



2023: First Quarter

Note to readers:

The Sentencing Round-up summarises select sentencing publications and developments in Queensland between 1 January and 31 March 2023 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.

Speeches delivered by the Queensland judiciary

Her Honour Judge Tracy Fantin, 'The Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022: What can we Expect' (Judicial CPD series, Supreme and District Court of Queensland, 23 February 2023) 3

Queensland Sentencing Advisory Council publications 3

Queensland Sentencing Guide (4th ed, March 2023) 3

Sentencing of Offences Committed by Children Aged Under 14 in Queensland (Research Brief No. 2, March 2023) 3

Sentencing of Offences Committed by Children Aged Under 14 in Queensland (Webinar, 15 March 2023) 3

Relevant Bills

Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023 4

Police Powers and Responsibilities and Other Legislation Amendment Bill 2023 4

Legislative amendments

Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023 (Qld) 5

Strengthening Community Safety Act 2023 (Qld) 5

Queensland Court of Appeal decisions

R v Brumby [2023] QCA 23 6

R v DAC [2023] QCA 53 6

R v Hirst [2023] QCA 25 6

R v Misi; Ex parte Attorney-General (Qld) [2023] QCA 34 6

R v Mitchell-Herden [2023] QCA 39 6

R v SDZ [2023] QCA 30 7

R v SEA [2023] QCA 56 7

<i>R v Stiller</i> [2023] QCA 51	7
<i>R v Wallace</i> [2023] QCA 22	7
Supreme Court of Queensland sentencing remarks	
<i>R v BXY</i> [2023] QSC 42	8
<i>R v Conley</i> [2023] QSC 25	8
<i>R v Finn (No 2)</i> [2023] QSC 43	8
<i>R v Finn</i> [2023] QSC 10	8
<i>R v Fisher</i> [2023] QSC 48	9
Childrens Court of Queensland sentencing remarks	
<i>R v TA</i> [2023] QCHC 2	9
District Court of Queensland sentencing remarks	
<i>Queensland Police Service v KBH</i> [2023] QDC 26	9
Academic articles/research of interest	
Antolak-Saper, N, 'The Role of Mercy and Sentencing for Infanticide: The Tragic Case of <i>R v Guode</i> '	10
Clifford et al, 'Experiences of Trauma and Alcohol and Other Drug Use by Domestic, Family, and Sexual Violence Offenders: A Review of 6 Months of Sentencing Remarks from the Supreme Court of the Northern Territory Australia'	10
Coulter et al, 'Culture, Strengths, and Risk: The Language of Pre-Sentence Reports in Indigenous Sentencing Courts and Mainstream Courts'	10
Crofts, T, 'Act Now: Raise the Minimum Age of Criminal Responsibility'	10
McGorrery, P and Weatherson, M, 'When is a Sentence Manifestly Excessive?'	10
Parker, M and Richards, K, 'A "Central Paradox": Judicial Decision-Making in Cases of Sexual Offending by Young People'	11
Proeve, M, 'Addressing the Challenges of Remorse in the Criminal Justice System'	11
Singh, Y, 'Old Enough to Offend but not to Buy a Hamster: The Argument for Raising the Minimum Age of Criminal Responsibility'	11
The Sentencing Project, <i>Why Youth Incarceration Fails: An Updated Review of the Evidence</i>	11
Walvisch, J, 'Sentencing Offenders with Self-Induced Mental Disorders: Towards a Theory of Meta-Culpability'	11

Speeches delivered by the Queensland Judiciary

Her Honour Judge Tracy Fantin, 'The Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022: What can we Expect' (Judicial CPD series, Supreme and District Court of Queensland, 23 February 2023)

Her Honour discussed the recent legislative changes in relation to criminal law and domestic and family violence, including the amendments to the *Penalties and Sentences Act 1992* (Qld) ('PSA') that provide for domestic violence as a mitigating factor, and some potential difficulties in their application.

Queensland Sentencing Advisory Council publications

Queensland Sentencing Guide (4th ed, March 2023)

An updated version of the Council's previous guide which, in addition to updating content to reflect changes to the law and adding to existing subject matter, includes new chapters on the sentencing of certain offences and about the *Human Rights Act 2019* (Qld).

