Sentencing considerations for Commonwealth offences

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What is Commonwealth crime?

1. There are two key pieces of legislation creating and dealing with what can be referred to as Commonwealth or Federal criminal law: the *Crimes Act 1914* (Cth) (the *Crimes Act*) and the *Criminal Code Act 1995* (Cth) (the *Code*).

2. The Code and the Crimes Act are the tip of the iceberg in terms of offences created under Commonwealth legislation. For instance, there are offences under the Commonwealth's *Corporations Act 2001*, *Customs Act 1901*, *Environment Protection and Biodiversity Act 1999*, *Fisheries Management Act 1991*, *Taxation Administration Act 1953*, *Social Security Act 1991* and the *Migration Act 1958* and many others. The offences largely fall into one of the following categories (in no particular order):

    - fraud – social security, tax fraud, Customs charges and general fraud;
    - prohibited imports (commonly drugs);
    - taxation offences;
    - terrorism;
    - money laundering;
    - human trafficking (slavery and slavery-like conditions);
    - telecommunications (often involving the misuse of a 'carriage service' for the purpose of 'grooming' or similar sexual activity with children)
    - environmental prosecutions; and
    - copyright infringements.

3. The power of a Court to hear and determine Commonwealth offences is invested in State and Territory courts of summary jurisdiction, including Children's Courts,

pursuant to s 39 *Judiciary Act* 1903 (Cth). While the Federal Court of Australia is a Commonwealth court and can deal with criminal matters, in reality, criminal cases are prosecuted by the same courts that prosecute State and Territory offences.

4. When sentencing offenders for Commonwealth crimes, the sentencing court can take into consideration the sentencing practices adopted by the local jurisdiction up to a point (as described below) but the most critical issue beyond correctly applying the Crimes Act itself are the types of sentences being imposed by other courts around Australia for the that particular Commonwealth offence: *Hili v R; Jones v R* (2010) 242 CLR 520 and *Pham* (2015) 256 CLR 550; [2015] HCA 39.

5. In *Pham* the High Court repeated what it has previously made clear in *Hili v R; Jones v R*, that is, that a sentencing court looks for consistency across the entire country and not just within its own jurisdiction.

6. *Pham* was a drug importer. When his case was heard on appeal at the Victorian Court of Appeal, the Court concluded that the sentences imposed for similar offences in New South Wales, Queensland and Western Australia were substantially greater than then sentences imposed in Victoria for offences even when involving similar quantities of drugs. The Court held that the sentence imposed on Pham were "well outside the range indicated by Victorian practice" and that, because the respondent would have pleaded guilty with the "reasonable expectation" that he would be sentenced in accordance with current sentencing practices of Victorian courts, his appeal was allowed and the sentence reduced. The Commonwealth appealed that decision – not surprisingly since it directly contradicted *Hili v R; Jones v R.*

7. On appeal to the High Court French CJ, Keane and Nettle JJ stated at [18]-[22]:

> *[18] As Hili v R made clear, where a State court is required to sentence an offender for a federal offence, the need for sentencing consistency throughout Australia requires the court to have regard to sentencing practices across the country and to follow decisions of intermediate appellate courts in other States and Territories unless convinced that they are plainly wrong.*
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> *[19] It follows that to approach the sentencing task on the basis that an offender is entitled to assume that he or she will be sentenced in accordance with current sentencing practices in the State or Territory where the offender is sentenced is an error that is likely to result in just the kind of inconsistency that the Australia-wide approach mandated by Hili is calculated to avoid.*
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> *[20] Of course, that is not to say that there are not differences between various State and Territory laws concerning trial and conviction, including sentencing*

laws, which may be picked up and applied to federal offences by s 68 of the Judiciary Act 1903 (Cth). The Australia-wide approach mandated in Hili recognises that, to some extent at least, the effect of s 68 of the Judiciary Act is "to place the administration of the criminal law of the Commonwealth in each State upon the same footing as that of the State".

[21] So, for example, a State or Territory aggregate sentence law may be picked up and applied in a manner which results in a different sentence structure in one State or Territory from that which would be imposed for the same federal offence in another State or Territory. The parole system in one State or Territory may also be so much different from the system in another as to warrant a significant difference between the non-parole period imposed in respect of a federal offence and the non-parole period which would be imposed for the same offence in the other State or Territory. It might be, too, that the particular difficulties faced by a class of offender in one State or Territory would warrant a significant difference between the sentences imposed for the same offence in other States or Territories.

[22] Nevertheless, such State and Territory sentencing laws as are picked up and applied by s 68 of the Judiciary Act operate only so far as they are applicable and the laws of the Commonwealth do not otherwise provide. They are excluded where applicable Commonwealth sentencing laws leave no room for their application. To the extent that Pt IB of the Crimes Act 1914 (Cth) specifically or impliedly provides for sentencing considerations which are different from otherwise applicable State and Territory sentencing considerations, the Crimes Act is exclusive.

8. It is for this reason that many of the cases relied upon by the Commonwealth Crown in sentencing are from interstate.

What is the prevalence of Commonwealth crime?

9. Over the 2015-2016 financial year there were 5,849 discrete charges prosecuted under the *Code* of which 3,719 related to fraudulent conduct charges, making fraudulent conduct the most commonly prosecuted Commonwealth offence. The balance were drug importation, offences against Commonwealth officials, identity crime, money laundering, cyber crime (usually child exploitation offences) and other minor offences.

