Sentencing Advocacy in the Local Court
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Sentencing is the bulk of the work for the criminal lawyer practicing in the local court in NSW, given that the vast majority of the state's criminal matters are disposed of in the local courts, and the majority of those, by way of a plea of guilty.

Sentencing is an art, and one of the most complex and delicate of roles for the defence advocate. In some ways the local court is the most difficult of criminal jurisdictions to practice in. This is largely the case because it is often difficult
to predict the magistrate and their particular manner of dealing with matters, and secondly because of the time constraints that are placed upon the average magistrate dealing with a busy list. What I mean by my first point is that magistrates are no doubt bound by a legislature that attempts to bring transparency and consistency to the sentencing process (by way of guideline judgments and legislated penalties), but the fact remains that that for as long as there is individualised justice and an approval of an "instinctive synthesis" approach to sentencing, then magistrate's instincts will be different. Knowing one's bench therefore becomes an important factor as to the manner of presentation and the ultimate result sought on sentence.

But first some preliminaries for starting out in sentencing in the local court. I will not deal with traffic matters in this paper as it requires a sentencing paper all on its own, and there are some very good ones around. I will attempt to deal with the matters to consider in preparing a plea in mitigation in the order in which they will happen, assuming that your client has instructed you to enter a plea of guilty and you have satisfied yourself on the law and the facts that the plea is properly entered.

Preparation

The facts

It is important to bear in mind that the facts prepared in police matters are very often not drafted by a person who was present at the time of the event that is the subject of the charge. They therefore may, and often do, contain inaccuracies, or at least matters that your client may not agree to, despite the fact that your client agrees to the essence of the charge levelled against them. Further, special attention should be given to whether the facts contain prejudicial and/or irrelevant matters that are objectionable or may support a more serious offence than that charged against your client[1]. If that is the case attempts should be made to have the facts amended. Facts can be negotiated, either directly with the police prosecutor, or the informant over the phone or, failing that, by way of written representations to the Informant or Police Legal Services.

[1] An example of this would be the inclusion in the fact sheet of the details of an injury that would sustain a charge of assault occasioning actual bodily harm (pursuant to s59 of the *Crimes Act* 1900) where the only offence charged against the client is that of common assault (pursuant to s61 of that Act), see *De Simoni* (1981) 147 CLR 383. Conversely, a Court must not give weight to the absence of a particular fact, where if it were established the offence would be considered to be more serious. For example, in the case of *R v Nguyen* [2013] NSWCCA 195 it was held that the absence of the knowledge of the offender that the victim was a police officer should not have served as the basis for the reduction in the seriousness of the offence by the judge.

The fact sheet once amended should be tendered by agreement. If the facts cannot be agreed in this manner then consideration must be given to whether it is worth taking the matter to hearing on **a disputed fact hearing**. Obviously, this would only be the appropriate course should the matter be significant, taking into account that all the benefit of a plea of guilty can be lost by a disputed facts hearing run on matters of little significance. Saying that however, a disputed fact hearing should be held where the matter is significant and where, if proved, it would constitute an aggravating feature in determining the objective criminality of the offence committed.

Criminal record

Sometimes the prosecution try to tender a bail record on sentence. As a practice this should be avoided. Charges recorded on a bail report do not necessarily result in convictions and a fingerprint record is the preferable course. It is also a good practice to go through the record with the client beforehand, it does sometimes happen that the wrong record is attached or errors are made on the record. It is not a bad idea to ask your client if they have any convictions in other jurisdictions as well to save being surprised at the bar table.

Gathering references

A good reference can make a real difference in sentence matters, but a poorly drafted reference is not only a waste of time, but can sometimes work against a client. References are not discount cards, the more you give the better result you get. A reference should always be made for the purpose of the court proceeding that is before the court and should therefore be directed to the "Presiding Magistrate". It sounds obvious but it needs to be dated and signed. It should refer to how the writer knows the offender, and for how long. They should refer to their knowledge of the offender's general character, their knowledge of the offences and whether they consider the offence out of character for the offender, or whether they have anything to add about the impact of commission of the offence on the person (i.e. any expressions of remorse or contrition). In some special cases it can help to ask a person giving a character reference to come to court to add further weight to their support, or even put their evidence into affidavit form. In extremely rare occasions I have called evidence from referees.

