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Sentencing for domestic violence

Amanda Gombru, Senior Research Officer (Legal)
Georgia Brignell, Principal Research Officer (Legal)
Hugh Donnelly, Director, Research and Sentencing

Editor: **Antonia Miller**

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Introduction

This *Sentencing Trends & Issues* focuses upon sentencing for family violence, referred to in case law and statutes as domestic violence.[1] What follows is a legal discussion of general sentencing principles, the most common offences and legislative initiatives to combat the problem.

Domestic violence is typically characterised by a wide range of controlling behaviours. An offence committed in the context of domestic violence is usually part of a larger picture of repeated and multifaceted physical, mental and emotional abuse in which the perpetrator uses tactics aimed at gaining power, control and dominance over the victim. A domestic violence victim is often so enveloped by fear that they are incapable of either escaping the violence or reporting it to the authorities.[2] Victims may also accept blame or forgive the offender contrary to their own physical and emotional well-being.

Nearly 10 years ago, the NSW Parliament enacted the *Crimes (Domestic and Personal Violence) Act* 2007 (CDPV Act) to give full recognition to the seriousness of violence against women and children.[3] The Act regulated the use of apprehended domestic violence orders (ADVOs) and introduced a requirement for courts to identify and record domestic violence offences on an offender's criminal record.[4] The Judicial Commission assigned over 100 new law part codes[5] for offences committed in a domestic-violence context to facilitate identification of these offences at the charging stage and for use in the courts.

In 2008, the National Council to Reduce Violence against Women and their Children was established and their report, *Time for action,*[6] led to a renewed focus on co-operative action between State and federal governments. This included the publication of a Joint Report of the Australian Law Reform Commission (ALRC) and New South Wales Law Reform Commission (NSWLRC) in 2010 entitled *Family violence — a national legal response* ("the Joint Commission Family Violence Report").[7]

The increased focus upon domestic violence has led to the implementation of a number of legislative and policy initiatives in NSW. In 2010, the NSW Domestic Violence Death Review Team (NSW DVDRT) was established[8] to investigate causes of domestic violence deaths throughout NSW, aiming to reduce their incidence and facilitate improvements in systems and services[9] through ongoing monitoring and reporting obligations.[10] The NSW Government implemented a NSW domestic violence justice strategy[11] and established the NSW

1 See further discussion of terminology in **Definitions and legislative framework** at pp 6–7.

2 *Pasinis v R* [2014] VSCA 97.

3 Second Reading Speech, Crimes (Domestic and Personal Violence) Bill 2007, NSW, Legislative Assembly, *Debates*, 16 November 2007, p 4327. The *Crimes (Domestic and Personal Violence) Act* 2007 (CDPV Act) was introduced following widespread academic discussion. See, for example, J Stubbs (ed), *Women, male violence and the law*, Institute of Criminology, 1994; R Hunter and J Stubbs, "Model laws or missed opportunity?" (1999) 24(1) *Alternative Law Journal* 12.

4 CDPV Act, s 12(2). Three months prior to the commencement of the CDPV Act, the *Crimes (Sentencing Procedure) Amendment Act* 2007 amended s 21A(2)(d) to add that prior record may be an aggravating factor "particularly if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences".

5 A law part code is a unique code allocated to a specific offence using a particular section or even subsection of legislation. They are assigned and maintained by the Judicial Commission of NSW. The reliability of law codes to capture accurately all domestic violence related assaults is dependent on the information available to the individual recording the offence. There is always a risk, where multiple codes are used for an offence, that coding errors may occur at the time of charging.

6 The National Council to Reduce Violence against Women and their Children, *Time for action: the National Council's plan for Australia to reduce violence against women and their children 2009–2021*, 2009.

7 ALRC and NSWLRC, *Family violence — a national legal response* (the Joint Commission Family Violence Report), ALRC Report 114 (Final report), NSWLRC Report 128 (Final report), 2010.

8 By the introduction of Chapter 9A into the *Coroners Act* 2009 by the *Coroners Amendment (Domestic Violence Death Review Team) Act* 2010, Sch 1, which commenced on 16 July 2010 (s 2 & LW 16 July 2010). The functions of the NSW Domestic Violence Death Review Team (NSW DVDRT) are to: review closed cases of domestic violence deaths in NSW; analyse data to identify patterns and trends related to such deaths; make recommendations to prevent or reduce the likelihood of such deaths; establish and maintain a database about such deaths; and, undertake research aiming to help prevent or reduce the likelihood of such deaths: *Coroners Act* 2009, s 101F.

