajah v R* (1994) 181 CLR 230.

1948 *R v Sexton* (2000) 77 SASR 405. There are unresolved issues in relation to committals. Refer to the footnotes to box 1 in Appendix 7 to this guide.

1949 *Putland v R* (2004) 218 CLR 174, [24] (Gleeson CJ). See "1.7 The application of State and Territory laws by Judiciary Act 1903, ss 68 and 79".

1950 **NSW:** *Mental Health (Forensic Provisions) Act 1990* (NSW), Part 2 - the criteria for unfitness are not defined in the legislation, and must be determined by reference to the common law; see, e.g., *R v Degei* [2020] NSWSC 1267. **Vic:** *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), Part 2 - the criteria for unfitness are set out in s 6; see the recitation of the relevant principles in *R v Dellamarta* [2020] VSC 745, [11]-[26]. **Qld:** *Criminal Code 1889* (Qld), ss 613 and 645 – the criteria for unfitness are not defined in the legislation, and must be determined by reference to the common law; see *R v Young* (2021) 8 QR 68, [161]-[210] (where the defendant was charged with both State and Commonwealth offences). **WA:** *Criminal Law (Mentally Impaired Accused) Act 1996* (WA), Part 3 - the criteria for unfitness are set out in s 9, and are "clearly based" on *Presser*; see *R v Dunne* [2001] WASC 263, [10]. **SA:** *Criminal Law Consolidation Act 1935* (SA), Part 8A - the criteria for unfitness are set out in s 269H; see *R v Hayles* [2018] SASFC 58, [30]-[31] for a recitation of the applicable principles. **Tas:** *Criminal Justice (Mental Impairment) Act 1999* (Tas), Part 2 - the criteria for unfitness are set out in s 8. **ACT:** *Crimes Act 1900* (ACT), Divisions 13.2 and 13.6 - the criteria for unfitness are set out in s 311; see *R v Monaghan* [2009] ACTSC 61, [3]-[5]. **NT:** *Criminal Code Act 1983* (NT), Schedule 1, Part IIA - the criteria for unfitness are set out in s 43J; see explanation of s 43J process in *R v Hoffmann (No 3)* [2022] NTSC 24, [9]-[19]

1951 The exceptions are New South Wales and Western Australia, where the question of unfitness is determined by judge alone: see *Mental Health (Forensic Provisions) Act 1990* (NSW), s 11; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA), s 12. In South Australia, unfitness is determined by a jury, unless the defendant has elected to have the matter determined by judge alone; see *Criminal Law Consolidation Act 1935* (SA), s 269B. In

1506. The provisions of Division 6 of Part IB of the *Crimes Act*, insofar as they relate to *dispositions following a finding of unfitness to be tried*, including the determination of whether a prima face case exists and whether the defendant may become fit to be tried in the future, appear to provide a comprehensive regime, which precludes the application of State/Territory laws relating to the same subject matter. In *Sharrouf (No 2)*,[1952] Whealy J summarised the process as follows:

> *The question of the accused's fitness having been raised, the parties agree that there is a three-stage process to be followed. First, there is an initial determination as to fitness or unfitness. As there is no Commonwealth legislation governing the procedure to be followed on this issue, the provisions of the Mental Health (Criminal Procedure) Act 1990 (NSW) apply to this first stage. I have earlier decided that this issue may be determined on a Judge-alone basis. …*
>
> *Secondly, in the event of a finding of unfitness, there is Commonwealth legislation dealing with the second stage process to be followed. This is to be found in s 20B(3) of the Crimes Act 1914 CTH ("the Act") and Division 6 of the Act generally. Essentially, the second stage requires the Court to determine whether a prima facie case has been established.*
>
> *The third stage process arises if a prima facie case has been established and the Court does not otherwise determine that the charge should be dismissed. In that situation, the Act imposes on the Court the need to make a determination as to whether the accused is likely to be fit within a 12-month period (s 20BB of the Act). In that event, the Court must also decide what must be done with the accused in terms of his remaining in custody, his hospitalisation, or release on bail. That question itself involves issues relating to the future treatment of the accused.*

1507. That is, State law applied to the first stage (initial determination of fitness or unfitness), but the second and third stages are dealt with solely under the Commonwealth provisions.

1508. Appendix 7 to this guide sets out the pathways that apply if a question arises as to the fitness to stand trial of a person charged with a federal indictable offence, whether the matter arises during committal proceedings or in a trial on indictment.

1509. The common law test applies to deciding whether a question as to a person's fitness has arisen initially (s 20B(1) and (2)), and also whenever a court is making a determination of fitness under ss 20BA-20BC after it has found that a prima facie case exists.[1953]

1510. The *Crimes Act 1914* (Cth) does not abrogate the inherent jurisdiction of a State or Territory court to grant a permanent stay of proceedings for an offence against a law of the Commonwealth.[1954] The existence of the regime in Division 6 of Part IB is relevant to the question whether a stay should be granted.[1955]

R v Baladjam (No 13) (2008) 77 NSWLR 630 (which concerned proceedings for a federal offence), Whealy J ruled that, in the circumstances, s 80 of the Constitution did not preclude determination of fitness by judge alone.

1952 *R v Sharrouf (No 2)* [2008] NSWSC 1450, [5]-[7].

1953 See *R v Presser* [1958] VR 45; *R v Sharrouf (No 2)* [2008] NSWSC 1450, [9]-[11]; *R v Ogawa* [2011] 2 Qd R 350, [90]; *R v Young* (2021) 8 QR 68, [176]-[177].

1954 *R v Sexton* (2000) 77 SASR 405.

1955 See *Agoston v R* [2008] NSWCCA 116 and the cases cited therein.

7.6.2 Unfitness in a court of summary jurisdiction

No specific provision for unfitness in a court of summary jurisdiction

1511. Commonwealth law makes no specific provision, in relation to proceedings before a court of summary offence for determining that the defendant is unfit to plead or to stand trial.[1956] Nor does the common law.[1957]

1512. However s 20BQ of the *Crimes Act 1914* (Cth) provides a general power for a court of summary jurisdiction, in proceedings for a federal offence, to deal with a defendant who is mentally-ill or intellectually-disabled. This provision is discussed below.

1513. In addition, some State or Territory laws provide for determinations of unfitness to plead or unfitness to be tried in summary proceedings. The question whether such laws are applied to proceedings for a federal offence is discussed at the end of this section.

Diversion of defendant suffering from mental illness or intellectual disability: s 20BQ

1514. Section 20BQ provides:

> *20BQ **Person suffering from mental illness or intellectual disability***
> *(1) Where, in proceedings in a State or Territory before a court of summary jurisdiction in respect of a federal offence, it appears to the court:*
> *(a) that the person charged is suffering from a mental illness within the meaning of the civil law of the State or Territory or is suffering from an intellectual disability; and*
> *(b) that, on an outline of the facts alleged in the proceedings, or such other evidence as the court considers relevant, it would be more appropriate to deal with the person under this Division than otherwise in accordance with law;*
> *the court may, by order:*
> *(c) dismiss the charge and discharge the person:*
> *(i) into the care of a responsible person, unconditionally, or subject to conditions, for a specified period that does not exceed 3 years; or*
> *(ii) on condition that the person attend on another person, or at a place, specified by the court for an assessment of the first-mentioned person's mental condition, or for treatment, or both, but so that the total period for which the person is required to attend on that other person or at that place does not exceed 3 years; or*
> *(iii) unconditionally; or*
> *(d) do one or more of the following:*
> *(i) adjourn the proceedings;*
> *(ii) remand the person on bail;*
> *(iii) make any other order that the court considers appropriate.*

1956 See *Berg v DPP (Qld)* [2016] 2 Qd R 248, [36] (and the cases there referred to), as to the distinction between fitness to plead and fitness to stand trial. In short, the latter is broader in scope and extends to the defendant's ability to follow and meaningfully participate in the course of the proceedings.

1957 *Pioch v Lauder* (1976) 13 ALR 266; *Ebatarinja v Deland* (1998) 194 CLR 444, [31]. See also *CL v DPP* [2011] VSCA 227.

> *(2) Where a court makes an order under paragraph (1)(c) in respect of a person and a federal offence with which the person has been charged, the order acts as a stay against any proceedings, or any further proceedings, against the person in respect of the offence.*
>
> *(3) Where a court makes an order under subsection (1) in respect of a person and a federal offence with which the person has been charged, the court must not make an order under section 19B, 20, 20AB (other than an order covered by subparagraph 20AB(1AA)(a)(viia)*[1958]*) or 21B in respect of the person in respect of the offence.*

1515. Section 20BQ provides a diversionary procedure in proceedings before a court of summary jurisdiction in which a defendant is charged with a federal offence. It applies where it appears to the court that a defendant "*is suffering from a mental illness within the meaning of the civil law of the State or Territory or is suffering from an intellectual disability*" (s 20BQ(1)).

1516. In terms, s 20BQ is capable of being used in any such proceedings and at any time, whether or not the defendant has entered a plea to the charge. Nor is the section explicitly confined to cases in which the defendant is unfit to plead or unfit to be tried.

1517. However in two decisions of the Supreme Court of South Australia,[1959] Gray J has read down s 20BQ. His Honour held that it applies only when no plea has been entered and that it has no application where a defendant is fit to plead. Gray J based this conclusion on the language of s 20BQ and its relationship with s 19B of the *Crimes Act 1914,* and the fact that no conviction is recorded.[1960] In *Morrison v Behrooz*, his Honour held that, as the defendant had entered a plea of guilty, s 20BQ had no application and that, in the circumstances, there was no adequate basis to allow the plea to be withdrawn.[1961]

1518. The correctness of this construction of s 20BQ is open to doubt. A strong line of authority in relation to cognate provisions in New South Wales, upon which s 20BQ appears to have been based, holds that the power could be used at any stage of a summary proceeding and could be used in an appropriate case in relation to a person suffering from mental illness or intellectual disability, whether or not the person was unfit to plead or unfit to be tried.[1962] It seems to be at least arguable that s 20BQ has a similar scope.[1963] However unless and until a superior court departs from the decisions of Gray J they are

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1958 The words in brackets were inserted by the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), s 3 and Schedule 12, item 2. The amendment applies to a sentence passed, or an order made, on or after 23 June 2020, in respect of a person convicted before, on or after that date: see s 2(1) and Schedule 12, item 3 of the amending Act.

1959 *Morrison v Behrooz* [2005] SASC 142; *Boonstoppel v Hamidi* [2005] SASC 248.

1960 *Morrison v Behrooz* [2005] SASC 142, [44]; *Boonstoppel v Hamidi* [2005] SASC 248, [39].

1961 *Morrison v Behrooz* [2005] SASC 142, [45].

1962 See *Mackie v Hunt* (1989) 19 NSWLR 130, 134-5; *DPP v El Mawas* (2006) 66 NSWLR 93 and the cases cited at [60]-[63]. See also *Nelson v Heil* [2013] ACTSC 11, [38]-[39]. However the differences in the text of s 20BQ and the statutes under consideration in these cases should be carefully noted. In *DPP (Cth) v Seymour* [2009] NSWSC 555, Simpson J found it unnecessary to decide whether *Morrison v Behrooz* [2005] SASC 142 was correctly decided on this point.

1963 Following the amendment to s 20BQ(3) by the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), Schedule 12, item 2, a court sentencing a federal offender is expressly empowered to make a residential treatment order (if such an order is available in the relevant State or Territory) under s 20AB of the *Crimes Act 1914* (Cth), "*in respect of the person in respect of the offence*" if the court makes an order under s 20BQ(1). An order applied by s 20AB can only be made following conviction for the offence. This provision would be redundant if an order under s 20BQ were available only where no plea has been entered.

binding on South Australian courts of summary jurisdiction, and at least highly persuasive authority for such courts in other jurisdictions.

1519. Section 20BQ has been described as requiring a two-stage process (similar to the process under s 19B): first, considering whether the person is suffering from a mental illness or intellectual disability; and, second, considering whether it would be more appropriate to deal with the person under the section.[1964]

1520. "Mental illness" for the purposes of s 20BQ takes its meaning from "*the civil law of the State or Territory*". Reference should therefore be made to relevant State or Territory legislation.

1521. The section does not require any causal link between the mental illness or intellectual disability and the offending. The focus is on the condition of the defendant at the time of the proceedings. Evidence of chronic mental illness may support a conclusion that the person is suffering from a mental illness.[1965] The mental illness spoken of in s 20BQ relates to any underlying condition; someone would not cease to be mentally ill because of a stable regime of medication.[1966]

1522. If it appears to the court that the defendant is suffering from a mental illness or an intellectual disability, the second stage arises. The court must determine whether it would be more appropriate to deal with the person under the section[1967] *"than otherwise in accordance with law*". In making that determination, the court may inform itself as it thinks fit, but not so as to require the person charged to incriminate himself or herself (s 20BR).

1523. For a court which is vested with jurisdiction to deal with a charge for a criminal offence to dismiss the charge, or otherwise to decline to determine it, where the offence is not trivial, is not a course to be taken lightly. The court must balance the purposes of punishment and the public interest in diverting a mentally disordered offender from the criminal justice system.[1968] It must have regard to the seriousness of the offending and give due weight to the protection of the community.[1969]

1524. So much is implicit in s 20BQ. Before making such a determination, the court must consider "*an outline of the facts alleged in the proceedings, or such other evidence as the court considers relevant*" (s 20BQ(1)(b)). By implication, the court must have regard not only to the nature and severity of the defendant's mental illness or intellectual disability, but also to the nature, seriousness and circumstances of the alleged offence. This focuses attention on the need, if the offence were to be proven, for proper weight to be given to personal and general deterrence,[1970] adequate punishment and rehabilitation[1971] and to the need to protect the community.[1972]

1964 *Boonstoppel v Hamidi* [2005] SASC 248, [29]; *Potts v Bonnici* (2009) 104 SASR 313, [6].
1965 *DPP (Cth) v Mahamat-Abdelgader* [2017] NSWSC 1102, [36]-[41].
1966 *Kelly v Saadat-Talab* (2008) 72 NSWLR 305, [30].
1967 The reference in s 20BQ(1)(b) is to "this Division", that is, Division 8 of Part 1B of the Act, but s 20BQ is the only relevant provision of that Division.
1968 *DPP v El Mawas* (2006) 66 NSWLR 93, [77], concerning a cognate NSW law.
1969 *Confos v DPP (NSW)* [2004] NSWSC 1159, [17] (approved in *DPP v El Mawas* (2006) 66 NSWLR 93, [77]-[78]), concerning a cognate NSW law.
1970 Cf *Quinn v DPP* [2015] NSWCA 331, [33], concerning a cognate NSW law.
1971 Cf *Boonstoppel v Hamidi* [2005] SASC 248, [42].
1972 *DPP (NSW) v Lopez-Aguilar* [2013] NSWSC 1019, [23], concerning a cognate NSW law.

1525. On the view taken by Gray J, if the court concludes that the defendant is fit to plead, s 20BQ has no application.[1973] However, if that does not conclude the inquiry, it will also be relevant to consider whether, on the evidence before the court, the defendant appreciated the nature and quality of the conduct alleged and its wrongfulness.[1974]

1526. A determination of whether it would be "*more appropriate*" to deal with the person under s 20BQ or *"otherwise in accordance with law*" implicitly requires consideration of both pathways. This includes, on the one hand, the disposition options available under s 20BQ and, on the other, the consequences should the charge be heard and determined, including the sentencing options if the defendant is found guilty.[1975]

1527. In the latter case, sentencing options available may include a non-conviction bond under s 19B subject to probation or other conditions, a bond under s 20 or an order under s 20AB(1) which is tailored to deal with the person's mental illness or intellectual disability, or a specific option such as a psychiatric probation order (s 20BV) or a program probation order (s 20BY).

1528. The options provided by s 20BQ include, by order, dismissing the charge and discharging the person-

- "*into the care of a responsible person, unconditionally, or subject to conditions, for a specified period that does not exceed 3 years*" (s 20BQ(1)(c)(i)) or
- "*on condition that the person attend on another person, or at a place, specified by the court for an assessment of the first-mentioned person's mental condition, or for treatment, or both*" for up to 3 years (s 20BQ(1)(c)(ii)).

An order under s 20BQ(1)(c) acts as a stay against any proceedings, or any further proceedings, against the person in respect of the offence (s 20BQ(2)).

1529. The court has an alternative power to adjourn the proceedings (s 20BQ(1)(d)(i)), remand the person on bail (s 20BQ(1)(d)(ii)) and/or "*make any other order that the court considers appropriate*" (s 20BQ(1)(d)(iii)).

1530. However, as the Australian Law Reform Commission pointed out in 2006,[1976] there is no provision for enforcement of, or for dealing with any breach of, any order under s 20BQ(1)(c)(i) or (ii) or (d)(iii), or any condition of such an order. If the court proceeds by such means, there is nothing to ensure that the order will be complied with or will have the intended effect. No means are provided for revoking the order or reinstating the charge. The inefficacy of these options must be taken into account in determining whether dealing with the person under s 20BQ is more appropriate than dealing with the person "*in accordance with law*".[1977]

1531. A disposition under s 20BQ is not available if the person has been convicted of the relevant federal offence. However if the conviction is set aside on appeal, the person is then a "*person charged*" with the

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1973 *Morrison v Behrooz* [2005] SASC 142, [44]; *Boonstoppel v Hamidi* [2005] SASC 248, [39].

1974 *Potts v Bonnici* (2009) 104 SASR 313, [8].

1975 *Mantell v Molyneux* (2006) 68 NSWLR 46, [40], concerning a cognate NSW law.

1976 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006), [28.10].

1977 *Mantell v Molyneux* (2006) 68 NSWLR 46, [47]. The absence of enforcement provisions in relation to orders under the NSW counterpart of s 20BQ, prior to amendments in 2005, led to frequent failure to comply with such orders and a reluctance of courts to make them: *DPP (NSW) v Saunders* [2017] NSWSC 760, [45]-[46]. No corresponding amendments have been made to s 20BQ.

offence, within the meaning of s 20BQ(1), and a disposition under that section is available to a court of summary jurisdiction (or an appellate court with the powers of such a court).[1978]

State and Territory laws providing for a determination of unfitness in summary proceedings

1532. Laws in some States and Territories provide for a determination of unfitness in summary proceedings.[1979] Such laws would appear to be of a kind that are capable of being applied by s 68 or s 79 of the *Judiciary Act 1903* (Cth), as surrogate federal law, to proceedings for Commonwealth offences. The question which then arises is whether "*a Commonwealth law expressly or by implication made contrary provision, or if there were a Commonwealth legislative scheme ... which was ''complete upon its face'' and can ''be seen to have left no room'' for the operation of*" the State or Territory law.[1980] Such a law or legislative scheme would preclude the State or Territory laws from being applied as surrogate federal law: see "1.7 The application of State and Territory laws by Judiciary Act 1903, ss 68 and 79".

1533. In *Kelly v Saadat-Talab*,[1981] the New South Wales Court of Appeal held that s 20BQ rendered a State law dealing with offenders who were mentally ill or cognitively impaired incapable of being applied to proceedings for a Commonwealth offence. The State law, s 32 of the *Mental Health (Criminal Procedure) Act 1990* (NSW), was in similar terms to s 20BQ, but also applied to a defendant who was suffering from a mental illness at the time of the alleged offence, and provided that the person could be dealt with by procedures under State law. Handley AJA (with whom Allsop P and Ipp JA agreed) said that s 20BQ "*should be understood as providing that, unless it applies, offenders charged with Federal offences shall be dealt with otherwise, that is according to law*" and that this excludes the exercise of the powers under other circumstances.[1982] This rendered the State law inapplicable. As Allsop P (with whom Ipp JA also agreed) expressed it, "*the terms of s 20BQ comprised on their face an intended regime of treatment in summary jurisdiction of the mentally ill*" and "*do not easily admit of a construction that they are intended to be supplemented or complemented by additional or differently worded provisions on the very same subject*".[1983]

1534. This decision left some uncertainty about whether s 20BQ similarly rendered inapplicable as surrogate federal law State or Territory laws which provided for offenders to be found unfit to plead or unfit to be tried in summary proceedings. In the view of the CDPP, such laws are not necessarily rendered

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1978 *Huynh v R* (2021) 105 NSWLR 384, [53]. Whether a court has power to set aside a conviction for a federal offence depends upon the relevant appeal provisions (usually under the law of the relevant State or Territory, applied as surrogate federal law by the *Judiciary Act 1903* (Cth)). In *Huynh*, the Court held ([54]) that the District Court of NSW has such a power on an appeal against *conviction* from the Local Court, but ([55]) not on an appeal against *sentence* from the Local Court.

1979 **Qld:** *Mental Health Act 2016* (Qld), ss 172, 173 – the criteria for unfitness are not defined in the legislation, and must be determined by reference to the common law. **WA:** *Criminal Law (Mentally Impaired Accused) Act 1996* (WA), Part 3 - the criteria for unfitness for trial are set out in s 9. "Sentencing proceedings" are excluded from the definition of "trial" (s 8). As to the application to a summary plea hearing, see *Squance v WA Police* [2023] WASC 479. **SA:** *Criminal Law Consolidation Act 1935* (SA), Part 8A - the criteria for unfitness are set out in s 269H. **Tas:** *Criminal Justice (Mental Impairment) Act 1999* (Tas), Part 2 - the criteria for unfitness are set out in s 8. **ACT:** *Crimes Act 1900* (ACT), Divisions 13.2 and 13.6 – the criteria for unfitness are set out in s 311.

1980 *Putland v R* (2004) 218 CLR 174, [7] (Gleeson CJ); see also *Solomons v District Court (NSW)* (2002) 211 CLR 119; *Bui v DPP (Cth)* (2012) 244 CLR 638, [25].

1981 In *Kelly v Saadat-Talab* (2008) 72 NSWLR 305. Special leave to appeal was refused by the High Court on the basis that it had no prospects for success: *ST v Kelly* [2009] HCATrans 175.

1982 *Kelly v Saadat-Talab* (2008) 72 NSWLR 305, [48]-[49].