Pre-Sentence Reports

"PSR's" are reports ordered by the court when it is interested in considering whether any alternatives to gaol are available to the subject offender. Alternatives include community service or periodic detention orders. Pre- Sentence reports are sometimes used as a defacto way of obtaining an alternative to a background report, although they should only be obtained in such a context where an alternative to a custodial sentence is being contemplated. A defence practitioner should not be asking for such a report unless a gaol term is a possibility in a matter. PSR's are good when they are good, but deadly when they are horrid. PSR's are court documents, and although certain objections can be made to their content, it is very difficult to discredit the findings of a probation and parole officer who are sometimes accepted as objective observers (when the reality can by quite the contrary). Unlike a psychologist report for example, obtained by the defence, a PSR can not be objected to just because it contains negative material from the defence perspective. Where material contained in the report is flatly denied by the defendant it may be necessary to challenge the contents of the report. If they are pressed,

then sometimes it is necessary to adjourn the proceedings until the probation officer can be brought to court, by subpoena if necessary, to answer questions about the contents of the report.

Other reports

Sometimes it is necessary to obtain a psychologist or, if appropriate, a psychiatric assessment in relation to your client or their behaviour. In this case it is usual to put on the court record that this is taking place to explain the longer than usual adjournment period required. It is important to advise the expert of the charges against your client, their record and any previous mental health history, as well as exactly what you would like them to address in their report. It is unwise to tender a report that contains the expert's view as to the penalty that the court should impose.

The process of the plea

Each Local Court will have its own practice as to how matters are dealt with. Some courts have a separate list before a registrar to whom you indicate that the matter is a plea matter before it gets referred to a magistrate (this is the case for example, at the Downing Centre Local Court here in Sydney). Other courts deal with other matters first, such as mentions and bail applications before they turn to the matters for sentence, so be prepared to seek out the practitioners who know the practice in that court and go with the flow.

As a matter of courtesy to other practitioners, and as a matter of common sense, if you know your matter is going to be longer than the average matter you might find you get a more patient reception from the bench if you have waited for the bulk of the court's list to have been dealt with before you start on your matter.

When your matter is called on, you call the defendant to sit behind you. You announce your appearance and mention the name and number of the matter and the fact that it is to proceed by way of a plea of guilty. The prosecution
will then hand up to the magistrate the police facts and the antecedent record. You will be formally shown those documents by the court officer. Any problems with the documents should have been sorted out beforehand so unless there is something minor that has not been resolved previously, there is usually no reason to object to the evidence at this point.

Once the Magistrate has read the facts and record then you, or they, might suggest that it is appropriate that a pre-sentence report be obtained. If a full report is required then the matter will usually be adjourned for 6 weeks, or perhaps for longer in country areas. If only a short assessment is required then in some instances an assessment might be able to be obtained on the day of court.

Should the matter proceed past this point then you should tender any references, affidavit material or other relevant documentation that you wish to rely upon. There is no need to "seek to tender" or "seek the court's leave to tender", the practice is simply to say: "I tender".

The magistrate should then indicate that they are ready to hear the plea in mitigation and the plea proceed. Sometimes the magistrate will engage with the solicitor, or seek further guidance from the prosecution, and on other occasions simply proceed to

judgment. The defendant sits during the judgment but should stand once the magistrate proceeds to the actual sentence. If the magistrate wishes to speak directly to your client then the defendant should stand and respond by calling the magistrate "your honour".

The plea itself

It pays to spend some time working out how to structure the plea in mitigation. Some matters, like drink driving, for example, may be more formulaic in style, whereas other matters call for a more detailed approach, even in the rarest of occasions for the calling of evidence.

There are some basic matters to turn your mind to:

- The maximum penalty for the offence charged and the jurisdictional maximum[2];
- The objective criminality of the offence, including an analysis of any aggravating features (s21A(2) *Crimes (Sentencing Procedure) Act 1999*);
- An analysis of any applicable mitigating features (s 21A(3) *C(SP) Act*), see below;
- The time when the plea of guilty was entered, or whether it followed conviction: any additional expressions of remorse or contrition noting specifically the manner of the expressions of this remorse (by way of apology, payment of compensation, or other);
- The prevalence of the offence in the community therefore raising issues of deterrence;
- Your client's subjective features: age; occupation, family and employment background, health issues and present circumstances;
- The circumstances in which the offence took place and the presence of alcohol or drugs; and
- Prospects for the future and rehabilitation;
- Your submissions on the appropriate penalty to be imposed.