10. Those numbers do not reflect the actual number of cases (i.e. individuals prosecuted) which, during 2015-2016 was 3,029 for the entire country. By comparison, the NSW ODPP prosecuted 16,806.

Is there a Commonwealth sentencing regime?

11. Yes and it is found at Part 1B of the Crimes Act. This section deals with sentencing considerations, parole issues and the types of sentences which can be imposed on an offender.

12. Section 16A(2) of the Act prescribes a non-exhaustive list of factors to be taken into account by the sentencing court, in no particular order. Note that the section does not include a sub-section (i), (l) or (o).

13. Section 16A(2) does not exclude the application of State and Territory sentencing or common law sentencing principles. State sentencing considerations are discussed below, but with respect to common law concepts, the following apply notwithstanding their absence from s 16A(2) of the Crimes Act: For example, the following:

- A discount on sentence in the range of 10% to 35% for the entry of a guilty plea (a controversial area, as discussed below);
- The 'totality' of the sentence;
- Consistency / parity; and
- The applicability of non-exculpatory duress considerations.

14. In terms of the specific heads of consideration at s 16A(2):

(a) the nature and circumstances of the offence

A key factor, as always, is the role of the offender in the offence and the precise circumstance of the offence. In *Olbrich* (1999) 199 CLR 270 the majority of the High Court said that while it was generally appropriate to categorise offenders and their roles in, for instance, a drug importation, it was not an essential aspect of the sentencing process. What was of key importance was the actual offence for which the offender is to be sentenced, so in the context of a drug importation offence, using terms such as 'courier' or a 'principal' must not obscure the assessment of what the offender did.

(b) other offences (if any) that are required or permitted to be taken into account

This section enables the sentencing court to sentence the offender not only in relation to a charge for which they have been convicted or pleaded guilty, but any other outstanding charge for which the offender has not yet been convicted and sentenced.

Section 16A(2)(b) should be read in conjunction with s 16BA of the Crimes Act which states that the sentencing court *'may, with the consent of the prosecutor and before passing sentence on the person, ask him whether he admits his guilt in respect of all or any of the offences specified in the list and wishes them to be taken into account by the court in passing sentence on him for the offence or offences of which he has been convicted'*. This is the Commonwealth's equivalent to a Form 1. The 'offences' referred to in s 16A(2)(b)) are the offences for which the offender has been convicted and for which he or she is about to be sentenced, not other offences the offender may have been involved in in the past.

(c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character- that course of conduct

The section requires the sentencing court to consider the period of time over which the offending conduct occurred, which may be relevant to the nature and circumstances of the conduct under s 16A(2)(a) and to assessing its relative seriousness: *Fitzgerald* [2015] NSWCCA 266 at [37].

(d) the personal circumstances of any victim of the offence

There is no judicial authority which discusses this fairly obvious consideration, although it is mentioned in passing in *Thorn* [2016] ACTSC 217 at [89] and *Gey-Houn Ra* (2002) 131 A Crim R 133 at [31].

(e) any injury, loss or damage resulting from the offence

This is, plainly, an aggravating factor on sentence. However, the section is not limited to circumstances where there is a readily identifiable victim of an offence who has suffered harm. In many cases in Commonwealth offences that is not the case, for example, there is identifiable victim for a taxation offence. However, in *Savkovits* [2013] NSWSC 464 and *Curtis (No.3)* [2016] NSWSC 114 s 16A(2)(e) was still a relevant consideration even though the offences involved dishonesty and the victims were the Commonwealth itself or the share market.

(ea) if an individual who is a victim of the offence has suffered harm as a result of the offence--any victim impact statement for the victim

The reference to victim's impact statement was introduced into the Act in 2013 and at this stage there is no reported authority which expressly refers to it. The Explanatory

Memorandum[1] stated that the inclusion of the subsection is to 'formalise the process of the court's consideration of the harm suffered by the victim as a result of the offence in determining an appropriate sentence for an offender'.

Attention should also be given to s 16AAA of the *Crimes Act* which sets out what the statement is to contain, such as the impact of the offence on the victim, including details of the harm suffered by the victim as a result of the offence and s 16AB of the Act which sets out how a victim's impact statement should be used by the court.

(f) the degree to which the person has shown contrition for the offence: (i) by taking action to make reparation for any injury, loss or damage resulting from the offence; or (ii) in any other manner.

This section is related to s 16A(2)(g) – the plea of guilty - but considers the distinct issue of whether or not the offender shows any contrition in relation to the offence. By splitting the concepts the Parliament is an acknowledgment that contrition may not always follow a guilty plea – a guilty plea can simply be a recognition of the inevitable or convenience. Nonetheless the two concepts are closely intertwined. The need for contrition to be genuine and proved is discussed in *Islam* [2016] NSWSC 233.

(fa) the extent to which the person has failed to comply with (i) any order under subsection 23CD(1) of the *Federal Court of Australia Act 1976* ; or (ii) any obligation under a law of the Commonwealth; or (iii) any obligation under a law of the State or Territory applying under subsection 68(1) of the *Judiciary Act 1903* about pre-trial disclosure, or ongoing disclosure, in proceedings relating to the offence.