1983 *Kelly v Saadat-Talab* (2008) 72 NSWLR 305, [27].

inapplicable by s 20BQ. The section enables a court of summary jurisdiction to determine whether it is "*more appropriate to deal with the person under [s 20BQ] than otherwise in accordance with law*". It leaves no scope for other provisions which are, in the language of Allsop P, "*on the very same subject*". But the "subject" is diversion of a mentally ill or intellectually disabled defendant, as distinct from disposition "*in accordance with law*". If the relevant State or Territory law providing for a determination of unfitness is more properly characterised as disposition "*in accordance with law*" rather than diversion, it would not be rendered inapplicable by s 20BQ.[1984] This might include, for example, a State or Territory law which provides for the unfitness of a defendant in summary proceedings to be determined and dealt with in a broadly similar way to that in proceedings on indictment.

Post-conviction orders for persons suffering from mental illness or intellectual disability

1535. As to post-conviction orders see "7.8 Disposition of persons suffering from mental illness/intellectual disability " below.

1984 In *Mantell v Molyneux* (2006) 68 NSWLR 46, [49], Adams J held that a decision of a magistrate not to divert a defendant under 32 of the NSW Act (the counterpart of s 20BQ) did not preclude a determination of the defendant's fitness to be tried.

7.7 Dispositions following acquittal because of mental illness

7.7.1 Power to make an order

1536. Section 7.3 of the *Criminal Code* (Cth) creates the defence of mental impairment that applies to all Commonwealth offences, whether a matter is prosecuted summarily or on indictment. Mental impairment is defined to include senility, intellectual disability, mental illness,[1985] brain damage and severe personality disorder (*Criminal Code*, s 7.3(8)).

1537. The provision requires that the person was suffering from a mental impairment at the time of carrying out the conduct constituting the offence, and this had the effect that:

- the person did not know the nature and quality of the conduct;
- the person did not know that the conduct was wrong; or
- the person was unable to control the conduct.

1538. In its report explaining the rationale for relevant provisions of the *Criminal Code*, the Criminal Law Officer's Committee noted that s 7.3 is based on the common law defence of insanity, under the McNaghten rules. Under those rules, it must be established that the defendant had a "disease of the mind". This was a general term – it captured situations where a defendant labours under "*such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong*".[1986] The determination of this question has been left to juries.

1539. The common law did not require an examination into the precise categorisation of the clinical reason for the disease of the mind. Times have changed in terms of how human behaviour and mental dysfunction are described. Medical science now distinguishes between mental illness, intellectual disability and personality disorder, amongst other states, in terms of their nature, whether they are treatable, and whether considered an illness. The McNaghten rules and subsequent common law cases were not concerned with these questions of classification, but with establishing a test for criminal responsibility based on (lack of) capacity to reason.[1987] The Committee noted in its report that it was appropriate to have an inclusive definition in the *Code* based on modern terminology of what may amount to disease of the mind, now described as "mental impairment".

1540. If a special verdict of "not guilty because of mental impairment" is returned, the court's powers to deal with the defendant are found in Division 7 of Part IB of the *Crimes Act 1914* (Cth). That Division provides for orders in proceedings on indictment for a Commonwealth offence, following the acquittal of a person *because of mental illness at the time of the offence* (s 20BJ(1) and (4)).

1541. Section 20BJ was enacted before the *Criminal Code*, when the common law McNaghten rules applied to federal offences. At that time the reference to "mental illness" was understood to encompass all situations where the McNaghten defence was made out. If the defence of "unsoundness of mind" was

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1985 The reference to "mental illness" in s 7.3(8) is defined as a reference to "*an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary external stimuli*": *Criminal Code* (Cth), s 7.3(9).

1986 *Stapleton v R* (1952) 86 CLR 358, 367-8 .

1987 E.g. *Willgoss v R* (1960) 105 CLR 295, regarding a person with a personality disorder.

made out, the court was empowered by s 20BJ to order that the defendant be detained. That was its purpose.

1542. The ancestor of this provision (then s 20B of the *Crimes Act*) applied where "*the person is acquitted by reason of unsoundness of mind at the time of the commission of the offence*".

1543. Whether the phrase used by Parliaments at given points in time has been "unsoundness of mind", or "mental illness", the relevant provision has been intended to apply following a finding of not guilty under the McNaghten test. That, is, both phrases were another way of referring to the relevant "disease of the mind" at common law.

1544. It is likely that s 20BJ would be read widely to cover all cases where a finding is made that a person is not guilty by reason of mental impairment, under s 7.3 of the *Criminal Code*. That is, the references in s 20BJ to "*acquittal … because of mental illness at the time of the offence*" must be taken as references to all forms of "mental impairment" within s 7.3(8) of the *Code*, not merely "mental illness" as defined in s 7.3(9). Such an interpretation is consistent with the purpose of the provision and its history as relating to all forms of "unsoundness of mind". Mental illness can be given a wide meaning as it is not defined narrowly in the provision.[1988]

1545. Further, s 20BJ(5) provides that if the court orders the release, rather than detention, of the person acquitted, conditions of release may require an "*assessment of the person's mental illness, mental condition or intellectual disability*" for the purposes of treatment. If "mental illness" in s 20BJ(1) were to be read narrowly to exclude "mental condition" and "intellectual disability", this power to order assessments for the latter two situations could still have residual meaning (as a person could be "mentally ill" and also have an intellectual disability). However, it is more likely that the provision illustrates an intention that the primary power to make orders upon acquittal in s 20BJ(1) applies to persons found not guilty by reason of mental illness in its broadest sense, encompassing not only mental illness as defined in civil law but also other forms of mental conditions and intellectual disability, consistent with the common law.

7.7.2 Detention or release

1546. Generally the court must order that the person be detained in safe custody in prison or in a hospital for a period specified in the order, not exceeding the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence charged: *Crimes Act 1914* (Cth), s 20BJ(1).

1547. However the court may, if in the court's opinion it is more appropriate to do so, order the person's release from custody either absolutely or subject to conditions: s 20BJ(4). Any such conditions apply for such period as the court specifies in the order, not exceeding 3 years. The conditions may include remaining in the care of a responsible person or attending for treatment: s 20BJ(5).

1548. If the court makes an order under s 20BJ(1), the length of the detention period should represent an estimate of the sentence which would have been imposed if the person had been found guilty of the offence charged, and no account should be taken of that person's mental illness or any state of mind

1988 See S Odgers, *Principles of Federal Criminal Law* (LBC, 4th edition, 2019), [7.3.260].

aggravated by that mental illness.[1989] The court must have regard to ordinary sentencing principles in making that estimate.[1990] If the person has been found not guilty by reason of mental illness in relation to more than one Commonwealth offence, the judge should fix the period of the detention order so that it takes account of each federal offence of which the accused person has been acquitted on the ground of mental illness as if a total custodial sentence were being imposed after conviction.[1991]

1549. If an order is made under s 20BJ(1), the Attorney-General must conduct periodic reviews, and may order the person's release: see *Crimes Act*, ss 20BK-20BP.

1989 *R v Goodfellow* (1994) 33 NSWLR 308; *R v G* (2019) 134 SASR 461. In *R v Robinson* (2004) 11 VR 165, Kellam J followed *Goodfellow* but held that the mental illness of the person was relevant to culpability and the sentence which would have been imposed had the person been found guilty.

1990 *R v G* (2019) 134 SASR 461.

1991 *R v Goodfellow* (1994) 33 NSWLR 308.

7.8 Disposition of persons suffering from mental illness/intellectual disability

7.8.1 Non-conviction disposition in a court of summary jurisdiction

1550. Section 20BQ of the *Crimes Act 1914* (Cth) creates a non-conviction option for dealing with a defendant who is suffering from mental illness or intellectual disability in proceedings before a court of summary jurisdiction.

1551. As to the scope and operation of s 20BQ, see "7.6.2 Unfitness in a court of summary jurisdiction". It has been held that the provision is available only when no plea has been entered and that it has no application where a defendant is fit to plead.[1992] However it is arguable that, contrary to these decisions, a disposition option under s 20BQ is available, according to the terms of the section itself, whenever a defendant in proceedings before a court of summary jurisdiction is suffering from a mental illness or intellectual disability.

7.8.2 Post-conviction dispositions

1552. Division 9 of Part IB of the *Crimes Act 1914* (Cth) provides for post-conviction dispositions for federal offenders suffering from mental illness (within the meaning of the civil law of the State or Territory) or intellectual disability.[1993]

1553. Commonwealth post-conviction disposition options relating to those suffering from mental illness or intellectual disability are:

Section	*Outcome*	*Summary/Indictable Disposition*
20BS	**Hospital Order**	On indictment only – where defendant convicted and person suffering from mental illness which contributed to offence.
20BV	**Psychiatric Probation Order**	Summary/Indictable – where defendant convicted and suffering from mental illness which contributed to offence.
20BY	**Program Probation Order**	Summary/Indictable – where defendant convicted and suffering from intellectual disability which contributed to offence.

1554. These post-conviction dispositions are not available for migration-related offences or child sex offences for which a term of imprisonment is mandatory: see "7.2 Migration offences" and "7.3.3 Mandatory terms of imprisonment for high-level Commonwealth child sex offences and for repeat child sexual abuse offences".

1992 *Morrison v Behrooz* [2005] SASC 142; *Boonstoppel v Hamidi* [2005] SASC 248.

1993 *Crimes Act 1914* (Cth), ss 20BQ – 20BY. For a more detailed outline, see Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006), Chapter 28.

APPENDIX 1: FEDERAL SENTENCING CHECKLIST

***Crimes Act* section**	***Effect of provision***
4AA	Value of penalty unit.[1994] One **Penalty unit** is valued at: • **$275** for offences committed on or after 1 January 2023;[1995] • **$222** for offences committed between 1 July 2020 and 31 December 2022; • **$210** for offences committed between 1 July 2017 and 30 June 2020; • **$180** for offences committed between 31 July 2015 and 30 June 2017; • **$170** for offences committed between 28 December 2012[1996] and 30 July 2015; and • **$110** for offences committed between 7 April 1997 and 27 December 2012.
4B(2)	Where an offence is punishable only by imprisonment, a **pecuniary penalty** can be imposed instead of or in addition to imprisonment. The section sets out the formula to be used in determining the maximum pecuniary penalty available.
4J	This section enables certain **indictable offences to be dealt with summarily** and establishes the maximum sentences when an offence is dealt with summarily.
4JA	This section enables certain indictable offences that are punishable by a **pecuniary penalty only** to be dealt with summarily, and specifies the applicable maximum fines.
4K	**Aggregate penalties for summary matters** Permits a court to impose one penalty in respect of charges against the same provision of a law of the Commonwealth "*founded on the same facts, or form, or are part of, a series of offences of the same or similar character*". Other powers also apply; see "6.10 Aggregate penalty". A single penalty cannot be imposed for State/Territory and federal offences.
16A(1)	The primary obligation on a sentencing court is to impose a sentence or order that is **of a severity appropriate in all the circumstances** of the offence – *R v Hili* (2010) 242 CLR 520. There is no judicially determined norm or starting point in terms of how much of the sentence of imprisonment should be served in prison before release.

1994 The value of a penalty unit is specified in s 4AA(1) of the *Crimes Act 1914* (as in force from time to time), subject to triennial indexation in line with the Consumer Price Index (s 4AA(3)). The amendments which provide for triennial indexation were introduced by the *Crimes Legislation Amendment (Penalty Unit) Act 2015* (Cth).

1995 *Crimes Amendment (Penalty Unit) Act 2022* (Cth), which came into effect on 1 January 2023.

1996 Section 3 and Schedule 3 to *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act No.167 of 2012*; *Crimes Legislation Amendment (Penalty Unit) Act 2015,* s 2.

16A(2)	This is a **non-exhaustive list of matters to which the court is to have regard** where *relevant and known* when passing sentence. The list is supplemented by relevant common law principles.
16A(2A)	The court is precluded from taking customary law or cultural practice into account to either mitigate or aggravate the seriousness of the criminal behaviour.
16A(3)	In determining whether a **non-custodial sentence** or order is appropriate regard must be had to the **nature or severity of the conditions** that may be imposed or may apply to the offender under the order.
16AAAA	Sets out requirements for a victim impact statement.
16AB	Sets out matters relevant to reliance on victim impact statements such as: - no implication is to be drawn from an absence of a victim impact statement; - the statement can be read by the victim or by someone on behalf of the victim; and - the offender may only cross examine the maker of the victim impact statement with leave of the court.
16AC **(formerly 21E)**	Court is to quantify reduction of sentence if an undertaking by an offender as to future cooperation in proceedings is given. Court is required to say that the reduction is made for this reason. For s 16AC to operate there must be a clear undertaking and it must be given in contemplation of the possible institution of some proceeding. A s 16AC reduction is not to include any mitigation of penalty consequent upon application of s 16A(2)(h) which relates to general cooperation with authorities. Those are distinct and separate.
16B	In sentencing, a court must have regard to **any sentence** (federal State or Territory) **that the offender has not served or any sentence liable to be served** through revocation of parole or licence (the totality principle).
16BA **(formerly 21AA)**	The Court can take other federal/external territory offences into account. Sets out a range of rules and qualifications where this is to occur.
16C	When imposing a **fine**, the court must have regard to the ability of the offender to pay. The court is not prevented from imposing a fine because the financial circumstances of the offender cannot be ascertained by the court.
19B	**Bond without conviction** If the conditions in s 19B(1)(b) have been met, the court: • may dismiss the charge/s – s 19B(1)(c); or • may discharge the person without conviction for a period not exceeding 3 years – s 19B(1)(d)

	• may order compliance with conditions for a period not exceeding 2 years – s 19B(1)(d)(iii) • must explain or cause to be explained the purpose of the order, the consequences which may follow if it is not complied with and that the recognizance may be varied – s 19B(2) • must provide a copy of the bond to the offender – s 19B(4)
20(1)(a)	**Bond <u>with</u> conviction** • period of order may not exceed 5 years – s 20(1)(a)(i) • may also order compliance with conditions for a period not exceeding 2 years Note that a fully suspended or partially suspended federal sentence or sentences requires an ancillary order being made under s 20(1)(b).
20(1)(b)	**Recognizance release order (RRO)**– court may order that offender be released immediately or after specified period of imprisonment on recognizance. Immediate release not available for certain child sex offences committed on or after 23 June 2020, other than in exceptional circumstances. RRO is not open in respect of sentences of imprisonment imposed for terrorism and certain other national security offences – s 19AG *Crimes Act 1914* (Cth). RRO not available for sentence of more than 3 months for federal offence committed while on federal parole o– licence - s 19AR *Crimes Act 1914* (Cth)
20A	Deals with **breaches** of bonds (imposed pursuant to ss 19B and 20(1)(a) or (b))
20AA	Empowers a court to discharge or vary conditions of a bond imposed under ss 19B or 20(1).
20AB	Makes available **particular State or Territory sentencing options**, on conviction. The options which are made available are described in s 20AB(1AA) (see "4.7.3 Types of State or Territory sentences or orders which are made available by s 20AB").
20AC	Deals with a **breach** of a sentence or order under s 20AB(1).
20C	This section incorporates all the State sentencing options for children or young persons. In respect of a *"child or young person"* which is not defined, the full range of federal options and any additional State/Territory sentencing options are available (if not inconsistent with Commonwealth law).
Imprisonment	
17B(1)	**Imprisonment not permitted for certain offences** Imprisonment precluded if convicted of one or more specified property offences where the total value of the property/money does not exceed $2,000 and the defendant has not previously been sentenced to imprisonment, unless exceptional circumstances exist.

17A	Where a court is satisfied that **no other penalty is appropriate** in the circumstances of the case. The court must state this and reasons must be entered in court records though failure to do so will not invalidate any sentence.
16AAA – 16AAC	Provides for mandatory minimum head sentences for high-level Commonwealth child sex offences and for repeat child sex offences.
16E	**Commencement of sentences and pre-sentence detention** This section adopts the law on the commencement of sentences and non-parole periods for federal offenders. However, the *Crimes Act 1914* (Cth) has its own regime for determining when a non-parole period or recognizance release order ought t– be made - see ss 19AB to 19AJ. State legislation has no application as to when a non-parole period of recognizance release order ought to be made. Pre-sentence detention for the offence must be taken into account. Sections 16E(2) & (3) adopt State/Territory laws for giving credit for pre-sentence detention (whether by backdating the sentence or by reducing the sentence imposed). Laws in Victoria and Queensland by which a sentencing court may declare pre-sentence custody as time served (*Sentencing Act 1991* (Vic), s 18; *Penalties and Sentences Act 1992* (Qld), s 161(1)) are also treated as applying to federal offenders.
16F	If the court imposes a federal sentence and fixes a non-parole period or a recognizance release order it must explain, or cause to be explained, the purpose and consequence of fixing and non-compliance with such a period or order. (Failure to comply with the requirements of this section does not invalidate a sentence: *R v Hutton* [2004] NSWCCA 60, [17]-[28].)
16G	**Repealed from 16 January 2003** Until repealed in 2003, this section required that the absence of remissions be taken into account in determining the length of the head sentence and for the sentences to be adjusted accordingly. (See "A2.1 Remissions: Crimes Act 1914 (Cth), s 16G, as in force between 17 July 1990 and 15 January 2003" and "A2.2 Remissions: Effect of the repeal of Crimes Act 1914 (Cth), s 16G (from 16 January 2003)".)
19(2)	Where multiple federal sentences are imposed the court must "by order direct" when each federal sentence imposed commences - simply stating only that sentences are to be concurrent, cumulative or cumulative to a nominated degree will not satisfy this section. Section 19(2) relates to the head sentence(s) not the non-parole period – see *R v DS* (2005) 153 A Crim R 14. The non-parole period will commence on the commencement of the first head sentence.
19(3)	Where a State sentence is imposed as well as a federal sentence(s) the court must "by order direct" when each federal sentence commences so there are no gaps in the sentence. Commencement of a State/Territory sentence is governed by State law (e.g. *Sentencing Act 1991* (Vic), s 16(4)). See *DPP v Swingler* [2017] VSCA 305.

19(5)-(7)	Creates a presumption that a sentence for a Commonwealth child sex offences committed on or after 23 June 2020 must be wholly cumulative upon a sentence for another child sex offence (federal, State or Territory). Court has a discretion to depart from this requirement but must give reasons for doing so.
19AB	Provides for situations in which a court must impose a **non-parole period** s 19AB(1) – where the period of imprisonment exceeds 3 **years** (i.e. 3 years and 1 day) and the offender is not undergoing a federal term of imprisonment, a single non-parole period must be imposed. s 19AB(3) – court may decline to impose a non-parole period on certain grounds s 19AB(4) – court must give reasons for failing to impose a non-parole period.
19AD	This section is relevant where the offender is already subject to a federal non-parole period when sentenced but is qualified by s 19AG in relation to sentencing for terrorism offences and certain other national security offences.
19AC	Provides for situations in which a court must fix a **recognizance release order (RRO)** s 19AC(1) – where the period of imprisonment does **not exceed 3 years** must make a RRO; s 19AC(3) – where period of imprisonment is **under 6 months** not required to make a RRO; – 19AC(4) - Court may decline to impose a RRO where it is otherwise required to do so having regard to the nature and circumstances of the offence(s) and to the antecedents – see *Hancock v R* [2012] NSWCCA 20", [45]-[51]. Where the court considers that this is not appropriate reasons are to be stated and recorded in the court records.
19AE	This section is relevant where the offender is already subject to a federal recognizance release order when sentenced but it is qualified by s 19AG in relation to sentences for national security offences (including terrorism, treason or espionage).
19AJ	Separate sentences must be imposed for federal/State offences. That is, a single sentence cannot be imposed for both State and federal offences.
19AK	A court is not precluded from imposing a non-parole period merely because the offender is liable to be deported.
19AQ	Deals with the situation where a federal parole order or licence is automatically revoked by the imposition of a sentence or sentences of more than 3 months.
19AR	Deals with the fixing of a new non-parole period where a parole order or licence is automatically revoked.
19AS	Requires a court imposing a sentence that revokes federal parole to issue a warrant of detention for the unserved part of the sentence.
19AU	Deals with the situation where the federal Attorney-General decides to revoke federal parole.

APPENDIX 2: HISTORICAL ASPECTS OF SENTENCING FEDERAL OFFENDERS

This Appendix describes matters relating to the sentencing of a federal offender which are no longer applicable. One reason for including them is to assist in understanding old decisions relating to the sentencing of federal offenders.

A2.1 Remissions: *Crimes Act 1914* (Cth), s 16G, as in force between 17 July 1990 and 15 January 2003

Historically, a number of jurisdictions provided for administrative remissions and reductions of prison sentences to compensate prisoners for hardship caused by industrial disputes, lockdowns or emergencies. In some jurisdictions, substantial remissions or reductions of sentences came to be allowed automatically (subject to cancellation). In the late 1980s and early 1990s, these practices were abolished or curtailed in a number of States under so-called "truth in sentencing" laws.[1997]

Section 16G of the *Crimes Act 1914* (Cth) was inserted by the *Crimes Legislation Amendment Act (No. 2) 1989* (with effect from 17 July 1990), in response to legislation in New South Wales which abolished remissions or reductions of sentences of imprisonment. The section required a court sentencing a federal offender to a term of imprisonment to adjust the sentence accordingly. It provided:

"If a federal sentence is to be served in a prison of a State or Territory where State or Territory sentences are not subject to remission or reduction, the court imposing the sentence must take that fact into account in determining the length of the sentence and must adjust the sentence accordingly."

In the process of adjustment required by s 16G, when it applied, it was appropriate to take into account the rate of remissions previously attracted, namely one third. This was referred to as "an appropriate starting point".[1998]

But in the process of adjustment it was impermissible to substitute a mathematical calculation for a discretion to make the required adjustment. The sentence fixed had to reflect the adjustment required by s 16G but that discount was not necessarily to be applied as a precise reduction to reflect the proportion of the sentence by which remissions, if granted, would previously have reduced it.[1999]

Further, it appears that there was a "shading out" of the weight to be given to the "starting point" the longer the sentence was and that where a very long sentence of imprisonment was warranted it was open to the sentencing judge to moderate the s 16G adjustment as part of the "instinctive synthesis".[2000]

Section 16G was initially considered to apply to cases where the court considered an indeterminate life sentence to be the appropriate sentence.[2001] The High Court decided that s 16G, when it operated, had no application to life sentences.[2002]

1997 E.g. *Sentencing Act 1989* (NSW); *Corrections (Remissions) Act 1991* (Vic); *Statutes Amendment (Truth in Sentencing) Act 1994* (SA).

1998 *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370.

1999 Ibid; *R v Corbett* (1991) 52 A Crim R 112; *R v O'Brien* (1991) 57 A Crim R 80; *R v Carroll* [1991] 2 VR 509; *R v Shore* (1992) 66 A Crim R 37; *R v Bradley* (1997) 137 FLR 314; *R v Li* [1998] 1 VR 637.