The final submissions as to the appropriate penalty should be couched in a way that has reference to the principles of sentencing which are found in s 3A of the *C(SP) Act.*

> **3A Purposes of sentencing**
>
> The purposes for which a court may impose a sentence on an offender are as follows:
>
> (a) to ensure that the offender is adequately punished for the offence,
> (b) to prevent crime by deterring the offender and other persons from committing similar offences,
> (c) to protect the community from the offender,

[2] For example the offence of larceny under s117 of the *Crimes Act* carries a maximum penalty of 5 years, however when dealt with in the local court has a maximum of 2 years, however if the value of the property stolen is under $5000 the maximum jurisdictional limit drops down to 50 penalty units and/or 2 years. If the value of the property stolen is under $2000 it drops further to 20 penalty units and/or 2 years. See s267 and s268 of the *Criminal Procedure Act*. It is also important to remember that a jurisdictional maximum does not necessarily mean that a penalty in a local court should be treated in the same way as a maximum penalty. For example a magistrate could impose a 2 year gaol sentence for a break, enter and steal offence pursuant to S112 of the *Crimes Act* 1900 (which carries a max penalty of 14 years, but when dealt with in the local court has a jurisdictional limit of 2 years) despite the fact the defendant had entered a plea of guilty and the matter could not be described as the worst category of offence: See *R v Doan* [2000] NSWCCA317

(d) to promote the rehabilitation of the offender,
(e) to make the offender accountable for his or her actions,
(f) to denounce the conduct of the offender,
(g) to recognise the harm done to the victim of the crime and the community.

S21A of the C(SP) Act is worth a thorough examination in each sentencing exercise. The features set out in this provision are relevant to determining the objective criminality of matter, and where the matter sits within a range of matters. It is also important to know that the lists provided are not exhaustive. S21A(1) specifically refers to the ongoing operation of the common law when assessing the objective criminality of a matter.

The **aggravating features** of a matter are set out in sub-section (2).

(2) Aggravating factors: The aggravating factors to be taken into account in determining the appropriate sentence for an offence are as follows:
(a) the victim was a police officer, emergency services worker, correctional officer, judicial officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work,
(b) the offence involved the actual or threatened use of violence, (c) the offence involved the actual or threatened use of a weapon, (ca) the offence involved the actual or threatened use of explosives or a chemical or biological agent,
(cb) the offence involved the offender causing the victim to take, inhale or be affected by a narcotic drug, alcohol or any other intoxicating substance,
(d) the offender has a record of previous convictions (particularly if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences),
(e) the offence was committed in company,
(ea) the offence was committed in the presence of a child under 18 years of age, (eb) the offence was committed in the home of the victim or any other person,
(f) the offence involved gratuitous cruelty,
(g) the injury, emotional harm, loss or damage caused by the offence was substantial, (h) the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability),
(i) the offence was committed without regard for public safety,
(ia) the actions of the offender were a risk to national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* of the Commonwealth),
(ib) the offence involved a grave risk of death to another person or persons,
(j) the offence was committed while the offender was on conditional liberty in relation to an offence or alleged offence,
(k) the offender abused a position of trust or authority in relation to the victim,
(l) the victim was vulnerable, for example, because the victim was very young or very old or had a disability, or because of the victim's occupation (such as a taxi driver, bus driver or other public transport worker, bank teller or service station attendant), (m) the offence involved multiple victims or a series of criminal acts,
(n) the offence was part of a planned or organised criminal activity, (o) the offence was committed for financial gain.
(p) without limiting paragraph (ea), the offence was a prescribed traffic offence and was committed while a child under 16 years of age was a passenger in the offender's vehicle.

Special care should be taken when assessing the criminality of a matter to not additionally aggravate under this section by taking into account a factor that is already an inherent element of an offence. An example of this would be taking into account the

aggravating factor of ss2 (i) above committing an offence without regard for public safety for an offence of drive manner dangerous: *R v Elyard* [2006] NSWCCA 43.