This slightly obscure section was introduced into the Crimes Act in 2015. As yet there are no reported cases dealing with it. The section requires the sentencing Court to consider whether the offender has complied with any pre-trial obligations that applied to them. A person cannot get a discount at sentence for complying with their pre-trial obligations, since all they will have done is comply with a legal requirement, but, there is a risk that they will receive a penalty higher than would have been imposed if they fail to comply with pre-trial obligations.

[1] Explanatory Memorandum to the *Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Bill* 2013, item 90.

(g) if the person has pleaded guilty to the charge in respect of the offence--that fact

The fact of a person's guilty plea is a consideration on sentence, but this has become a slightly controversial topic because the NSW and Victorian jurisdictions have diverged as to why the guilty plea is taken into account.

The NSW view is that the guilty plea is only considered as evidence of the offender's willingness to facilitate the course of justice (see for instance *Lee* [2012] NSWCCA 123 and *Tyler* (2007) 173 A Crim R 458 at 476), while the Victorian view is that the guilty plea can also be considered purely on the basis of the utilitarian benefits of saving the community money and court time (see *DPP (Cth) v Thomas; DPP (Cth) v Wu* [2016] VSCA 237). It may be a distinction without a difference in reality, but one which may ultimately be resolved by the High Court.

At present the Commonwealth Director of Public Prosecution (CDPP) relies on *Cameron* (2002) 209 CLR 339, where the High Court examined the discount open to an offender who pleaded guilty to drug possession at Perth airport. Although the case did not deal with a Commonwealth offence, nor s 16A(2)(g) of the Act, it is considered a key authority on the question of how a guilty plea should be factored into the sentencing mix.

In *Cameron*, after noting that the purpose for the guilty plea discount was not the saving of any expense for the community,[2] the High Court in at [14] and [19] held that the plea can also be considered an indication of the offender's remorse, acceptance of responsibility and a willingness to facilitate the course of justice. A significant issue is whether the plea was entered at the first reasonable opportunity.[3] However, it is a balancing exercise between allowing a reduction for a plea of guilty and not penalising a convicted person for not pleading guilty because the accused exercised his or her right to trial.[4] At [14] Gaudron, Gummow and Callinan JJ held:

> *Reconciliation of the requirement that a person not be penalised for pleading not guilty with the rule that a plea of guilty may be taken into account in mitigation requires that the rationale for that rule, so far as it depends on factors other than remorse and acceptance of responsibility, be expressed in terms of willingness to facilitate the course of justice and not on the basis that the plea has saved the community the expense of a contested hearing.*

[2] In contrast to *Siganto* (1998) 194 CLR 656 at 663-664.
[3] (2002) 209 CLR 339 at [22].
[4] Ibid at [12]-[13].

The New South Wales Court of Criminal Appeal's guideline judgment on the discount afforded an offender who has entered a plea of guilty in *Thomson v R; Houlton v R* (2000) 49 NSWLR 383 has no application to Commonwealth offences[5] because s 16(2)(g) of the Act focuses upon the offender's contrition and not the fact that the plea has saved the community the expense of a contested hearing, which is part of the rationale in *Thomson v R; Houlton v R.*

However, an offender can seek a discount for the plea of guilty in the range of 10 per cent to 25 per cent in line with *Thomson*[6] or possibly in the range of 30 per cent to 35 per cent in Western Australia where the offender participates in the 'fast track' entry of a guilty plea.[7] There is authority in South Australia that a discount of 25 per cent for an early plea of guilty is acceptable[8] and 'quite common'.[9]

A court is not required to specify a quantifiable discount for an offender's guilty plea to a Commonwealth offence.[10] Other factors which will impact on the amount of the discount will be the timing of the plea,[11] the strength of the Crown case[12] and whether the plea at a late stage was a recognition of the inevitable rather than evidence of contrition or a real willingness to facilitate the course of justice.[13]

The CDPP's standard submissions on sentence say something to the effect of the sentencing Court having to *consider the offender's:*

- *willingness to facilitate the course of justice and not the utilitarian value of the plea of guilty.*
- *A guilty plea is not limited to whether there is a willingness to facilitate the course of justice, and can be relevant to other subjective considerations such as remorse.*

[5] *Tyler* (2007) 173 A Crim R 458 at 476.
[6] (2000) 49 NSWLR 383 and *Bugeja* [2001] NSWCCA 196 at [24]-[28]; *Otto* (2005) 157 A Crim R 540 at [69].
[7] *Miles* (1997) 17 WAR 518 at 521; *Verschuren* (1996) 17 WAR 467; *De Luce* (unreported, WACCA, 19 July 1996).
[8] *Nixon* (1993) 66 A Crim R 83 at 90; *Kendall* (unreported, SACCA, 16 June 1997) and *Allen* [1999] SASC 346.
[9] *Rooke* (unreported, SACCA, 19 June 1998).
[10] *Lee* [2012] NSWCCA 123 at [58].
[11] *Maxwell* (2007) 177 A Crim R 498 at 505.
[12] *Tyler* (2007) 173 A Crim R 458 at [114]; *Lee* [2012] NSWCCA 123 at [58]-[59]; *Karan* [2013] NSWCCA 53; SC [2008] NSWCCA 29 at 48.
[13] *SC* [2008] NSWCCA 29 at [48].