2000 *R v Majeric* [2001] VSCA 15. See also *R v Sweet* [2001] NSWCCA 445.

2001 *R v Yook* (1995) 122 FLR 109.

2002 *Lee Vanit v R* (1997) 190 CLR 378.

Section 16G, in this form, was repealed with from 16 January 2003. The effect of the repeal is discussed below: Appendix 2, "A2.2 Remissions: Effect of the repeal of Crimes Act 1914 (Cth), s 16G (from 16 January 2003)".

A2.2 Remissions: Effect of the repeal of *Crimes Act 1914* (Cth), s 16G (from 16 January 2003)

As noted above, s 16G of the *Crimes Act 1914* (Cth), which required a court sentencing a federal offender to imprisonment to take into account the absence of remissions, was repealed with effect from 16 January 2003.

In *Kevenaar*,[2003] the Court observed that the effect of the repeal of s 16tG was that the length of sentences of imprisonment (and non-parole periods) for those offences to which s16G previously applied should, as a necessary and logical consequence of the way the courts implemented s16G, increase by approximately 50%.

However in *Bezan*,[2004] Wood CJ at CL (with whom Buddin and Shaw JJ agreed) summarised the effect of the repeal of s 16G as follows:

- While the repeal of s 16G is likely to result in an increase in the current and future sentencing pattern, the proper approach is to set a sentence that meets the requirements of s 16A(1) of the *Crimes Act 1914* (Cth) and the relevant objectives of sentencing, without giving a s 16G discount.
- It would be inappropriate to approach the sentencing exercise upon a broad arithmetic approach that would require the pre-repeal sentencing range to be adjusted by some bare arithmetic formula, let alone one that would call for its increase by a factor of 50% in order to restore an equivalence with the pre-repeal range.
- Starting points selected in pre-repeal cases involving federal offenders would not necessarily have been the same had s 16G not been in force as judges were aware that it was a somewhat beneficial provision.
- Care needs to be taken when reference is made to any material relating to pre-repeal decisions.
- The approach now required by s 16A(1) is that a sentence be imposed that "is of a severity appropriate to all of the circumstances of the case", including those identified in ss 16A(2) and (3).

Subsequent decisions applied these principles.[2005] That is, although the repeal of s 16G would normally lead to the imposition of a heavier sentence than discernible in the pre-repeal pattern of sentencing[2006] or would be likely to result in an increase over the pre-repeal pattern,[2007] adjustment for the repeal of s 16G should not be made automatically by use of a mathematical formula or fixed percentage.[2008]

2003 *R v Kevenaar* [2004] NSWCCA 210 (Hulme J, with whom Simpson J agreed).
2004 *R v Bezan* [2004] NSWCCA 342. See also *R v Dujeu* [2004] NSWCCA 237, [20]-[43]; *R v A* [2004] NSWCCA 292.
2005 *R v J* [2005] NSWCCA 1; *Clarkson v R* [2007] NSWCCA 70; *R v Tran* [2007] QCA 221; *Korgbara v R* (2007) 71 NSWLR 187, [101]-[108]; *R v Chea* [2008] NSWCCA 78.
2006 *R v Rivadavia* (2004) 61 NSWLR 63, [72]; *Okeke v R* [2005] NSWCCA 444, [20] and *R v Liu* [2005] NSWCCA 378.
2007 *R v Tsiaousis* [2005] NSWCCA 240.
2008 *R v SC* [2008] NSWCCA 29.

A2.3 The effect on sentencing of a forfeiture or pecuniary penalty order under the *Proceeds of Crime Act 1987* (Cth)

The *Proceeds of Crime Act 1987* (Cth) was silent on the relevance of confiscation orders to sentencing. The Act did however permit the sentencing court to defer sentencing until a confiscation application had been determined.[2009]

In the absence of specific provisions and having regard to relevant authority, the Commonwealth adopted the approach that such orders are part of the overall punishment imposed upon an offender and should be taken into account in determining sentence. The approach was that, if possible, any application should be made prior to sentencing to allow the court to take any such order into account.

The weight which was attributable to the order varied greatly depending upon the specific circumstances under consideration.[2010]

The principles which emerged in the cases established that weight should be afforded to a forfeiture order representing property "used in or in connection with" the commission of an offence in contrast to proceeds of the crime. The situation was more complex where the confiscation order was a forfeiture order or pecuniary penalty order representing proceeds or benefit derived from the offence.

- In its 1989 decision in *R v Allen*[2011] the Victorian Court of Appeal considered that a forfeiture order was "part of the retribution exacted from offenders on behalf of the community" and that the order, if made before sentence, should be taken into account, but that the weight to be attributed to the making of the order would vary depending upon the circumstances.
- In *McDermott v R*,[2012] the Full Federal Court considered that a pecuniary penalty order relating entirely to the profits of the crime had a significant punitive and deterrent effect if enforced against the only available asset, or against future earnings.
- By contrast, in *Tapper v R*,[2013] the Full Federal Court found that whilst such a pecuniary penalty order must be taken into account, it might have little or no impact on sentence if it was unlikely to impact on the offender or their assets. In that matter there was little prospect of recovery.

Where confiscation action was resolved prior to sentencing the court was able to take into account the impact of the order on the sentence. Where however the confiscation action was not resolved before the sentencing the court, where advised of the situation, would have regard to the likelihood of an order being made or automatic forfeiture occurring in the future.

The *Proceeds of Crime Act 1987* was repealed and replaced by the *Proceeds of Crimes Act 2002* (Cth). The 2002 Act makes specific provision for the manner in which proceedings and orders under that Act are to be taken into account in sentencing: see "3.5.15 Orders under *Proceeds of Crime Act 2002* (Cth)", "3.5.16 Prospect of a future order under *Proceeds of Crime Act* 2002 (Cth)" and "3.5.17 Cooperation in resolving action under *Proceeds of Crime Act 2002* (Cth)".

2009 *Proceeds of Crime Act 1987* (Cth), s 18(2).
2010 *McDermott v R* (1990) 49 A Crim R 105 and *Tapper v R* (1992) 39 FCR 243, following the reasoning of the Victorian CCA in *R v Allen* (1989) 41 A Crim R 51.
2011 *R v Allen* (1989) 41 A Crim R 51.
2012 *McDermott v R* (1990) 49 A Crim R 105.
2013 *Tapper v R* (1992) 39 FCR 243.

A2.4 Automatic revocation of federal parole or licence prior to 20 July 2020

The regime governing automatic revocation of federal parole or licence was significantly amended by the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), with effect from 20 July 2020.[2014] The following describes the regime in force immediately before those amendments came into effect. For a description of the current regime, see "4.11.11 Automatic revocation of parole or licence".

Revocation upon sentencing for an offence committed on parole or licence

Parole or licence was revoked automatically (i.e. by force of statute) when a federal offender who had been released on parole or licence was sentenced to life imprisonment or to a sentence of, or sentences aggregating, more than 3 months in respect of a federal, State or Territory offence committed during the parole or licence period.[2015] The only exception was if the sentence of imprisonment, or each sentence of imprisonment, was suspended (that is, wholly suspended).[2016]

If at the date of sentence for the new offence, the federal parole period had already ended, the parole order was taken to have been revoked from the time immediately before the end of the parole period.[2017]

Upon the automatic revocation of parole or licence (whether as a consequence of a sentence imposed during or after the period of parole or licence[2018]), the parolee or licensee was regarded as still under sentence and became liable to serve that part of the sentence or each sentence for a federal offence that had not been served at the time of their release under the parole order or licence,[2019] subject to any credit to be allowed for "street time" and subject (except in the case of a life sentence) to any further remission or reduction of that sentence. Credit to be allowed for "street time" (that is, a period spent on parole or licence before it was revoked) was governed by s 19AQ(5) and s 19AA(2)-(3) of the *Crimes Act 1914* (Cth): see below.

The service of that balance of the federal sentence commenced on the date the offender was sentenced for the new offence.[2020] A consequence was that the court was precluded from backdating the sentence to allow for time spent on remand.[2021]

Fixing a new NPP or making a new RRO following automatic revocation of parole or licence

Where parole or licence was automatically revoked by a sentence for further offences committed during the parole or licence period ('the new sentence'), s 19AR of the *Crimes Act 1914* (Cth) made provision for the fixing of a new non-parole period (NPP) or recognizance release order (RRO), in relation to the unserved part of the original federal sentence ('the outstanding sentence') and also in relation to the new sentence, as follows:

2014 *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), s 3 and Schedule 13, item 21.

2015 *Crimes Act 1914* (Cth), s 19AQ(1). The reference to the period of 3 months referred to the head sentence or total effective sentence, not the period to be served: see the definitions of "aggregate" and "sentence" in s 16(1) of the Act.

2016 *Crimes Act 1914* (Cth), s 19AQ(6).

2017 *Crimes Act 1914* (Cth), s 19AQ(2).

2018 *DPP (Cth) v WJB* (2000) 78 SASR 44; *Nweke v R* [2020] NSWCCA 153, [73]-[75].

2019 *Crimes Act 1914* (Cth), s 19AQ(5); *R v Novak* [2003] VSCA 46, [63].

2020 *R v Piacentino* (2007) 15 VR 501; *Crimes Act 1914* (Cth), s 19AS(1)(d).

2021 *Nweke v R (No 2)* [2020] NSWCCA 227, [9]-[10].

- Where **the new sentence was more than 3 years for a federal offence/s**, the court was required[2022] to fix a single new NPP in respect of the new sentence and the outstanding sentence, having regard to the total period of imprisonment that the person was liable to serve.[2023]
- Where the new sentence was 3 years or less for a federal offence/s, and either (i) the outstanding sentence was life imprisonment, or (ii) the outstanding sentence and the new sentence aggregated more than 3 years, the court was required[2024] to fix a single new NPP in respect of the new sentence and the outstanding sentence, having regard to the total period of imprisonment that the person was liable to serve.[2025]
- Where the new sentence was 3 years or less for a federal offence, and the outstanding sentence and the new sentence aggregated 3 years or less, the court was required not to fix a NPP but was permitted to make a RRO in respect of the new sentence and the outstanding sentence, having regard to the total period of imprisonment that the person was liable to serve.[2026]
- Where the new sentence was more than 3 months for a State/Territory offence/s, and the outstanding federal sentence was more than 3 years, the court was required[2027] to fix a single new NPP in respect of the outstanding federal sentence.[2028]
- Where **the new sentence was more than 3 months for a State/Territory offence, and the outstanding federal sentence was 3 years or less**, the court was required not to fix a NPP, but was permitted to make a RRO in respect of the outstanding federal sentence.[2029]

A court sentencing for an offence which constituted a breach of parole was required to take into account the fact that (subject to remissions and to any credit for "street time") the whole of the original federal sentence was liable to be served, regardless of whether a NPP or a RRO was also fixed. The court was also required to have regard to the totality principle.[2030] (The regime relating to credit for "street time" is described below.)

If the court fixed a new federal NPP it could not fix a single NPP in respect of both federal and State/Territory sentences of imprisonment. If a NPP was to apply to the State/Territory offence, it needed to be fixed separately.[2031]

2022 Subject to the Court's power to decline to set a NPP in certain circumstances – see *Crimes Act 1914* (Cth), s 19AR(4)-(7).

2023 *Crimes Act 1914* (Cth), s 19AR(1).

2024 Subject to the Court's power to decline to set a NPP in certain circumstances – see *Crimes Act 1914* (Cth), s 19AR(4)-(7).

2025 *Crimes Act 1914* (Cth), s 19AR(2)(d).

2026 *Crimes Act 1914* (Cth), s 19AR(2)(e).

2027 Subject to the Court's power to decline to set a NPP in certain circumstances – see *Crimes Act 1914* (Cth), s 19AR(4)-(7).

2028 *Crimes Act 1914* (Cth), s 19AR(3)(d). There was no express requirement to have regard, in fixing the new federal NPP, to the total period of imprisonment that the person was liable to serve. But s 16A of the *Crimes Act* applied to the fixing of the new NPP. That section accommodates common law principles of totality: *Johnson v R* (2004) 78 ALJR 616.

2029 *Crimes Act 1914* (Cth), s 19AR(3)(e). There was no express requirement to have regard, in deciding whether to make the new RRO, to the total period of imprisonment that the person was liable to serve. But s 16A of the *Crimes Act* applied to the decision whether to make the new RRO. That section accommodates common law principles of totality: *Johnson v R* (2004) 78 ALJR 616.

2030 *R v Arico (No 2)* [2002] VSCA 230, [8]-[11]; *R v Piacentino* (2007) 15 VR 501, [106]-[108].

2031 *Crimes Act 1914* (Cth), s 19AJ and s 19AR(6).

The regime for crediting "street time"

A parolee or licensee whose parole or licence was revoked (whether automatically or by the Attorney-General) was generally liable to serve the balance of the sentence that was outstanding at the time of their release on parole. However ss 19AA and 19AQ(5) of the *Crimes Act 1914* (Cth) provided for credit to be given for a period between the parolee's or licensee's release on parole and the revocation of parole (often referred to as "street time" or "clean street time"). Depending on the law of the relevant State or Territory,[2032] that period of "street time" could be credited in reducing the outstanding period of the sentence to be served.[2033] If it was not so credited, the period could be taken into account in the fixing of a new NPP following the revocation of parole (under s 19AR or s 19AW, as the case may be).

Section 19AQ(5) provided:

> Where the parole order or licence relating to a person is revoked under subsection (1) or (3) [i.e. the automatic revocation provisions], the person becomes liable to serve that part of the sentence or each sentence for a federal offence that the person had not served at the time of their release under that order or licence, subject to the operation of subsection 19AA(2) and subject (except in the case of a life sentence) to any further remission or reduction of that sentence. [emphasis added]

Section 19AA relevantly provided:

> *(1) A law of a State or Territory that provides for the remission or reduction of State or Territory sentences applies in the same way to the remission or reduction of a federal sentence in a prison of that State or Territory.*
>
> *…*
>
> *(2) Where a law of a State or Territory provides that a person is to be taken to be serving a State or Territory sentence during the period from the time of release under a parole order or licence (however called) until the parole order or licence is, or is taken to be, revoked, the law:*
>
> *(a) is, for the purposes of subsection (1), to be taken to be providing for the remission or reduction of sentences; and*
>
> *(b) applies to any calculation of the part of a federal sentence remaining to be served at the time of a federal offender's release under a federal parole order or licence as if the sentence were a State or Territory sentence.*
>
> *(3) Where a federal offender who is released on parole or licence and whose parole order or licence has subsequently been revoked does not get the benefit of subsection (2) in calculating the part of any federal sentence of imprisonment remaining to be served at the time of release:*
>
> *(a) a court fixing a new non-parole period in respect of such a person under section 19AR; or*
>
> *(b) a prescribed authority fixing a non-parole period in respect of such a person under section 19AW;*

2032 The relevant State/Territory was the one in which the offender was serving their sentence at the time of release on federal parole, or (possibly) the State/Territory in which the offender had been on parole with the permission of the relevant Commonwealth authority at the time the calculation fell to be performed: *DPP (Cth) v Wallace* (2011) 43 WAR 61, [46] (Martin CJ).

2033 The automatic reduction did not apply to reduce the NPP or pre-release period under a RRO: *Crimes Act 1914* (Cth), s 19AA(1A).

must have regard to the period of time spent by the person on parole or licence before that parole order or licence is revoked or is to be taken to have been revoked.

Under these provisions, any entitlement to credit for "street time" depended upon whether the law of the relevant State or Territory "*provides that a person is to be taken to be serving a State or Territory sentence during the period from the time of release under a parole order or licence (however called) until the parole order or licence is, or is taken to be, revoked*" (s 19AA(2)) and for that reason was to be taken to (or otherwise did) relevantly provide "*for the remission or reduction of State or Territory sentences*" (s 19AA(1)).

Which jurisdictions had laws which provided for reduction for "street time"?

Immediately prior to the 2020 amendments coming into effect, the regimes under State or Territory law were as follows:

- **New South Wales, Queensland, Western Australia and South Australia** each had legislation[2034] of a type which fell within s 19AA(2). That is, those provisions directly provided that a person was taken to be serving a sentence between the time of release on parole and the time of revocation of the parole.
- The legislation in the **Northern Territory and the ACT** did not so provide.[2035] Those laws did not give any credit for "street time".
- The position in **Victoria and Tasmania** was less clear, but the laws in those States appeared not to be of a kind described in s 19AA(1) or (2). The relevant State laws[2036] provided no entitlement to credit for "street time". Instead, any credit to be given for time on parole to be treated as time served was a matter within the discretion of the State parole board. That is, the State laws did not themselves provide "*that a person is to be taken to be serving a State … sentence during the period from the time of release under a parole order or licence (however called) until the parole order or licence is, or is taken to be, revoked"* (s 19AA(2)); they did no more than allow a parole authority to make a direction to that effect. Nor could the State laws be said otherwise to 'provide for' the remission or reduction of State sentence*s* within s 19AA(1). The scheme of ss 19AA(1) and (2) and 19Q(5) of the *Crimes Act 1914* was, relevantly, to apply State or Territory *laws* which made specific provision for crediting "street time", not *executive decisions* under State laws. It was necessary that the period of time which remained to be served upon the automatic revocation of parole be capable of calculation with certainty from the moment of revocation. The court which sentenced the offender for the breaching offence needed to know the period which remained to be served, in order to comply with the applicable requirements of s 19AR and s 19AA(3) and in order to apply the principle of totality. Therefore the scheme could not be read as applying State laws which provided for determination of these matters by a State administrative body.

2034 **NSW:** *Crimes (Administration of Sentences)* Act 1999 (NSW), s 132. **Qld:** *Corrective Services Act* 2006 (Qld), s 211(2). **WA:** *Sentence Administration Act* 2003 (WA), s 71 (which specifically uses the term "clean street time"). **SA:** *Correctional Services Act* 1982 (SA), s 75(2). See also *DPP (Cth) v Wallace* (2011) 43 WAR 61, [55]; *DPP (Cth) v WJB* (2000) 78 SASR 44; *Nweke v R (No 2)* [2020] NSWCCA 227, [14]-[17].

2035 **ACT:** *Crimes (Sentence Administration) Act* 2005 (ACT), s 160 and s 139. See also *Turrise v Hunter* [2008] ACTSC 128, [15]-[21]. **NT:** *Parole of Prisoners Act* 1971 (NT), s 14.

2036 **Vic:** *Corrections Act* 1986 (Vic), s 77A. **Tas:** *Corrections Act* 1997 (Tas), s 79(5).

Calculating the "street time" where an automatic reduction applied

Where State or Territory law provided for "street time" to be credited, a further issue could arise as to the basis of calculation in cases of automatic revocation. In its 2006 report on federal sentencing,[2037] the Australian Law Reform Commission noted that "street time" for federal offenders was calculated from the date of release on parole or licence to the date of revocation. Automatic revocation of a federal parole order or licence occurred, not at the time of committing the offence while on parole or licence, but only when the offender was actually sentenced for that offence. If sentencing for a breaching offence occurred after expiry of the parole or licence period, revocation was deemed to have occurred immediately before the end of the parole or licence period. The practical effect was that, in those jurisdictions whose laws provide for automatic credit for "street time" (New South Wales, Queensland, Western Australia and South Australia), if the offender was sentenced for a breaching offence (that is, an offence committed during the parole period) after the expiry of the parole period, the whole (expired) parole period would be automatically credited as "street time".

This position may be contrasted with the position which applied to State offenders in those States at the time. For example, in New South Wales, a State offender's parole was deemed to have been revoked at the time of the first breach of parole conditions. Therefore the offender would be credited with "street time" only from the date of release on parole to the date of the first offence committed on parole. If the State offender committed an offence on the first day of release on parole, the offender may be entitled to no credit for any time on parole. By contrast, if a federal offender in New South Wales committed an offence on the first day of release on parole or licence, any automatic revocation of parole would not occur until the offender was sentenced for that offence; the whole of the intervening period would be credited to the offender as "street time". In a case in which the sentencing did not occur until after the expiry of the parole or licence period, the practical effect could be that the whole of the period on parole or licence was automatically credited to the offender and that no period remained to be served.[2038]

Position when State/Territory provisions did not provide for reduction for "street time"

Where the relevant State/Territory law did not give the offender the benefit of a reduction for "street time" (that is, in Victoria, Tasmania, the ACT and the NT), a sentencing court fixing a NPP under s 19AR was required to "*have regard to the period of time spent by the person on parole or licence before that parole order or licence is revoked or is to be taken to have been revoked*" (s 19AA(3)).

The requirement was only that the court or magistrate "have regard to" the period on parole. The parolee had no entitlement to any specific numerical deduction. Circumstances which could be relevant in determining the extent of any allowance to be made for the period spent on parole could include the duration and seriousness of any offending or other conduct in breach of parole conditions. For example, the allowance to be made could be reduced to the extent that the offender had used the period on parole to engage in serious offending or other serious breaches of parole.

Having regard to street time in fixing a new NPP did not affect the period which the parolee or licensee was liable to serve. The parolee or licensee remained liable to serve the whole of the balance of the sentence

2037 ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders* [2006] ALRC 103, [24.28]-[24.29].

2038 Although s 19AA(2) of the *Crimes Act 1914* referred to the relevant State law applying to the calculation of the balance of the federal sentence (which might suggest that the lesser reduction permitted under the State law would apply rather than the more generous federal provisions), obiter observations by Martin CJ in *DPP (Cth) v Wallace* (2011) 43 WAR 61, [59], suggest the contrary.

that was outstanding at the time of their release on parole or licence (subject to any remissions). In this regard, a federal parolee or licensee whose parole or licence was automatically revoked in Victoria, Tasmania, the ACT or the NT was substantially disadvantaged compared to a parolee or licensee who got the benefit of s 19AA(2) in the calculation of the period of a federal sentence of imprisonment which remained to be served. The amendments which came into effect on 20 July 2020 removed this anomaly.

A2.5 Credit for "street time" following revocation of parole or licence by the Attorney-General: *Crimes Act 1914*, s 19AA, as in force prior to 9 December 2021

If a parole order or licence is revoked by the Attorney-General, the parolee or licensee is generally liable to serve the balance of the sentence that was outstanding at the time of their release on parole or licence (see s 19APB of the *Crimes Act 1914* (Cth)).

