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Update Summary

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QUEENSLAND SENTENCING MANUAL

Robertson

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UPDATED COMMENTARY

Judge Robertson has written new commentary on:

Particular Offences

Commonwealth offences – Defrauding the Commonwealth – Sexual offences committed against children outside Australia

Sentencing for serious depraved sexual offending against children in other countries, by directing the offending using a carriage service, including live-streaming: *R v Schulz* [2023] QCA 150. See [16.171].

Commonwealth offences – Defrauding the Commonwealth – Medicare fraud

For a comprehensive discussion of Australian sentences in intermediary courts of appeal relating to sentences for Medicare fraud, see *R v Waters* [2023] QCA 131. See [16.80].

Drug offences – Drugs Misuse Act 1986 – Sentencing on basis of s 129(1)(c) (formerly s 57(c)) of the Drugs Misuse Act 1986 (Qld)

In *R v Atasoy* [2023] QCA 121, the sentencing judge was held to have erred in proceeding on the basis of actual possession in relation to prohibited weapons found in a vehicle under his control. See [16.1680].

Factors Personal to the Offender

Relevance of “quasi-custody” in in-house rehabilitation clinics

Relevance to the exercise of the sentencing discretion to periods in in-house rehabilitation clinics, described in *R v Delaney* (2003) 59 NSWLR 1; [2003] NSWCCA 342 at [22] as “quasi-custody”: *R v Staines* (2022) 11 QR 872; [2022] QCA 187. See [10.387].

Victims of Crime

As part of the sentencing process – Victim impact statements

R v Abdullah [2023] QCA 198 discusses the proper approach to harm to victims in the sentencing process, including the use of victim impact statements, by reference to s 9(2)(c)(i) and s 179K of the *Penalties and Sentences Act 1992* (Qld). See [19.80].

Sentencing Options – General

Detention (juveniles) – Detention is a sentence of last resort

A concise summary of the principles applicable when sentencing a child pursuant to the provisions of the Youth Justice Act 1992 : *R v SDW* [2023] QCA 241; (2022) 12 QR 479 at [16] – [17]. See [15.1010].

Imprisonment (adults) – Cumulative sentences – Proportionality and the concept of the “crushing sentence”

In *R v Norgate* [2023] QCA 231, the court allowed an appeal against a sentence imposed for grooming a child which was made cumulative on balances of various suspended sentences imposed for similar offending. See [15.601].

Plea of Guilty

Onus of proof in establishing a miscarriage of justice

In *R v Burman* [2023] QCA 245, in dismissing an appeal against convictions following pleas of guilty to various offences on three separate occasions, the Chief Justice held that the appellant bears the onus of establishing that a miscarriage of justice took place when the court accepted and acted on pleas of guilty. See [12.105].

The Sentencing Hearing

Sentencing when criminal conduct is not admitted

In *R v HCP* [2023] QCA 211, the applicant contended that the sentencing judge had impermissibly taken into account circumstances of aggravation not admitted or charged. The Court rejected that argument. See [14.560].

Appeal Against Sentence

Appeal to the Court of Appeal – Principles to be applied in Attorney-General appeals

By reference to *R v Harrison* [2021] QCA 279; (2021) 294 A Crim R 1, Bond JA summarised in *R v Schulz* [2023] QCA 150 at [39] – [42] relevant general principles of sentencing for Commonwealth offences. See [18.21].

The Sentencing Hearing

Taking into account criminal conduct not admitted – Sentencing for only the offences of which the offender has been convicted

R v HCL [2023] QCA 68 demonstrates once again the difficulties that can confront a sentencing judge in complying with the principle emanating from *R v De Simoni* (1981)

147 CLR 383; [1981] HCA 31 at 389 (CLR) per Gibbs J (as his Honour then was) applied in Queensland in cases such as *R v D* [1996] 1 Qd R 363; even when more extensive offending is apparently admitted in the agreed statement of facts. See [14.500].

Taking into account other offences under section 16BA of the Crimes Act 1914 (Cth)

R v Stiller [2023] QCA 51 involved the application of s16BA of the *Crimes Act 1914* (Cth) where as a result of the primary judge taking into account two other counts of using a carriage service to access child abuse material, the period of offending contemplated by the one similar charge to which the applicant had pleaded guilty, was extended from 7 months to over 6 years. See [14.640].

Sentencing Options – General

Detention (juveniles) – Amendments to the Youth Justice Act 1992 creating a power for a court to declare a child a “serious repeat offender”

By the commencement of the *Strengthening Community Safety Act 2023* (Qld) on 22 March 2023, a court may, on the application of the prosecutor, in relation to certain defined prescribed indictable offences, declare a child to be a “serious repeat offender” with significant implications for the structure of sentences and time served. See [15.1005].

