Queensland Sentencing Round-up

Queensland Sentencing Advisory Council

2023: Fourth Quarter

Note to readers:

The Sentencing Round-up summarises select sentencing publications and developments in Queensland between 1 October and 31 December 2023 as identified by the Council. It is not intended to be exhaustive. Decisions and cases in this document are as at date of publication and may be subject to appeal. The Council welcomes feedback on additional resources that might be referenced in future issues.

Childrens Court of Queensland sentencing remarks

District Court of Queensland decisions

Academic articles and reports of interest

Speeches delivered by the Queensland judiciary

His Honour Judge David R Kent KC, *'The Sentencing Process'*, delivered at the Europe/Asia Legal Conference held in Lake Como, Italy, 25 June 2023 (published 2 November 2023

His Honour Judge Kent KC explains the sentencing process, the nature of sentencing discretion and key legislative guidance under the *Penalties and Sentences Act 1992 (Qld)* ('PSA'). His Honour also discusses the complexity of sentencing, the variety of factors which must be balanced and current problems with artificial intelligence.

Practice Directions

Magistrates Court Practice Direction No 3 of 2023: Summary proceedings under the *Justices Act 1886* for domestic violence offence (amended 3 October 2023)

A practice direction for the process which applies where there are summary proceedings for a domestic violence offence under the *Justices Act 1886* (Qld). This process also applies for a contested sentence where a protected witness is required for cross-examination.

Magistrates Court Practice Direction No 4 of 2023: Non-publication orders – *Criminal Law (Sexual Offences) Act 1978* (3 October 2023)

If a person is charged with a certain sexual offence, they may be identified by the media unless there is a non-publication order. This is a Practice Direction for the procedure to follow when a there is an Application for a Non-Publication Order, including the forms to be completed and filed.

Relevant Bills

Health and Other Legislation Amendment Bill (No. 2) 2023

Introduced: 30 November 2023

The Bill proposes to extend the circumstances were an expert report and transcripts from the Mental Health Court, can be used in criminal proceedings, including in the consideration of sentencing. Previously, they could only be allowed if it related to the same offence in the Mental Health Court. Under the proposed Bill, it can now be used for any offence.

Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023

Introduced on 29 November 2023, the Bill proposes to amend the *Criminal Code Act 1899 (Qld)* ('Criminal Code (Qld)') to:

- allow a person to appeal their conviction again, with leave of the Court of Appeal. The person must have been convicted of an offence on indictment or of a summary offence under section 651 of the Criminal Code (Qld).
- expand the exception to double jeopardy (the ability of a person acquitted to be tried again) to 10 prescribed offences, punishable by life imprisonment (in addition to murder):
    - repeal engaging in penile intercourse with a child in certain circumstances (ss 215(3)–(4A))
    - abuse of persons with an impairment of the mind in certain circumstances (ss 216(3)(a) or (b)
    - incest (s 222(1))
    - repeated sexual conduct with a child (s 229B)
    - manslaughter (s 303)
    - attempted murder (s 306)
    - killing an unborn child (s 313)
    - unlawful striking causing death (s 314A)
    - rape (s 349)
    - sexual assaults in certain circumstances (s 352(3)).

Summary Offences (Prevention of Knife Crime) and Other Legislation Amendment Bill 2023

Introduced on 29 November 2023, the Bill proposes to amend the *Summary Offences Act 2005* and *Police Powers and Responsibilities Act 2000* in respect of the sale, possession and storage of knives and other dangerous items.

Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023

Introduced on 11 October 2023, the Bill proposes the following changes to the law relating to sentencing and the substantive criminal law:

- Introduce an affirmative model of consent which requires free and voluntary agreement to participate in a sexual activity, which also recognise non-consensual condom removal or tampering with a condom ("stealthing") (Exp Notes, 4).
- Introduce the offence of coercive control which will be subject to a maximum penalty of 14 years imprisonment.
- Establish a court-based domestic violence diversion scheme for adult defendants which aims include to 'promote ongoing behavioural change', to 'hold the defendant accountable for acts of domestic violence for which the defendant has accepted responsibility', and 'to reduce the risk of harm to, and increase the safety of, victims' (Exp Notes, 16).
- Amend section 9 of the PSA to require a court to treat the following circumstances as aggravating when sentencing an offender for a domestic violence offence:
    - if an offender commits a domestic violence offence against a child
    - if a child was exposed to the domestic violence during the commission of an offence
    - if the domestic violence offence was also a contravention of an order or release conditions under the *DFVP Act*, or an injunction (Exp Notes, 13).
- Amend section 12A of the PSA, to require that an offender's criminal history must now reflect when domestic violence offending is committed against a child or exposed a child to domestic violence (Exp Notes, 13).
- Amend the PSA and the *Youth Justice Act* 1992 (Qld) to require the court to consider:
    - 'the hardship that any sentence imposed would have on the offender, having regard to the offender's characteristics, including age, disability, gender identity, parental status, race, religion, sex, sex characteristics and sexuality' (Exp Notes, 26)
    - 'the probable effect that any sentence imposed would have on a person with whom the offender is in a family relationship and for whom the defendant is the primary caregiver, or a person with whom the defendant is in an informal care relationship and where a defendant is pregnant, the probably effect of the sentence on the child, once born'. (Exp Notes, 26)
    - the defendant's history of being abused or victimised
    - when sentencing an Aboriginal or Torres Strait Islander person, any cultural considerations, including the effect of systemic disadvantage and intergenerational trauma on the offender.