Further, the inclusion of the aggravating feature of a defendant's criminal record under ss2 (d) has been tempered more recently. The Court of Criminal Appeal sat a bench of five in *R v McNaughton* [2006] NSWCCA 242 to settle how prior criminal record should be used against an offender in light of the common law and the terms of s 21A. The following propositions can be extracted from that case:

- That the common law principle of proportionality requires that a sentence should neither exceed nor be less than the gravity of the crime having regard to the objective circumstances: *McNaughton* at [15] and *Veen v The Queen (No 2)* (1988) 164 CLR 465.

- That prior offending is *not* an "objective circumstance" for the purposes of the application of the proportionality principle: at [25]

- Prior convictions are pertinent to deciding where, within the boundary set by the objective circumstances, a sentence should lie: *McNaughton* at [26]: "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 to the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted."

- Taking into account in sentencing for an offence all aspects, both positive and negative, of an offender's known character and antecedents, is not to punish the offender again for those earlier matters; it is to take proper account of matters which are relevant to fixing the sentence under consideration: *Weininger v The Queen* (2003) 212 CLR 629 at [32].

Matters in mitigation. S21A (3) sets out some of the matters that may be used to mitigate a sentence.

> 3) Mitigating factors The mitigating factors to be taken into account in determining the appropriate sentence for an offence are as follows:
> (a) the injury, emotional harm, loss or damage caused by the offence was not substantial,
> (b) the offence was not part of a planned or organised criminal activity, (c) the offender was provoked by the victim,
> (d) the offender was acting under duress,
> (e) the offender does not have any record (or any significant record) of previous convictions,
> (f) the offender was a person of good character, (g) the offender is unlikely to re-offend,
> (h) the offender has good prospects of rehabilitation, whether by reason of the offender's age or otherwise,
> (i) the remorse shown by the offender for the offence, but only if:
> (i) the offender has provided evidence that he or she has accepted responsibility for his or her actions, and
> (ii) the offender has acknowledged any injury, loss or damage caused by his or her actions or made reparation for such injury, loss or damage (or both),
> (j) the offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability,
> (k) a plea of guilty by the offender (as provided by section 22),
> (l) the degree of pre-trial disclosure by the defence (as provided by section 22A),
> (m) assistance by the offender to law enforcement authorities (as provided by section

23).

Matters in mitigation are generally supported by some sort of evidence, such as through a psychologist's report, or character references rather than simply stated from the bar table.

The plea of guilty

Special mention should always be made in a matter where the sentence has resulted following a plea of guilty rather than conviction. It is a matter of mitigation as mentioned above at ss(3)(k), but is also referred to separately at s22:

> **22 Guilty plea to be taken into account**
>
> (1) In passing sentence for an offence on an offender who has pleaded guilty to the offence, a court must take into account:
>
> (a) the fact that the offender has pleaded guilty, and
>
> (b) when the offender pleaded guilty or indicated an intention to plead guilty,
>
> and may accordingly impose a lesser penalty than it would otherwise have imposed.
>
> (c) the circumstances in which the offender indicated an intention to plead guilty,
>
> and may accordingly impose a lesser penalty than it would otherwise have imposed
>
> (1A) A lesser penalty imposed under this section must not be unreasonably disproportionate to the nature and circumstances of the offence.
>
> (2) When passing sentence on such an offender, a court that does not impose a lesser penalty under this section must indicate to the offender, and make a record of, its reasons for not doing so.
>
> (3) Subsection (2) does not limit any other requirement that a court has, apart from that subsection, to record the reasons for its decisions.
>
> (4) The failure of a court to comply with this section does not invalidate any sentence imposed by the court.

Unfortunately, this provision is often given lip service, particularly I find in the local court. The guideline judgment of *R v Thompson; R v Houlton* (2000) 49 NSWLR 383 stipulates that a plea of guilty should in most cases result in a discount between 10-25% off the sentence imposed depending on the timing of the plea, in order to reflect the *utilitarian* value of the plea. Additional discounts may apply if there is evidence of contrition and remorse. The discount is more readily apparent when the court is imposing a sentence of imprisonment, however it is sometimes questionable whether the court gives it quite the same weight when the court considers that a s9 bond is the appropriate sentencing outcome, for example.

A discount may be imposed by way of a stepping down in the sentencing process, rather than a specific reduction of the period of the sentence imposed, or the amount of it, in the case of the imposition of a fine. The approval of the High Court of Australia of the "instinctive synthesis" approach to sentencing has the effect that each step in the sentencing process does not have to equate to a reduction in sentence that is mathematically transparent[3].