However, prior to its repeal (which took effect on 9 December 2021), s 19AA of the Act provided for credit to be given for a period between a person's release on parole or licence and the revocation of the parole or licence (often referred to as "street time" or "clean street time").

This section of Appendix 2 describes the provision for credit for clean street time following revocation of a parole order or licence by the Attorney-General, under the law in force immediately before the repeal of s 19AA. The transitional provisions which apply to the repeal are described below: Appendix 2, "A2.7 Repeal of Crimes Act 1914 (Cth), s 19AA: transitional provisions".

The regime for crediting "street time" prior to the repeal of s 19AA

Immediately prior to its repeal, s 19AA relevantly provided:

> *(1) A law of a State or Territory that provides for the remission or reduction of State or Territory sentences applies in the same way to the remission or reduction of a federal sentence in a prison of that State or Territory.*
>
> *…*
>
> *(2) Where a law of a State or Territory provides that a person is to be taken to be serving a State or Territory sentence during the period from the time of release under a parole order or licence (however called) until the parole order or licence is, or is taken to be, revoked, the law:*
>
> *(a) is, for the purposes of subsection (1), to be taken to be providing for the remission or reduction of sentences; and*
>
> *(b) applies to any calculation of the part of a federal sentence remaining to be served at the time of a federal offender's release under a federal parole order or licence as if the sentence were a State or Territory sentence.*
>
> *(3) If a prescribed authority is fixing a non-parole period under section 19AW in respect of a federal offender:*
>
> *(a) who is released on parole or licence; and*
>
> *(b) whose parole order or licence has subsequently been revoked under section 19AU; and*
>
> *(c) who does not get the benefit of subsection (2) in calculating the part of any federal sentence of imprisonment remaining to be served at the time of release;*
>
> *the prescribed authority must have regard to the period of time spent by the person on parole or licence before that parole order or licence was revoked.*

Under these provisions, any *entitlement to credit* for "street time" (in the calculation of the period of the sentence which remains to be served[2039]) depended upon whether the law of the relevant State or Territory[2040] "*provides that a person is to be taken to be serving a State or Territory sentence during the period from the time of release under a parole order or licence (however called) until the parole order or licence is, or is taken to be, revoked*" (s 19AA(2)) and for that reason was to be taken to (or otherwise did) relevantly provide "*for the remission or reduction of State or Territory sentences*" (s 19AA(1)). If it did, the State or Territory law was applied to the federal parolee or licensee by s 19AA. If it did not, the parolee or licence had no entitlement to credit for "street time", but in fixing a new NPP under s 19AW, a prescribed authority (that is, a magistrate) "*must have regard to the period of time spent by the person on parole or licence before that parole order or licence was revoked*" (s 19AA(3)).

Which jurisdictions had laws which provided for reduction for "street time" at the relevant time?

In summary, **New South Wales**, **Queensland**, **Western Australia** and **South Australia** had such legislation. See the discussion of credit for street time in these States in Appendix 2, "A2.4 Automatic revocation of federal parole or licence prior to 20 July 2020", above. The same laws applied at the time of the repeal of s 19AA.

Position when State/Territory provisions did not provide for reduction for "street time"

Where the relevant State/Territory law did not give the offender the benefit of a reduction for "street time" (that is, in **Victoria**, **Tasmania**, the **ACT** and the **NT**), a magistrate fixing a NPP under s 19AW was required to "*have regard to the period of time spent by the person on parole or licence before that parole order or licence is revoked or is to be taken to have been revoked*" (s 19AA(3)). (Following the repeal of s 19AA, a similar regime applies in all jurisdictions.)

A2.6 Remissions and reductions of federal sentences of imprisonment under applied State law: *Crimes Act 1914* (Cth), s 19AA, as in force before 9 December 2021

The period of operation of s 19AA

Section 19AA of the *Crimes Act 1914* (Cth) was inserted by s 9 of the *Crimes Legislation Amendment Act (No. 2) 1989* (with effect from 17 July 1990). It applied State or Territory laws for remissions or reductions of a head sentence of imprisonment to federal offenders. It also provided for State or Territory laws for remissions or reductions of a non-parole period (NPP) as a result of industrial action to be applied to the NPP or pre-release period of a federal sentence of imprisonment.

The *Crimes Amendment (Remissions of Sentences) Act 2021* (Cth) (the amending Act) repealed s 19AA of the *Crimes Act 1914* (Cth), and made a number of consequential amendments, so that State and Territory provisions for remissions and reductions of sentences no longer applied to federal offenders. The amending Act came into effect on 9 December 2021.

2039 The automatic reduction did not apply to reduce the NPP or pre-release period under a RRO: *Crimes Act 1914* (Cth), s 19AA(1A).

2040 The relevant State/Territory is the one in which the offender is serving their sentence at the time of release on federal parole, or (possibly) the State/Territory in which the offender has been on parole with the permission of the relevant Commonwealth authority at the time the calculation falls to be performed: *DPP (Cth) v Wallace* (2011) 43 WAR 61, [46] (Martin CJ).

The impetus for the repeal of s 19AA

The impetus for the amending Act came from laws and practices in Victoria. Although Victoria enacted "truth in sentencing" laws in 1991 which abolished automatic remissions (*Corrections (Remissions) Act 1991* (Vic)), it retained a wide discretionary power for correctional authorities to reduce the length of a sentence or a non-parole period by giving credit for "emergency management days" (EMDs). At the time of the repeal of s 19AAA, the reduction powers were as follows (*Corrections Act 1986* (Vic), s 58E; *Corrections Regulations 2019* (Vic), reg 100):

- In the case of an industrial dispute or an emergency in the prison, up to 4 days reduction could be given for each day or part of a day on which the industrial dispute or emergency existed.
- In the case of "other circumstances of an unforeseen and special nature", a reduction of up to 14 days could be given.

The latter discretion was construed by Victorian authorities as permitting reductions of up to 14 days to be applied, without limit, for each day served where prisoners suffered deprivation or disruption relating to the COVID-19 emergency, including restrictive regimes because of COVID-19 or having out of cell time significantly restricted due to being placed in quarantine. That was so even if, in passing sentence, the sentencing court had taken into account the applicable prison conditions (for example, where the prisoner had endured such deprivation or disruption while held on remand).

This regime was applied by s 19AA to federal sentences. The effect was that the period of a federal sentence (that is, a head sentence) could be drastically reduced administratively by Victorian authorities. The Second Reading speech of the relevant Minister on the bill for the amending Act gave an example of a particular federal offender convicted of a foreign incursion offence who was given a reduction of 340 days as a result of being held on remand during the pandemic[2041] and of another offender, a high-risk child sex offender, who was given a reduction of more than 300 days off his sentence.[2042]

The Minister said,[2043]

> *Repealing section 19AA of the Crimes Act through this Bill is necessary to restore respect for the sentences which courts impose on federal offenders, including the careful balance struck by courts between the appropriate expiry of the non-parole period compared to the head sentence. Currently, if offenders are found suitable for release on parole after EMDs have been applied to reduce their head sentence, their rehabilitation and reintegration options may be limited or less effective during their shorter parole period, increasing the risk of reoffending. The removal of the unpredictable application of EMDs is critical to ensure community safety.*

2041 Second Reading Speech of the Minister for Families and Social Services, Minister for Women's Safety and Manager of Government Business in the Senate on the *Crimes Amendment (Remissions of Sentences) Bill 2021*, *Commonwealth Parliamentary Debates, Senate*, 25 August 2021, 76. In that case the sentencing judge had also taken into account, as a factor mitigating the sentence imposed, hardship caused by being held on remand during the pandemic: *R v Brookman* [2021] VSC 367, [46]-[47].

2042 Second Reading Speech of the Minister for Families and Social Services, Minister for Women's Safety and Manager of Government Business in the Senate on the *Crimes Amendment (Remissions of Sentences) Bill 2021*, *Commonwealth Parliamentary Debates, Senate*, 25 August 2021, 77.

2043 Second Reading Speech of the Minister for Families and Social Services, Minister for Women's Safety and Manager of Government Business in the Senate on the *Crimes Amendment (Remissions of Sentences) Bill 2021*, *Commonwealth Parliamentary Debates, Senate*, 25 August 2021, 77.

> …
>
> *Further, the Bill is necessary to ensure that federal offenders are being treated more consistently across Australia. Under the existing laws, a federal offender incarcerated in Victoria may serve a significantly lower sentence than they would if they served their sentence in any other jurisdiction. In addition, where an offender has been sentenced since the beginning of the COVID-19 pandemic, courts have taken into account additional hardships and restrictions imposed on prisoners, so offenders are already receiving consideration of the impact of COVID-19 when being sentenced. The subsequent granting of EMDs by Victoria can lead to the impacts of COVID'19 being 'double-counted', with offenders effectively receiving two discounts off their sentence.*

Credit for "street time" following automatic revocation of federal parole or licence

In the period up to 20 July 2020, s 19AA also had a significant effect on the credit to be given to a person released on federal parole or licence for the period since their release ("street time"), if the person's parole or licence was automatically revoked. The operation of that regime is described above: see Appendix 2, "A2.4 Automatic revocation of federal parole or licence prior to 20 July 2020".

Following amendments which took effect on 20 July 2020, credit for "street time" following the automatic revocation of federal parole or licence is determined by a court and not pursuant to laws applied by s 19AA. For a description of the current regime, see "4.11.11 Automatic revocation of parole or licence".

Credit for "street time" following revocation of federal parole or licence by the Attorney-General

In the period prior to its repeal on 9 December 2021, s 19AA also had a significant effect on the credit to be given to a person released on federal parole or licence for the period since their release, if the person's parole or licence was revoked by the Attorney-General. The operation of that regime is described in Appendix 2, "A2.5 Credit for "street time" following revocation of parole or licence by the Attorney-General: Crimes Act 1914, s 19AA, as in force prior to 9 December 2021". In summary, in States which had laws which provided credit for "street time" for offenders on parole or licence (New South Wales, Queensland, Western Australia and South Australia), s 19AA applied those laws to federal offenders. With the repeal of s 19AA, those laws no longer apply to federal offenders (subject to the transitional provisions described in Appendix 2, "A2.7 Repeal of Crimes Act 1914 (Cth), s 19AA: transitional provisions").

The repeal of s 19AA did not have any similar effect on federal parolees or licensees in Victoria, Tasmania, the Australian Capital Territory or the Northern Territory, because the laws in those jurisdictions did not provide automatic credit for "street time" and therefore were not applied by s 19AA.

Following the repeal of s 19AA, if federal parole or licence is revoked by the Attorney-General, the period the offender is liable to serve is not reduced by any period between their release and their return to custody. The only allowance for "clean street time" is that, in fixing a new NPP under s 19AW of the *Crimes Act*, a magistrate must "have regard to" the period of time spent by the offender on parole or licence before it was revoked.

The relevant Minister explained that the reason for ceasing to apply State laws which automatically gave credit for "street time" was to ensure that "*federal offenders are subject to a consistent, Australia wide framework for 'clean street time', which rightly places decision-making in the hands of the court*".[2044]

Transitional provisions

The transitional provisions relating to the repeal of s 19AA are described in Appendix 2, "A2.7 Repeal of Crimes Act 1914 (Cth), s 19AA: transitional provisions".

A2.7 Repeal of *Crimes Act 1914* (Cth), s 19AA: transitional provisions

The *Crimes Amendment (Remissions of Sentences) Act 2021 (Cth)* (the amending Act) repealed s 19AA of the *Crimes Act 1914* and made consequential amendments to a number of other provisions of the Act. The amending Act came into operation on 9 December 2021 (s 2(1)).

Item 11 of Schedule 1 of the amending Act sets out transitional provisions. The following is a summary of those provisions.

The transitional provisions apply if, immediately before the commencement of the amending Act,

(a) a person had served, or was serving, a federal sentence in a prison of a State or Territory; and

(b) a law of the State or Territory provides, or provided, for the remission or reduction (however described) of State or Territory sentences being served in a prison of the State or Territory; and

(c) as a result of:

(i) the law mentioned in paragraph (b); and

(ii) subsection 19AA(1) of the *Crimes Act 1914* (as in force immediately before the commencement of item 11);

there was a remission or reduction (the pre-commencement remission or reduction) of the federal sentence.

Remissions and reductions of completed sentences: If, before 9 December 2021, the person had served the federal sentence, Part IB of the *Crimes Act* continues to apply as if the amendments had not been made.

State laws providing for street time: If the person was serving the federal sentence and the State or Territory law is or was of a kind described in s 19AA(2) (that is, a law relating to street time on parole or licence), Part IB of the *Crimes Act* continues to apply, in relation to the pre-commencement remission or reduction of the federal sentence, as if the amendments had not been made. (Such laws existed in New South Wales, Queensland, Western Australia and South Australia, but not in Victoria, Tasmania, the ACT or the NT: see Appendix 2, "A2.4 Automatic revocation of federal parole or licence prior to 20 July 2020".)

Other State or Territory laws for remissions or reductions of sentence: If the person was serving the federal sentence and the State or Territory law is or was not of a kind described in– 19AA(2)--

- the amendments of Part IB of the *Crimes Act* made by the amending Act apply in relation to the pre-commencement remission or reduction of the federal sentence and

2044 Second Reading Speech of the Minister for Families and Social Services, Minister for Women's Safety and Manager of Government Business in the Senate on the *Crimes Amendment (Remissions of Sentences) Bill 2021*, *Commonwealth Parliamentary Debates, Senate*, 25 August 2021, 77.

- the pre-commencement remission or reduction of the federal sentence is taken to be of no effect.

That is, any remissions or reductions (such as those under the regime for EMDs in Victoria) do not apply to a federal sentence which a person was serving at the time the amending Act came into operation. Any pre-commencement remissions or reductions (that is, those which had been credited to the prisoner) are taken to be of no effect. The underlying policy was explained in the Second Reading speech for the relevant Bill as follows:[2045]

> *This ensures that any offenders who are still in prison at the time the Bill commences will not receive hundreds of days off their sentences, and will instead serve the sentence that the court considered was appropriate for them.*

2045 Second Reading Speech of the Minister for Families and Social Services, Minister for Women's Safety and Manager of Government Business in the Senate on the *Crimes Amendment (Remissions of Sentences) Bill 2021*, *Commonwealth Parliamentary Debates, Senate*, 25 August 2021, 77.

APPENDIX 3: FEDERAL OFFENCES TRIGGERING REGISTRATION UNDER STATE AND TERRITORY SEX OFFENDER LEGISLATION

This Appendix lists Commonwealth offences which are specified as registrable offences under the law of each State and Territory.

A conviction for a Commonwealth offence which is listed as a registrable offence, in any State or Territory, operates as a trigger for mandatory sentencing requirements if the person is later convicted of a Commonwealth child sexual abuse offence specified in s 16AAB(2) of the *Crimes Act 1914* (Cth) in relation to conduct engaged in on or after 23 June 2020: see "7.3.3 Mandatory terms of imprisonment for high-level Commonwealth child sex offences and for repeat child sexual abuse offences".

A3.1 New South Wales: Registrable federal offences under the *Child Protection (Offenders Registration) Act 2000* (NSW)

Class 1 offences include the following federal offences (listed in s 3)

- Sexual offences against children outside Australia, under Division 272 of the *Criminal Code*:
  - s 272.8 (sexual intercourse with child under 16 outside Australia, or causing such activity in defendant's presence);
  - s 272.10 (aggravated offence—child with mental impairment or under care, supervision or authority of defendant) where involving sexual intercourse
  - s 272.11 (persistent sexual abuse of child outside Australia);
- Offences of benefiting from (s 272.18), encouraging (s 272.19) or preparing for or planning (s 272.20) sexual offences against children outside Australia (under Division 272 of the *Criminal Code*) if it relates to another Class 1 offence as elsewhere defined in s 3 of the *Child Protection (Offenders Registration) Act 2000* (NSW);
- An offence an element of which is an intention to commit an offence of a kind listed in the definition of "Class 1 Offence" in s 3 of the *Child Protection (Offenders Registration) Act 2000* (NSW);
- An offence of attempting, or of conspiracy or incitement, to commit an offence of a kind listed in the definition of "Class 1 Offence" in s 3 of the *Child Protection (Offenders Registration) Act 2000* (NSW);
- An offence that, at the time it was committed:
  - was a Class 1 offence for the purposes of the *Child Protection (Offenders Registration) Act 2000* (NSW), or
  - in the case of an offence occurring before the commencement of this definition [27/6/2000], was an offence of a kind listed in the definition of "Class 1 Offence" in s 3 of the *Child Protection (Offenders Registration) Act 2000* (NSW).

Class 2 offences include the following federal offences (listed in s 3)

- Offences against the following provisions of the *Criminal Code*:
  - s 271.4 (trafficking in children)
  - s 271.7 (domestic trafficking in children)
  - s 272.9 (sexual activity (other than sexual intercourse) with child under 16 outside Australia or causing such activity in defendant's presence);
  - s 272.10(1) (aggravated offence—child under 16 with mental impairment or under care, supervision or authority of defendant) where not involving sexual intercourse (if it relates to an underlying offence against section 272.9);
  - s 272.11 (persistent sexual abuse of child outside Australia);

  - s 272.12 (sexual intercourse with young person outside Australia—defendant in position of trust or authority - or causing such activity in defendant's presence);
  - s 272.13 (sexual activity (other than sexual intercourse) with young person outside Australia—defendant in position of trust or authority - or causing such activity in defendant's presence);
  - s 272.14 (procuring child to engage in sexual activity outside Australia);
  - s 272.15 "grooming" child to engage in sexual activity outside Australia).
- Offences of benefiting from (s 272.18), encouraging (s 272.19) or preparing for or planning (s 272.20) sexual offences against children outside Australia (under Division 272 of the *Criminal Code*) if it relates to another Class 2 offence as elsewhere defined in s 3 of the *Child Protection (Offenders Registration) Act 2000* (NSW).
- Offences against the *Criminal Code* relating to child pornography and child abuse material outside Australia:
  - s 273.5 (possessing, controlling, producing, distributing or obtaining child pornography material outside Australia);
  - s 273.6 (possessing, controlling, producing, distributing or obtaining child abuse material outside Australia);
  - s 273.7 (aggravated offending relating to child pornography or child abuse material outside Australia).
- Offences against the *Criminal Code* relating to the use of a postal or similar service:
  - s 471.16 (using a postal or similar service for child pornography material);
  - s 471.17 (possessing, controlling, producing, supplying or obtaining child pornography material for use through a postal or similar service);
  - s 471.19 (using a postal or similar service for child abuse material);
  - s 471.20 (possessing, controlling, producing, supplying or obtaining child abuse material for use through a postal or similar service);
  - s 471.22 (aggravated offending relating to child pornography or child abuse material).
  - s 471.24 (using a postal or similar service to procure persons under 16);
  - s 471.25 (using a postal or similar service to "groom" persons under 16);
  - s 471.26 (using a postal or similar service to send indecent material to person under 16).
- Offences against the *Criminal Code* relating to the use of a carriage service:
  - s 474.19 (using a carriage service for child pornography material);
  - s 474.20 (possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service);
  - s 474.22 (using a carriage service for child abuse material);
  - s 474.23 (possessing, controlling, producing, supplying or obtaining child abuse material through a carriage service)
  - s 474.24A (aggravated offence involving child abuse material through a carriage service);
  - s 474.25A (using a carriage service for sexual activity with person under 16);
  - s 474.25B (aggravated offence—child with mental impairment or under care, supervision or authority of defendant);
  - s 474.26 (using a carriage service to procure persons under 16);
  - s 474.27 (using a carriage service to "groom" persons under 16);
  - s 474.27A (using a carriage service to transmit indecent communication to person under 16).

- Offences against s 270.6[2046] or s 270.7 (deceptive recruiting for labour or services) of the *Criminal Code* where the victim is a child.[2047]
- Offences under s 233BAB of the *Customs Act 1901* (Cth) involving items that are child pornography or child abuse material.
- An offence an element of which is an intention to commit an offence of a kind listed in the definition of "Class 2 Offence" in s 3 of the *Child Protection (Offenders Registration) Act 2000* (NSW);
- An offence of attempting, or of conspiracy or incitement, to commit an offence of a kind listed in the definition of "Class 2 Offence" in s 3 of the *Child Protection (Offenders Registration) Act 2000* (NSW);
- An offence that, at the time it was committed:
  - was a Class 2 offence for the purposes of the *Child Protection (Offenders Registration) Act 2000* (NSW), or
  - in the case of an offence occurring before the commencement of this definition [27/6/2000], was an offence of a kind listed in the definition of "Class 2 Offence" in s 3 of the *Child Protection (Offenders Registration) Act 2000* (NSW).

2046 Section 270.6 originally provided for "sexual servitude" offences. The *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Act 2013* (Cth) (which came into effect on 8 March 2013) repealed s 270.6, re-enacted servitude offences as s 270.5, and substituted a new s 270.6 which contained only definition provisions.

2047 The New South Wales provisions appear to apply to forced labour and deceptive recruitment of children even if it does not relate to sexual services.

A3.2 Victoria: Registrable federal offences under the *Sex Offenders Registration Act 2004* (Vic)

Class 1 offences (s 7(2)) include the following federal offences (listed in Schedule 1)

- Sexual offences against children outside Australia, under Division 272 of the *Criminal Code*:
  - s 272.8(1) and (2) (sexual intercourse with child under 16 outside Australia, or causing such activity in defendant's presence);
  - s 272.9(1) and (2) (sexual activity (other than sexual intercourse) with child under 16 outside Australia, or causing such activity in defendant's presence);
  - s 272.10(1) (aggravated offence—child under 16 with mental impairment or under care, supervision or authority of defendant);
  - s 272.11(1) (persistent sexual abuse of child under 16 outside Australia);
  - s 272.12(1) and (2) (sexual intercourse with young person outside Australia—defendant in position of trust or authority – or causing such activity in defendant's presence);
  - s 272.13(1) and (2) (sexual activity (other than sexual intercourse) with young person outside Australia—defendant in position of trust or authority – or causing such activity in defendant's presence);
  - s 272.14(1) (procuring child to engage in sexual activity outside Australia);
- An offence an element of which is an intention to commit an offence of a kind listed in Schedule 1 to the *Sex Offenders Registration Act 2004* (Vic).
- An offence that, at the time it was committed[2048]—
  - was a Class 1 offence for the purposes of the *Sex Offenders Registration Act 2004* (Vic); or
  - if committed before 1 October 2004, was an offence of a kind listed in Schedule 1 to the *Sex Offenders Registration Act 2004* (Vic).
- An offence of attempting, or conspiracy or incitement to commit an offence listed in Schedule 1 to the *Sex Offenders Registration Act 2004* (Vic).