Legislative admendments

Victims of Crime Assistance and Other Legislation Amendment Act 2023

The Act, in addition to other changes, amends the PSA to increase QSAC's membership from no more than 12 members to no more than 14 members, and to require the appointment of at least one person to the Council who has lived experience as a victim of crime.

The Act also increases the amount of financial assistance payable to persons who are a victim, secondary victim or witness of a crime. The State may seek to recover the increased amounts from a person convicted of an offence. The amendments are to commence on a date to be fixed by proclamation.

Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Act 2023

The Act makes the following amendments relevant to sentencing to commence on 29 April 2024:

- Introduction of a new circumstance of aggravation where the offender, in committing the offence, is wholly or partly, motivated by hatred or serious contempt for a person or group of persons based on actual or presumed race, religion, sexuality, sex characteristics, or gender identity. It applies to:
    - Criminal Code (Qld) offences (maximum penalty for aggravated offences listed):
        - going armed as to cause fear (s 69) (max penalty: 3 years)
        - threatening violence (s 75) (max penalty: 3 years)
        - disturbing religious worship (s 207) (max penalty: 6 months)
        - common assault (s 335) (max penalty: 4 years)
        - assaults occasioning bodily harm (s 339) (max penalty: 10 years)
        - threats (s 359) (max penalty: 7 years)
        - punishment of unlawful stalking, intimidation, harassment or abuse (s 359E) (max penalty: 7 years), and
        - wilful damage (s 469) (max penalty: 7 years).
    - *Summary Offences Act* 2005 offences of public nuisance (s 6) and trespass (s 11).
- Introduction of a new offence of "display, distribution or publication of prohibited symbols" in the Criminal Code (Qld) (s 52D), to which a maximum penalty of 70 penalty units or six months imprisonment will apply.
- Relocation of the offence of "serious racial, religious, sexual vilification" from the *Anti-Discrimination Act* 1991 (Qld) into the Criminal Code (Qld) (new s 52A) with an increase in the maximum penalty from 70 penalty units or 6 months imprisonment to three years imprisonment.

Justice and Other Legislation Amendment Act 2023

The following provisions of this Act commenced on 3 October 2023:

- Removal of restrictions in the *Criminal Law (Sexual Offences) Act 1978* which prohibit identification of an adult defendant charged with a prescribed sexual offence prior to finalisation of committal proceedings.

The following amendments, which apply to both the sentencing of adults and children, commenced on 1 December 2023:

- Requirement for the courts to treat the death of an unborn child as an aggravating factor for sentences of certain offences unless there are exceptional circumstances. The offences include murder, manslaughter, grievous bodily harm, wounding, dangerous operation of a vehicle, assaults occasioning bodily harm and careless driving of motor vehicles.

The Act also expanded the definition of a victim, including for the purposes of the making of a victim impact statement under the PSA. The definition of a victim now includes a person who suffers harm because they would, if an unborn child had been born alive, have been a family member of the child, in circumstances where a crime is committed against a pregnant person and as a result of the crime the pregnant person dies or sustains a bodily injury resulting in the destruction of the life of the unborn child.

Police Powers and Responsibilities and Other Legislation Amendment Act (No. 1) 2023

Amendments commencing on 1 October 2023:

- *Child Protection (Offender Reporting and Offender Prohibition Order) Act* 2004 (Qld) (CPOROPO Act): amendments to this Act, which are not retrospective, include increasing the reporting periods (from 8 years, 15 years and life to 10 years, 20 years and life); that a person who was subject to an order under the *Dangerous Prisoner (Sexual Offenders) Act* 2003 (Qld) is subject to reporting obligations under the CPOROPO Act once the order ends.