Sentencing of Offences Committed by Children Aged Under 14 in Queensland (Research Brief No. 2, March 2023)

The second publication in the Council's *Research Brief* series, this paper explores demographic information and sentencing outcomes for children for offences committed before they reached 14 years of age, reviewing data from July 2005 to June 2022.

Sentencing of Offences Committed by Children Aged Under 14 in Queensland (Webinar, 15 March 2023)

In this webinar, the Council Chair, John Robertson, Director, April Chrzanowski and Manager of Research, Samuel Jeffs, discuss the findings from the Council's research brief of the same name.

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

This Bill proposes to, inter alia:

- Move the offence of serious racial, religious, sexuality or gender identity vilification from the *Anti-Discrimination Act 1991* (Qld) into the *Criminal Code* (Qld) and increase the maximum penalty from 70 penalty units or 6 months imprisonment to 3 years imprisonment.
- Amend the *Criminal Code* (Qld) and the *Summary Offences Act 2005* (Qld) to introduce a circumstance of aggravation that applies to specific offences where a person, in committing a particular offence, is wholly or partly, motivated by hatred or serious contempt for a person or group of persons based on the person's (or group of persons') actual or presumed race, religion, sexuality, sex characteristics or gender identity (or that shared by members of the group). This introduces new maximum penalties for these aggravated forms of offences. That is, for the aggravated offence of:
 - Going armed as to cause fear – 3 years imprisonment
 - Threatening violence – 3 years imprisonment
 - Disturbing religious worship – 6 months imprisonment
 - Common assault – 4 years imprisonment
 - Assaults occasioning bodily harm – 10 years imprisonment
 - Threats – 7 years imprisonment
 - Stalking – 7 years imprisonment
 - Wilful damage – 7 years imprisonment
 - Public nuisance – 25 penalty units or 6 months imprisonment
 - Trespass – 40 penalty units or 1 year's imprisonment.

The Bill was referred to the Legal Affairs and Safety Committee on 29 March 2023.

Police Powers and Responsibilities and Other Legislation Amendment Bill 2023

This Bill proposes to:

- Increase the maximum penalty for trafficking in dangerous drugs from 25 years imprisonment to life imprisonment.
- Enhance the police drug diversion program, including broadening the scope of what constitutes a minor drug offence.
- Introduce circumstances of aggravation for the offence of evading police (if the offence is committed at night, the driver of the motor vehicle uses or threatens violence, is armed or pretends to be armed, is in company, damages or threatens to damage any property or has previously been convicted of certain offences), with the new aggravated form of offence to carry a maximum penalty of 5 years imprisonment or 300 penalty units.
- Introduce a new offence of assaulting a person in the performance of their functions or exercising powers under the *Fire and Emergency Services Act 1990* (Qld), with a maximum penalty of 100 penalty units or 6 months imprisonment.

The Bill was referred to the Legal Affairs and Safety Committee on 21 February 2023, which is due to report by 14 April 2023.

Legislative amendments

Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023 (Qld)

The Queensland Parliament passed the Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill with amendment on 22 February 2023. This legislation introduced changes with specific relevance to sentencing:

- Amending the PSA and *Youth Justice Act 1992* (Qld) ('YJA') to require a court, when sentencing an offender who is a victim of domestic violence (and, for a child sentenced under the YJA, who has been exposed to domestic violence), to treat the effect of the domestic violence on the offender and the extent to which the commission of the offence is attributable to the effect of the violence, as a mitigating factor, unless (only for adults) it is not reasonable due to exceptional circumstances.
- Amending the PSA to provide for a sentencing court to consider the history of domestic violence orders made or issued against an offender when determining an offender's character.

These provisions will commence on a day fixed by proclamation.