In *R v Borkowski* (2009) 195 A Crim R 1, the court set out at [32] "principles of general application" to be applied by sentencing courts in relation to the discount:

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

[3] *Markarian v R* [2005] HCA 25

2. Some allowance may be made in determining the discount where the trial would be particularly complicated or lengthy: *Thomson* at [154].
3. The utilitarian discount does not reflect any other consideration arising from the plea, such as saving witnesses from giving evidence but this is relevant to remorse: *Thomson* at [119] to [123]; nor is it affected by post-offending conduct: *Perry* [2006] NSWCCA 351.
4. The utilitarian discount does not take into account the strength of the prosecution case: *Sutton* [2004] NSWCCA 225.
5. There is to be no component in the discount for remorse nor is there to be a separate quantified discount for remorse: *MAK and MSK* [2006] NSWCCA 381; *Kite* [2009] NSWCCA 12 or for the 'Ellis discount'; *Lewins* [2007] NSWCCA 189; *S* [2008] NSWCCA 186.
6. Where there are multiple offences and pleas at different times, the utilitarian value of the plea should be separately considered for each offence: *SY* [2003] NSWCCA 291
7. There may be offences that are so serious that no discount should be given: *Thomson* at [158]; *Kalache*[2000] NSWCCA 2; where the protection of the public requires a longer sentence: *El-Andouri* [2004] NSWCCA 178.
8. Generally the reason for the delay in the plea is irrelevant because, if it is not forthcoming, the utilitarian value is reduced: *Stambolis* [2006] NSWCCA 56; *Giac* [2008] NSWCCA 280.
9. The utilitarian value of a delayed plea is less and consequently the discount is reduced even where there has been a plea bargain: *Dib* [2003] NSWCCA 117; *Ahmad* [2006] NSWCCA 177; or where the offender is waiting to see what charges are ultimately brought by the Crown: *Sullivan and Skillin* [2009] (*sic*[2008]) NSWCCA 296; or the offender has delayed the plea to obtain some forensic advantage: *Stambolis*[2006] NSWCCA 56; *Saad* [2007] NSWCCA 98, such as having matters put on a Form 1: *Chiekh and Hoete*(*sic* Cheikh) [2004] NSWCCA 448.
10. An offer of a plea that is rejected by the Crown but is consistent with a jury verdict after trial can result in a discount even though there is no utilitarian value: *Oinonen* [1999] NSWCCA 310; *Johnson* [2003] NSWCCA 129
11. The discount can result in a different type of sentence but the resulting sentence should not again be reduced by reason of the discount: *Lo* [2003] NSWCCA 313.
12. The amount of the discount does not depend upon the administrative arrangements or any practice in a particular court or by a particular judge for the management of trials or otherwise."

Bathurst CJ upheld these principles in *R v AB* [2011] NSWCCA 229 where his Honour stated at [3] that, "the principles have to be applied by reference to the particular circumstances in any case."

It should be kept in mind that the court remains guided by the overarching objectives of the purposes of sentencing in s3A, and it is still open to judges to withhold discounts for guilty pleas based on the circumstances of an offence.[4]

Other tools of preparation

Statistics

In some matters, particularly where the offence is serious, or where the offence is infrequently dealt with in the local court it is worthwhile looking at, and if appropriate tendering, a copy of the Judicial Commission of NSW statistics. These statistics are useful for considering what the range of results are for certain offences and where this matter might fall within the range. The Law Society library has access to these statistics if you do not work for a government body. Where the pool of matters dealt with in the local court is large, then the statistics can be even more persuasive to persuading a

[4] This was seen in *Milat v R* [2014] NSWCCA 29 based on the extreme and horrific nature of the murders. Spigelman CJ at [84] acknowledged that there will be cases where a discount is withheld however his Honour did not specifically define these.

magistrate that the sentence they wish to impose may fall outside of the range reflected in the statistics.

Common Law

It is always useful to be aware of any relevant case law that might touch upon the offence for sentence and provide some guiding principles on sentencing when dealing with a particular kind of offence. Examples of this are particularly guideline judgments such as *Re Attorney General's Application under s 37 Crimes (Sentencing Procedure) Act 1999* (2004) 61 NSWLR 305 regarding high range drink driving offences, or *R v Ponfield* (1999) 48 NSWLR 327 regarding break, enter and steal offences. Useful sources are simply looking at the commentary attached to the relevant offence charged in a Butterworth's practice, or looking up the Judicial Commission website.

