Queensland Sentencing Round-Up

Queensland Sentencing Advisory Council

2022: The Year in Review

Note to readers:

The Sentencing Round-Up summarises select sentencing publications and developments in Queensland as identified by the Council. It is not intended to be exhaustive. The Council welcomes feedback on additional resources that might be referenced in future issues.

The Honourable Chief Justice Helen Bowskill, 'Sentencing (adults) – A Practical Update' (Queensland Magistrates State Conference, Brisbane, 26 May 2022)

The Chief Justice, in an address delivered at the Queensland Magistrates State Conference discusses a number of developments relevant to sentencing.

With reference to key Court of Appeal and District Court appeal decisions, Her Honour discusses:

- the ongoing importance of natural justice as 'a fundamental requirement of sentencing' and its practical application;
- when the principle of totality arises;
- how s 159A(1) of the *Penalties and Sentences Act 1992* (Qld) ('PSA'), amended in 2020 , should be understood to operate now that this section provides courts with a broader discretion to declare time served in pre-sentence custody as time served under the sentence, including to ensure its consistent application with s 156A, which requires that a cumulative sentence be served in certain circumstances;
- anomalies that may arise when setting a person's 'parole release date' as the date of sentence taking into account time already served under the sentence as this means the person is unconditionally released as at this date;
- ensuring that proper mitigation is given to reflect a plea of guilty in light of known circumstances, such as previously experienced delays in the Parole Board Queensland considering parole applications; and
- the basis for accepting expert evidence at sentencing hearings and the law applying to fact finding on sentence in Queensland, with reference to s 132C of the *Evidence Act 1977* (Qld).

The Chief Justice also explores relevant principles and case authorities on guilty pleas and how these are to be taken into account in sentencing, as well as the principles that apply to the relevance of voluntary intoxication and mental health issues as sentencing considerations.

Other issues considered include:

- the utility of short terms of imprisonment;
- the need to consider the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld);
- how to approach sentencing when there are no comparable decisions available to a sentencing court; and
- application of the parity principle.

His Honour Judge Paul E Smith, 'Sentencing for Domestic Violence Offences and Procedural Fairness' (Magistrates Court Conference, September 2022)

In this speech, His Honour Judge Paul Smith discusses recommendations and the legislative response (specifically the *Criminal Law (Domestic Violence) Amendment Act 2015* (Qld) and the *Criminal Law (Domestic Violence) Amendment Act 2016* (Qld)) to the *Not Now Not Ever* report of the Special Task Force on Domestic and Family Violence in Queensland. The legislative amendments included:

- introducing the ability to aver an offence as a 'domestic violence offence';
- giving courts the ability to order that an offence of which a person has been convicted be recorded as a 'domestic violence offence';
- increasing the maximum penalties for a contravention of a domestic violence order;
- establishing a new offence of choking, suffocation or strangulation in a domestic setting (s 315A of the *Criminal Code* (Qld)); and
- inserting a new aggravating factor in s 9 of the PSA of being convicted of a 'domestic violence offence'.

His Honour discusses relevant statutory and common law principles that apply when sentencing an offender for an offence of domestic violence and, with reference to relevant Queensland Court of Appeal decisions, suggests this may provide evidence of a 'toughening of approach' to domestic violence matters. His Honour goes on to discuss examples of cases (mostly from the District Court) that demonstrate the sentencing approach for breaching domestic violence orders, both prior to and subsequent to the increase in the maximum penalty.

His Honour Judge A J Rafter SC, Acting President, Childrens Court of Queensland, 'Childrens Court Issues' (Queensland Magistrates' Childrens Court Conference, September 2022)

His Honour Judge Rafter SC in his address to the Queensland Magistrates' Childrens Court Conference discussed a number of relevant Court of Appeal decisions involving those sentenced as children, including decisions which set out general principles or considering the approach to deciding whether to record a conviction or not.