Strengthening Community Safety Act 2023 (Qld)

The Strengthening Community Safety Bill 2023 passed with amendment on 16 March 2023, was assented to and commenced on 22 March 2023. It amended the *Bail Act 1980* (Qld), the *Criminal Code*, the *Police Powers and Responsibilities Act 2000* (Qld) and the YJA. Relevant sentencing-related amendments include:

- Increasing the maximum penalties for unlawful use of motor vehicle offences.
- Introducing a social media circumstance of aggravation on unlawful use of motor vehicle.
- Extending the offence of breach of a bail condition to children.
- Creating the ability for a sentencing court to declare a child a 'serious repeat offender', in which case the court must have primary regard to certain sentencing considerations, including the need to protect members of the community and the impact of the offence on public safety.
- Increasing the possible length of conditional release orders from 3 to 6 months and on breach requiring courts to revoke the order and order detention unless there are special circumstances.

R v Brumby [2023] QCA 23

Keywords: Dangerous operation of motor vehicle causing death with circumstances of aggravation; comparable cases

Leave to appeal was refused against a 9-year sentence with no early parole recommendation for dangerous operation of vehicle causing death while adversely affected by alcohol and excessively speeding. Discussion of comparable cases. The Court found that the sentence in this case was consistent with the general pattern of sentencing revealed by comparable cases, and recognised 'the seriousness of the offending conduct, and the importance of sending a strong message of denunciation and deterrence for offending of this kind,' [31].

R v DAC [2023] QCA 53

Keywords: Cooperation; partially suspended sentence; guilty plea; exceptional circumstances of mitigation

Appeal allowed for a 5-year imprisonment sentence suspended after 16 months for trafficking in dangerous drugs. The Court found the sentence manifestly excessive due to the failure to reflect the exceptional circumstances of mitigation in addition to the guilty plea. The sentence was varied to require suspension after 12 months' imprisonment.

R v Hirst [2023] QCA 25

Keywords: Home invasion; comparable cases; parity

Appeal allowed against a 3½ -year imprisonment sentence for assault occasioning bodily harm ('AOBH') in company and burglary, by break, with violence, in company, with property damage and a 12-month imprisonment sentence for common assault. Discussion of comparable cases. The Court found the sentence manifestly excessive given there was only brief premeditation, the perpetrators were not armed and Hirst had no previous criminal history. The sentence was also found to lack parity with the co-offenders' sentences. Hirst was sentenced instead to 3 years' imprisonment for the AOBH and burglary, suspended after 9 months, for an operational period of 3 years, and 6 months' imprisonment for the common assault.

R v Misi; Ex parte Attorney-General (Old) [2023] QCA 34

Keywords: AG appeal; taking a child for immoral purposes; rape; comparable cases

Attorney-General appeal dismissed for a 7-year imprisonment sentence for taking a child under 12 for immoral purposes (with a serious violent offence declaration), a 3-year sentence for each of the two counts of indecent treatment of a child under 12, and a 4-year sentence for rape (all concurrent). The Court found that it was not shown that the sentence was 'so markedly different from sentences imposed in similar cases to permit the conclusion that there must have been a misapplication of principle,' [32].

R v Mitchell-Herden [2023] QCA 39

Keywords: Recording of a conviction; parity

Leave to appeal refused against the recording of a conviction with a sentence of 12 months' probation and a compensation order for an offence of AOBH in company. Discussion of the application of s 12(2) of the PSA in the facts of the case. Justice Henry found that while loss of specifically identified opportunity was not required, here 'the vague information preferred ... about the prospective impact upon future employment inevitably made that consideration ... less weighty', 4-5. Henry J also noted that there was no logical reason why parity should not apply 'in respect of that component of a sentence which involves the recording of a conviction though the mix of relevant considerations personal to the offender in that context will diminish the chances of them being alike as between co-offenders', 5.