The sentencing options

A practitioner should be thoroughly versed in the provisions of the C(SP) Act concerning the sentencing options set out in the Act, in addition to whatever diversionary programs that the particular court may participate in. Knowing the way that a sentencing option operates, the length of time certain orders may be imposed are part and parcel of practice in this field. The following are examples of the non-custodial penalties that are available:

C(SP)Act	**Penalty**	**Relevant provision of Act regarding suitability and process**	**Maximum period allowable**	**PSR required**
Section 8	Community service orders	Part 7	500 hours	Yes
Section 9	Good behaviour bond	Part 8	5 years	No
Section 10	Dismissal of charge and conditional discharge of offender	See factors to "have regard to": s10 (3), and Part 8	2 years if conditions attached	No
Section 10A	Conviction with no other penalty			No

Section 11	Deferral of sentence for rehabilitation program or to participate in an intervention program		12 months	No, but in practice might follow the ordering of one
Div 4 Part 2	Fines		See relevant penalty attaching to the offence and then jurisdictional cap (usually found in commentary to offence in Butterworths)	

Certain courts may also have attached to them diversionary or "intervention programs" such as circle sentencing, community conferencing, traffic offender or merit programs. An enquiry at the Registry should provide you with the information you need as to the availability of these programs. A referral to the *Criminal Procedure Regulation* 2005 will provide you with the necessary information as to the operation of these programs within the court's sentencing scheme[5].

Structuring a gaol sentence in the Local Court

This subject is a whole paper in itself, but a sizeable proportion of the work in the Local Court does involve the sentencing of people to periods in custody. It goes without saying that the role of the defence is to do all one reasonably can to keep the client out of custody. There are times however where the objective circumstances of the offence together with the lack of realistic non- custodial options conspire to make gaol the only likely outcome.

There is a three-stage procedure in determining that a sentence of imprisonment should be imposed, and what that sentence should be. The first stage is determining that there is no other appropriate penalty other than that of imprisonment (s5(1) CSP Act), the second is to set the term of the sentence and the third is to determine how that sentence is to be served: *R v Foster* (2001) NSWCCA215, taking into account the following options in an increasing order of severity: a suspended sentence; home detention; intensive correction order or full-time custody: *R v Zamagias* [2002] NSWCCA17. Alternatives to full-time custody are set out below:

C (SP) Act	**Penalty**	**Relevant provision of Act regarding suitability and process**	**Maximum period allowable**	**PSR required**

[5] See Regulation 19-19B of Part 5

S5A	Compulsory drug treatment detention	Part 2A of the Drug Court Act 1998: A court refers an eligible convicted offender to the Drug Court to make an order for compulsory drug treatment detention. Eligability and suitability factors such as those in s18E are taken into account.		
S6	Home detention	Part 6: restrictions on which offences, and offenders with certain histories and appropriate home environment	18 months	No, home detention assessments occur after the offender has been sentenced to gaol and the matter is adjourned for a home detention assessment
S7	Intensive Correction Orders	Part 5: restrictions on which offences this sentence is available for. For example, this sentence is not available for sexual offences	2 years	No, ICOs occur after the offender has been sentenced to gaol. Only after the term of imprisonment is set can the Court then have regard to the manner in which it is served.
S12	Suspended sentence	Part 8: s99(1)-(4) specifically dealing with consequences of revocation of a suspended sentence	2 years	No, but in practice a PSR has already been obtained as part of the necessity of the court considering all alternatives to a custodial sentence

Determining the length of a sentence

In sentencing offenders to periods over 6 months, S44 of the C(SP) Act requires that the court set a non-parole period first before setting the balance of the term, with the balance of the term of the sentence not to exceed one- third of the non-parole period, unless there is a finding of special circumstances.

Determining the appropriate non-parole period involves an examination of all the factors set out above as to the maximum penalty, any relevant case law, the objective criminality of the offence, the defendant's subjective features and the timing of the plea. JIRS statistics may assist you in determining the appropriate range. The ratio of non-parole period to parole is determined by reference to s44 above and to a finding of "special circumstances". In practice a finding of special circumstances under the provision results in an alteration of the ratio of parole to non-parole. *R v Simpson* [2001] NSWCCA 534 at [59] stating that the "non-parole period is to be determined by what the sentencing judge concludes that all the circumstances of the case, including the need for rehabilitation, indicate ought to be the minimum period of actual incarceration".