Parliamentary inquiries and reports

Community Support and Services Committee, *Inquiry into Victims of Crime Assistance and Other Legislation Amendment Bill 2023* (Report No. 37, 57th Parliament)

Tabled on 24 November 2023, this report presents a summary of the Community Support and Services Committee's examination of the Victims of Crime Assistance and Other Legislation Amendment Bill 2023. The Committee recommended that the Bill be passed and made two further recommendations:

- that the Department of Justice and Attorney-General explore alternative models of delivery for financial assistance and counselling support for vulnerable victims such as young people, and
- that the Attorney-General and Minister for Justice clarify whether the KPMG review of the Financial Assistance Scheme will examine the legislative framework for that scheme, including annual adjustments of limits to reflect inflation and cost of living expenses.

Queensland Court of Appeal decisions

R v Cane [2023] QCA 199

Keywords: 156A of the *Penalties and Sentences Act* 1992 (Qld); cumulative sentence; De Simoni principle; facts at sentence.

Leave to appeal granted for a sentence of 6 years' imprisonment for kidnapping for ransom. The sentence was reduced to 5 years' imprisonment.

Cane was charged with kidnapping for ransom and assault offences. The Prosecution agreed to not proceed on the assault offences but to include the facts of the violence in the agreed statement of facts if Cane pleaded guilty to kidnapping for ransom. When Cane was sentenced, the judge took the violence into account. The Court of Appeal considered this was an error because Cane was not charged with the assault offences (and this breached the De Simoni principle).

At the time of the offending, Cane was on parole. The Court discussed the mandatory cumulative application of s 156A of the PSA (if a person commits certain offences while serving a term of imprisonment, the sentence must start after the other sentence is served).

R v Ali [2023] QCA 207

Keywords: recording of conviction; imprisonment; probation.

Appeal against sentence dismissed. Ali was sentenced for 10 offences involving supplying cannabis 8 times, possessing cannabis and $5,050 cash, and a shortened lever-action rifle for which he was sentenced to 12 months' imprisonment for the most serious count, wholly suspended for 2.5 years and 18 months' probation for the weapon offence with a requirement for monthly drug testing with convictions recorded. Ali was sentenced for 10 offences involving supplying cannabis 8 times, possessing cannabis and $5,050 cash, and a shortened lever-action rifle. He was 19 years old at the time of the offending and 21 at sentence.

On appeal, it was argued the sentence was manifestly excessive and should be reduced to 2 years' probation for all offences, with no conviction recorded. The Court of Appeal discussed what a court must consider when deciding whether to record a conviction. The Court did not consider there was an error in the decision to record a conviction for the probation offence. The Court considered the serious features of the offending (the profit, doing acts preparing for further sales and possessing a firearm was significant), compared to the mitigating factors (plea of guilty, his youth, no relevant prior history, efforts at rehabilitation). The Court did not consider the sentence was manifestly excessive.

R v Jones [2023] QCA 212

Keywords: dangerous operation of a vehicle causing grievous bodily harm while intoxicated; plea of guilty and parole eligibility after 50%; serious violent offence declarations.

Appeal dismissed against a sentence of 7 years' imprisonment with no parole eligibility date set (meaning parole eligibility will be after 50% of the sentence is served). Jones was sentenced for 2 different sets of offending. The first involved Jones stabbing a person Jones knew after drinking together. The complainant required urgent medical intervention to save his life (charge of grievous bodily harm). The second set of offending, over 6 months later while on bail, involved Jones driving under the influence and using her car as a weapon to hit the complainant (unknown to her) who was on a motorbike. The complainant was knocked off the motor bike and suffered fractures. Jones did not remain at the scene (charge of dangerous operation of a vehicle causing grievous bodily harm while intoxicated and leaving the scene).

Jones had a traumatic background and experienced domestic violence. She suffered from post-traumatic stress disorder resulting from the death of her 2-year-old son. The Court of Appeal accepted this 'was mitigating, but there was no expert evidence to the effect that this disorder had caused her intoxication.' [65] Her intoxication also was found not to prevent the sentencing judge from finding that she deliberately used her vehicle as a weapon.

The Court of Appeal discussed while the plea of guilty must be taken into account, the law does not prescribe how. Unless the law says otherwise, the judge is free to choose when to fix the parole eligibility date. This will vary from case to case. The Court also noted the offending in this case could have resulted in a serious violent offence declaration (meaning Jones would not be eligible for parole until after serving 80% of the sentence). The mitigating factors in this case were taken into account by not setting the parole eligibility date after 50%. The sentence was not manifestly excessive.

R v VN [2023] QCA 220

Keywords: rape; physical violence; serious violent offence declaration.

The Court of Appeal refused an application for leave to appeal against a sentence of 12 years' imprisonment for 3 counts of rape against his step-daughter. There was a serious violent offence declaration (meaning VN would not be eligible for parole until after serving 80% of the sentence). VN was convicted after trial and on appeal, argued the sentence was manifestly excessive.