R v SDZ [2023] OCA 30

Keywords: Impact of sentencing submissions on appeal; rape as a child; comparable cases

Leave to appeal refused against 6-year imprisonment sentences (concurrent) for each of two counts of rape (domestic violence offences) committed when SDZ and his victim were adults, and 18 months and 15 months imprisonment for two counts of rape (domestic violence offences) and 9 months imprisonment for each of two counts of indecent treatment of a child under 12 (domestic violence offences) committed when SDZ and his victim were children. One of the 6-year imprisonment sentences for rape as an adult was ordered to be served cumulatively upon the 18-month imprisonment sentence for rape as a child. A parole eligibility date was set at one-third of the total term of imprisonment. Discussion of whether the concession by the defence counsel at sentence that the proposed sentence was within range was relevant to the consideration of manifest excess. Martin SJA, with whom Dalton JA and Gotterson AJA agreed, stated

[a]fter *Volkov* it is clear that an erroneous submission by the defendant's counsel as to the range of sentences which might apply does not increase the burden on an applicant for leave. If the sentence imposed was manifestly excessive then the consequence of that remains the same. The mere fact that, at first instance, it was conceded that the sentence imposed was appropriate does not preclude this court from considering the sentence and whether it demonstrated an error nor does it make the task of an applicant any greater than it would have been in the absence of such a submission, [29].

Discussion of comparable cases for rape. The Court determined that the sentence was within the sound exercise of sentencing discretion.

R v SEA [2023] OCA 56

Keywords: Maintaining a sexual relationship with a child; comparable case; life imprisonment

Leave to appeal refused against a sentence of life imprisonment for maintaining a sexual relationship with a child (most serious offence ('MSO')). Boddice AJA remarked

[w]hilst it is undesirable to categorise offending as the most serious, as there is always the possibility of others committing even worse offending, the sentencing judge's categorisation did not lead to error in the present case. The applicant's offending involved criminality of such depravity, committed in circumstances of such an egregious breach of trust against a helpless child, as to warrant a sentence of life imprisonment, notwithstanding early pleas of guilty and a lack of prior criminal history, [28].

R v Stiller [2023] OCA 51

Keywords: Commonwealth offences; statutory minimum; guilty plea; cooperation

Leave to appeal refused against a 3½-year imprisonment sentence with a non-parole period of 12 months for using a carriage service to access child abuse material. The Court found that the sentencing judge's approach to reducing the statutory minimum to account for the cooperation and guilty plea as permitted under s 16AAC(2) of the *Crimes Act 1914* (Cth) was not in error and the sentence was not manifestly excessive.

R v Wallace [2023] OCA 22

Keywords: Rape and grievous bodily harm; comparable cases

Appeal allowed against 12-year imprisonment sentences imposed for two counts of rape and one of attempted rape, concurrent with a 6-year sentence for grievous bodily harm and a cumulative term of 18 months' imprisonment for AOBH. Wallace was automatically subject to a serious violent offence declaration. Discussion of comparable cases. Bowskill CJ, with whom Bond JA agreed, found that the initial sentence failed to give weight to favourable mitigating factors (age, lack of prior criminal history, disadvantaged background and genuine remorse). Wallace was sentenced instead to 10 years' imprisonment for the rape counts, 5 years concurrent for each of the grievous bodily harm and attempted rape and a cumulative term of 12 months for AOBH, with serious violent offence declarations made for each offence.

R v BXY [2023] QSC 42

Keywords: Youth justice; manslaughter; violence; heinous; consistency; comparable cases

BXY was sentenced under the YJA for burglary and stealing, and unlawful use of motor vehicle to 18 months' detention each, for dangerous operation of a vehicle causing grievous bodily harm to three children, while adversely affected by an intoxicating substance, while excessively speeding to 5 years' detention, and for the manslaughter of another child to 7 years, all to be served concurrently. Convictions were recorded for the final two offences. BXY was 14 years of age at the time of the offences. Discussion of youth justice principles and sentencing considerations. Bowskill CJ found in this case that the only appropriate sentence to mark the seriousness of the offending was detention. Discussion of whether s 176(3) of the YJA applied. Bowskill CJ found that the offending in this case did not involve the commission of violence against a person.

BXY is criminally responsible for causing the death of BS because of his substantial lack of care whilst in charge and control of the car he was driving; not because he used, or inflicted – committed – violence against BS. It follows from this conclusion that s 176(3) does not apply, and the maximum penalty to which BXY is liable is 10 years detention, [74].