Class 2 offences (s 7(3)) include the following federal offences (listed in Schedule 2)

- Offences against s 270.7 of the *Criminal Code* where the victim is a child and the conduct involves deceptive recruiting for sexual services.
- Offences against s 271.4 (trafficking in children) or s 271.7 (domestic trafficking in children) of the *Criminal Code* in circumstances where the purpose of the exploitation is to provide sexual services.
- Offences of benefiting from, encouraging or preparing for sexual offences against children outside Australia (under Division 272 of the *Criminal Code*):
  - s 272.15(1) ("grooming" child to engage in sexual activity outside Australia);
  - s 272.15A(1) ("grooming" person to make it easier to engage in sexual activity with a child outside Australia);
  - s 272.18(1) (benefiting from offence against Division 272);
  - s 272.19(1) (encouraging offence against Division 272);
  - s 272.20(1) and (2) (preparing for or planning offence against Division 272);
- Offences against the *Criminal Code* relating to child pornography and child abuse material outside Australia:

2048 The Explanatory Memorandum to the *Sex Offenders Registration Amendment (Miscellaneous) Bill 2017* (Vic), states, by way of example, that historical offences against the now repealed section 270.6 of the *Criminal Code* (sexual servitude offences) will continue to be Class 1 offences.

  - s 273.5(1) (possessing, controlling, producing, distributing or obtaining child pornography material outside Australia);
  - s 273.6(1) (possessing, controlling, producing, distributing or obtaining child abuse material of a sexual nature outside Australia), except if the offence only relates to material that depicts, represents or describes a person who is, or appears to be, or is implied to be, a victim of cruelty or physical abuse, where the cruelty or physical abuse is not sexual ;
  - s 273.7(1) (aggravated offending relating to child pornography or child abuse material of a sexual nature outside Australia, except if the offence only relates to material that depicts, represents or describes a person who is, or appears to be, or is implied to be, a victim of cruelty or physical abuse, where the cruelty or physical abuse is not sexual).
  - s 273A.1 (possession of child-like sex dolls etc)
- Offences against the *Criminal Code* relating to the use of a postal or similar service:
  - s 471.22 (aggravated offending relating to child abuse material of a sexual nature. Except if the offence only relates to material that depicts, represents or describes a person who is, or appears to be, or is implied to be, a victim of cruelty or physical abuse, where the cruelty or physical abuse is not sexual).
  - s 471.24 (using a postal or similar service to procure persons under 16);
  - s 471.25 (using a postal or similar service to "groom" persons under 16);
  - ss 471.25A(1), (2) or (3) (using a postal or similar service to "groom" another person to make it easier to procure persons under 16);
  - s 471.26 (using a postal or similar service to send indecent material to person under 16).
- Offences against the *Criminal Code* relating to the use of a carriage service:
  - s 474.22(1) (using a carriage service for child abuse material);
  - s 474.22A(1) (possessing or controlling child abuse material obtained or accessed using a carriage service) except if the offence only relates to material that depicts, represents or describes a person who is, or appears to be, or is implied to be, a victim of cruelty or physical abuse, where the cruelty or physical abuse is not sexual
  - s 474.23(1) (possessing, controlling, producing, supplying or obtaining child abuse material of a sexual nature through a carriage service) except if the offence only relates to material that depicts, represents or describes a person who is, or appears to be, or is implied to be, a victim of cruelty or physical abuse, where the cruelty or physical abuse is not sexual;
  - s 474.23A(1) (conduct for the purposes of electronic service used for child abuse material);
  - s 474.24A (aggravated offence involving child abuse material of a sexual nature through a carriage service); except if the offence only relates to material that depicts, represents or describes a person who is, or appears to be, or is implied to be, a victim of cruelty or physical abuse, where the cruelty or physical abuse is not sexual;
  - s 474.25A (using a carriage service for sexual activity with person under 16);
  - s 474.25B (aggravated offence—child with mental impairment or under care, supervision or authority of defendant);
  - s 474.25C (using a carriage service to prepare or plan to cause harm to, engage in sexual activity with, or procure for sexual activity, persons under 16) except if the offence does not involve an act in preparing or planning to engage in sexual activity with a person under 16 years of age or an act in preparing or planning to procure a person under 16 years of age to engage in sexual activity;
  - s 474.26 (using a carriage service to procure persons under 16);
  - s 474.27 (using a carriage service to "groom" persons under 16);

  - s 474.27A(1) (using a carriage service to transmit indecent communication to person under 16).
  - s 474.27AA(1), (2) or (3) (using a carriage service to "groom" another person to make it easier to procure persons under 16 years of age).
- Offences under s 233BAB of the *Customs Act 1901* (Cth) involving items of child abuse material except if the offence only relates to material that depicts, represents or describes a person who is, or appears to be, or is implied to be, a victim of cruelty or physical abuse, where the cruelty or physical abuse is not sexual.
- An offence an element of which is an intention to commit an offence of a kind listed in Schedule 2 to the *Sex Offenders Registration Act 2004* (Vic).
- An offence that, at the time it was committed—
  - was a Class 2 offence for the purposes of the *Sex Offenders Registration Act 2004* (Vic); or
  - if committed before 1 October 2004, was an offence of a kind listed in Schedule 2 to the *Sex Offenders Registration Act 2004* (Vic).
- An offence of attempting, or conspiracy or incitement to commit an offence listed in Schedule 2 to the *Sex Offenders Registration Act 2004* (Vic).

A3.3 Queensland: Registrable federal offences under the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld)

Prescribed offences include the following federal offences (listed in Schedule 1)

- Offences against the following provisions of the *Criminal Code*, as in force from time to time before being amended by *the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act* 2013 (Cth) —
  - s 270.6 (Sexual servitude offences)
  - s 270.7 (Deceptive recruiting for sexual services)

  in circumstances where:
  - the victim is a child; or
  - the police commissioner reasonably believes the offender believed that the victim was a child.
- An offence against any of the following provisions of the *Criminal Code*:
  - s 271.4 (Offence of trafficking in children)
  - s 271.7 (Offence of domestic trafficking in children)
  - s 272.8 (Sexual intercourse with child outside Australia)
  - s 272.9 (Sexual activity (other than sexual intercourse) with child outside Australia)
  - s 272.10 (Aggravated offence—child with mental impairment or under care, supervision or authority of defendant)
  - s 272.11 (Persistent sexual abuse of child outside Australia)
  - s 272.12 (Sexual intercourse with young person outside Australia—defendant in position of trust or authority)
  - s 272.13 (Sexual activity (other than sexual intercourse) with young person outside Australia—defendant in position of trust or authority)
  - s 272.14 (Procuring child to engage in sexual activity outside Australia)
  - s 272.15 ("Grooming" child to engage in sexual activity outside Australia)
  - s 272.15A ("Grooming" person to make it easier to engage in sexual activity with a child outside Australia)
  - s 272.18 (Benefiting from offence against Division 272)
  - s 272.19 (Encouraging offence against Division 272)
  - s 272.20 (Preparing for or planning offence against Division 272)
  - s 273A.1 (Possession of child-like sex dolls etc.)
  - s 273.5 (Possessing, controlling, producing, distributing or obtaining child pornography material outside Australia)
  - s 273.6 (Possessing, controlling, producing, distributing or obtaining child abuse material outside Australia)
  - s 273.7 (Aggravated offence—offence involving conduct on 3 or more occasions and 2 or more people)
  - s 471.16 (Using a postal or similar service for child pornography material)
  - s 471.17 (Possessing, controlling, producing, supplying or obtaining child pornography material for use through a postal or similar service)
  - s 471.19 (Using a postal or similar service for child abuse material)
  - s 471.20 (Possessing, controlling, producing, supplying or obtaining child abuse material for use through a postal or similar service)
  - s 471.22 (Aggravated offence—offence involving conduct on 3 or more occasions and 2 or more people)

  - s 471.24 (Using a postal or similar service to procure persons under 16)
  - s 471.25 (Using a postal or similar service to "groom" persons under 16)
  - s 471.25A (Using a postal or similar service to "groom" another person to make it easier to procure persons under 16)
  - s 471.26 (Using a postal or similar service to send indecent material to person under 16)
  - s 474.19 (Using a carriage service for child pornography material)
  - s 474.20 (Possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service)
  - s 474.22 (Using a carriage service for child abuse material)
  - s 474.22A (Possessing or controlling child abuse material obtained or accessed using a carriage service)
  - s 474.23 (Possessing, controlling, producing, supplying or obtaining child abuse material for use through a carriage service)
  - s 474.23A (Conduct for the purposes of electronic service used for child abuse material)
  - s 474.24A (Aggravated offence—offence involving conduct on 3 or more occasions and 2 or more people)
  - s 474.25A (Using a carriage service for sexual activity with person under 16 years of age)
  - s 474.25B (Aggravated offence—child with mental impairment or under care, supervision or authority of defendant)
  - s 474.25C (Using a carriage service to prepare or plan to cause harm to, engage in sexual activity with, or procure for sexual activity, persons under 16)
  - s 474.26 (Using a carriage service to procure persons under 16 years of age)
  - s 474.27 (Using a carriage service to "groom" persons under 16 years of age)
  - s 474.27AA (Using a carriage service to "groom" another person to make it easier to procure persons under 16 years of age)
  - s 474.27A (Using a carriage service to transmit indecent communication to person under 16 years of age).
- An offence against any of the following provisions of the *Crimes Act 1914* (Cth), as in force from time to time before being repealed[2049] by the *Crimes Legislation Amendment (Sexual Offences Against Children) Act* 2010 (Cth) —
  - s 50BA (Sexual intercourse with child under 16)
  - s 50BB (Inducing child under 16 to engage in sexual intercourse)
  - s 50BC (Sexual conduct involving child under 16)
  - s 50BD (Inducing child under 16 to be involved in sexual conduct)
  - s 50DA (Benefiting from offence against this Part)
  - s 50DB (Encouraging offence against this Part)
- An offence against the *Customs Act 1901* (Cth), s 233BAB that involves child pornography or child abuse material.
- An offence an element of which is an intention to commit an offence listed in Schedule 1.
- An offence of attempting, or of conspiracy or incitement, to commit an offence listed in Schedule 1.
- An offence that, at the time it was committed, was a class 1 offence or a class 2 offence within the meaning of the *Child Protection (Offender Reporting and Offender Prohibition Order) Act* 2004 (Qld) as

2049 Repeal of these sections occurred on 15 April 2010.

in force immediately before the commencement[2050] of the *Child Protection (Offender Reporting) and Other Legislation Amendment Act* 2014 (Qld).

2050 Operative provisions commenced on 22 September 2014, substituting a new Schedule 1 containing "prescribed offences" as compared to "Class 1" and Class 2" offences in the previous Schedule 1.

A3.4 Western Australia: Registrable federal offences under the *Community Protection (Offender Reporting) Act 2004* (WA)

Class 1 offences include the following federal offences (listed in s 10 and Schedule 1)

- An offence against s 50BA[2051] of the *Crimes Act 1914* (Cth) (sexual intercourse with child under 16).
- An offence against s 50BB[2052] of the *Crimes Act 1914* (Cth) (inducing child under 16 to engage in sexual intercourse).
- An offence an element of which is an intention to commit an offence of the above kind.
- An offence of attempting, or of conspiracy or incitement, to commit an offence of the above kind.
- An offence that, at the time it was committed:
  - was a Class 1 offence; or
  - if the offence was committed before the commencement date – was an offence of a kind referred to above;

Class 2 offences include the following federal offences (listed in s 11 and Schedule 2)

- An offence against s 50BC[2053] of the *Crimes Act 1914* (Cth) (sexual conduct involving child under 16).
- An offence against s 50BD[2054] of the *Crimes Act 1914* (Cth) (inducing child under 16 to be involved in sexual conduct).
- An offence against s 50DA or 50DB of the *Crimes Act 1914* (Cth) (benefiting from offence and encouraging offence, respectively)[2055]
- Offences under s 233BAB of the *Customs Act 1901* (Cth) involving items that are child pornography or child abuse material.
- An offence an element of which is an intention to commit an offence of the above kinds.
- An offence of attempting, or of conspiracy or incitement, to commit an offence of the above kinds.
- An offence that, at the time it was committed:
  - was a Class 2 offence; or
  - if the offence was committed before the commencement date – was an offence of the kind referred to above.

2051 Section 50BA was repealed on 15 April 2010 by the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) (Act No. 42 of 2010).

2052 Section 50BB was repealed on 15 April 2010 by the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) (Act No. 42 of 2010).

2053 Section 50BC was repealed on 15 April 2010 by the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) (Act No. 42 of 2010).

2054 Section 50BD was repealed on 15 April 2010 by the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) (Act No. 42 of 2010).

2055 Sections 50DA and 50DB were repealed on 15 April 2010 by the C*rimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) (Act No. 42 of 2010).

A3.5 South Australia: Registrable federal offences under the *Child Sex Offenders Registration Act 2006* (SA)

Class 1 offences include the following federal offences (listed in Part 2 of Schedule 1)

- Offences against s 270.6 of the *Criminal Code,* as in force before the commencement of the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth).[2056]
- Sexual offences against children outside Australia, under Division 272 of the *Criminal Code*:
  - s 272.8 (sexual intercourse with child under 16 outside Australia, or causing such activity in defendant's presence);
  - s 272.10 (aggravated offence—child under 16 with mental impairment or under care, supervision or authority of defendant);
  - s 272.11 (persistent sexual abuse of child under 16 outside Australia);
  - s 272.12 (sexual intercourse with young person outside Australia—defendant in position of trust or authority - or causing such activity in defendant's presence);
  - s 272.13 (sexual activity (other than sexual intercourse) with young person outside Australia—defendant in position of trust or authority - or causing such activity in defendant's presence);
  - s 272.14 (procuring child to engage in sexual activity outside Australia);
  - s 272.15 (grooming child to engage in sexual activity outside Australia).
- Offences of benefiting from (s 272.18) or encouraging (s 272.19) sexual offences against children outside Australia (under Division 272 of the *Criminal Code*).
- An offence against a law of the Commonwealth previously in force that corresponds to any of the above offences.

Class 2 offences include the following federal offences (listed in Part 3 of Schedule 1)

- Offences against s 270.7 (deceptive recruiting) of the *Criminal Code* where the victim is a child.
- Offences against s 271.4 (trafficking in children) or s 271.7 (domestic trafficking in children) of the *Criminal Code*.
- Sexual offences against children outside Australia, under Division 272 of the *Criminal Code*:
  - s 272.9 (sexual activity (other than sexual intercourse) with child under 16 outside Australia, or causing such activity in defendant's presence);
  - s 272.15A ("grooming" person to make it easier to engage in sexual activity with a child outside Australia)
  - s 272.20 (preparing for or planning sexual offences against children outside Australia under Division 272 of the *Criminal Code*)
- Offence against the *Criminal Code* s 273A.1 (possession of child-like sex dolls etc)
- Offences against the *Criminal Code* relating to child pornography and child abuse material outside Australia:
  - s 273.5 (possessing, controlling, producing, distributing or obtaining child pornography material outside Australia);
  - s 273.6 (possessing, controlling, producing, distributing or obtaining child abuse material outside Australia);

2056 Section 270.6 originally provided for "sexual servitude" offences. The *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Act 2013* (Cth) (which came into effect on 8 March 2013) repealed s 270.6, re-enacted servitude offences as s 270.5, and substituted a new s 270.6 which contained only definition provisions.

  - s 273.7 (aggravated offending relating to child pornography or child abuse material outside Australia).
- Offences against the *Criminal Code* relating to the use of a postal or similar service:
  - s 471.16 (using a postal or similar service for child pornography material);
  - s 471.17 (possessing, controlling, producing, supplying or obtaining child pornography material for use through a postal or similar service);
  - s 471.19 (using a postal or similar service for child abuse material);
  - s 471.20 (possessing, controlling, producing, supplying or obtaining child abuse material for use through a postal or similar service);
  - s 471.22 (aggravated offending relating to child pornography or child abuse material).
  - s 471.24 (using a postal or similar service to procure persons under 16);
  - s 471.25 (using a postal or similar service to "groom" persons under 16);
  - s 471.25A (using a postal or similar service to “groom” another person to make it easier to procure persons under 16)
  - s 471.26 (using a postal or similar service to send indecent material to person under 16).
- Offences against the *Criminal Code* relating to the use of a carriage service:
  - s 474.19 (using a carriage service for child pornography material);
  - s 474.20 (possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service);
  - s 474.22 (using a carriage service for child abuse material);
  - s 474.22A (possessing or controlling child abuse material obtained or accessed using a carriage service)
  - s 474.23 (possessing, controlling, producing, supplying or obtaining child abuse material through a carriage service)
  - s 474.23A (conduct for the purposes of electronic service used for child abuse material)
  - s 474.24A (aggravated offence involving child abuse material through a carriage service);
  - s 474.25A (using a carriage service for sexual activity with person under 16);
  - s 474.25B (aggravated offence—child with mental impairment or under care, supervision or authority of defendant);
  - s 474.25C (Using a carriage service to prepare or plan to cause harm to, engage in sexual activity with, or procure for sexual activity, persons under 16), if the person was sentenced on the basis that the act was done with the intention of committing a sexual offence against a child
  - s 474.26 (using a carriage service to procure persons under 16);
  - s 474.27 (using a carriage service to "groom" persons under 16);
  - s 474.27AA (using a carriage service to “groom” another person to make it easier to procure persons under 16 years of age)
  - s 474.27A (using a carriage service to transmit indecent communication to person under 16).
- An offence against a law of the Commonwealth previously in force that corresponds to any of the above offences.
- Offences under s 233BAB of the *Customs Act 1901* (Cth) involving items that are child pornography.

A3.6Tasmania: Registrable federal offences under the *Community Protection (Offender Reporting) Act 2005* (Tas)

Class 1 offences include the following federal offences (listed in s 13 and Schedule 1)

- An offence against s 233BAB of the *Customs Act 1901* (Cth), that involves child exploitation material.
- An offence against any of the following provisions of the *Criminal Code*:
  - s 273.5 (Possessing, controlling, producing, distributing or obtaining child pornography material outside Australia)
  - s 273.6 (Possessing, controlling, producing, distributing or obtaining child abuse material outside Australia)
  - s 471.16 (Using a postal or similar service for child pornography material)
  - s 471.17 (Possessing, controlling, producing, supplying or obtaining child pornography material for use through a postal or similar service)
  - s 471.19 (Using a postal or similar service for child abuse material)
  - s 471.20 (Possessing, controlling, producing, supplying or obtaining child abuse material for use through a postal or similar service)
  - s 471.24 (Using a postal or similar service to procure persons under 16)
  - s 471.25 (Using a postal or similar service to "groom" persons under 16)
  - s 471.26 (Using a postal or similar service to send indecent material to person under 16)
  - s 474.19 (Using a carriage service for child pornography material)
  - s 474.20 (Possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service)
  - s 474.22 (Using a carriage service for child abuse material)
  - s 474.23 (Possessing, controlling, producing, supplying or obtaining child abuse material for use through a carriage service)
  - s 474.25A (Using a carriage service for sexual activity with person under 16)
  - s 474.26 (Using a carriage service to procure persons under 16)
  - s 474.27 (Using a carriage service to "groom" persons under 16)
  - s 474.27A (Using a carriage service to transmit indecent communication to person under 16).
- An offence an element of which is an intention to commit such an offence.
- An offence of attempting, or of conspiracy or incitement, to commit such an offence.
- An offence that, at the time it was committed:
  - was a Class 1 offence; or
  - if the offence was committed before the commencement date – was an offence of a kind referred to in s 13.

Class 2 offences include the following federal offences (listed in s 14 and Schedule 2)

- Offences against any of the following provisions of the *Criminal Code*:
  - s 272.9 (Sexual activity (other than sexual intercourse) with child outside Australia)
  - s 272.12 (Sexual intercourse with young person outside Australia—defendant in position of trust or authority)
  - s 272.13 (Sexual activity (other than sexual intercourse) with young person outside Australia—defendant in position of trust or authority)
  - s 272.14 (Procuring child to engage in sexual activity outside Australia)
  - s 272.15 ("Grooming" child to engage in sexual activity outside Australia)
  - s 272.20 (Preparing for or planning offence against Division 272)

  - s 273.7 (Aggravated offence—offence involving conduct on 3 or more occasions and 2 or more people)
  - s 471.22 (Aggravated offence—offence involving conduct on 3 or more occasions and 2 or more people)
  - s 474.24A (Aggravated offence—offence involving conduct on 3 or more occasions and 2 or more people)
  - s 474.25B (Aggravated offence—child with mental impairment or under care, supervision or authority of defendant)
- An offence an element of which is an intention to commit such an offence.
- An offence of attempting, or of conspiracy or incitement, to commit such an offence.
- An offence that, at the time it was committed:
  - was a Class 2 offence; or
  - if the offence was committed before the commencement date – was an offence of a kind referred to in s 14.

Class 3 offences include the following federal offences (listed in s 15 and Schedule 3)

- Offences against any of the following provisions of the *Criminal Code*:
  - s 272.8 (Sexual intercourse with child outside Australia)
  - s 272.10 (Aggravated offence—child with mental impairment or under care, supervision or authority of defendant)
  - s 272.11 (Persistent sexual abuse of child outside Australia)
  - s 272.18 (Benefiting from offence against Division 272)
  - s 272.19 (Encouraging offence against Division 272)
- An offence an element of which is an intention to commit such an offence.
- An offence of attempting, or of conspiracy or incitement, to commit such an offence.
- An offence that, at the time it was committed:
  - was a Class 3 offence; or
  - if the offence was committed before the commencement date – was an offence of a kind referred to in s 15.

A3.7 Australian Capital Territory: Registrable federal offences under the *Crimes (Child Sex Offenders) Act 2005* (ACT)

Class 1 offences include the following federal offences (listed in Part 1.2 of Schedule 1)

- Offences against s 270.5(1) and s 270.8(1)(a) (cause person to enter into or remain in servitude) where the service provided is a sexual service
- Offences against s 270.5(2) and s 270.8(1)(a) (conduct a business involving child servitude) where the service provided is a sexual service
- Sexual offences against children outside Australia, under Division 272 of the *Criminal Code*:
  - s 272.8(1) and (2) (sexual intercourse with child under 16 outside Australia, or causing such activity in defendant's presence);
  - s 272.10(1) (aggravated offence—child under 16 with mental impairment or under care, supervision or authority of defendant);
  - s 272.11 (persistent sexual abuse of child under 16 outside Australia);
  - s 272.12 (sexual intercourse with young person outside Australia—defendant in position of trust or authority - or causing such activity in defendant's presence);
- Offences of benefiting from (s 272.18) or encouraging (s 272.19) sexual offences against children outside Australia (under Division 272 of the *Criminal Code*).