The Court of Appeal discussed previous decisions regarding physical injury and harm as an aggravating factor. This case involved non-physical harm (an abuse of trust and power, threats and blackmailing the complainant with the threat of posting a video on social media which also carried significant cultural implications). The Court held 'It is hard to see how it could be said the psychological harm… to be any less significant [than physical harm]' [32].

R v MDS [2023] QCA 228

Keywords: domestic violence offences; strangulation; 'one-third rule'; early parole release date (after one-quarter).

Appeal against a sentence of 3 years' imprisonment with parole release date set after one-quarter of the sentence served dismissed. MDS was sentenced for 8 domestic violence offences involving wilful damage, assault and strangulation committed against his ex-partner over 4 hours. A 16-year-old child was present and witnessed some of the offending, which was an aggravating factor, as well as the offences being domestic violence offences.

The sentencing judge increased the sentence for the strangulation offence to 3 years to take into account the other domestic violence offending but reflected mitigating factors by setting the parole release date at 'less than the customary one-third which would ordinarily reflect an early plea of guilty' [14]. They referred to the future effects of strangulation and research of this being associated with escalating violence and an increased risk of domestic homicide.

On appeal it was argued the sentencing judge made an error relying on future harm. The Court of Appeal did not agree, finding the judge's comments 'was simply the sentencing judge emphasising the seriousness of the criminality of the strangulation by reference to the fact that it is obviously potentially associated with lethality.' [27]

R v Sellies-Cullen [2023] QCA 247

Keywords: serious violent offence declaration; armed robbery; grievous bodily harm; young offender

Appeal against sentence of 6 years' imprisonment for armed robbery and grievous bodily harm refused. The sentencing judge made a serious violent offence declaration (meaning Sellies-Cullen must serve 80% of the sentence before being eligible for release on parole). The appeal considered whether the declaration made the sentence manifestly excessive.

The offending involved Sellies-Cullen, at night, following the complainant (a homeless man) and demanded his backpack which contained all his possessions. Sellies-Cullen produced a large folding knife. The complainant ran away and was chased. There was a struggle and Sellies-Cullen stabbed the complainant in the neck and abdomen and ran off with the complainant's backpack. Sellies-Cullen was 18 years old at the time of the offending and pleaded guilty.

The sentencing judge referred to the need to deter others from carrying knives in public places; protect the community; and denounce the conduct, which 'outweighed the desire to see [Sullies-Cullen] rehabilitated' ([16]–[17]). The Court noted a sentence of 7 years' imprisonment with no declaration was open, but the sentence was not manifestly excessive.

R v Solway [2023] QCA 267

Keywords: serious violent offence declaration; parole eligibility date; trafficking in dangerous drugs; young offender.

Appeal against sentence refused for a sentence of 9 years and 6 months' imprisonment with parole eligibility after 50% of the sentence (4.5 years) for one count of trafficking in dangerous drugs,35 related counts of drug offending and 3 summary charges. Solway was 23 years old at the time of offending, had mental health issues and a drug addiction. The trafficking was sophisticated over a 10-month period and for profit beyond his addiction.

The sentencing judge considered the starting point to be 10 to 11 years' imprisonment. This would mean Solway must serve 80% of his sentence before he is eligible for release on parole (SVO scheme) due to the length of sentence. The Court of Appeal considered the sentence was significantly reduced to take into account mitigating factors (his young age, plea of guilty, lack of previous drug offending and significant prospects of rehabilitation), and no further reduction to the parole eligibility date was warranted

R v TSL [2023] QChC 21

Keywords: disadvantaged background, intellectual deficits, and moral culpability; *Bugmy v The Queen*; serious repeat offender declaration.

TSL, an Aboriginal child, pleaded guilty to one count of attempted armed robbery and was sentenced to 12 months' probation. TSL had spent 197 days in pre-sentence detention for that offence and 119 days in detention for other offences. His time in detention included 58 days where he spent less than two hours out of his cell and 13 days with no time out of his cell.

TSL was 15 years old at the time of the offending and 16 years at sentence. There was a substantial delay in the charges being dealt with. TSL, who had an intellectual disability, had a 'profoundly disadvantaged childhood and upbringing', being exposed to domestic and family violence and substance misuse. At the time of sentence, he was under the long-term guardianship of the Department of Child Safety. TSL suffered a brain injury as a young child which affected his development. Reports found a causal link between his diagnoses and offending, reducing his moral culpability (*Bugmy v The Queen* (2013) 249 CLR 571 applied).

The judge determined probation would permit his NDIS supports to be provided (they could not be in detention) and punishment had already been 'served by the lengthy and harsh period' spent in pre-sentence detention. The judge declined to declare TSL a 'serious repeat offender' (s 150A YJA). The judge also noted a declaration made by a Childrens Court Magistrate since the offence was committed did not impact this sentence because 'it was not made by a Court of like or higher jurisdiction' (s 150B(1)(b), YJA).