- *In assessing the willingness of an offender to facilitate the course of justice the strength of the Crown case against the offender is a relevant consideration. That enquiry may reveal whether the plea was a recognition of the inevitable or "truly motivated by a willingness to facilitate the course of justice: Tyler v R (2007) 173 A Crim R 458 at [114]; Lee v R [2012] NSWCCA 123 at [58].*

However, this approach has been challenged. As noted above, 16A(2)(f) refers to the sentencing Court's capacity to take any form of contrition into account on sentence. Section 16A(2)(g) provides that the sentencing court must take into account the fact that an offender pleaded guilty.

In *DPP (Cth) v Gow* [2015] NSWCCA 208, Basten JA (Hamill J agreeing, Garling J not deciding) in *obiter* (the offender had pleaded not guilty and was convicted after trial, so the issue of a guilty plea did not arise) their Honours held that *Cameron* had been misunderstood.

In contrast to the 'usual' CDPP interpretation, the CCA held at [27]:

> *...In Cameron the sentence was imposed for an offence against the Misuse of Drugs Act 1981 (WA), picked up and applied as federal law by the Commonwealth Places (Application of Laws) Act 1970 (Cth). By contrast, s 16A of the Crimes Act 1914 (Cth), identifying general sentencing principles, is said to apply to "federal offences". The term "federal offence" is defined to mean "an offence against the law of the Commonwealth." No doubt the Western Australian Court in Cameron was exercising federal jurisdiction, but only Kirby J referred to the possibility that s 16A was applicable and, the point not being argued, dealt with the matter on the basis that the offence remained one against a law of the State. The joint reasons of Gaudron, Gummow and Callinan JJ, whilst recognising that the sentencing exercise took place in federal jurisdiction, made no reference to s 16A, but rather assumed that relevant provisions of the state Sentencing Act applied.*
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> *Accordingly, Cameron has nothing to say about the operation of Commonwealth law with respect to sentencing. Furthermore, it is at least doubtful that Cameron limits the basis upon which a plea of guilty may be taken into account in the way suggested in Lee.*

In *R v Harrington* [2016] ACTCA 10, the ACT Court of Appeal held that the conclusion in *DPP (Cth) v Gow* was "clearly wrong" on the basis that the joint judgment in *Cameron* is in fact concerned with general sentencing principles which would apply to the sentencing of Commonwealth offenders: at [131]–[132]; *Tyler v R* at [111]; *R v Saleh* [2015] NSWCCA 299 at [5].

In Victoria, *DPP (Cth) v Thomas; DPP (Cth) v Wu* [2016] VSCA 237, the Victorian Court of Appeal (Redlich, Santamaria and McLeish JJA) did not follow *R v Harrington* and held that when sentencing Commonwealth offenders, *Cameron v The Queen* does not preclude a discount for a guilty plea on the basis of its utilitarian benefit: *Thomas* at [3], [125], [126], [136]. The court said at [7]:

> *(a) The question whether a discount is available in respect of the utilitarian benefit of a plea of guilty to a Commonwealth offence is to be determined by reference to s 16A(2)(g) of the Crimes Act.*
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> *(b) A sentencing court must take account of the fact of the plea of guilty. Having regard to the text, context and purpose of s 16A(2)(g) of the Crimes Act, it is to be construed as meaning that a sentencing court must take into account the objective utilitarian benefit of a plea of guilty.*
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> *(c) We consider the view expressed in Tyler, that Cameron altered the nature and extent of the discount to be allowed for a plea of guilty for Commonwealth offences, to be plainly unsustainable. Intermediate appellate authority is quite divided as to how the joint reasons in Cameron are to be understood. In any event, the principle of comity does not require one appellate court to accept another appellate court's understanding of the meaning to be given to reasons in a High Court judgment.*
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> *(d) Cameron was not concerned with a Commonwealth offence or the construction of s 16A(2)(g) of the Crimes Act. Further, there was no reference to s 16A(2)(g) in Tyler nor any consideration of whether statute governed the discount to be allowed for the fact of the plea of guilty or whether the statute could have been modified by the common law.*
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> *(e) Section 16A(2)(g) copied s 10(g) of the Criminal Law (Sentencing) Act 1988 (SA), as it originally stood. That provision and similar statutory provisions in other States require a sentencing court to take account of 'the fact' of the plea of guilty. Intermediate appellate courts have consistently construed the State provisions, both before and since Cameron, as meaning that a discount is to be allowed for the utilitarian benefit to the administration of justice of the plea of guilty. Given the common features of the text, purpose and context of the State and Commonwealth provisions, s 16A(2)(g) should be given the same construction.*
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> *(f) Tyler and other intermediate appellate decisions that have not allowed a discount for the utilitarian benefit of the plea of guilty for Commonwealth offences should not be followed. They are inconsistent with other appellate authority both before and since Cameron, which in our opinion has correctly allowed a discount for the utilitarian benefit of the plea for Commonwealth offences.*
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> *(g) A willingness to facilitate, or co-operate in, the course of justice is manifested by an offender's plea of guilty. The plea, by its very nature,*

constitutes an acknowledgement that the charge has been rightly laid and evidences a preparedness by the offender to relinquish his or her right to contest the charges and to submit to punishment. The offender's willingness to follow that course, often described in the authorities as 'co-operation', vindicates the course of justice, saves the community the expense of a trial and releases witnesses from the ordeal of a trial. These considerations provide the primary basis for the discount for a plea of guilty.