Detention (juveniles) – Conditional release orders (ss 176–187)

Since since the commencement of the *Strengthening Community Safety Act 2023* (Qld) on 22 March 2023, the maximum duration of a conditional release order has been increased from 3 months to 6 months, and there is now a requirement that a child sentenced to a conditional release order for a prescribed indictable offence as defined in that Act, must serve their suspended period of detention if they breach the order unless there are special circumstances. See [15.1110].

Detention (juveniles) – Special circumstances under s 227(2) of the Youth Justice Act 1992

In *R v RSG* [2023] QCA 70, the applicant child had pleaded guilty at the start of his trial to one count of murder and two counts of malicious act with intent. The primary judge imposed a 10-year detention order for murder and concurrent terms of 4 years for the other offences. The applicant argued that the judge had erred in not finding special circumstances under s 227(2). The court rejected this argument and refused leave to appeal. See [15.1130].

Detention (juveniles) – Meaning of “particularly heinous offence”

R v YTZ [2023] QCA 87 involved serious criminal conduct by a 17-year-old offender with a significant criminal history and personal disadvantage in which he drove a stolen motor vehicle with extreme recklessness and whilst intoxicated leading to the death of a young couple and their unborn child. See [15.1170].

Imprisonment (adults) – Presentence custody – Proper approach to s 159A(1) since 25 May 2020

In *R v Palmer* [2023] QCA 118, the court (Mullins P, Bond JA, and Martin SJA) summarised the proper approach to declaring pre-sentence custody under s 159A(1) of the *Penalties and Sentences Act 1992* (Qld). See [15.641].

Particular Offences

Offences against the person – Dangerous driving – Imprisonment almost inevitable in dangerous driving causing death or grievous bodily harm whilst intoxicated

In *R v Brumby* [2023] QCA 23, the court dismissed an appeal against a sentence of 9 years without a parole eligibility date being set imposed on the applicant who had pleaded guilty to one count of aggravated dangerous operation of a motor vehicle involving driving at extreme speeds over a considerable distance in a built up area with heavy traffic conditions while intoxicated which caused the death of another motorist. See [16.520].

Sexual offences – Rape – Rapes in public places

In *R v Wallace* [2023] QCA 22, the court reduced a sentence imposed on a 19-year-old first offender from a severely compromised background for offences relating to two separate episodes of extreme sexual violence, including rape, against two women on the same day, the first a sex worker and the second a 66-year-old woman who was out walking in a public place and who was attacked from behind. In citing *R v Benjamin* (2012) 224 A Crim R 40; [2012] QCA 188, the Court regarded the case as being more serious but reduced an overall sentence of 13 years to one of 11 years. See [16.1040].

Sexual offences – Indecent dealing with children – Sexual offences against children

In *R v HCK* [2023] QCA 65, the court allowed an appeal against a sentence of actual imprisonment imposed after a trial where the applicant had been acquitted of 2 counts but convicted of one. See [16.1095].

Appeals Against Sentence

Appeal to the Court of Appeal – Principles to be applied in Attorney-General appeals

The approach to appeals by the Attorney General on the ground of manifest inadequacy was re-stated by the court in *R v Misi* [2023] QCA 34. See [18.20].

Appeal to the Court of Appeal – The relevance of defence counsel’s submission in lower court

In *R v SDZ* [2023] QCA 30, *R v Volkov* (2022) 10 QR 451; [2022] QCA 57 was cited with approval as representing the present state of the law in circumstances in which defence counsel misstates the law. See [18.35].

Sentencing Federal Offenders

Crimes Act 1914 (Cth) – Discounts for Commonwealth offenders for plea of guilty

In relation to the reference in s 16A to minimum penalties for certain offences – see 16AAA, 16AAB and 16 AAC of the *Crimes Act 1914* (Cth); the Court recently considered the proper approach in *R v Stiller* [2023] QCA 51 and approved the approach taken by the primary judge. See [7.31].

Governing Principles

Penalties and Sentences Act 1992 – Maximum penalty for worst category of case

In relation to an unsuccessful appeal against a life sentence imposed on a mother for maintaining a sexual relationship with a child and multiple counts of rape who had assisted her male co-offender to repeatedly rape and otherwise sexually abuse her 4–5-year-old daughter whilst the events of the offending were recorded on video: *R v SEA* [2023] QCA 56. See [9.80].

Plea of Guilty

The “One Third” Discount

In *R v DAC* [2023] QCA 53, the court allowed an appeal against a sentence of 5 years suspended after 16 months for a mature offender with no previous convictions who pleaded guilty to trafficking in a number of dangerous drugs including testosterone, and who had exceptional mitigating circumstance, by reducing the time to be served to 12 months. See [12.35].