OFA v The Office of the Director of Public Prosecutions (Qld) [2023] QChC 26

Keywords: *Youth Justice Act* 1992 (Qld) s 162; mandatory consideration of referral to a restorative justice process.

OFA was 17 years old when he was sentenced to 6 months' probation for 3 offences (entering a dwelling, removing tools and possessing marijuana). He pleaded guilty to those offences and no conviction was recorded. The magistrate said while no restorative justice application had been made, it was not appropriate as 'some supervision was required'.

OFA lived with his mother, was employed full time and had been participating in regular and specialist drug and alcohol counselling. OFA had a 'disturbed upbringing', including his schizophrenic father leaving when he was 2 years old and experiencing domestic and family violence perpetrated against his mother. OFA had been seeing a psychologist for over 12 months and had been diagnosed with post-traumatic stress disorder, major depression, ADHD and ODD (oppositional defiant disorder).

Section 162 of the YJA mandates that a court must consider whether diversionary restorative justice is appropriate. The judge noted 'the child had little need for additional supervision given that he was doing everything that was appropriate to turn his life around'. The original sentence was set aside, and OFA was diverted to a restorative justice process.

CEE v The Office of the Director of Public Prosecutions (Qld) [2023] QChC 27

Keywords: Relevance of pre-sentence detention to sentence.

This appeal reviewed 2 sentences of 3 months' detention imposed on CEE for 2 separate periods of offending relating to unlawful use of a motor vehicle and property offences. The applications were granted and the Court imposed a good behaviour order for the first offence and formal reprimand for the second. CEE had a relevant criminal history and was 14 when he committed these offences. At the time of offending, he was on other orders, including probation, with which he was non-compliant. His pre-sentence report linked his offending to negative peer relationships.

In relation to the first series of offences for which a good behaviour order was imposed, the Court said: 'it is always unsatisfactory that the Court's sentencing powers are hampered by the time spent on remand' noting this 'leaves the court in the position where it is imposing a sentence it might otherwise not have imposed'. 'This would not have been an appropriate sentence had the child been on bail, however, the time on remand was so significant that the court cannot properly reflect that time in any other manner.' [15]

PCN v Queensland Police Service [2023] QChC 28

Published 14 November 2023

Keywords: *Youth Justice Act* 1992 (Qld) s 162; mandatory consideration of referral to a restorative justice process.

The 17-year-old applicant had pleaded guilty to one count of unlawful use of a motor vehicle and one count of receiving tainted property. He was sentenced to 40 years community service on each count and ordered to pay $500 restitution within 6 months. No convictions were recorded. He appealed that sentence on the grounds of it being manifestly excessive and that the magistrate had erred by failing to consider referring the offences for a court diversion restorative justice process (YJA, ss 163 and 164) citing *R v PBD* [2019] QCA 59,[29]-[32].

The judge agreed it had been an error of law not to consider a referral under YJA, s 162(1) and that it also been an error to not 'comply with the mandatory provisions of YJA s 195 which sets out the preconditions for making a community service order'. The judge noted the child had 'no criminal history…was working, supported by his family and indicated he was willing and able to participate in restorative justice referral processes', providing him with an 'appropriate "off-ramp" from the criminal justice system. The original sentence was set aside and both offences were referred for a restorative justice court diversion referral (YJA, s 163(1)(d)).

District Court of Queensland decisions

Kennedy v Commissioner of Police [2023] QDC 190

Published 20 October 2023

Keywords: production of a dangerous drug for personal use; relevance of criminal history to decision to imprison; effect of partial completion of previous order to re-sentence.

Kennedy pleaded guilty to several drug and summary offences and was sentenced to a 12-month intensive correction order ('ICO') for the most serious offence (producing a dangerous drug) and concurrent sentences of imprisonment wholly suspended for 3 years for all remaining offences. Convictions were recorded. He appealed his sentence on the basis of manifest excessiveness, arguing the Magistrate had placed too much emphasis on his criminal history, did not adequately take into account his guilty plea or cooperation and the sentence was out of proportion to similar factual cases.

The respondent conceded the appeal. His Honour found several errors to warrant resentence. His Honour noted appellant's cannabis production was for personal use and not 'in any sense a commercial operation' and the sentence should have reflected this, such as a fine or probation. The Magistrate made no reference to the plea of guilty or cooperation with police, nor that Mr Kennedy's drug use was 'a means of self-medication' for his mental health issues. The Court found: 'reliance on the criminal history as a basis to determine that only imprisonment was appropriate' for 'these relatively less serious offence was clear misconceived'.