His Honour concludes:

> [38] In exercising the discretion to record or not record a conviction, the court must have regard to all the circumstances of the case, including the specific matters in s 184(1) [of the *Youth Justice Act 1992* (Qld) ('YJA')]: the nature of the offence, the child's age and any previous convictions; and the impact of recording a conviction on the child's chances of rehabilitation, or finding or retaining employment.
>
> [39] The well established starting point is that a conviction should not be recorded against a child.
>
> [40] Although a child's previous offences are relevant, that cannot be allowed to overwhelm other important factors of rehabilitation and employment prospects. (citations omitted)

Queensland Sentencing Advisory Council publications

The '80 per cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 *(Qld)* (May 2022)

This final report is the culmination of a 13-month review by the Council of Queensland's serious violent offences ('SVO') scheme, and presents 26 recommendations made by the Council to improve the operation and efficacy of the SVO scheme in Queensland. More information, including a Community Summary of the final report, is available here.

Engendering Justice: The Sentencing of Women and Girls in Queensland (Sentencing Profile, August 2022)

The fourth publication in the Council's Sentencing Profiles series, this paper explores demographic information and sentencing outcomes for sentenced women and girls in Queensland over a 14-year period (2005–06 to 2018–19).

Sentencing Spotlight on Maintaining an Unlawful Sexual Relationship with a Child (August 2022)

Released as part of the Council's Sentencing Spotlight series, this report contains information about the offence of maintaining an unlawful sexual relationship with a child, the types of penalties imposed, demographic characteristics of those sentenced for this offence and data on recidivism (repeat offending).

Sentencing Spotlight on Rape (September 2022)

Released as part of the Council's Sentencing Spotlight series, this report contains information about the offence of rape, the types of penalties imposed, demographic characteristics of those sentenced for this offence and data on recidivism (repeat offending).

Updated web content is available at www.sentencingcouncil.qld.gov.au

Including the addition of sentencing myths relating to the sentencing of children and sentencing trends data for 2021–22.

Legislative amendments

Animal Care and Protection Act 2001 (Qld)

The Animal Care and Protection Amendment Bill 2022 (Qld) was passed by the Queensland Parliament on 2 December 2022. The Act commenced operation on the date of assent on 12 December 2022.
This legislation creates a number of new offences and associated maximum penalties for animal welfare offences. For example, section 17 was amended to create a new aggravated offence provision for breaching the duty of care to an animal which causes death, deformity, serious disability or prolonged suffering to an animal, with a maximum penalty of 2000 penalty units or 3 years imprisonment.

Penalties and Sentences Regulation 2015 (Qld)

Section 3 of the *Penalties and Sentences Regulation 2015* (Qld) was amended by s 4 of the *Penalties and Sentences (Penalty Unit Value) Amendment Regulation 2022* (Qld) to increase the prescribed value of a penalty unit for the purpose of s 5A(1) of the PSA from $137.85 to $143.75. This change came into effect on 1 July 2022.

Queensland Court of Appeal decisions

R v Adam [2022] QCA 41

Keywords: Interaction of mental disorder with voluntary intoxication

Leave to appeal refused against a 3-year imprisonment sentence with a parole release date after 9 months for dangerous operation of a vehicle causing grievous bodily harm whilst adversely affected by an intoxicating substance (most serious offence ('MSO')). The Court determined that the common law exceptional circumstances limitation, where something (here a mental condition) wholly or partly excuses

the taking of alcohol or drugs, applies to s 9(9A) of the PSA. However, for it to apply in a particular case there must be evidence of a causal link between the offending and the feature that caused the voluntary ingestion of alcohol. In this case the psychologist's evidence did not establish that the intoxication on the day of the offending was caused by Adam's mental disorders and as such it was not an exceptional case and moral culpability was not affected.

R v Braeckmans [2022] QCA 25

Keywords: Mandatory cumulative sentences; pre-sentence custody

Appeal allowed against a 9-year imprisonment sentence with a serious violent offence declaration and a pre-sentence custody declaration of 153 days for robbery in company with personal violence (MSO). At the time of the offending Braeckmans was on parole and so s 156A of the PSA required the order of cumulative sentences. The sentencing judge was found to have erred in not fixing a new parole eligibility date, according to s 160D(2), and applying s 159A in error. Discussion of interrelationship between 159A and 156A. '[I]n a case such as the present one, a sentencing judge must exercise the power under s 159A to avoid the consequence that a cumulative term of imprisonment will become part of a concurrent term' [30]. New sentence passed of 7 years imprisonment, removed serious violent offence declaration, pre-sentence custody could not be taken to be imprisonment already served.