Bowskill CJ also discussed the requirement for an offence to be found to be 'particularly heinous' to enable the court to impose a sentence of greater than 10 years and found it did not apply. Discussion of comparable cases.

R v Conley [2023] QSC 25

Keywords: Manslaughter; child's defencelessness and vulnerability as an aggravating factor; comparable cases

Conley was sentenced to 9 years' imprisonment to be served concurrently for each of two counts of manslaughter (domestic violence offences), with a parole eligibility date after serving five years and a declaration of 1,181 days as time served under the sentence. The charges related to Conley negligently leaving her two daughters, aged 2 ½ and 1 ½ years, strapped in their car seats with the windows and doors of the car closed for 9 hours. The girls died of vehicular hyperthermia. Justice Applegarth noted that the sentencing purposes of denunciation and (general) deterrence were particularly relevant. Discussion as to whether s 9(9B) of the PSA, requiring child's defencelessness and vulnerability in manslaughter cases of children under 12 years to be treated as an aggravating factor, was declaratory of existing law. Applegarth J found it was not merely declaratory and therefore that 'what once may have been regarded as a range of sentences for child manslaughter cases or a range of sentences for certain categories of child manslaughter cases may no longer reflect an appropriate range following the enactment of section 9(9B)', 11.

R v Finn (No 2) [2023] QSC 43

R v Finn [2023] QSC 10

Keywords: Hardship of incarceration; mental illness; overcrowding; trafficking; deterrence; totality

Finn, a veteran suffering severe complex post-traumatic stress disorder, pleaded guilty. Justice Applegarth sentenced Finn to 4 years' imprisonment for trafficking in dangerous drugs, ordered no further penalty for the other drug offences and a concurrent term of 18 months' imprisonment for possession of a weapon in a public place. Justice Applegarth (in the first decision) discussed the value of general deterrence in sentencing drug addicts and the mentally ill and the problems with prison overcrowding and the impact on rehabilitation. Justice Applegarth also discussed the relevant principles (drawn from *R v Verdins*) as to how mental functioning is relevant to sentencing. Applegarth J commented that:

Imprisonment of any offender in an overcrowded prison of any security classification imposes a harsher form of punishment than punishment for the same period of imprisonment did some years

ago when prisons were not as overcrowded. This should be reflected in some adjustment to the length of sentence that would have been a just sentence some years ago, [86].

R v Fisher [2023] QSC 48

Keywords: Manslaughter; killing an unborn child; guilty plea; domestic violence as an aggravating factor

Fisher pleaded guilty to manslaughter (by choking), interfering with a corpse and killing an unborn child. Justice Davis noted that 'Parliament has determined that manslaughter and killing an unborn child both attract the same maximum penalty, namely life imprisonment. The offence of killing an unborn child is not, as a species of offending, less serious than manslaughter', 8. Fisher was sentenced to 13 years' imprisonment for the manslaughter, 8 years' concurrent for killing the unborn child (both declared serious violent offences) and 12 months' imprisonment cumulatively for interfering with the corpse.

Childrens Court of Queensland sentencing remarks

R v TA [2023] QCHC 2

Keywords: Youth justice principles; robbery with circumstances of aggravation; foetal alcohol syndrome ('FASD'); detention conditions

TA was 13 years old at the time of committing a robbery in company with personal violence. Discussion of FASD as a factor in mitigation. TA had spent significant periods of time on remand in detention and during that time was subject to long periods of time in separation. Judge Fantin found that the period of incarceration was 'significantly more onerous than it otherwise would have been; that the circumstances in which you have been detained have been cruel, inappropriate, and have served no rehabilitative effect' and the 'incarceration for large periods of time in solitary confinement or virtually in solitary confinement ... is a direct breach of the Charter of Youth Justice principles', 5. Given the plea of guilty, the mitigating factors and the lengthy period in detention on remand in those circumstances, TA was reprimanded.