(h) As a willingness to cooperate with the course of justice is evidenced by the fact of the plea, the discount continues to be allowed regardless of the presence of motives of self-interest or the absence of remorse. Ordinarily there will be no material difference between the discount to be allowed for a willingness to facilitate the course of justice and the objective utilitarian value of that plea. However, the subjective circumstances of the offender, including his or her willingness to facilitate the course of justice, will not always have the same mitigating weight as the utilitarian benefit of avoiding a contested trial. For that reason, while statute requires a sentencing court to have regard to the fact of a plea of guilty, it is important that the utilitarian benefit be adequately reflected. We do not understand Cameron to say anything to the contrary.

No doubt the Commonwealth would like to clarify the situation, but *Thomas* will not be the vehicle to do so because, despite the Court's criticism of the Commonwealth's approach, the Commonwealth succeeded on the appeal on other grounds and it cannot take the matter further.

In many respects it may be a distinction without a difference: if there is a plea of guilty does it matter whether the sentencing court characterises the discount as a utilitarian benefit or facilitating the course of justice? Ultimately, a plea of guilty is simply one of a number of factors the sentencing court takes into account in passing sentence and there is no entitlement to a presumption in favour of a particular percentage: *Trujillo-Mesa* [2010] NSWCCA 201.

For the foreseeable future the position in NSW is that set out in *Lee* and *Tyler*, noting that a three judge bench in *Linggo* [2017] NSWCCA 67 declined to resolve the potential inconsistency or to express a view upon it.

(h) the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or of other offences

This section applies to offenders who have provided information to investigative authorities and should be read in conjunction with the different, but related sentence discount at s 16AC(1) and (2) of the Crimes Act.

Section 16AC requires a sentencing court which reduces the sentence imposed because of an offender's undertaking to co-operate in future with law enforcement agencies, to state that the sentence or order is being reduced for that reason and the sentence or order that would have applied otherwise. Section 16A(2)(h) and 16AC create discounts for different reasons: s 16A(2)(h) relates to past co-operation whereas s 16AC involves prospective co-operation: *R v Vo* [2006] NSWCCA 165 at [36], although the reference was to the then applicable s 21E.

Section 16AC was inserted by the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act* 2015 (Cth) and replaced s 21E of the Crimes Act. The difference between the two sections is that s 16AC extends to all penalties imposed on Commonwealth offenders, including fines and recognizance orders and refers to the reduction of a "sentence" or "order" or "non-parole period" whereas s 21E only referred to a "sentence" and "non-parole period".

Where an offender has given assistance to investigators, the usual practice is for the case officer in charge of the investigation to provide the sentencing court with a document, either in the form of an affidavit or letter, setting out the nature of the offender's assistance and the usefulness of otherwise of the information provided by the offender. The nature of the assistance may necessitate there being a closed court. If the investigators feel the letter of assistance is particularly sensitive it may be the case that the prosecution is not shown a copy and is unaware of its specific contents. Even if that is the case, the offender's legal team should still insist on seeing it, even if they cannot keep a copy, if only to ensure that the letter is accurate.

The value of that assistance, and the discount to be allowed, are determined on 'objective and pragmatic grounds'.[14] The practical value of the assistance is an important consideration. If the offered assistance has no practical value, or relatively little practical value, that must have an impact on its significance, although it may still be relevant as an indication of contrition.[15]

In *Alchikh* [2007] NSWCCA 345 at [25] Handley AJA held that if the authorities reject the proffered assistance, and it is not used, the prisoner will have given no assistance in the result and will not be entitled to any discount on that basis. In such a case the prisoner may be entitled to a greater discount for his plea of guilty but only if

[14] *Alchikh* [2007] NSWCCA 345.
[15] *Sukkar* [2005] NSWCCA 55 at [53]; *Te* (1993) 61 SASR 501 at 503-504; *Hing* (unreported, WACCA, 31 May 1993).

the sentencing Judge is able to find on the civil onus that his proffered assistance was honest and truthful.

There is no set discount where assistance has been provided, although the range is generally 20% to 50%,[16] with 50% only occurring where there is a combined discount for a guilty plea and assistance, but a discount of more than 50 per cent[17] would be exceptional. There is some authority to the effect that 40 per cent should also be very exceptional because it is no longer inevitable that an offender who has provided assistance will serve the sentence in more difficult conditions than another inmate.[18] In *DPP (Cth) v AB* [2006] SASC 84 Perry J awarded a combined discount of 40 per cent but observed that there did not appear to be a clearly defined range in South Australia.

The actual benefit which flows from such assistance is a relevant matter to be taken into account, although the absence of any benefit is not to disentitle the offender to some discount for that reason alone, as a genuine offer of assistance may still be evidence of contrition.[19]

A discount of 50 per cent would only occur where the assistance is considered by the court to be of 'a very high order'.[20] In *Sukkar* (2006) 172 A Crim R 151, Latham J in the New South Wales Court of Criminal Appeal held that a discount of 45 per cent was excessive in circumstances where the offender pleaded guilty to being knowingly concerned in the importation of a commercial quantity of MDMA, contrary to s 233B(1)(d) of the *Customs Act 1901* (Cth). The offender had been interviewed by both Australian and Dutch investigators concerning the syndicate responsible for the importation. The Australian authorities regarded the information as being of little or no value, while it was of some limited value to the Dutch. Her Honour stated that there was no evidence of any personal risk to the respondent or to any member of his family or no evidence of any hardship arising directly out of the provision of assistance to the Dutch authorities. Her Honour considered a combined discount of 35% for the guilty plea and his assistance to the authorities.