Class 2 offences include the following federal offences (listed in Part 2.2 of Schedule 2)

- Offences against s 270.7 (deceptive recruiting) or 270.8 (aggravated slavery-like offence) of the *Criminal Code* where the offending involves sexual services.
- Offences against s 271.4 (trafficking in children) where the first person (as mentioned in the subsection) intends or is reckless as to whether the other person (as mentioned in the subsection) will be used to provide sexual services or will be otherwise exploited for sexual services
- Offences against s 271.7 (domestic trafficking in children) of the *Criminal Code*
- Sexual offences against children outside Australia, under Division 272 of the *Criminal Code*:
  - s 272.9(1) and (2) (sexual activity (other than sexual intercourse) with child under 16 outside Australia, or causing such activity in defendant's presence);
  - s 272.13(1) and (2) (sexual activity (other than sexual intercourse) with young person outside Australia—defendant in position of trust or authority - or causing such activity in defendant's presence);
  - s 272.14(1) (procuring child to engage in sexual activity outside Australia);
  - s 2"2.15(1) ""grooming" child to engage in sexual activity outside Australia).
- Offences of preparing for or planning (s 272.20) sexual offences against children outside Australia (under Division 272 of the *Criminal Code*)
- Offences against the *Criminal Code* relating to child exploitation material and child abuse material outside Australia:
  - s 273.6 (possessing, controlling, producing, distributing or obtaining child abuse material outside Australia);
  - s 273.7 (aggravated offending relating to child pornography or child abuse material outside Australia).
- Offences against the *Criminal Code* relating to the use of a postal or similar service:
  - s 471.19 (using a postal or similar service for child abuse material);
  - s 471.20 (possessing, controlling, producing, supplying or obtaining child abuse material for use through a postal or similar service);
  - s 471.22 (aggravated offending relating to child pornography or child abuse material).

  - s 471.24 (using a postal or similar service to procure persons under 16);
  - s 471.25 (using a postal or similar service to "groom" persons under 16);
  - s 471.26 (using a postal or similar service to send indecent material to person under 16).
- Offences against the *Criminal Code* relating to the use of a carriage service:
  - s 474.22 (using a carriage service for child abuse material);
  - s 474.23 (possessing, controlling, producing, supplying or obtaining child abuse material through a carriage service)
  - s 474.24A (aggravated offence involving child abuse material through a carriage service);
  - s 474.25A (using a carriage service for sexual activity with person under 16);
  - s 474.25B (aggravated offence—child with mental impairment or under care, supervision or authority of defendant);
  - s 474.26 (using a carriage service to procure persons under 16);
  - s 474.27 (using a carriage service to "groom" persons under 16);
  - s 474.27A (using a carriage service to transmit indecent communication to person under 16).
- Offences against the *Criminal Code* s 273A.1 (possession of child-like sex dolls etc)
- Offences under s 233BAB(5) and s 233BAB(6) of the *Customs Act 1901* (Cth) involving importing/exporting items that are child pornography or child abuse material.

A3.8 Northern Territory: Registrable federal offences under the *Child Protection (Offender Reporting and Registration) Act 2004* (NT)

Class 1 offences include the following federal offences (listed in Schedule 1)

- An offence against s 50BA[2057] of the *Crimes Act 1914* (Cth) (sexual intercourse with child under 16).
- An offence against s 50BB[2058] of the *Crimes Act 1914* (Cth) (inducing child under 16 to engage in sexual intercourse).
- An offence an element of which is an intention to commit an offence of the above kind.
- An offence of attempting, or of conspiracy or incitement, to commit an offence of the above kind.
- An offence that, at the time it was committed:
  - was a Class 1 offence; or
  - if the offence was committed before the commencement date – was an offence of a kind referred to in Schedule 1;

Class 2 offences include the following federal offences (listed in Schedule 2)

- An offence against s 50BC[2059] of the *Crimes Act 1914* (Cth) (sexual conduct involving child under 16).
- An offence against s 50BD[2060] of the *Crimes Act 1914* (Cth) (inducing child under 16 to be involved in sexual conduct).
- An offence against s 50DA or 50DB of the *Crimes Act 1914* (Cth) (benefiting from offence and encouraging offence, respectively)[2061]
- Offences against s 271.4 (trafficking in children to provide sexual services) or s 271.7 (domestic trafficking in children to provide sexual services) of the *Criminal Code*.
- Offences against the *Criminal Code* relating to the use of a carriage service:
  - s 474.19 (using a carriage service for child pornography material);
  - s 474.20 (possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service);
  - s 474.26 (using a carriage service to procure persons under 16);
  - s 474.27 (using a carriage service to "groom" persons under 16);
- An offence an element of which is an intention to commit an offence of the above kind.
- An offence of attempting, or of conspiracy or incitement, to commit an offence of the above kind.
- An offence that, at the time it was committed:
  - was a Class 2 offence; or
  - if the offence was committed before the commencement date – was an offence of a kind referred to in Schedule 2;

2057 Section 50BA was repealed on 15 April 2010 by the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) (Act No. 42 of 2010).

2058 Section 50BB was repealed on 15 April 2010 by the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) (Act No. 42 of 2010).

2059 Section 50BC was repealed on 15 April 2010 by the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) (Act No. 42 of 2010).

2060 Section 50BD was repealed on 15 April 2010 by the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) (Act No. 42 of 2010).

2061 Sections 50DA and 50DB were repealed on 15 April 2010 by the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) (Act No. 42 of 2010).

A3.9: Summary of federal offences which are State or Territory registrable child sex offences

The following table summarises, by offence, the Commonwealth offences which are registrable offences under the laws of the various States and Territories (as detailed in the foregoing lists in this Appendix). These offences would appear to fall within the definition of "State or Territory registrable child sex offences" in s 3(1) of the *Crimes Act 1914* (Cth), and therefore also within the definition of "child sexual abuse offence" in s 3(1) (even if they would not otherwise fall within that definition).

As a result, a conviction in any jurisdiction at any time of an offence listed in the following table would appear to trigger the mandatory sentencing requirement upon conviction for an offence listed in s 20AAB of the *Crimes Act 1914* (committed on or after 23 June 2020): see "7.3.3 Mandatory terms of imprisonment for high-level Commonwealth child sex offences and for repeat child sexual abuse offences".

Note: Offences listed in **bold** also fall within paragraph (a), (b) or (c) of the definition of "child sexual abuse offence" in s 3(1) of the *Crimes Act 1914*.

Summary of federal offences which are State or Territory registrable child sex offences

Act	Section	Jurisdiction	Qualification (if any)
***Crimes Act 1914* (Cth)**	**50BA**[2062]	**QLD, WA, NT**	**QLD: as in force from time to time before being repealed by *the Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth)**
***Crimes Act 1914* (Cth)**	**50BB**[2063]	**QLD, WA, NT**	**QLD: as in force from time to time before being repealed by *the Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth)**
***Crimes Act 1914* (Cth)**	**50BC**[2064]	**QLD, WA, NT**	**QLD: as in force from time to time before being repealed by *the Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth)**
***Crimes Act 1914* (Cth)**	**50BD**[2065]	**QLD, WA, NT**	**QLD: as in force from time to time before being repealed by *the Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth)**
***Crimes Act 1914* (Cth)**	**50DA**[2066]	**QLD, WA, NT**	**QLD: as in force from time to time before being repealed by *the Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth)**

2062 Section 50DB were repealed by the C*rimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) (Act No. 42 of 2010), with effect from 15 April 2010.

2063 Section 50DB were repealed by the C*rimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) (Act No. 42 of 2010), with effect from 15 April 2010.

2064 Section 50DB were repealed by the C*rimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) (Act No. 42 of 2010), with effect from 15 April 2010.

2065 Section 50DB were repealed by the C*rimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) (Act No. 42 of 2010), with effect from 15 April 2010.

2066 Section 50DB were repealed by the C*rimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) (Act No. 42 of 2010), with effect from 15 April 2010.

Act	Section	Jurisdiction	Qualification (if any)
***Crimes Act 1914* (Cth)**	**50DB[2067]**	**QLD, WA, NT**	**QLD: as in force from time to time before being repealed by *the Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth)**
Criminal Code (Cth)	270.5(1)[2068]	ACT	ACT: where the service provided is a sexual service
Criminal Code (Cth)	270.5(2)	ACT	ACT: where the service provided is a sexual service
Criminal Code (Cth)	270.6	NSW, QLD, SA	NSW: where the victim is a child QLD: the victim is a child or the police commissioner reasonably believes the offender believed that the victim was a child.
Criminal Code (Cth)	270.7	NSW, VIC, QLD, SA, ACT	NSW: where the victim is a child VIC: where the victim is a child and the conduct involves deceptive recruiting for sexual services QLD: the victim is a child or the police commissioner reasonably believes the offender believed that the victim was a child. ACT: where the offending involves sexual services
Criminal Code (Cth)	270.8(1)(a)	ACT	ACT: where the service provided is a sexual service
Criminal Code (Cth)	271.4	NSW, VIC, QLD, SA, ACT, NT	VIC: in circumstances where the purpose of the exploitation is to provide sexual services. ACT: where the first person (as mentioned in the subsection) intends or is reckless as to whether the other person (as mentioned in the subsection) will be used to provide sexual services or will be otherwise exploited for sexual services.
Criminal Code (Cth)	271.7	NSW, VIC, QLD, SA, ACT, NT	VIC: in circumstances where the purpose of the exploitation is to provide sexual services.
***Criminal Code* (Cth)**	**272.8**	**NSW, VIC, QLD, SA, TAS, ACT**	

2067 Section 50DB was repealed on 15 April 2010 by the C*rimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) (Act No. 42 of 2010).

2068 Section 270.5(1) is entitled "Causing a person to enter into or remain in servitude", while the entry for s 270.5(1) in the *Crimes (Child Sex Offenders) Act 2005* (ACT) refers to the section as "cause child to enter into or remain in servitude".

Act	Section	Jurisdiction	Qualification (if any)
Criminal Code (Cth)	272.9	NSW, VIC, QLD, SA, TAS, ACT	
Criminal Code (Cth)	272.10	NSW, VIC, QLD, SA, TAS, ACT	NSW: if it relates to an underlying offence against section 272.9
Criminal Code (Cth)	272.11	NSW, VIC, QLD, SA, TAS, ACT	
Criminal Code (Cth)	272.12	NSW, VIC, QLD, SA, TAS, ACT	
Criminal Code (Cth)	272.13	NSW, VIC, QLD, SA, TAS, ACT	
Criminal Code (Cth)	272.14	NSW, VIC, QLD, SA, TAS, ACT	
Criminal Code (Cth)	272.15	NSW, VIC, QLD, SA, TAS, ACT	
Criminal Code (Cth)	272.15A	VIC, QLD, SA	
Criminal Code (Cth)	272.18	NSW, VIC, QLD, SA, TAS, ACT	NSW: if it relates to another Class 1 or Class 2 offence as elsewhere defined in s 3 of the Child Protection (Offenders Registration) Act 2000 (NSW);
Criminal Code (Cth)	272.19	NSW, VIC, QLD, SA, TAS, ACT	NSW: if it relates to another Class 1 or Class 2 offence as elsewhere defined in s 3 of the *Child Protection (Offenders Registration) Act 2000* (NSW)
Criminal Code (Cth)	272.20	NSW, VIC, QLD, SA, TAS, ACT	NSW: if it relates to another Class 1 or Class 2 offence as elsewhere defined in s 3 of the *Child Protection (Offenders Registration) Act 2000* (NSW)
Criminal Code (Cth)	273.5	NSW, VIC, QLD, SA, TAS	
Criminal Code (Cth)	273.6	NSW, VIC, QLD, SA, TAS, ACT	VIC: except if the offence only relates to material that depicts, represents or describes a person who is, or appears to be, or is implied to be, a victim of cruelty or physical abuse, where the cruelty or physical abuse is not sexual
Criminal Code (Cth)	273.7	NSW, VIC, QLD, SA, TAS, ACT	VIC: except if the offence only relates to material that depicts, represents or describes a person who is, or appears to be, or is implied to be, a

Act	Section	Jurisdiction	Qualification (if any)
			victim of cruelty or physical abuse, where the cruelty or physical abuse is not sexual
***Criminal Code* (Cth)**	**273A.1**	**SA, ACT**	
***Criminal Code* (Cth)**	**471.16**[2069]	**NSW, QLD, SA, TAS**	
***Criminal Code* (Cth)**	**471.17**[2070]	**NSW, QLD, SA, TAS**	
***Criminal Code* (Cth)**	**471.19**	**NSW, QLD, SA, TAS, ACT**	
***Criminal Code* (Cth)**	**471.20**	**NSW, QLD, SA, TAS, ACT**	
***Criminal Code* (Cth)**	**471.22**	**NSW, VIC, QLD, SA, TAS, ACT**	**VIC: except if the offence only relates to material that depicts, represents or describes a person who is, or appears to be, or is implied to be, a victim of cruelty or physical abuse, where the cruelty or physical abuse is not sexual**
***Criminal Code* (Cth)**	**471.24**	**NSW, VIC, QLD, SA, ACT**	
***Criminal Code* (Cth)**	**471.25**	**NSW, VIC, QLD, SA, TAS, ACT**	
***Criminal Code* (Cth)**	**471.25A(1), (2), or (3)**	**VIC, QLD, SA**	
***Criminal Code* (Cth)**	**471.26**	**NSW, VIC, QLD, SA, TAS, ACT**	
***Criminal Code* (Cth)**	**474.19**[2071]	**NSW, QLD, SA, TAS, NT**	

2069 This section was repealed by the *Combatting Child Sexual Exploitation Legislation Amendment Act 2019*. However the offence, as in force before its repeal, falls within the definition of "child sexual abuse offence" in s 3(1) of the *Crimes Act 1914* (Cth).

2070 This section was repealed by the *Combatting Child Sexual Exploitation Legislation Amendment Act 2019*. However the offence, as in force before its repeal, falls within the definition of "child sexual abuse offence" in s 3(1) of the *Crimes Act 1914* (Cth).

2071 This section was repealed by the *Combatting Child Sexual Exploitation Legislation Amendment Act 2019*. However the offence, as in force before its repeal, falls within the definition of "child sexual abuse offence" in s 3(1) of the *Crimes Act 1914* (Cth).

Act	Section	Jurisdiction	Qualification (if any)
***Criminal Code* (Cth)**	**474.20[2072]**	**NSW, QLD, SA, TAS, NT**	
***Criminal Code* (Cth)**	**474.22**	**NSW, VIC, QLD, SA, TAS, ACT**	
***Criminal Code* (Cth)**	**474.22A**	**VIC, QLD, SA**	**VIC: except if the offence only relates to material that depicts, represents or describes a person who is, or appears to be, or is implied to be, a victim of cruelty or physical abuse, where the cruelty or physical abuse is not sexual**
***Criminal Code* (Cth)**	**474.23**	**NSW, VIC, QLD, SA, TAS, ACT**	**VIC: except if the offence only relates to material that depicts, represents or describes a person who is, or appears to be, or is implied to be, a victim of cruelty or physical abuse, where the cruelty or physical abuse is not sexual;**
***Criminal Code* (Cth)**	**474.23A(1)**	**VIC, QLD, SA**	
***Criminal Code* (Cth)**	**474.24A**	**NSW, VIC, QLD, SA, TAS, ACT**	
***Criminal Code* (Cth)**	**474.25A**	**NSW, VIC, QLD, SA, TAS, ACT**	
***Criminal Code* (Cth)**	**474.25B**	**NSW, VIC, QLD, SA, TAS, ACT**	
***Criminal Code* (Cth)**	**474.25C**	**VIC, QLD, SA**	**VIC: except if the offence does not involve an act in preparing or planning to engage in sexual activity with a person under 16 years of age or an act in preparing or planning to procure a person under 16 years of age to engage in sexual activity**
***Criminal Code* (Cth)**	**474.26**	**NSW, VIC, QLD, SA, TAS, ACT, NT**	
***Criminal Code* (Cth)**	**474.27**	**NSW, VIC, QLD, SA, TAS, ACT, NT**	

2072 This section was repealed by the *Combatting Child Sexual Exploitation Legislation Amendment Act 2019*. However the offence, as in force before its repeal, falls within the definition of "child sexual abuse offence" in s 3(1) of the *Crimes Act 1914* (Cth).

Act	Section	Jurisdiction	Qualification (if any)
***Criminal Code* (Cth)**	**474.27A**	**NSW, VIC, QLD, SA, TAS, ACT**	
***Criminal Code* (Cth)**	**474.27AA**	**VIC, QLD, SA**	
Customs Act 1901 (Cth)	233BAB	NSW, VIC, QLD, WA, SA, TAS	NSW: involving items that are child pornography or child abuse material. VIC: involving items of child abuse material except if the offence only relates to material that depicts, represents or describes a person who is, or appears to be, or is implied to be, a victim of cruelty or physical abuse, where the cruelty or physical abuse is not sexual QLD: that involves child pornography or child abuse material WA: involving items that are child pornography or child abuse material. SA: involving items that are child pornography TAS: that involves child exploitation material ACT: involving importing/exporting items that are child pornography or child abuse material.

APPENDIX 4: SENTENCE OR ORDER UNDER *CRIMES ACT 1914* (CTH), S 20AB(1): JURISDICTION-SPECIFIC ISSUES

A4.1 New South Wales

Drug Court programs

In *R v Miller and Omar*,[2073] the Drug Court held that programs under the *Drug Court Act 1998* (NSW) are not available in sentencing a federal offender. There were two reasons for the decision. First, the requirement in s 7A(3) of the Act that the offender be sentenced in accordance with the *Crimes (Sentencing Procedure) Act 1999* (NSW) (the **C(SP)Act**) was incapable of being applied to the sentencing of a federal offender, as it was inconsistent with the regime in Part IB of the *Crimes Act 1914* (Cth). Second, the Drug Court programs were not applied by s 20AB of the *Crimes Act* as the orders were not of a kind described in s 20AB(1AA).

In the view of the CDPP, this decision is correct.

The Court also doubted whether it could use its ancillary powers under s 24 of the *Drug Court Act 1998* in relation to a joint State and federal offender – for example by imposing a sentence for a federal offence in such a way as to render the offender available to start a Drug Court program.

The better view would appear to be that the Drug Court could only sentence a federal offender in a conventional way – for example, in the exercise of the functions of the District Court in its criminal jurisdiction, in accordance with s 24.

Intensive Correction Order (ICO) not available for specified Commonwealth offences

An ICO is an order listed in s 20AB(1AA) of the *Crimes Act 1914* (Cth): see "4.7.3 Types of State or Territory sentences or orders which are made available by s 20AB".

However specific provisions preclude the making of an ICO under s 7 of the C(SP) Act for particular federal offences.

First, an ICO is "*an order … that involves detention or imprisonment*" and therefore cannot be made in respect of a conviction for a minimum non-parole offence mentioned in s 19AG (that is, a terrorism or national security offence to which the three-quarters rule in s 19AG applies): s 20AB(6). See "7.1.3 Sentences and orders under s 20AB(1) for the service of a sentence not available for minimum non-parole offence".

Second, s 67(1) of the C(SP) Act provides that an ICO must not be made in respect of a sentence of imprisonment for an offence referred to in that section. The relevant offences include the following:

- a prescribed sexual offence (s 67(1)(b));
- a terrorism offence within the meaning of the *Crimes Act 1914* (Cth) (s 67(1)(c));[2074] and
- an offence that includes the commission of, or an intention to commit, and an offence of attempting, or of conspiracy or incitement, to commit, such an offence (s 67(1)(g) and (h)).

"Prescribed sexual offence" is defined in s 67(2). It includes the following Commonwealth offences:

- an offence against section 50BA, 50BB, 50BC, 50BD, 50DA or 50DB of the *Crimes Act 1914* (Cth), being an offence the victim of which was a person under the age of 16 years, or

2073 *R v Miller and Omar* [2021] NSWDRGC 1.

2074 This provision is largely redundant in view of s 20AB(6) of the *Crimes Act 1914* (Cth).

- an offence against section 71.8, 71.12, 271.4, 271.7, 272.8 (1) or (2), 272.9 (1) or (2), 272.10 (1), 272.11 (1), 272.12 (1) or (2), 272.13 (1) or (2), 272.14 (1), 272.15 (1), 272.18 (1), 272.19 (1), 272.20 (1) or (2), 273.5, 273.6, 273.7, 471.16 (1) or (2), 471.17 (1), 471.19 (1) or (2), 471.20 (1), 471.22 (1), 471.24, 471.25, 471.26, 474.19 (1), 474.20 (1), 474.22 (1), 474.23 (1), 474.24A (1), 474.25A (1) or (2), 474.25B (1), 474.26, 474.27 (1), (2) or (3), 474.27A of the *Criminal Code* (Cth), being an offence the victim of which was a person under the age of 16 years,[2075] or
- an offence against s 233BAB of the *Customs Act 1901* (Cth) involving items of child pornography or child abuse material.

The exclusion of an ICO extends to a sentence of imprisonment for two or more offences, any one of which includes an offence specified: C(SP) Act, s 67(3).

Notable (and presumably unintended) omissions from the list in the definition of "prescribed sexual offence" are offences against ss 272.15A, 273A.1, 471.25A, 474.22A, 474.23A and 474.27AA of the *Criminal Code*.

Availability of, and criteria for, ICOs generally

Section 66 of the C(SP) Act sets out matters which must be considered by a court in deciding whether to make an ICO under s 7 of that Act. Community safety must be the paramount consideration (s 66(1)). When considering community safety, the court is to 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 reoffending (s 66(2)). The court must also consider the provisions of s 3A of the Act (Purposes of sentencing) and any relevant common law sentencing principles, and may consider any other matters that the court thinks relevant (s 66(3)).