In *R v El-Hayek* (2003) 144 A Crim R 90 Howie J at [105] stated that a finding of special circumstances is not always limited to the rehabilitation or reform of the offender. Findings also attach to other circumstances: such as the age of the offender; the circumstances of their custodial arrangements; their mental health; the accumulation of their sentences and numerous other factors. In setting the non-parole period the court should always ensure that it reflects the objective criminality of an offence, as well as the principles of condign punishment and deterrence: *R v Maclay* (1990) 19 NSWLR 112 at 126.

Fixed terms

Under s45 the court can decline to set a non-parole period if it appears to the court that it is appropriate to do so due to the nature of the offence or the antecedent character of the offender, because of any other penalty previously imposed on the offender, or for any other reason that the court considers sufficient. The court must give reasons for declining to set a non-parole period.

Commencement of the sentence

S47 of the Act states that in the usual course of events a sentence will commence *on the day* it is imposed unless it is a sentence to be served by way of periodic detention in which case it would commence on the first attendance date for detention, or unless stayed for the purpose of a home detention assessment.

A sentence can commence *in the future* when the defendant is currently serving a sentence and the magistrate wishes to make the fresh sentence consecutive on the current sentence.

Pursuant to s47(2)(a) of the Act a court may have a sentence commence *before the day* on which the sentence is imposed. According to ss(3) the court must take into account any time for which the offender has been held in custody in relation to the offence to which the sentence relates, see also *R v Sayak* CCANSW 16 Sept 1993. In *R v McDonald* CCA(NSW) 12 December 1995 the court held:

> "..that a sentencing judge has power to back-date a sentence, even in circumstances where the offender has been at large during the intervening period, is not in doubt. That not infrequently happens in this court, and, when it does, the court makes it clear that it is aware, in imposing its sentence, that the prisoner has been at large during part of the period the subject of the offence"

If the court is imposing a sentencing in the future, on the expiration of another sentence, then the first day of the new sentence must commence on the day following the earliest day that the offender may become eligible for release, ss(4). If however, the prisoner is serving a period of imprisonment at the time of the sentence, after the period of non-parole has expired, and they are still in custody, then the sentencing court must impose a sentence that commences on the day of the sentencing, if not before, ss(5).

Dealing with multiple offences

In sentencing multiple offences the procedure is as follows: first, set the appropriate sentence for each offence; second, consider whether the offences should be served concurrently or consecutively; and then finally consider the application of the principle of totality: *Pearce v The Queen* (1998) 194 CLR 610.

Part 4 Division 2 of the Act deals with concurrent and consecutive sentences. S55 of the Act stipulates that in the absence of a direction to the contrary where an offender is being sentenced to multiple offences, or is already serving another sentence which is yet to expire, any fresh sentence of imprisonment is to be served concurrently. Ss(2) however directs that a court may instead determine that a new sentence is to be served consecutively on another sentence, or partly concurrently and partly consecutively with another sentence. In line with the concept of "no gaps" any fresh sentence must commence on the day after the expiry of the non-parole period of the earlier sentence.

Limitation on consecutive sentences imposed in the Local Court

Section 58 of the Act applies only to local courts and imposes on a magistrate a limitation on the number of times a court may accumulate sentences of imprisonment and the number of years that may be imposed when sentencing for multiple offences. Except for a few exceptions relating to escape offences and assault matters on a certain class of victim, the section places a total overall cap of 5 years on new sentences imposed on current sentences imposed by the local court.

Lodging appeals

A final word on appeals. After any sentence, but particularly after the imposition of a gaol sentence, it is a wise practice to speak to the client to discuss the result and consider, if appropriate, the possibility of appeal. The right to appeal to the district court against a sentence imposed in the Local Court exists under s11 of the *Crimes (Appeal and Review) Act* 2001 and should be lodged within 28 days of the date on which the sentence was imposed. There is often little to be lost by such an appeal, given the practice that sentences are seldom, if ever, increased on appeal (there being a practice of issuing a "Parker warning" allowing the appellant to withdraw their appeal if the judge thinks an increase is appropriate). Saying that, it is seldom in the personal interest of a client to hold out false hope of a reduction on sentence when the initial sentence imposed is sound.

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