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[16] *Gallagher* [2004] NSWCCA 162 at [71]; *Pang* (1999) 105 A Crim R 474; *Chu* (unreported, NSWCCA, 16 October 1998); *Cartwright* (1989) 17 NSWLR 243 at 252.
[17] *SZ* (2007) 168 A Crim R 249 at [3].
[18] *Sukkar* (2006) 172 A Crim R 151 at [5].
[19] *Dinic* (unreported, NSWCCA, 13 July 1997); *Barrientos* (unreported, NSWCCA, 10 February 1999).
[20] *Sukkar* at [54].

A discrete quantifiable sentence discount may be provided where it is possible and appropriate to do so[21] but a combined discount for a plea of guilty and assistance is usually more appropriate.[22]

As noted above, an offender's undertaking to cooperate by way of giving evidence in future proceedings is addressed at s 16AC of the Act. It contrasts with assistance that has already been provided at the time of sentencing. The purpose of s 16AC is to enable an appeal court to know what variation to make to the sentence in the event that the future cooperation 'in proceedings' is ultimately not forthcoming.[23] If a discount is given because an offender undertakes to provide assistance at a later date, by giving evidence at a trial for instance, and they do not do so, the Director of Public Prosecutions may appeal against the reduction in sentence and the offender can be resentenced and an increased sentence imposed.

(j) the deterrent effect that any sentence or order under consideration may have on the person.

This is a reference to specific deterrence.

(ja) the deterrent effect that any sentence or order under consideration may have on other persons

The need to consider 'general deterrence' was only expressly introduced into the Crimes Act in 2015, although it had long been considered to apply when sentencing a Commonwealth: *DPP (Cth) v El Karhani* (1990) 21 NSWLR 37. *El Karhani* made it clear that the considerations of s 16A(2) were in addition to any other matters that the court may consider and must be read subject to the primary obligation of the court, to impose a sentence that is of a severity appropriate in all the circumstances of the offence. See also *Paull* (1990) 20 NSWLR 427 at 434; *Sinclair* (1990) 51 A Crim R 418; *Wong* (2005) 2001 75 CLR 584 and *Putland* (2004) 218 CLR 174 at [12].

(k) the need to ensure that the person is adequately punished for the offence

This section is in similar terms to the overriding principle of Part1B of the *Crimes Act*, as set out in s 16A(1), that is, that the sentencing court must impose 'a sentence … of a severity appropriate in all the circumstances of the offence'. There is no case

[21] *Gallagher* [2004] NSWCCA 162 at 227-228.
[22] *A* [2004] NSWCCA 292 at [27].
[23] *Gladkowski* [2000] QCA 352.

law which expands upon this general concept of ensuring that the sentence is appropriate to the person taking into account the objective seriousness of the offence and the offender's subjective circumstances. In order to ensure that a person is 'adequately punished' any of the factors surrounding the offence which are not otherwise specified in s 16A(2) could be taken into account. For example, the level of complexity of the offence, how common the offence may be, the duration and extent of the offence, whether it included a breach of trust or whether the offence occurred when the offender was on a recognisance release.

(m) the character, antecedents, age, means and physical or mental condition of the person

The consideration in (m) embraces an offender's personal circumstances. In particular, the notion of "antecedents" is broad enough to pick up any period spent on home detention bail: *Hudson* (2016) 125 SASR 171; [2016] SASCFC 60 at [16]. In *Weininger* (2003) 212 CLR 629 at [57] the High Court held that s 16A(2)(m) distinguishes between 'character' and 'antecedents' but that each is relevant to sentencing, with past criminal convictions being a legitimate factor for the court to take into account when assessing the offender's character. Having said that, the courts have held that prior good character is of limited value in matters involving drug couriers because a person with prior good character is the type of person used by drug cartels because they are less likely to attract the attention of authorities while committing the offence: *Leroy* [1984] 2 NSWLR 441; *Luu* (unreported, NSWCCA, 23 March 1989); *Klein* (2001) 121 A Crim R 90.

The section is a specific reference to the sentencing court's entitlement to take into consideration the offender's basic features such as age, employment, education and family. Note that there has been criticism of offenders who seek to adduce evidence about these matters via a third party report, such as from a psychologist or counsellor, rather than giving evidence themselves.[24]

In *Bui v DPP* (2012) 244 CLR 638 at [12] the appellant submitted that she went through distress and anxiety as a result of resentencing and that this was a 'mental condition' within the meaning of s 16A(2)(m). The High Court rejected that

[24] See *Palu* (2002) 134 A Crim R 174, *Niketic* [2002] NSWCCA 425 and *Qutami* [2001] NSWCCA 353.

submission at [21]-[23] and referred to *De La Rosa* adopting Simpson J's analysis that the opening words of s 16A(2) of the *Crimes Act* requires the sentencing court to take into account matters that are relevant and *known* of the court. The consequence of that approach is that it did not follow that because an appeal may result in distress and anxiety that such distress and anxiety should automatically be a principle taken into account to reduce the sentence – such emotions must be demonstrated, not presumed.[25] See also *Director of Public Prosecutions (Cth) v Pratten (No 2)* [2017] NSWCCA 42 at [40] and [43].