9 *Coroners Act* 2009, s 101A.

10 ibid, ss 101J, 101K.

11 The NSW domestic violence strategy: improving the NSW criminal justice system's response to domestic violence 2013-2017 at www.crimeprevention.nsw.gov.au/domesticviolence/Documents/domestic-violence/jag2391_dv_strategy_book_online.pdf, accessed 21 March 2016.

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Domestic and Family Violence Council (now renamed the NSW Domestic and Family Violence and Sexual Assault Council).[12] The government created a new role of Minister for Prevention of Domestic Violence and Sexual Assault[13] as part of the Premier's priority to reduce domestic violence reoffending by 2019 and support victims to escape and survive domestic and family violence.[14] In 2015, the Department of Justice made a number of recommendations following a review of the CDPV Act.[15] In Victoria, a Royal Commission into Family Violence was established, leading to the release of a report containing 227 recommendations to the Victorian Government on 29 March 2016.[16]

Numerous recent legislative reforms have aimed to increase support and protection for victims of domestic violence. Senior police officers have been granted the power to approve provisional ADVOs immediately after an incident,[17] and new criminal procedures have been implemented allowing domestic violence complainants to give evidence by way of audio or video recorded evidence.[18] In March 2016, NSW became the first State to pass legislation seeking to implement model laws adopted by the Council of Australian Governments to give effect to a national domestic violence order scheme for recognition and enforceability of domestic violence orders in any State or Territory of Australia.[19]

The *Crimes (Domestic and Personal Violence) Amendment (Review) Act* 2016 is anticipated to commence upon proclamation later in 2016.[20] The Act was introduced to give effect to the recommendations contained in the *Statutory review of the Crimes (Domestic and Personal Violence) Act 2007 (NSW)* and the *Statutory review of Chapter 9A of the Coroners Act 2009: the Domestic Violence Death Review Team*.[21] The Act will extend the definitions of *domestic relationship*[22] and *domestic violence offence*[23] and expand the offences contained in the definition of *personal violence offence*.[24] It will also insert a new object of the CDPV Act for the court to have regard to "the particular impact of domestic violence on Aboriginal persons and Torres Strait Islanders, persons from culturally and linguistically diverse backgrounds, persons from gay, lesbian, bisexual, transgender and intersex communities, older persons and persons with disabilities".[25] A number of procedural provisions in the CDPV Act will be amended including the insertion of a provision to prevent a defendant from directly questioning a child witness in proceedings for the making,

12 NSW Health: Women NSW — Violence Prevention, NSW Domestic and Family Violence and Sexual Assault Council at www.women.nsw.gov.au/violence_prevention/dfv_council, accessed 22 March 2016.

13 The Hon Pru Goward MP was the first minister to be appointed to the position on 2 April 2015. NSW Parliament, Legislative Assembly, Members at www.parliament.nsw.gov.au/members/Pages/Member-details.aspx?pk=34, accessed 22 March 2016.

14 The NSW Government has committed a $60 million package to domestic and family violence, in addition to the $148.5 million over four years the government committed for specialist domestic and family violence services in the 2015–16 Budget: at www.nsw.gov.au/news/reducing-domestic-violence-0, accessed 22 March 2016.

15 NSW Department of Justice, *Statutory review of the Crimes (Domestic and Personal Violence) Act 2007 (NSW)*, 2015 at www.justice.nsw.gov.au/justicepolicy/Documents/report-review-of-crimes-domestic-personal-violence-act-2007.pdf, accessed 12 May 2016.

16 See Royal Commission into Family Violence (Victoria), *Report and recommendations*, 2016 at www.rcfv.com.au/Report-Recommendations, accessed 26 May 2016.

17 *Crimes (Domestic and Personal Violence) Amendment Act* 2013 (rep), commenced on 20 May 2014 (s 2 & LW 14 May 2014).

18 *Criminal Procedure Amendment (Domestic Violence Complainants) Act* 2014 (rep), commenced on 1 June 2015 (s 2 & LW 27 May 2015).

19 *Crimes (Domestic and Personal Violence) Amendment (National Domestic Violence Orders Recognition) Act* 2016, received assent on 6 April 2016. The Act commences on proclamation and, as at the date of publication, has not been proclaimed to commence.

20 Part 4 sets out the savings and transitional provisions of the *Crimes (Domestic and Personal Violence) Amendment (Review) Act* 2016. The Act commences on proclamation and, as at the date of publication, has not been proclaimed to commence.