District Court of Queensland sentencing remarks

Queensland Police Service v KBH [2023] QDC 26

Keywords: Contravention of a domestic violence order; comparable cases

In the Magistrates Court KBH, who was subject to a suspended sentence, was fined \$300 for two counts of contravention of a domestic violence order, and \$200 for an additional two counts of contravention of a domestic violence order. The Commissioner of Police appealed on the basis that the sentence was

manifestly inadequate. Discussion of legal principles related to s 222 appeals. Coker DCJ found that the Magistrate mischaracterised the offending as minor and the penalty was very lenient, unreasonable and unjust. Coker DCJ stated:

I note particularly the more recent developments in relation to the domestic violence legislation, and the very real need to accept that domestic violence is something far more than simply the imposition of physical force by one party to an intimate relationship upon another. There are a multitude of means by which there can be control exercised upon another and it is important, in fact, in my view, overwhelmingly so, that penalties imposed reflect the recognition of the importance of ensuring that such behaviours do not continue, [32].

Discussion of comparable cases. Coker DCJ allowed the appeal, set aside the fines and instead ordered 3 months' imprisonment on Count 2, and 1 month imprisonment on each of the other counts (to be served concurrently).

Academic articles/research of interest

Antolak-Saper, N. 'The Role of Mercy and Sentencing for Infanticide: The Tragic Case of *R v Guode*'

This article considers the Victorian case of *R v Guode* and argues that references to mercy as a sentencing principle should be avoided and instead mercy is more appropriately described as a mitigating factor.

Clifford et al. 'Experiences of Trauma and Alcohol and Other Drug Use by Domestic, Family, and Sexual Violence Offenders: A Review of 6 Months of Sentencing Remarks from the Supreme Court of the Northern Territory Australia'

The authors found that trauma and alcohol and other drug use were widespread among offenders convicted of domestic, family and sexual violence offences.

Coulter et al. 'Culture, Strengths, and Risk: The Language of Pre-Sentence Reports in Indigenous Sentencing Courts and Mainstream Courts'

This research analysed presentence reports for Victorian Aboriginal and Torres Strait Islander people. It evaluated whether and how cultural information (particularly cultural strengths) and community circumstances were addressed and compared the approaches of Indigenous sentencing courts and mainstream courts.

Crofts, T. 'Act Now: Raise the Minimum Age of Criminal Responsibility'

Crofts examines the ongoing debate about whether to raise the minimum age of criminal responsibility in Australia and considers the reforms that would be required to do so.

McGorrey, P and Weatherson, M. 'When is a Sentence Manifestly Excessive?'

This piece analysed successful appeals based on manifest excessiveness in Victoria with the aim of identifying how much a sentence must stray from the permissible range to be manifestly excessive.

Parker, M and Richards, K ‘A “Central Paradox”: Judicial Decision-Making in Cases of Sexual Offending by Young People’

This research analysed sentencing remarks and judgments to investigate how judicial decision-makers construct this cohort of young people given the paradox that young offenders are typically regarded as reformable while sexual offenders are not.

Proeve, M, ‘Addressing the Challenges of Remorse in the Criminal Justice System’

Proeve considers an alternative approach to evaluating remorse in sentencing and for offender rehabilitation.

Singh, Y, ‘Old Enough to Offend but not to Buy a Hamster: The Argument for Raising the Minimum Age of Criminal Responsibility’

Singh argues that the minimum age of criminal responsibility should be raised, assessing the need to do so in a framework that decisions should be just, scientific, not racist, humane, cost-effective and generally not ludicrous. Singh also offers principles for an alternative approach to criminalisation.

The Sentencing Project. Why Youth Incarceration Fails: An Updated Review of the Evidence

This research from the United States of America summarises evidence about the problems associated with incarceration of children.

Walvisch, J, ‘Sentencing Offenders with Self-Induced Mental Disorders: Towards a Theory of Meta-Culpability’

This article analyses the way in which Australian courts have dealt with the *Verdins* principle in situations where the offender’s mental health condition was triggered by drug use, or by a failure to take prescribed psychiatric medication. It highlights problems with the current approach and proposes an alternative that focuses on the offender’s ‘meta-culpability.’

Brought to you by



**Queensland Sentencing
Advisory Council**