The prioritisation of the consideration of community safety as the "paramount consideration" necessarily means that other considerations, including those enunciated in s 3A of the Act, become subordinate.[2076] This is inherently inconsistent with the requirement in s 16A(1) of the *Crimes Act 1914* (Cth) that, in sentencing a federal offender, "*a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence*" and the requirement in s 16A(2) to have regard to *all* the listed factors, to the extent that they are relevant and known to the court.[2077]

In addition, s 66A(3) requires a court, when deciding whether to make an ICO, to consider "*the provisions of section 3A (Purposes of sentencing)*" of that Act. Such a requirement is also inconsistent with Part IB of the *Crimes Act*. The sentencing of federal offenders is governed by s 16A and common law sentencing considerations, "*and not peculiarly local or state statutory principles of sentencing*".[2078]

2075 In *R v Bredal* [2024] NSWCCA 75, [55], Dhanji J, *obiter dicta*, doubted whether "*an offence the victim of which was a person under the age of 16 years*" included a case in which there was no actual victim aged under 16: for example, an online grooming offence where the part of the 'child' was played by a police officer. In such a case, however, the charged offence would still fall within the definition on the basis that it included an intention to commit one of the listed offences against the *Code*: C(SP) Act, s 67(1)(g). That paragraph would appear to have been included in contemplation of just such a case.

2076 *R v Pullen* [2018] NSWCCA 264, [86]; *Stanley v DPP (NSW)* (2023) 97 ALJR 107, [72]-[77] (Gordon, Edelman, Steward and Gleeson JJ).

2077 See, for example, *Wong v R* (2001) 207 CLR 584, [71]-[72] (Gaudron, Gummow and Hayne JJ); *R v Pham* (2015) 256 CLR 550, [22] (French CJ, Keane and Nettle JJ; Bell and Gageler JJ agreeing on this ground).

2078 *Johnson v R* (2004) 78 ALJR 616, [15] (Gummow, Callinan and Heydon JJ)).

State laws do not apply of their own force to the sentencing of a federal offender. Nor are State sentencing options made available by the provisions of s 68 or s 79 of the *Judiciary Act*. They are made available, if at all, only by the provisions of Part IB of the *Crimes Act* (or other specific provisions of Commonwealth law).

The mere fact that a sentence or order is of a type listed or described in s 20AB(1AA) does not mean that it is available in the sentencing of a federal offender, either generally or in the particular case. Not only may it be specifically unavailable in particular circumstances (as the examples above illustrate), but it will also be unavailable if its application would be inconsistent with a Commonwealth legislative scheme, including Part IB of the *Crimes Act*.

The power to make a sentence or order of a type listed in s 20AB(1AA) in respect of a person convicted of a federal offence is a power under s 20AB(1). If a sentence or order is made under that power, it is *a sentence or order under s 20AB(1)*, not a sentence or order under the law of the relevant State or Territory. (Hence the numerous references in the *Crimes Act* to a "sentence or order under s 20AB(1)" or variants of that phrase.[2079]) The decision whether or not to make an order under s 20AB(1) is governed by s 16A; indeed s16A(3) expressly requires a court to have regard to certain matters "*in determining whether a sentence or order under subsection … 20AB(1) is the appropriate sentence or order to be passed or made in respect of a federal offence*".

This raises fundamental questions: (1) whether s 66 of the C(SP) Act is inherently inconsistent with Part IB of the *Crimes Act*; and (2) if it is, whether this inconsistency means that an ICO under s 7 of the C(SP) Act cannot be made as an order under s 20AB(1) of the *Crimes Act*.

There is also a question about the interaction between the mandatory requirements of Division 4 of Part IB and the decision whether to make an ICO in respect of a sentence of imprisonment for a federal offence.

Some reservations have been expressed in the New South Wales Court of Criminal Appeal about the interaction between the provisions of the C(SP) Act relating to ICOs and Part IB of the *Crimes Act*. In *Mourtada*,[2080] Adamson J preferred not to express a view as to the wider topic of the extent to which State laws are picked up when State courts are imposing sentences for federal offences (although her Honour agreed with the reasoning of Basten JA on two grounds of appeal which were founded on the premise that s 66 of the C(SP) Act applied in relation to the sentencing of a federal offender). Beech-Jones CJ at CL in *Al Am Ali*[2081] and in *Homewood*,[2082] found it unnecessary to decide questions about the application and effect of s 66 on the sentencing of a federal offender. One of those questions which was reserved by Beech-Jones CJ at CL in *Homewood* was how "*the reasoning in Stanley along with s 66 of the Sentencing Act upon which it is based engages with the balance of the provisions of the Crimes Act especially s 16A*".

Nevertheless, decisions of the Court have proceeded on the basis of a series of assumptions about these questions.

In *Mourtada*,[2083] Basten JA (with whom Campbell J agreed) proceeded on the assumption that s 66 did apply in the sentencing of a federal offender, without detailed analysis of the relevant statutory provisions and

2079 See fn. 1098.
2080 *Mourtada v R* [2021] NSWCCA 211, [35].
2081 *Al Am Ali v R* [2021] NSWCCA 281, [1] (Wilson J agreeing).
2082 *Homewood v R* [2023] NSWCCA 159, [7].
2083 *Mourtada v R* [2021] NSWCCA 211, [20].

without reference to relevant authorities. Ultimately, however, that assumption was not decisive as the Court held that the sentencing judge had not erred as alleged by the applicant.[2084]

In *Elzein*,[2085] Bellew J (Bell P and Walton J agreeing), after referring to *Mourtada*, concluded that, in relation to the applicant Doughan, the sentencing judge had erred in failing to engage with a submission that consideration should be given to an ICO, and in failing to consider the requirements of s 66 of the C(SP) Act. In *Al Am Ali*,[2086] Davies J (with whom Wilson J agreed) reached the same conclusion as in *Elzein*. Neither in *Elzein* nor in *Al Am Ali* did the Court, in resentencing the offender, make an ICO.

In *Chan*,[2087] the Court again proceeded on the assumption that an ICO was available and that s 66 governed the decision whether or not to make such an order. In that case, the sentencing judge had imposed an aggregate sentence of two years' imprisonment for three federal offences and (in accordance with s 19AC(1) of the *Crimes Act*) made a recognizance release order (RRO) for the release of the applicant after serving a period of 14 months. The judge said, "*Having determined that a custodial sentence is appropriate, I am required to determine the length of each sentence before considering the question of the appropriateness of the sentence being served by way of an Intensive Correction Order.*" Having regard to the sentencing considerations in s 16A, including general deterrence, the judge held that an ICO should not be made. On appeal, N Adams J (with whom Kirk JA and Rothman J agreed) referred to the observation of Basten JA in *Mourtada* as authority for the proposition that "*in picking up the power under State law to impose an ICO, s 20AB also picks up the procedural steps governing the operation of the State provision*" (implicitly including s 66). Kirk JA (Rothman J agreeing) referred to s 20AB(3) of the *Crimes Act*, with the implication that s 66 was applied by this subsection. N Adams J held that the sentencing judge had erred in determining that an ICO should not be imposed, by making that decision on the basis of the considerations in s 16A of the *Crimes Act* and not those under State law. In resentencing the offender to a term of imprisonment of eight months and 17 days, the Court did not make a RRO, but ordered that "*[p]ursuant to s 7(1) of the Sentencing Act*", the sentence be served by way of an ICO.

In *AM*,[2088] the Court held that observations of the sentencing judge contained "*a similar vice*" to those in *Chan*, in that the judge erred by applying the considerations in s 16A of the *Crimes Act*, and not those under State law, in deciding whether to make an ICO. In resentencing the offender, the Court did not make an ICO.

In *Khanat*,[2089] the Court held (by majority) that the sentencing judge, in sentencing a federal offender, had erred in declining to impose an ICO, because contrary to s 66 (as interpreted by the majority of the High Court in *Stanley*) the judge had subordinated community safety to general deterrence in making that decision. In resentencing the offender, the Court did not make an ICO.

In none of these cases did the Court of Criminal Appeal give consideration to the effect of the requirements of Division 4 of Part IB of the *Crimes Act* (see "4.10.3 The mechanisms for setting the period, or minimum period, of imprisonment to be served for a federal offence" and "4.10.4 Non-parole period (NPP),

2084 The decision in *Quinn v DPP (Cth)* (2021) 106 NSWLR 154 also proceeded on the assumption that s 66 applies to the sentencing of a federal offender in relation to an ICO, although the basis for this was not examined.
2085 *Elzein v R* [2021] NSWCCA 246, [321]-[328].
2086 *Al Am Ali v R* [2021] NSWCCA 281, [22]-[23].
2087 *Chan v R* [2023] NSWCCA 206.
2088 *AM v R* [2024] NSWCCA 26.
2089 *Khanat v R (Cth)* [2024] NSWCCA 41.

recognizance release order (RRO) or straight sentence?"). In *Chan*, the Court, in resentencing the offender, made no reference to the requirements of s 19AC of the *Crimes Act*.

Nor did the Court (either in *Chan* or in these other cases) address the question of how, once the sentencing judge decided, in accordance with the requirements of Div 4 and s 16A, that a RRO should be made and a period of imprisonment should be served, any question arose about making an ICO (even assuming such an option was available).

The Court did not, in any of these cases, refer to the decision of the Victorian Court of Appeal (Weinberg, Kyrou and Kaye JJA) in *Atanackovic*,[2090] which appears to be irreconcilable with the approach adopted.

Nor was any consideration given to the correctness of the assumption made by Basten JA in *Mourtada*, and adopted without examination in subsequent cases, that the decision whether or not to make an ICO (if available) was governed by State law and not by s 16A of the *Crimes Act* (see "4.7.6 Decision whether or not to pass a sentence or make an order under s 20AB(1) is governed by s 16A"). Although in *Chan* Kirk JA referred to s 20AB(3) (implicitly as the basis for the application of s 66 of the C(SP) Act), there was no consideration of whether, in its own terms, s 20AB(3) applies State law as it relates to the anterior decision whether or not to make an order under s 20AB(1) if available (see "4.7.19 Application of State/Territory laws with respect to a sentence passed or order made under s 20AB(1)") or how, if it does, s 66 is "*capable of application and … not inconsistent with the laws of the Commonwealth*" for the purposes of s 20AB(3).

In the view of the Director, *Chan* and *Khanat* were wrongly decided. These decisions proceed from a series of erroneous assumptions about the effect of Part IB of the *Crimes Act*, including the obligations of a court under Division 4, the operation of s 20AB and the application (or non-application) of s 16A to the sentencing of a federal offender. They are contrary to the principles espoused by the High Court in *Hili*, *Wong*, *Pham* and other cases and contrary to the decision of the Victorian Court of Appeal in *Atanackovic*.[2091]

A4.2 Victoria

Community correction order (CCO) and a condition to pay money as a bond

Under s 48JA of the *Sentencing Act 1991* (Vic) (in force from 1 May 2013), a court may attach a condition requiring an offender to pay an amount by way of a bond under a CCO. Section 83AS(4) sets out the consequences for a contravention. Whilst such a condition could be included as one of the 'any other conditions as the court thinks fit to specify' (s 48 *Sentencing Act 1991* (Vic)), it may be effectively unenforceable in relation to federal matters as any breach would be dealt with pursuant to s 20AC(6) of the *Crimes Act 1914* (Cth). Hence, it is the view of the CDPP that it is preferable that a bond should not be made a condition of a CCO in relation to a federal offender.

CCOs and a Justice Plan for Intellectually Disabled Offenders

Under Division 2 of Part 3BA of the *Sentencing Act 1991* (Vic), in making a CCO in relation to an intellectually-disabled offender, a court may attach a condition directing the offender to participate in the services specified in a justice plan.

2090 *Atanackovic v R* (2015) 45 VR 179. See "4.7.15 Whether sentence or order can be combined with a term of imprisonment for the same offence", "4.7.18 Application of a guideline judgment regarding use of a sentence or order under s 20AB(1)" and "4.10.14 Can a RRO be combined with a sentence or order under s 20AB(1) for the same offence(s)?".

2091 *Atanackovic v R* (2015) 45 VR 179; see also *R v Medalian* (2019) 133 SASR 50.

The CDPP has previously taken the view that such a condition could not be made as a condition of a CCO for a federal offence, on the basis that the availability of program probation orders under s 20BY of the *Crimes Act 1914* (Cth) left no room for the imposition of such a condition. This view was stated in *Federal Sentencing in Victori*a and was carried over into the first to sixth editions of this guide.

The CDPP has since reconsidered this question and is now of the opinion that a justice plan condition, like other conditions available under the *Sentencing Act* for a CCO, may be ordered under a CCO imposed on a federal offender. An analysis of the text and history of s 20BY shows that it was intended to, and does, no more than provide an additional sentencing disposition for intellectually-disabled offenders. It does not impliedly exclude any conditions of a CCO or of any other order applied by s 20AB. Sentencing courts in Victoria have proceeded on this basis in sentencing federal offenders. The CDPP now considers that it was open to courts to do so.

Imprisonment for a federal offence and CCO for a State offence

Where a term of imprisonment is imposed for one federal offence and a CCO ordered for a State offence (to which s 44 applies), the question of the commencement date of that CCO arises. Section 38(2) of the *Sentencing Act 1991* (Vic) contains an exception to the 3-month deadline for the commencement of CCOs in circumstances where a combination sentence (in accordance with s 44) is imposed for a State offence. The exception is set out in s 44(3) which provides that the 3-month rule is not applicable where a person is serving a term of imprisonment pursuant to a s 44 combination sentence. In those circumstances, the CCO commences upon release from imprisonment regardless of whether it is more than 3 months from the date of sentence. Accordingly, the CCO imposed as part of a s 44 combination sentence for a State offence would commence upon the release of a person from imprisonment independent of the end date of the imprisonment imposed for the federal offence.

Drug and Alcohol Treatment Order (DATO)

A DATO is a sentencing option created by subdivision (1C) of Division 2 of Part 3 of the *Sentencing Act 1991* (Vic). It can only be imposed by the Drug Court (that is, the Drug Court division of the Magistrates' Court or of the County Court). A DATO can only be imposed where the Court determines that it would otherwise have imposed a sentence of imprisonment of up to 4 years, not suspended. A DATO has two parts: the treatment and supervision part and the custodial part: (s 18ZC(1)). The custodial part consists of a sentence of imprisonment of no more than 4 years (ss 18ZC(3), 18ZD(1), (1A)), being the sentence which the Court would have imposed had it not made the order (s 18ZD(2)). The Court must not fix a non-parole period (NPP): s 18ZD(3). The custodial part is not served unless it is activated under that Subdivision: s 18ZE(1).

In the view of the CDPP, a DATO is not applied by s 20AB of the *Crimes Act 1914* to the sentencing of a federal offender, because the requirements for a DATO are inconsistent with Part IB of the Act. In particular, the exhaustive regime in Part IB leaves no room for the application of a State law which prescribes how periods, or minimum periods, of incarceration for offenders sentenced to imprisonment are to be fixed.[2092] The requirement that no NPP be fixed under the custodial part of a DATO, the provision that the sentence of imprisonment is automatically wholly suspended and the provision that the sentence is to be activated only in accordance with the relevant provisions of the Sentencing Act are all fundamentally inconsistent with Part IB. Other problems include the following:

2092 *Hili v R* (2010) 242 CLR 520, [21]-[22], [52]. See also *R v Tran* [2019] SASCFC 5, [26]-[41].

- Section 18X(2) of the Sentencing Act requires that the Drug Court regard the rehabilitation of the offender and the protection of the community from the offender (achieved through the offender's rehabilitation) as having greater importance than other sentencing purposes. This is contrary to s 16A of the *Crimes Act*.
- The regime governing breaches of a DATO – which is integral to the DATO scheme – is also inconsistent with Part IB. Orders applied by s 20AB can only be enforced under s 20AC. Breaches of the conditions on which a federal offender who is sentenced to imprisonment is released are only capable of being dealt with under s 20A or under the provisions for breach of federal parole or licence, as the case may be. There is no scope for applying an entirely different regime such as that in the relevant subdivision of the Sentencing Act.

There does not appear to be any impediment to the Drug Court sentencing a federal offender otherwise than by imposing a DATO – for example, where the offender is charged with both Commonwealth and State offences and a DATO is imposed for the State offence – although the sentencing task may be complicated in such a case.

APPENDIX 5: MANDATORY MINIMUM SENTENCES FOR HIGH-LEVEL CHILD SEX OFFENCES AND REPEAT CHILD SEXUAL ABUSE OFFENCES (*CRIMES ACT 1914* (CTH), SS 16AAA AND 16AAB)

Sections 16AAA and 16AAB of the *Crimes Act 1914* (Cth) provide for mandatory terms of imprisonment for certain specified Commonwealth sexual offences relating to children which were committed on or after 23 June 2020 (subject to exceptions in s 16AAC). Section 16AAA relates to specified high-level Commonwealth child sex offences and applies in any case in which a person is convicted of a specified offence. Section 16AAB relates to specified Commonwealth child sexual abuse offences and applies if the offender has, at an earlier sitting, been convicted of a Commonwealth, State or Territory child sexual abuse offence. For further details, see "7.3.3 Mandatory terms of imprisonment for high-level Commonwealth child sex offences and for repeat child sexual abuse offences".

This Appendix lists the offences and mandatory minimum sentences which are specified in s 16AAA and s 16AAB.

A5.1 Mandatory minimum sentences for high-level child sex offences (s 16AAA)

Item	Offence	Maximum penalty	Mandatory minimum sentence
1	offence against subsection 272.8(1) of the *Criminal Code* *Engaging in sexual intercourse with child outside Australia*	25 years	6 years
2	*offence against* subsection *272.8(2) of the Criminal Code* *Causing a child to engage in sexual intercourse outside Australia*	25 years	6 years
3	offence against subsection 272.9(1) of the *Criminal Code* *Engaging in sexual activity with child outside Australia*	20 years	5 years
4	offence against subsection 272.9(2) of the *Criminal Code* *Causing a child to engage in sexual activity outside Australia*	20 years	5 years
5	offence against s272.10 of the *Criminal Code* *Aggravated offence – child with mental impairment or under care, supervision or authority of defendant or degrading treatment or death*	Life imprisonment	7 years
6	offence against section 272.11 of the *Criminal Code* *Persistent sexual abuse of child outside Australia*	30 years	7 years
7	offence against section 272.18 of the *Criminal Code* *Benefitting from a sexual offence against children outside Australia*	25 years	6 years
8	offence against section 272.19 of the *Criminal Code* *Encouraging a sexual offence against children outside Australia*	25 years	6 years

Item	Offence	Maximum penalty	Mandatory minimum sentence
9	offence against section 273.7 of the *Criminal Code* *Aggravated offence (child abuse material outside Australia) – involving conduct on 3 or more occasions and 2 or more people*	30 years	7 years
10	offence against section 471.22 of the *Criminal Code* *Aggravated offence (child abuse material using postal service) – involving conduct on 3 or more occasions and 2 or more people*	30 years	7 years
11	offence against section 474.23A of the *Criminal Code* *Conduct for the purposes of electronic service used for child abuse material*	20 years	5 years
12	offence against section 474.24A of the *Criminal Code* *Aggravated offence (child abuse material using carriage service) – involving conduct on 3 or more occasions and 2 or more people*	30 years	7 years
13	offence against subsection 474.25A(1) of the *Criminal Code* *Engaging in sexual activity with a person under 16 years of age using a carriage service*	20 years	5 years
14	offence against subsection 474.25A(2) of the *Criminal Code* *Causing a person under 16 years of age to engage in sexual activity with another person using carriage service*	20 years	5 years
15	offence against section 474.25B of the *Criminal Code* *Aggravated offence of sexual activity with a child under 16 using a carriage service - child with mental impairment or under care, supervision or authority of defendant or degrading treatment or death*	30 years	7 years

A5.2 Mandatory minimum sentences for repeat child sexual abuse offender (s 16AAB)

Item	Offence	Maximum penalty	Mandatory minimum sentence
1	Offence against subsection 272.12(1) of the *Criminal Code* *Sexual intercourse with young person outside Australia – in position of trust or authority*	10 years	3 years
2	Offence against subsection 272.12(2) of the *Criminal Code* *Causing young person to engage in sexual intercourse outside Australia – in position of trust or authority*	10 years	3 years
3	Offence against subsection 272.13(1) of the *Criminal Code* *Sexual activity with young person outside Australia – in position of trust and authority*	7 years	2 years
4	Offence against subsection 272.13(2) of the *Criminal Code* *Causing young person to engage in sexual activity outside of Australia – in position of trust and authority*	7 years	2 years
5	Offence against subsection 272.14(1) of the *Criminal Code* *Procuring child to engage in sexual activity outside Australia*	15 years	4 years
6	Offence against subsection 272.15(1) of the *Criminal Code* *Grooming child to engage in sexual activity outside Australia*	15 years	4 years
7	Offence against subsection 272.15A(1) of the *Criminal Code* *Grooming person to make it easier to engage in sexual activity with a child outside Australia (Third party grooming outside Australia)*	15 years	4 years
8	Offence against subsection 272.20(1) of the *Criminal Code* *Preparing for or planning offence involving sexual intercourse or other sexual activity with child outside Australia*	10 years	3 years
9	Offence against subsection 272.20(2) of the *Criminal Code* *Preparing for or planning offence involving sexual intercourse or other sexual activity with young person outside of Australia*	5 years	1 year
10	Offence against subsection 273.6(1) of the *Criminal Code* *Possessing, controlling, producing, distributing or obtaining child abuse material outside Australia*	15 years	4 years
10A	Offence against subsection 273A.1 of the *Criminal Code* *Possession of child-like sex dolls etc.*	15 years	4 years
11	Offence against subsection 471.19(1) of the *Criminal Code* *Using a postal or similar service for child abuse material*	15 years	4 years