21 NSW Department of Justice, *Statutory review of the Crimes (Domestic and Personal Violence) Act 2007 (NSW)*, n 15, and the *Statutory review of Chapter 9A of the Coroners Act 2009: the Domestic Violence Death Review Team*, 2015 at www.justice.nsw.gov.au/justicepolicy/Documents/report-review-of-chap-9a-coroners-act-dv-death-review.pdf, accessed 12 May 2016.

22 The definition of *domestic relationship* in s 5 of the CDPV Act will be expanded to include the relationship between a current partner and former partner of a person: Sch 1[7] (uncommenced) of the *Crimes (Domestic and Personal Violence) Amendment (Review) Act* 2016.

23 The definition of *domestic violence offence* in s 11 of the CDPV Act will be reworded and will also include Commonwealth offences under the *Criminal Code Act* 1995 (s 11(2)): Sch 1[9] (uncommenced) of the *Crimes (Domestic and Personal Violence) Amendment (Review) Act* 2016.

24 The definition of *personal violence offence* in s 4 of the CDPV Act will be expanded to include, for example, offences such as the prohibition of female genital mutilation (*Crimes Act* 1900, s 45); sexual intercourse with a child between 16 and 18 under special care (*Crimes Act*, s 73); incest (*Crimes Act*, s 78A); and, breaking, entering and assaulting with intent to murder etc (*Crimes Act*, s 110): Sch 1[2]–[6] (uncommenced) of the *Crimes (Domestic and Personal Violence) Amendment (Review) Act* 2016.

25 Section 9(3)(f1): Sch 1[8] (uncommenced) of the *Crimes (Domestic and Personal Violence) Amendment (Review) Act* 2016.

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varying or revoking of an ADVO[26] and the addition of provisions expanding the prohibitions and restrictions imposed by an apprehended violence order (AVO).[27]

Prevalence — current figures

Available data shows that domestic and family violence is a common phenomenon across NSW and throughout Australia. However, figures indicating the prevalence of domestic violence must be viewed in light of research demonstrating the large extent to which domestic violence goes unreported. For example, an Australian Bureau of Statistics (ABS) Personal Safety Survey (PSS), conducted in 2012, estimated that 94.7% of males and 80.2% of females in Australia who had reported experiencing violence from their current partner had not contacted police.[28] Similarly, a survey conducted by the NSW Bureau of Crime Statistics and Research (BOCSAR) in 2013 found that of 300 victims who attended domestic violence services, just over half (51.8%) had reported their most recent incident to the police.[29]

Using figures from the 2012 PSS, the ABS estimated that 5.3% of males and 16.9% of females Australia-wide had experienced violence perpetrated by a current or former partner since the age of 15.[30] During 2015, 29,001 incidents[31] of domestic violence related assaults were recorded in NSW, representing a 1.9% increase over the five-year period between January 2011 and December 2015.[32] This figure may be compared with 30,660 non-domestic violence related assault incidents in 2015, representing a decline of 4.8% over the same five-year period.[33] During that five-year period, an upward trend was seen with regard to incidences of recorded domestic violence related sexual offences;[34] malicious property damage; and, harassment, threatening behaviour and private nuisance offences.[35]

In 2014, 26,543 ADVOs were granted in NSW.[36] From April 2015 to March 2016, there were 13,310 incidents of breaches of ADVOs recorded,[37] representing a 4.7% increase over the preceding five-year period.[38]

The crime of domestic violence is inherently gendered. Of the 29,227 recorded incidents of domestic violence assaults between April 2015 and March 2016,[39] 69.54% of victims were female[40] and 80.96% of alleged offenders[41] were male.[42] Similarly, 83.09% of victims in the recorded incidents of

26 Section 41A: Sch 1[22] (uncommenced) of the *Crimes (Domestic and Personal Violence) Amendment (Review) Act* 2016.

27 The insertion of s 35(2)(c1) (Sch 1[16] (uncommenced) of the *Crimes (Domestic and Personal Violence) Amendment (Review) Act* 2016) and the replacement of s 36 (Sch 1[17] (uncommenced) of the amending Act).

28 Australian Bureau of Statistics (ABS), *Personal safety, Australia, 2012*, 2013, cat no 4906.0, Table 25, at www.abs.gov.au/AUSSTATS/abs@.nsf/mf/4906.0, accessed 10 March 2016.

29 E Birdsey and L Snowball, "Reporting violence to police: a survey of victims attending domestic violence services", NSW Bureau of Crime Statistics and Research (BOCSAR), *Crime and Justice Statistics, Bureau Brief*, Issue paper no 91, October 2013, pp 4–5.