It was suggested that as Mr Kennedy had almost completed his ICO, he should be resented to a fine. However, his Honour thought this would be 'twice punishing' the appellant. His Honour set the sentence aside in respect to all offences and ordered Kennedy be convicted and not further punished for each offence.

Allende v Queensland Police Service [2023] QDC 202

Keywords: possession of a dangerous drug for personal use; relevance of criminal history to decision to imprison; deterrence.

The appellant, Allende, pleaded guilty to 4 drug-related offences (2 involving possession of dangerous drugs) and sentenced to 5 months' imprisonment for each charge, wholly suspended for a 12-month operational period. She had a several convictions for drug offences and had previously been sentenced to multiple probation orders and 6 months' imprisonment with a parole release date after serving 1 month of actual custody.

Her Honour noted that the appellant's legal counsel at sentence had made submissions in relation to a suspended sentence, conceding that the penalty was open in the matter. Her Honour also noted that section 9(10) of the PSA requires courts treat relevant previous convictions as aggravating and that her history had all failed to deter her from reoffending. Her Honour noted the respondent's referral of *Whyte v QPS* [2010] QDC 9, which showed the sentence was not excessive. She further noted that the maximum penalty for the offence of possession is 15 years, and while 'the quantities of drugs…were small, she fell to be sentenced by reference to that maximum penalty'. The appeal was dismissed.

Ferris v Commissioner of Police [2023] QDC 206

Published 16 November 2023

Keywords: driving under the influence; licence disqualification; relevance of extreme hardship.

The appellant, Ferris, had pleaded guilty to driving under the influence and was fined $1,900 and disqualified from holding a licence for 12 months. He appealed on the basis that the sentence was manifestly excessive and the Magistrate had committed several sentencing errors. Ferris argued the Magistrate should have taken into account the limited availability of public transport where he lives, the impact of a loss of licence to his business and the fact he is the family breadwinner.

His Honour rejected the appellant's argument that he should have received the minimum mandatory sentence because his breath testing result was 'towards the lower end of the upper range', citing *Chilcott v Commissioner of Police* [2020] QDC 142 at [11]. His Honour concluded the 12-month disqualification was in range given his traffic history, however thought the Magistrate had not taken into account the extreme hardship it would cause the family, given the appellant's partner was receiving cancer treatment and there are 3 dependent children. The Judge allowed the appeal and reduced the disqualification period from 12 to 8 months.

Tran v Queensland Police Service [2023] QDC 217

Published 21 November 2023

Keywords: unlawful stalking; principle of imprisonment as a last resort; De Simoni principle.

The appellant, Tran, had pleaded guilty to offences of unlawful stalking, going armed so as to cause fear, possess knife in a public place, as well as several drug-related offences. All offences were committed on the same day and in the context of drug use and breaching a probation order imposed to drug offences. Tran was sentenced to 18-months' imprisonment with immediate release on parole, recognising 105 days of pre-sentence custody. He appealed his sentence on the basis of manifest excessiveness, arguing the magistrate should not have regarded the stalking offence as involving violence, therefore not disregarding s 9(2)(a) [principles of imprisonment as a sentence of last resort and that a sentence that allows the person to stay in the community is preferable]. He also argued the Magistrate had relied on an uncharged aggravating circumstances in relation to the stalking offence, breaching the De Simoni principle.

Tran did not know the complainant. He initially approached her while she was working and then followed her home. During that journey he commented on her appearance and body and repeatedly invaded her personal space, making unwanted physical contact. She altered her destination in fear for her safety, going to her boyfriend's house. When she arrived, her boyfriend and his father came out and questioned Tran about why he was following the complainant. He responded by producing a large knife from his bag and threatening them with it.

The Judge noted that while the physical contact to the complainant was 'so nebulous' a court could not conclude

it 'involved the use of "violence"', going armed to cause fear was and 'therefore the harsher sentencing regime in s 9(3) applied' ([19]). The act of producing a knife formed 'part of the factual matrix of the unlawful stalking', as did the offence of going armed to cause fear ([24]). It was open to the Magistrate to find that when confronted with the boyfriend and father, the appellant produced a knife which 'really aggravated the circumstances' and the De Simoni principle was not offended.

The appeal was dismissed, noting that it was 'seriously aggravating' that the 'appellant was a virtual stranger to the complainant' ([40]). The decision affirmed recent Court of Appeal decisions disavowing 'the notion that error can be identified' because a sentence 'does not, on its face, appear to sit comfortable with other cases of broad comparability' ([41]): *R v Williams* [2015] QCA 276 and *R v Watson* [2017] QCA 72 cited.