R v Bui [2022] QCA 67

Keywords: Events that occurred after sentence impacting on previous criminal history

Appeal allowed against a 10-year imprisonment sentence and serious violent offence declaration for trafficking in dangerous drugs (MSO). The sentencing judge noted that Bui's criminal history included a 7-year imprisonment sentence for arson (MSO) (for which he served 3 years 9 months in custody). Following the trafficking sentence Bui successfully appealed the conviction for the arson and proceedings were discontinued. The time spent in custody for those discontinued offences 'was "a relevant personal circumstance" upon which [Bui] could properly rely for some mitigation of an otherwise appropriate penalty, especially in the context of a sentence which had the consequence of an automatic declaration of the conviction of a serious violent offence' [15]. As such, the Court passed a new sentence of 9 years imprisonment with a parole eligibility date and did not make a serious violent offence declaration.

R v Grace [2022] QCA 10

Keywords: Rape; comparable cases

Appeal allowed against a 17-year imprisonment sentence for rape (MSO). Discussion of comparable cases. While the Court found that Grace's conduct was properly described as predatory, 'a consideration of the circumstances and comparable authority supports a conclusion there must have been some misapplication of pinciple' [131]. As such, the Court passed a new sentence of 14 years imprisonment.

R v Lewis; Ex parte Attorney-General (Qld) [2022] QCA 14

Keywords: AG Appeal; malicious act with intent (domestic violence offence); serious violent offence declaration

Attorney-General appeal dismissed against a 9½-year imprisonment sentence for malicious act with intent (domestic violence offence), without a serious violent offence declaration. The Court found that the sentencing judge took an integrated sentencing approach and correctly followed *R v Free; Ex parte Attorney-General (Qld)* [2020] QCA 58 in that he made a 'sentence towards the top of the bounds of appropriate discretion and [did] not reduce the parole eligibility date, rather than sentence towards the bottom and impose a serious violent offence declaration' [75].

R v Nona [2022] QCA 26

Keywords: Impact on sentence of becoming reportable offender under the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) *('*CPOR*')*

Leave to appeal refused against a 3-month imprisonment sentence, wholly suspended, for attempted indecent treatment of a child under 16 years. A suspended sentence, which requires the recording of a conviction, mandatorily made Nona a reportable offender according to CPOR. Discussion of *R v Bunton* [2019] QCA 214 and *R v Rodgers* [2021] QCA 97. Bond JA determined that the impact of the reporting requirements was relevant in the integrated process of determining a just sentence and that the sentencing judge did not err. Boddice J expressed that the reporting requirements 'could not form … any basis to conclude that a sentence of imprisonment was manifestly excessive' [8]. Henry J determined that in this case the reporting requirements would not have been material.

R v O'Connor [2022] QCA 65

Keywords: Pre-sentence custody; discretionary cumulative sentences; totality

Appeal allowed against a 5-year imprisonment sentence, with 1 day pre-sentence custody declared, for dishonestly obtaining property from others, of a value of at least $100,000 (to be served cumulatively upon an earlier 7-year imprisonment sentence for fraud). Error on pre-sentence custody certificate. Discussion of whether the sentencing court should declare all or part of the pre-sentence custody as imprisonment already served and the impact of ordering a cumulative sentence on that decision. To account for totality and the fact that O'Connor had been in pre-sentence custody for 473 days, the sentence was varied to 3½ years imprisonment, but no pre-sentence custody was taken to be imprisonment already served under the sentence.