(n) the prospect of rehabilitation of the person

Where the offender has already benefited from some rehabilitation, that fact should also be taken into account via s 16A(2)(n). In *Zehavi* [1998] VSCA 81 an Israeli citizen pleaded guilty to importing MDMA into Australia. He had no prior convictions. After considering a number of mitigating factors, including the fact that a custodial sentence would be particularly onerous on someone with no family or support in the country, the court referred to the concept of rehabilitation. The Court of Appeal held that any rehabilitation which had already been achieved worked in favour of the offender when sentenced because it reduced the need for the sentence to involve 'special deterrence'.

In *R v Succarieh; R v Succarieh; Ex parte Commonwealth Director of Public Prosecutions* [2017] QCA 85 at [120]-[121] the Queensland Supreme Court of Appeal affirmed the sentence imposed on offender for two counts of preparing for incursions into a foreign state and two counts of giving money for incursions into a foreign state under the now repealed *Crimes (Foreign Incursions and Recruitment) Act 1978*. The QCA found that the sentencing remarks made it plain that the sentencing judge fully comprehended the objective seriousness of the total criminality of the offending and considered the issue of rehabilitation, but considering the issue did not require the Court to make a determination one or the other on the nature of the rehabilitation, it was sufficient to merely finding that there were prospects of rehabilitation, or a cause for optimism on that score.

[25] *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [280].

(p) the probable effect that any sentence or order under consideration would have on any of the person's family or dependants.

Since its inception, the interpretation of s 16A(2)(p) of the Crimes Act has proceeded as if it is prefaced by the words 'in an exceptional case': *Sakovits* [2014] NSWCCA 109; *Zerafa* [2013] NSWCCA 222; *Togias* (2001) 127 A Crim R 23; *Hinton* (2002) 124 A Crim R 286; *Berlinksy* [2005] SASC 316; *R v Huston; Ex parte DPP (Cth)* (2011) 219 A Crim R 209; *Markovic* (2010) 200 A Crim R 510; *Nguyen* (2001) 118 A Crim R 519; *McAree v Barr* [2006] TASSC 37. The exception is the Australian Capital Territory, in *DPP v Ip* [2005] ACTCA 24 at [60] Higgins CJ, Gray and Madgwick JJ stated that there was nothing to warrant a sentencing court to presume to qualify the clear parliamentary command by suggesting that s 16A(2)(p) should be read as if it were preceded by the words 'in an exceptional case' as per *Togias*.

The approach of assuming that the hardship is 'exceptional' has been queried in a number of New South Wales cases, including *Zerafa* [2013] NSWCCA 222 (Beech-Jones J's judgement), *Elshani* [2015] NSWCCA 254, *Kaveh* [2017] NSWCCA 52 and in *Director of Public Prosecutions (Cth) v Pratten (No 2)* [2017] NSWCCA 42.

In *Pratten (No.2)*, the NSW Court of Criminal Appeal considered the case of convicted fraudster Timothy Charles Pratten, who was engaged in the sale of insurance through a company, Rural & General Insurance Ltd, collecting premiums in excess of $19 million over 6 years, $4.5 million of which was paid to Pratten, or at his direction for his own use, but was not declared by him as income in the relevant financial years. He was sentenced to 5 years imprisonment, with a non-parole period of 2 years. The CDPP successfully appealed on the grounds of manifest inadequacy of the sentences, including the fact that the sentencing court took into consideration hardship caused to Pratten's two daughters in mitigation of sentence. The sentence was increased to a fixed non-parole period of 3 years and 9 months. At [48]-[53] his Honour Basten JA (with whom S Campbell and N Adams JJ agreed stated (omitting citations):

> ***[48]*** *Very soon after the enactment of s 16A intermediate courts of appeal held that par (p) was intended to reflect principles established under the general law, namely that hardship to a family member, resulting from the imposition of a sentence of imprisonment on the offender, could only be relied on to reduce the sentence in circumstances which were "exceptional".*

> ***[49]*** *That approach has been treated as settled in this State, following the judgment of Spigelman CJ inR v Togias. The case-law, both in this Court and in other intermediate courts of appeal, was carefully reviewed by Beech-Jones J in R v Zerafa. However, as Beech-Jones J explained, despite the weight of authority supporting Togias, there have been expressions of disquiet that the approach adopted under the common law involves a reading down of the Commonwealth statute in a manner which finds no basis in the statutory language. Indeed, the trial judge in Zerafa (Simpson J) had herself expressed the same disquiet whilst accepting that binding authority required that the general law principle be applied.*
>
> ***[50]*** *The consideration stated in par (p) is unusual in several respects. First, it focuses not on the nature of the offending, or the effect on the victim, or on the circumstances of the offender, but on third persons, uninvolved in the offending, namely the offender's family or dependants. This is a factor which has encouraged sentencing courts to address the consideration with circumspection. It makes sense to delimit the circumstances in which such extraneous considerations should properly reduce the sentence which would otherwise be imposed.*
>
> ***[51]*** *Indeed, par (p) contains its own internal constraint in that, unlike the other factors to be considered, it requires the court to refer to "the probable effect" that the sentence may have on family or dependants.*
>
> ***[52]*** *Secondly, although not uniquely, the consideration operates in one direction only, namely to provide a basis for reducing the sentence.*
>
> ***[53]*** *Thirdly, as Beech-Jones J further explained in Zerafa, one difficulty with the application of the general law principle is its uncertain scope. Whether particular circumstances are characterised as exceptional or unexceptional may depend upon the frame of reference within which they are assessed...*

15. As with the conflict over the correct application of a guilty plea as a factor in mitigation, the need to find 'exceptional' hardship as opposed to simply considering the probable effect of any sentence or order under consideration would have on any of the person's family or dependants may need to be resolved by the High Court.