30 ABS, *Personal safety, Australia, 2012*, n 28, Table 4.

31 BOCSAR, *NSW recorded crime statistics 2015*, 2016, Table 2.3 at www.bocsar.nsw.gov.au/Documents/RCS-Annual/Report-Recorded-Crime-Statistics-2015-rcs2015.pdf, accessed 21 April 2016. At Appendix 2, p 45, BOCSAR defines *criminal incident* as an activity detected by or reported to police which: involved the same offender(s); involved the same victim(s); occurred at one location; occurred during one interrupted period of time; falls into one ANZSOC offence category; and falls into one incident type (eg "actual", "attempted", "conspiracy").

32 ibid, Table 2.1.

33 ibid, Table 2.3.

34 Including sexual offences involving both adult and child victims.

35 BOCSAR, *Fast facts: domestic violence overview*, 2015, sr15-12943 (Summary of offences worksheet). In contrast, the five-year trend generally (ie for both domestic violence related and non-domestic violence related) for sexual offences, malicious property damage and harassment, threatening behaviour and private nuisance offences generally was stable: BOCSAR, *NSW recorded crime statistics 2015*, n 31, Table 2.3.

36 BOCSAR, *NSW criminal courts statistics 2014*, no CCS14, 2015, p 55 at www.bocsar.nsw.gov.au/Documents/CCS-Annual/ccs2014.pdf, accessed 10 March 2016.

37 BOCSAR, *Domestic violence statistics* (NSW recorded crime statistics April 2011 to March 2016), sr16-14048 (Summary of offences worksheet) at www.bocsar.nsw.gov.au/Pages/bocsar_pages/Domestic-Violence.aspx, see "Domestic Violence Excel Table", accessed 29 June 2016.

38 ibid.

39 ibid.

40 ibid (Victims worksheet). The relevant total number of victims was 31,730 (of which 22,065 are females). The figure for the total number of victims is more than the number of recorded incidents of domestic violence related assaults as an incident can involve more than one victim.

41 ibid (Offenders worksheet). The relevant total number of offenders was 19,028 (of which 15,405 are male). An alleged offender is a person of interest in connection with a criminal incident who has been proceeded against, either to court by way of Court Attendance Notice or other than to court (eg by way of an infringement notice or warning).

42 ibid.

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breaches of ADVOs between April 2015 and March 2016 were female.[43]

The NSW DVDRT reported that of 995 homicides committed in NSW between 1 July 2000 and 30 June 2012, 280 (28%) occurred in a domestic violence context.[44] Of those domestic homicide victims, 164 were female and 116 were male.[45] In 59% of the domestic homicides, the victim was killed by their current or former intimate partner, and the majority of intimate partner victims (78%) were women.[46]

That domestic violence is also perpetrated against children is evident from available data. Of all domestic violence related assault victims between April 2015 and March 2016, 11.80% were under the age of 18,[47] while 21.43% of domestic violence homicide victims between 2000 and 2012 (60 of 280 total victims) were children under 18 years of age.[48]

A 2015 study found that courts do not treat people who commit domestic assaults more leniently than those who commit non-domestic assaults.[49]

Definitions and legislative framework

The terms *domestic violence* and *family violence* are used interchangeably in parliamentary reports and academic papers. Government reviews such as the Joint Commission Family Violence Report and the recent report by the Victorian Royal Commission into Family Violence[50] use the term *family violence*. However, to reflect the language used in NSW legislation and case law the term *domestic violence* has been used in this publication.

The objects of the CDPV Act expressly state that Parliament recognises domestic violence in all its forms is unacceptable; is predominantly perpetrated by men against women and children; occurs in all sectors of the community; extends beyond physical violence and may involve the exploitation of power imbalances and patterns of abuse over many years; and occurs in traditional and non-traditional settings. The Act also recognises the particularly vulnerable position of children exposed to domestic violence as victims or witnesses, and the impact that such exposure can have on their current and future physical, psychological and emotional well-being.[51]

Section 11 of the CDPV Act defines a *domestic violence offence* as "a personal violence offence committed by a person against another person with whom the person who commits the offence has or has had a domestic relationship".[52]

Section 4 of the CDPV Act sets out the specific offences falling within the definition of *personal violence offence* and includes offences such as murder, manslaughter, certain offences causing danger to life or bodily harm, assault and wounding offences, sexual assault, certain property damage offences, stalking and contravening an AVO.[53]

Domestic relationship is broadly defined in s 5 of the CDPV Act and includes persons who have been or are currently married, in a de facto relationship, in an intimate personal relationship, living together, long-term residents in the same residential facility,

43 ibid (Victims worksheet). The relevant total number of victims was 12,627 (of which 10,492 are female).