R v Ponting [2022] QCA 83

Keywords: Burglary and sexual assault; totality; serious violent offence declaration; cumulative sentences; pre-sentence custody

Appeal allowed against an 8-year imprisonment sentence for burglary and a 6-year imprisonment sentence concurrent for sexual assault, which was declared a serious violent offence. One day pre-sentence custody was declared and taken to be time already served. 880 days was not taken to be imprisonment already served. The sentences were ordered to be served cumulatively upon a previous term of 7 years imprisonment. The Court held that the sentencing judge failed to consider the making of a serious violent offence declaration as part of the instinctive synthesis process and failed to give the parties an opportunity to be heard about the making of a declaration. The cumulative effect of the sentence made it unjust. The reduction of the head sentence to reflect pre-sentence custody was appropriate because 'the primary reason the appellant served out the 7-year sentence in full [was] because he reoffended, by similar offending, just six weeks after being released' [92]. Ponting was resentenced to 7 years imprisonment for burglary in the night and 4 years imprisonment for sexual assault (to be served concurrently, but cumulatively upon a pre-existing sentence). The pre-sentence custody declarations were unchanged.

R v Smith [2022] QCA 89

Keywords: Parity; serious violent offence declaration

Appeal dismissed against a 10-year imprisonment sentence with an automatic serious violent offence declaration for trafficking in dangerous drugs (MSO). The co-accused was sentenced to 9 years imprisonment with parole eligibility after 3 years. Extensive discussion of the parity principle and its application where a serious violent offence declaration was mandatory for one co-accused. 'The parity principle requires one to look at all components of the sentences, not simply the non-parole periods' [129]. The Court concluded that Smith would probably have received a higher head sentence without the serious violent offence regime.

R v Stapleton [2022] QCA 131

Keywords: Suspended sentence; cumulative sentences

Appeal allowed against a 3½-year imprisonment sentence for trafficking in dangerous drugs (Count 2) and 18 months imprisonment for counts of trafficking (Count 3) and supplying (Count 1) dangerous drugs. The imprisonment for Counts 1 & 2 was ordered to be served concurrently. The imprisonment for Count 3 was ordered to be served cumulatively upon Counts 1 & 2. The term of imprisonment was to be suspended after 15 months for an operational period of 5 years. Declaration of 158 days pre-sentence custody to be deemed as time already served. The Court found that the sentencing judge erred by imposing separate terms of imprisonment and then purporting to suspend the total period of imprisonment. The Court passed a new sentence of 12 months imprisonment for Count 1, 4½ years imprisonment for Count 2 (suspended after 408 days, with an operational period of 4½ years), and 3 years imprisonment for Count 3 (suspended after 408 days, with an operational period of 3 years). All sentences were to be served concurrently, 408 days pre-sentence custody was deemed time already served.

R v Volkov [2022] QCA 57

Keywords: Impact of sentencing submissions on appeal; comparable cases; trafficking

Leave to appeal refused against a 9-year imprisonment sentence for trafficking in dangerous drugs, with no parole recommendation. Discussion of relevance of counsel submissions as to appropriate sentence at first instance. Discussion of comparable cases for trafficking. The Court found that the counsel concession at sentence was not relevant to whether the sentence was manifestly excessive and the sentence was not outside a proper sentencing range.

R v WBR [2022] QCA 62

Keywords: Adult sentenced for childhood offending; undue delay

Appeal allowed against a 3-year imprisonment sentence with a parole eligibility date for a rape committed when WBR was 17 years and 9 months of age (20 years old at time of sentence). Discussion of Part 6 Division 11 of the YJA. The court found that WBR should have been sentenced as a child in relation to this offence. The sentence was varied to delete the order for a parole eligibility date and instead order that WBR be released from detention forthwith.

R v Wilson [2022] QCA 18

Keywords: Pre-sentence custody; totality

Application for leave to appeal dismissed against a 5½-year imprisonment sentence for unlawful possession of dangerous drugs (exceeding 2 grams) (MSO), with a parole eligibility date and a declaration of 51 days pre-sentence custody as time served. Wilson committed offences whilst on parole. Wilson had served an additional 288 days in pre-sentence custody both on remand and serving the previous sentence, which was not noted on the pre-sentence custody certificate. Discussion of amendments to s 159A of the PSA. Discussion of totality. The Court found that the sentencing judge imposed a sentence on a legally incorrect premise (that s 159A did not apply to the 288 days). However, the Court would have imposed the same or a more severe sentence on re-sentence and so the application was dismissed.