***Chambers v Commissioner of Police* [2023] QDC 228**

The appellant pleaded guilty to 19 offences and was sentenced to 18 months' imprisonment to be served cumulatively on activated suspended sentences of imprisonment. The total effective sentence was 27 months, however due to the sentence backdating to an earlier period of imprisonment, this became 29 months.

Chambers argued the sentence was manifestly excessive, that the Magistrate had not considered totality when ordering the suspended sentences be cumulative and that the pre-sentence custody had been incorrectly declared.

The Court found the Magistrate had not indicated 'either explicitly or implicitly' consideration of totality and had miscalculated the time owing on the suspended sentences. It was noted there had been 'no discussion between the parties and the bench during submissions' on totality, nor by the Magistrate ([25]). The Court found the Magistrate erred in not applying the totality principle when ordering the suspended sentences be cumulated and without then moderating the terms of imprisonment once the decision was made to cumulate.

While not a ground of appeal, The Court found it was 'very concerning' that the Magistrate had told the court of 'the intended outcome of the sentence process, before hearing defence submissions' (emphasis in original) ([16]). It could be perceived that the Magistrate 'had prejudged the matter' and it was a denial of procedural fairness. [17]

Academic articles and reports of interest

Arie Freiberg, *Sentencing Drug Law Reform in Victoria: A Chronically Relapsing Disorder* (August 30, 2023. Victorian Drug and Alcohol Association)

This paper prepared for the Victorian Drug and Alcohol Association, argues that many of sentencing interventions for AOD-related crime have not been successful due to their poor construction, inadequate resourcing, lack of continuity and clarity of purpose, unrealistic and inflexible conditions, geographic disparity, and unresponsiveness to different groups of offenders. The paper concludes that sentencing alone can never provide the answer to AOD-related crime and that more fundamental reform to the regulation of AOD-related offending is required.

Rory Kelly, *Reforming the Sentencing and Release of Terrorist Offenders*, Criminal Law Review [2023] Iss 10, p 639

The sentencing and release of terrorist offenders were the subject of statutory reform in England and Wales in 2019, 2020 and 2021. The changes have included: the introduction of a new type of sentence, extending the applicability of existing sentences, toughening existing sentences, increasing maximum sentences, obligating the consideration of a terrorist connection as an aggravating factor, delaying release, and removing automatic release. The author of this article suggests the effects of these reforms have been to leave the law on sentencing terrorists unduly complicated, often without compelling rationale, and ever more severe. The discretion of sentencing judges and the Parole Board has also been narrowed. The authors considered that the time has come for an independent and principled review, which focuses on rationalising the current law.

RMIT University, *Family Violence and Sexual Harm: Research Report 2023* (September 2023)

This research report explores the co-occurrence of family violence and sexual harm in Victoria. Drawing on victim survivor and stakeholder interviews and the outcomes of a sector-wide survey, the report presents key findings and implications for the development of policy, interventions, and support.

Scottish Sentencing Council, *Annual Report 2022-23* (released 26 October 2023)

In its annual report, the Scottish Council reports on the activities of the Scottish Sentencing Council including public consultation on the first offence guideline of the Council on causing death by driving (now approved by the Scottish High Court), work on the development of new guidelines on sexual assault, domestic abuse and sentence discounts for guilty pleas together with:

- the publication of the findings of research on the *challenges of sentencing individuals with mental health issues*; a *study of the difficulties in comparing sentencing across different jurisdictions*; and a series of literature reviews exploring the law and sentencing practice in relation to *domestic abuse*, *indecent images of children*, *assault*, and *fraud*
- preparation of a range of educational resources, including videos on the key themes of the sentencing young people guideline
- the relaunch of the Council's blog as "*Spotlight on sentencing*"
- the publication of *information for victims* and information *about sentencing guidelines*, and the launch of a newsletter, *Spotlight on Sentencing Circular*.

Domestic and Family Violence Death Review and Advisory Board, *Annual Report 2022-23* (tabled 27 October 2023)

The Domestic and Family Violence Death Review and Advisory Board's annual report presents information on the Board's operations for 2022–23 and progress made to implement recommendations made by the Board since its establishment in 2016. The report also highlights planned activities for 2023–24 including a review of past cases of domestic and family violence-related deaths involving sexual violence with a view to further developing the evidence base, identifying systemic and practice issues, and improving responses.

Victim Sentencing Advisory Council, *Combined Orders of Imprisonment with a Community Correction Order in Victoria* (November 2023)

The Council's paper presents a statistical profile of combined orders of imprisonment with a Community Correction Order (CCO) in the 9 calendar years from 2012 to 2020. A CCO is a sentencing order that an offender serves in the community while subject to various mandatory conditions as well as at least one optional condition. When courts impose a combined order, the offender commences their CCO on release from prison. The Council examined combined orders better understand how the courts use CCOs and because combined orders are functionally different from straight CCOs or straight imprisonment. The 5 most common principal offences were all violent or robbery offences: armed robbery (287 cases), intentionally causing injury (136), recklessly causing serious injury (92), attempted armed robbery (61) and recklessly causing injury (59). 41/7% of combined orders were imposed in cases with a family violence indicator (5.093/12,202 cases).