Recognisance release orders

16. A recognisance release order is defined by s 16(1) *Crimes Act* 1914 as an order made under s 20(1)(b) and is in effect a suspended sentence. The term is also used in the context of an offender who has been sentenced to imprisonment for one or more Commonwealth offences where the aggregate sentence does not exceed 3 years. In that scenario a court must make a recognizance release order for the offender to be released on a bond, unless the court is satisfied that it is not appropriate to do so,

having regard to the nature of the offence/s and the antecedents of the person: s 19AC(1).

Non-parole periods and sentence structuring

17. Under s 19AB, where a Commonwealth offender is convicted of one or more Commonwealth offences at the same sitting and the court imposes a sentence or sentences in the aggregate *exceeding three years*, the court must fix a single non-parole period. There is no judicially determined norm or percentage for non-parole periods and recognizance release orders for Commonwealth offences: *Hili v The Queen* at [13], [37]–[38]. In *Lam v The Queen* [2014] WASCA 114, McLure P reiterated that, following *Hili v The Queen*, it was wrong to rely on a fixed or narrow range expressed as a proportion of the head sentence for determining the non-parole period: at [58].

18. Section 19AC applies where the offender is sentenced for a Commonwealth offence(s) and the court imposes a sentence or sentences that in aggregate does not exceed three years. In that situation the court must make a recognisance release order *and not* fix a non-parole period (s 19AC(1)). However, if the period of imprisonment does not exceed six months, the court is not required to make a recognisance release order (s 19AC(3)).

19. Section 19AM(2) of the Crimes Act states that an offender is not to be released on parole for a Commonwealth offence while the offender is serving (or is to serve) a State or Territory sentence.

20. Finally, in relation to a limited number of offences, including terrorism offences[26] there must be a minimum 75% non-parole period: s 19AG. The Crimes Act does not create a ground for varying this ratio by way of 'special circumstances.'

Are NSW sentencing options available for Commonwealth offences?

21. Yes, in certain circumstances. Section 20AB of the Crimes Act and / or cl 6 *Crimes Regulations* 1990 (Cth)('the Regulations') permits the sentencing court to pass a sentence which picks up the local jurisdiction's sentencing options such as community service orders, periodic detention or a work order, as may apply in the State or

[26] Section 3 of the *Crimes Act 1914* defines a 'terrorism offence' as an offence against Parts 5.3 or 5.5 of the Criminal Code.

Territory where the sentencing is occurring. Options that are not covered by the Crimes Act or the Regulations are *not* available.

22. See the Annexure for details.

Children & Young Persons

23. While there is no definition of "child" or "young person" under the *Crimes Act,* s 20C *Crimes Act* provides that children and young persons may be tried and punished for federal offences in accordance with the law of the State or Territory in which they were charged or convicted. This enables the States and Territories to apply their respective juvenile justice regimes.

24. Section 20 permits a sentencing court dealing with a child who is "charged with or convicted of" a Commonwealth offence to be "tried, punished or otherwise dealt with" as if the offence was a State or Territory offence. The words "otherwise dealt with" are sufficiently broad to encompass many diversionary programs.

25. The power of a body to hear and determine federal offences must also be ascertained. Federal jurisdiction is invested in State and Territory courts of summary jurisdiction, including Children's Courts, pursuant to s 39 *Judiciary Act* 1903 (Cth). But s 39 restricts jurisdiction to "courts", which may not necessarily cover all alternative schemes.

Dated 26 July 2017

Annexure

NSW v Commonwealth sentencing regimes

Crimes (Sentencing Procedure) Act 1999	***Crimes Act 1914***
Section 5 – penalty of imprisonment only after considering all alternatives.	Section 17A
Section 6 – home detention	Section 20AB and / or cl 6 *Crimes Regulations* 1990
Section 7 – intensive correction orders	Section 20AB and / or cl 6 *Crimes Regulations* 1990
Section 8 – community service orders	Section 20AB(1AA).
Section 9 – good behaviour bonds	Sections 19B(1)(d), 20 and 20AB(1AA)
Section 10 – dismissal of charges / conditional discharge	Section 19B
Section 11 – deferral of sentencing for rehabilitation	No equivalent provision
Section 12 – suspended sentence bonds	Section 20(1)(b)
Section 17A – non association and place restriction orders	No equivalent provision
Section 21A –aggravating and mitigating features	Section 16A
Section 22 – guilty plea to be taken into account	Section 16A(2)(g)
Section 22A – facilitating the administration of justice.	Section 16A(2)(h)
Section 23 – providing assistance to	Section 16A(2)(h) and 16AC (future

authorties.	assistance)
Section 24(1) – taking into account pre-sentence custody.	Section 24 is picked up by section 16E.
Section 26 – victim impact statements	Section 16A(2)(ea)
Section 32 – 'Form 1' offences	Section 16BA – 'schedule offences'
Section 53 – aggregate sentences	No equivalent provision
Section 44 – setting of a non-parole period 'special circumstances'	No 'special circumstances' required
Sections 54A and 54B - SNPP	No equivalent provision