Item	Offence	Maximum penalty	Mandatory minimum sentence
12	Offence against subsection 471.19(2) of the *Criminal Code* *Requesting another person to use a postal or similar service for child abuse material*	15 years	4 years
13	Offence against subsection 471.20(1) of the *Criminal Code* *Possess, control, produce, supply or obtain child abuse material for use through postal or similar service*	15 years	4 years
14	Offence against subsection 471.24(1) of the *Criminal Code* *Using a postal or similar service to procure persons under 16*	15 years	4 years
15	Offence against subsection 471.24(2) of the *Criminal Code* *Sender using a postal or similar service to procure a person under 16 to engage in sexual activity with another person*	15 years	4 years
16	Offence against subsection 471.24(3) of the *Criminal Code* *Sender using postal or similar service to procure a person under 16 to engage in sexual activity with another person in the presence of sender or another person*	15 years	4 years
17	Offence against subsection 471.25(1) of the *Criminal Code* *Using a postal or similar service to groom person under 16 to engage in sexual activity with sender*	15 years	4 years
18	Offence against subsection 471.25(2) of the *Criminal Code* *Sender using postal or similar service to groom person under 16 to engage in sexual activity with another person*	15 years	4 years
19	Offence against subsection 471.25(3) of the *Criminal Code* *Sender using postal or similar service to groom person under 16 to engage in sexual activity with another person in the presence of sender or another person*	15 years	4 years
20	Offence against subsection 471.25A(1) of the *Criminal Code* *Using a postal service to groom another person to make it easier to procure persons under 16 to engage in sexual activity with sender. (Third party grooming postal service.)*	15 years	4 years
21	*Offence* against subsection 471.25A(2) of the *Criminal Code* *Using a postal service to groom another person to make it easier to procure person under 16 to engage in sexual activity with another person*	15 years	4 years

Item	Offence	Maximum penalty	Mandatory minimum sentence
22	Offence against subsection 471.25A(3) of the *Criminal Code* *Using a postal service to groom another person to make it easier to procure person under 16 to engage in sexual activity with another person in the presence of sender or another person*	15 years	4 years
23	Offence against subsection 471.26(1) of the *Criminal Code* *Using a postal service or similar service to send indecent material to person under 16*	10 years	3 years
24	Offence against subsection 474.22(1) of the *Criminal Code* *Using a carriage service for child abuse material*	15 years	4 years
24A	Offence against subsection 474.22A(1) of the *Criminal Code* *Possessing or controlling child abuse material obtained or accessed using a carriage service*	15 years	4 years
25	Offence against subsection 474.23(1) of the *Criminal Code* *Possessing, controlling, producing, supplying or obtaining child abuse material for use through a carriage service*	15 years	4 years
26	Offence against subsection 474.26(1) of the *Criminal Code* *Using a carriage service to procure persons under 16 years to engage in sexual activity*	15 years	4 years
27	Offence against subsection 474.26(2) of the *Criminal Code* *Using a carriage service to procure a person under 16 years to engage in sexual activity with another person*	15 years	4 years
28	Offence against subsection 474.26(3) of the *Criminal Code* *Using a carriage service to procure a person under 16 years of age to engage in sexual activity with another person in the presence of the sender or another person*	15 years	4 years
29	Offence against subsection 474.27(1) of the *Criminal Code* *Using a carriage service to groom a person under 16 years of age*	15 years	4 years
30	Offence against subsection 474.27(2) of the *Criminal Code* *Using a carriage service to groom person under 16 years of age to engage in sexual activity with another person*	15 years	4 years
31	Offence against subsection 474.27(3) of the *Criminal Code* *Using a carriage service to groom person under 16 years of age to engage in sexual activity with another person in the presence of the sender or another person*	15 years	4 years

Item	Offence	Maximum penalty	Mandatory minimum sentence
32	Offence against subsection 474.27AA(1) of the *Criminal Code* *Using a carriage service to transmit communication to groom another person to make it easier to procure person under 16 years to engage in sexual activity. (Third party grooming by carriage service)*	15 years	4 years
33	Offence against subsection 474.27AA(2) of the *Criminal Code* *Using a carriage service to groom another person to make it easier to procure person under 16 years to engage in sexual activity with another person*	15 years	4 years
34	Offence against subsection 474.27AA(3) of the *Criminal Code* *Using a carriage service to groom another person to make it easier to procure person under 16 years of age to engage in sexual activity with another person in the presence of the sender or another person*	15 years	4 years
35	Offence against subsection 474.27A(1) of the *Criminal Code* *Using a carriage service to transmit indecent communication to person under 16 years of age*	10 years	3 years

APPENDIX 6: AGGREGATE SENTENCES: PRACTICES IN PARTICULAR JURISDICTIONS

A6.2 Victoria

Aggregate sentences were originally introduced in order to simplify the task of sentencing for multiple offences, especially where orders for concurrency, partial concurrency, and cumulation could become complex and productive of error.[2093] Aggregate sentencing has been considered appropriate on indictment:

- where there is such a large number of charges that the application of the normal principles governing cumulation and concurrency would produce an inappropriate total effective sentence; an aggregate sentence may then be more readily understood;[2094] or
- where the number, similarity and proximity in time of the offences is such that it would be an artificial exercise to impose individual sentences and then, by means of modest orders for cumulation, to arrive at a total effective sentence proportionate to the total criminality.[2095]

In a number of cases,[2096] courts in Victoria have set out reasons for maintaining the conventional approach, in sentencing a federal offender on indictment:

- Only if specific sentences are identified for federal indictable offences will the transparency of the sentencing process be fully upheld.
- Aggregate sentencing may mask error in sentencing.
- A single undifferentiated aggregate sentence carries a risk of injustice by making the task of challenging the unidentified components of the aggregate sentence much more difficult.
- An aggregate sentence risks depriving the offender of the provision of adequate reasons for the components of the sentence.
- An aggregate sentence risks undermining the objective of identifying differential sentences for specific federal crimes so that their content might be known and compared throughout the Commonwealth.
- An aggregate sentence diminishes the effectiveness of the deterrent value of particularised sentences.
- An aggregate sentence reduces the utility and availability of effective appellate review addressed to consistency throughout Australia in the sentencing of federal offenders for particular offences.

An aggregate sentence generally should not be imposed where an indictment contains only a small number of counts, or where the counts vary significantly in their seriousness or the manner in which the offences

2093 *R v Copeland (No 2)* (2010) 108 SASR 398, [15]-[30]; *Fitzpatrick v R* [2016] VSCA 63, [45]; *DPP v Rivette* [2017] VSCA 150, [82]. Cf *R v Nykolyn* [2012] NSWCCA 219, [31].

2094 *DPP v Felton* (2007) 16 VR 214, [2]; *Fitzpatrick v R* [2016] VSCA 63, [48].

2095 *DPP v Frewstal Pty Ltd* (2015) 47 VR 660, [44]; cf *DPP (Cth) v Beattie* [2017] NSWCCA 301, [28].

2096 E.g. *R v Bibaoui* [1997] 2 VR 600, 603; *R v Beaumont* [2000] VSCA 214, [6]-[7]; *DPP v Felton* (2007) 16 VR 214; *DPP v Frewstal Pty Ltd* (2015) 47 VR 660, [115]. See the summary in the dissenting judgment of Kirby J in *Putland v R* (2004) 218 CLR 174, [116].

were committed.[2097] An aggregate sentence will rarely, if ever, be appropriate where there are only two charges and one of them is much more serious than the other.[2098]

A particular issue may arise in relation to rolled up and representative charges. In *Felton*,[2099] Kellam JA observed that "*to aggregate a series of "rolled up counts" into an aggregate sentence, is to impose an aggregation upon something that has already been aggregated by being the subject of a rolled up count.*" The imposition of an aggregate sentence in such a case may create an added layer of opacity.

The Victorian Court of Appeal has doubted whether an uplifted summary charge can be dealt with as part of an aggregate sentence imposed on indictment.[2100]

The imposition of aggregate sentences in summary proceedings is far more common than it is on indictment. In particular, aggregate fines may be very convenient in a busy Magistrates' Court.[2101] In summary hearings, reasons for sentence are usually given orally and in summary form, and an aggregate sentence does not create such difficulties for appeals, because appeals generally proceed by way of rehearing.[2102]

One circumstance in which a single aggregate penalty may be appropriate is where, in relation to offences dealt with summarily, the division of the overall offending into more than one offence is merely fortuitous.[2103]

If a court is considering imposing an aggregate penalty, it is the duty of a prosecutor to oppose such a penalty, by reference to authority, if it would be inappropriate or beyond the power of the court in the circumstances (for example where statutory preconditions for the exercise of the power were not satisfied).[2104]

2097 *DPP v Felton* (2007) 16 VR 214, [2], 19; *R v Grossi* (2008) 23 VR 500, [39]; *Fitzpatrick v R* [2016] VSCA 63, [48]; *DPP v Rivette* [2017] VSCA 150, [87]-[88]; *Turney v R* [2020] VSCA 131, [34]. The reference to variation in the seriousness of counts is a reference to "*the objective gravity of the conduct, not the maximum penalty which the offence carries*": *Kerapa v R* [2017] VSCA 56, [12].

2098 *Stevens v R* [2020] VSCA 170, [54]. An example of such a rare case, in which an appellate court considered that an aggregate sentence would have been appropriate in these circumstances, is *Holt v R* [2021] NSWCCA 14, [109].

2099 *DPP v Felton* (2007) 16 VR 214, [42]. Since *Felton*, legislation in Victoria has been amended specifically to permit an aggregate sentence to include a sentence for a rolled-up or representative charge: *Sentencing Act 1991* (Vic), s 9(4A).

2100 *Fitzpatrick v R* [2016] VSCA 63, [51].

2101 *DPP v Frewstal Pty Ltd* (2015) 47 VR 660, [115].

2102 *R v Bibaoui* [1997] 2 VR 600, 603-4, 607; *R v Beaumont* [2000] VSCA 214; *DPP v Felton* (2007) 16 VR 214, [48].

2103 E.g. *Irvine v Hanna-Rivero* (1991) 23 IPR 295.

2104 *DPP v Frewstal Pty Ltd* (2015) 47 VR 660, [35]; *DPP v Rivette* [2017] VSCA 150, [91]-[93].

APPENDIX 7: FITNESS TO PLEAD AND FITNESS TO BE TRIED: PROCEDURES AND ORDERS

Division 6 of Part IB of the *Crimes Act 1914* (Cth) sets out procedures and powers when issues of fitness to plead or fitness to be tried arise in committal proceedings and proceedings on indictment for federal offences. These procedures and powers are summarised in the following boxes. The text should be read in conjunction with the general discussion in "7.6.1 Unfitness in committal proceedings and on indictment".

Box 1: Question of fitness to be tried arises at committal stage – assessing fitness

1. If the prosecution, defendant or defendant's lawyer raises the question of the defendant's fitness to be tried in a committal for a federal offence on indictment, the magistrate must refer the proceedings to the court to which the proceedings would have been referred had the person been committed for trial ("the court") (s 20B(1)).
2. The magistrate may order the defendant's detention in prison or hospital but only for so long as is reasonably necessary to allow the court to deal with the matter (s 20B(4)).
3. If the court finds the defendant fit to be tried, it must remit proceedings to the magistrate and the committal must continue as soon as practicable (s 20B(2)).
4. The court will decide the question of fitness (s 20B(2) and (3)). If the State/Territory law provides a procedure for determining unfitness when it is raised during committal, it may apply, provided there is no inconsistency with Commonwealth law.[2105]
5. If the defendant is found to be unfit, Commonwealth law provides for the next steps, as set out in box 3 onwards below.

2105 In *Kesavarajah v R* (1994) 181 CLR 230, 243, Mason CJ, Toohey and Gaudron JJ observed that the reference to the "court" in s 20B(2) (in the context of a referral from a committal) finding a person *fit to be tried* refers to a judge making this decision. This is compared with a finding that a person is *unfit* to be tried, which is set out in section 20B(3) and is said to pick up the relevant Victorian legislation at the time, which meant that fitness was to be determined by a jury. The laws of some States or Territories make provision in relation to questions of fitness arising in a committal hearing. Whether such provisions are capable of being applied will depend upon the terms of the relevant State/Territory law. Different views have been expressed as to whether and if so how State laws can apply at the committal stage. *DPP (Cth) v Galea* [2018] VSC 30, [18]-[19], appears to accept that the test of unfitness in the Victorian legislation could be determined by a jury (on referral from a magistrate), even though the Victorian legislation does not provide for fitness questions to be resolved at committal stage (*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 8). In contrast, in *R v Sexton* (2000) 77 SASR 405 the court stated that a "*…number of the provisions under the state statutory scheme appear to be in direct conflict with the Crimes Act. For example, s20B of the Crimes Act provides that where in proceedings for the commitment of a person for trial a question of a person's fitness to be tried arises, the proceedings must be referred to the court where the trial will take place. Under s269J(4) of the Criminal Law Consolidation Act provision is made for the referral of the issue of mental unfitness but leaving a discretion for the preliminary examination to be continued. The Criminal Law Consolidation Act allows the Court to try the objective elements of the offence before determining the issue of unfitness for trial. Such a course would not be open on the trial of a federal offence. S269L, s269M and s269N would appear to be substantially inconsistent with the terms of s20B of the Crimes Act.*" Also see *Agoston v R* [2008] NSWCCA 116, 70.
On the question of whether a State or Territory law is capable of applying, see *R v Ogawa* [2011] 2 Qd R 350, [90]-[93], where the *Mental Health Act* (Qld) stated it did not apply to Commonwealth offences. Provisions in the Queensland *Criminal Code* were applied instead.
On referral from a magistrate in *R v Kaczmarek* [2011] ACTSC 177, Refshauge ACJ decided that the defendant was fit to be tried, solely under s 20B(2). It appears that it was not thought necessary to apply ACT legislation.

Box 2: Question of fitness to be tried arises in trial on indictment – assessing fitness

1. The issue of fitness can be raised by prosecution, defence or on a court's own motion.
2. The court will decide the question of fitness (s 20B(2) and (3)).
3. State/Territory law applies to the procedure for determining a question of fitness raised in a proceeding on indictment (to the extent the law is not inconsistent with Commonwealth law), where it is capable of applying.[2106]
4. The court has an inherent power to determine that there not be a fitness investigation, where circumstances have changed such that the investigation is unnecessary.[2107]
5. If defendant is found to be fit, the trial must be commenced or resumed in accordance with normal trial procedures.[2108]
6. If the defendant is found to be unfit, the court may order that the person be detained in prison or hospital for so long as is reasonably necessary to allow the court to deal with the matter (s 20B(5)).
7. Commonwealth law provides for the next steps, as set out in box 3 onwards below.

2106 *Kesavarajah v R* (1994) 181 CLR 230, 241-243. The "court" will be the jury in all States, except NSW and WA (and SA if a defendant has elected to have judge decide the issue). In *Agoston v R* [2008] NSWCCA 116, [70], the court expressed the view that decisions under the Commonwealth provisions are to be made by a court (that is a judge). This may only have been meant to apply after the preliminary finding of unfitness is made, at least where that question arises on indictment. See also *R v Baladjam (No 1)* [2008] NSWSC 721.

2107 See *DPP (Cth) v Galea* [2018] VSC 30, [18]-[19] (Hollingworth J).

2108 For example, In Victoria, a new jury must be empanelled for the trial, because the jury which decided fitness cannot decide any other matters: see *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 11(6). In South Australia, the same jury will continue in the trial unless the trial judge thinks there are special reasons to have separate juries: see *Criminal Law Consolidation Act 1935* (SA), s 269B.

Box 3: Assessing whether there is a prima facie case against a defendant found to be unfit to be tried and subsequent orders

1. The following procedure applies whether the question of fitness arose during the committal (box 1) or trial (box 2). In either case, if the defendant has been found to be unfit to be tried, the remaining steps are to be taken by the court (ie judge) under sections 20B-20BC.[2109]
2. The first of these steps is to determine whether there has been established a prima facie case that the defendant committed the offence concerned (s 20B(3)).
3. This requires a finding as to whether "there is evidence that would (except for the circumstances by reason of which the person is unfit to be tried) provide sufficient grounds to put the person on trial in relation to the offence") (s 20B(6)).[2110]
4. In proceedings to determine this question:
   - The person may give evidence or make an unsworn statement;
   - The person may raise may defence that could properly be raised if the proceedings were a trial for that offence; and
   - The court may seek such other evidence, whether oral or in writing, as it considers likely to assist (s 20B(7)).
5. If the court determines that there has not been established a prima facie case, the court must dismiss the charge and release the person from custody (s 20BA(1)).
6. If the court determines that a prima facie case has been established but it is of the opinion, having regard to-
   - the character, antecedents, age, health or mental condition of the person, or
   - the extent (if any) to which offence is of a trivial nature; or
   - the extent (if any) to which the offence was committed under extenuating circumstances-

   that it is inappropriate to inflict any punishment, or to inflict any punishment other than a nominal punishment, the court must dismiss the charge and order their release (s 20BA(2)).
7. If the court determines that there is a prima facie case, and does not dismiss the charge in accordance with s 20BA(2) because it would be appropriate to inflict punishment (other than nominal punishment), the court must make further findings, as outlined in box 4.

2109 *Kesavarajah v R* (1994) 181 CLR 230, 241-243. See also *Agoston v R* [2008] NSWCCA 116, [70]; *R v Sharrouf (No 2)* [2008] NSWSC 1450

2110 For a discussion about this requirement, see *R v Sharrouf (No 2)* [2008] NSWSC 1450, [26] et seq. In addition, the Explanatory Memorandum to the Bill which inserted this provision into the *Crimes Act 1914* (Cth) states that this means that "*…the court must be satisfied that the person engaged in the conduct constituting the offence. Any mental element or mens rea attaching to the offence is irrelevant to the finding of a prima facie case…*" (*Crimes Legislation Amendment Bill (No 2) 1989*, Explanatory Memorandum (Senate), Clause 15).

Box 4: Prima facie case established and punishment would be appropriate – inquiry as to future fitness.

1. The court (ie judge) must undertake two inquiries in this situation.[2111]
2. **Inquiry 1:** The first question for the court to determine is whether, on the balance of probabilities, the person will become fit to be tried for the offence within the period of 12 months after the day the person was found to be unfit to be tried (s 20BA(4)).
3. A court may only make this determination about future fitness after considering evidence from a duly qualified psychiatrist and one other duly qualified medical practitioner (s 20BA(5)). It can also obtain other evidence as appropriate (s 20BA(6)).
4. **Inquiry 2:** This inquiry is required to determine what custodial/bail arrangements are to be made for the person.
   - The court must first determine whether the person is suffering from a mental illness or condition, for which treatment is available in a hospital, and
   - If this is the case, the court must ascertain whether the person objects to being detained in a hospital.

   (This is required under s 20BB(1) if the defendant is found to be fit to be tried within the period, and s 20BC(1) if they are found unfit to be tried.)
5. A range of orders are possible, depending on the answers to these inquiries.
6. If the court finds that the person-
   - will not become fit to be tried within the 12 month period, refer to box 5
   - will become fit to be tried within the 12 month period, refer to box 6.

2111 *Kesavarajah v R* (1994) 181 CLR 230, 241-243. For an example of the process see *R v Sharrouf (No 2)* [2008] NSWSC 1450.

Box 5: Finding that the person will not become fit to be tried within the 12 month period

1. If the court finds the person will not become fit to be tried within the 12 month period, it must make orders regarding custody or release.
2. The court must order the detention of the person as follows:
   - that the person be detained in a hospital - but only if the person is suffering from a mental illness or mental condition for which treatment is available in a hospital, and the person does not object to detention in a hospital; or
   - otherwise - that the person be detained in another place, including a prison.

   The period of detention specified in the order must not exceed the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence charged (s 20BC(2)).

   OR

   If in the court's opinion it is more appropriate to do so, the court may release the person from custody either absolutely or subject to conditions, for a period not exceeding 3 years (s 20BC(5)).

   The conditions of release may include:

   - that the person remain in the care of a responsible person nominated in the order;
   - that the person attend upon a person nominated, or at a place specified, in the order for assessment of the person's mental illness, mental condition or intellectual disability, and where appropriate, for treatment;
   - any other condition that the court thinks fit (s 20BC(5) and (6)).
3. The previous determination that that there is a prima facie case for the commission of the offence charged acts as a stay against any proceedings, or any further proceedings, against the person, in respect of the offence (s 20BC(8)).

Box 6: Finding that the person will become fit to be tried within the 12 month period.

1. If the court finds that the person will become fit within the 12 month period and:
   - is suffering from a mental illness or condition, for which treatment is available in a hospital, and
   - if so, does not object to being detained in a hospital-

   the court must order the person be detained in a hospital until the person becomes fit to be tried[2112] (s 20BB(2)).
2. In other situations where the court finds that the person will become fit within the 12 month period the court must:
   - order the person's detention in a place other than a hospital (including a prison); or
   - grant bail on condition that the person live at an address or place specified by the court-

   until the person becomes fit to be tried[2113] (s 20BB(2)).

   See box 7

2112 Or subsequently, if it transpires that the person is not fit within the 12 month period, until the court makes an order for detention or release.

2113 Or subsequently, if it transpires that the person is not fit within the 12 month period, until the court makes an order for detention or release.

Box 7: Resolution if person expected to become fit to be tried within the 12 month period

1. If the court has found that the person will become fit within 12 months (see box 6), and the person duly becomes fit within that period-
   - if the person had been indicted on the charge before being found unfit, the proceedings on the indictment must be continued as soon as practicable (s 20BB(3)(a)); or
   - if the matter of fitness arose during the committal, the committal proceedings must continue before the magistrate as soon as practicable (s 20BB(3)(b)).
2. If the person does not become fit within the 12 month period, at the end of that period the court must make an order as to the detention or release of the person.
3. The court must order the detention of the person as follows:
   - that the person be detained in a hospital - but only if the person is suffering from a mental illness or mental condition for which treatment is available in a hospital, and the person does not object to detention in a hospital; or
   - otherwise - that the person be detained in another place including a prison.

   The period of detention specified in the order must not exceed the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence charged (s 20BC(2) applied by s 20BB(4)).

   In fixing the period of detention the court must have regard to any period of detention already served under section 20BB(2) (s 20BB(5)).

   OR

   If in the court's opinion it is more appropriate to do so, the court may release the person from custody either absolutely or subject to conditions, for a period not exceeding 3 years ((20BC(5) applied by s 20BB(4)).

   If it is appropriate to release the person, and the person is already on bail, the court must continue the person's release on bail (s 20BB(5)).

   Conditions of release may include:
   - That the person remain in the care of a responsible person nominated in the order;
   - That the person attend upon a person nominated, or at a place specified, in the order for assessment of the person's mental illness, mental condition or intellectual disability, and where appropriate, for treatment;
   - Any other condition that the court thinks fit (s 20BC(5) and (6) applied by s 20BB(4)).

   In fixing the period of the person's release for which conditions apply, the court must have regard to any period of detention already served under section 20BB(2) (s 20BB(5)).
4. The previous determination that there is a prima facie case for the commission of the offence charged acts as a stay against any proceedings, or any further proceedings, against the person, in respect of the offence (s 20BB(6)).