Victorian Sentencing Advisory Council, *Annual Report 2022-2023* (November 2023)

The Victorian Sentencing Advisory Council's annual report highlights key achievements over the 12 months to 30 June 2023. The Council published 6 research reports, overhauled their sentencing statistics database (SACStat), and hosted the first national meeting of sentencing councils.

Adam Teperski and Stewart Boiteux, *The Long and Short of It: The Impact of Apprehended Domestic Violence Order Duration on Offending and Breaches*, NSW Bureau of Crime Statistics and Research: Crime and Justice Bulletin (November 2023)

This research examined whether longer apprehended domestic violence orders (ADVO) were associated with changes in domestic violence (DV) offending and ADVO breaches. A dataset of 13,717 defendants who were placed on an ADVO after a DV incident between January 2016 and April 2018 was examined. This included 10,820 defendants subject to a final 12-month order and 2,897 defendants subject to a

final 24-month order. The research found that relative to 12-month ADVOs, 24-month ADVOs were associated with an increased probability that the person subject to it will breach the conditions of their ADVO, and a decreased probability of the person committing a proven DV offence.

Childrens Court of Queensland, *Annual Report 2022–23* (tabled 14 December 2023)

The Children's Court of Queensland's annual report highlights key developments over the 12 months to 30 June 2023, including heightened community concern about serious forms of offending and the subsequent introduction of reforms through the Strengthening Community Safety Act 2023 which commenced on assent on 22 March 2023. It identifies following these changes, there appears to have been an increase in the number of children in detention on remand, although no decrease in offending. It notes other initiatives underway, including a fast-track sentencing pilot in the Brisbane, Southport, Cairns and Townsville Childrens Court which commenced on 1 March 2023 intended to reduce delays in the finalisation of matters. The Court's annual report includes data on penalty outcomes and trends as well as data on the number of children in youth detention, 88 per cent of whom are unsentenced. It also includes data on applications for sentence reviews.

The Office of the Independent Implementation Supervisor, Women's Safety and Justice Taskforce reforms, *Biannual Progress Report 3* (November 2023)

The Third Progress Report details the progress of, and the Supervisor's findings and conclusions on the implementation of the Government Response to recommendations scheduled between 1 April and 30 September 2023 from:

- Hear Her Voice – Report One – Addressing Coercive Control and Domestic and Family Violence in Queensland;
- Hear Her Voice – Report Two – Women and Girls' Experiences Across the Criminal Justice System; and
- A Call for Change: Commission of Inquiry into Queensland Police Service Responses to Domestic and Family Violence.

Of the 63 recommendations due to be delivered in the period, a majority were completed. This included legislative reforms the introduction of the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislative Amendment Bill 2023 on 11 October 2023 to Parliament. Recommendation 73 relating to the referral of an assessment of the impact of section 9(10A) of the PSA to the Queensland Sentencing Advisory Council as part of our current Terms of Reference is now considered fulfilled and is closed.

Ben Mathews et al, *'Child Maltreatment and Criminal Justice System Involvement in Australia: Findings from a National Survey'* (December 2023, Trends & Issues in Crime and Criminal Justice No 681)

This study analyses data from the Australian Child Maltreatment Study and examined associations between self-reported child maltreatment (physical abuse, sexual abuse, emotional abuse, neglect and exposure to domestic violence) and criminal justice system involvement (arrest, convictions and imprisonment). Results show there is moderate associations between child maltreatment and arrest and convictions. For men, there was moderate associations between child maltreatment and imprisonment. If a person self-reports three or more types of maltreatment, there was a stronger association.

UK House of Lords, Justice and Home Affairs Committee, *Cutting Crime: Better Community Sentences* (released 28 December 2023)

This report examines the effectiveness of community orders at reducing reoffending and looks at best practices in the delivery of community sentences, as well as exploring some of the challenges that the Probation Service is facing. Over an 8-month inquiry, the Committee looked at best practices in sentencing and in how sentences are carried out. The Committee found that community sentences currently fall significantly short of their potential, but with the right investment, intensive community sentences can succeed where short prison sentences fail. The Committee recommended community sentences as providing judges and magistrates with the option to create flexible 'bespoke' sentences because they could 'select from a range of requirements' and 'tailor the sentence to the individual case, setting out how to punish and rehabilitate the offender. This meets the objectives of sentencers, helps the offender and protects society'.