44 NSW DVDRT, *Annual Report* 2013-2015, p 5. A domestic violence context is a context "where there was an identifiable history of domestic violence".

45 ibid.

46 ibid.

47 BOCSAR, *Domestic violence statistics*, sr16-14048, n 37, (Victims worksheet). The relevant total number of victims was 31,730 (of which 3,743 are under 18). The ages of 0.54% of the victims were unknown.

48 NSW DVDRT, *Annual Report*, n 44, p 8.

49 N Donnelly and S Poynton, "Prison penalties for serious domestic and non-domestic assault", BOCSAR *Crime and Justice Statistics, Bureau Brief*, Issue paper no 110, October 2015, p 12.

50 Joint Commission Family Violence Report, n 7, Vol 1, pp 193–201; Royal Commission into Family Violence (Victoria), *Report and recommendations*, n 16, Vol 1, pp 15–16.

51 CDPV Act, s 9(3)(a)–(f), see also p 4 in relation to the insertion of an additional object: s 9(3)(f1).

52 The *Crimes (Domestic and Personal Violence) Amendment (Review) Act* 2016 (Sch 1[9]; uncommenced) will expand the definition of *domestic violence offence* to include: (a) a personal violence offence, or (b) an offence (other than a personal violence offence) that arises from substantially the same circumstances as those from which a personal violence offence has arisen, or (c) an offence (other than a personal violence offence) the commission of which is intended to coerce or control the person against whom it is committed or to cause that person to be intimidated or fearful (or both).

53 ibid, (Sch 1[2]–[6]; uncommenced), see n 24, will expand the list of offence provisions within the meaning of *personal violence offence*. Before the amendment, *personal violence offence* under s 4 of the CDPV Act included: (a) an offence under, or mentioned in, ss 19A, 24, 25, 26, 27, 28, 29, 30, 31, 33, 33A, 35, 35A, 37, 38, 39, 41, 44, 46, 47, 48, 49, 58, 59, 61, 61B, 61C, 61D, 61E, 61I, 61J, 61JA, 61K, 61L, 61M, 61N, 61O, 65A, 66A, 66B, 66C, 66D, 66EA, 80A, 80D, 86, 87, 93G, 93GA, 195, 196, 198, 199, 200, 562I (as in force before its substitution by the *Crimes Amendment (Apprehended Violence) Act* 2006) or 562ZG of the *Crimes Act* 1900, or (b) an offence under ss 13 or 14 of the CDPV Act, or (c) an offence of attempting to commit an offence in paragraph (a) or (b).

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current and former relatives,[54] and, in the case of an Aboriginal person or a Torres Strait Islander, part of the extended family or kin according to the Indigenous kinship system of the person's culture.[55]

The definitions in ss 4, 5 and 11 of the CDPV Act are used as a basis for applying provisions in the *Crimes (Sentencing Procedure) Act* 1999 (CSP Act) such as those relating to home detention,[56] intensive correction orders,[57] and the use of an offender's prior record.[58]

Section 12(2) of the CDPV Act provides that if a person pleads guilty to, or is found guilty of, an offence and the court is satisfied that the offence was a domestic violence offence, the court is to direct that the offence be recorded on the person's criminal record as a domestic violence offence.[59] On convicting an offender of a *domestic violence offence*,[60] a court must make an ADVO for the protection of the victim unless satisfied that an order is "not required".[61]

Overarching sentencing principles

Section 3A of the CSP Act sets out the purposes "for which a court may impose a sentence on an offender", which include: to ensure that the offender is adequately punished for the offence; to prevent crime by deterring the offender and others from committing similar offences; to protect the community from the offender; to promote rehabilitation of the offender; to make the offender accountable for his or her actions; to denounce the offender's conduct; and to recognise the harm done to the victim and the community. These purposes are applied in domestic violence cases and are treated as overarching principles of sentencing.

The courts have repeatedly emphasised that while deterrence, community protection and denunciation are explicitly listed as some of the purposes of sentencing under s 3A of the CSP Act,[62] they are to be attributed significant weight in the sentencing exercise for offences involving domestic violence.[63] In *Munda v Western Australia,*[64] the High Court acknowledged that general deterrence may have limited utility where a violent offence is not pre-meditated and in communities with widespread disadvantage.[65] However, the criminal law is not limited to the utilitarian value of general deterrence but includes:

> the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence.[66]

A leading authority is *R v Hamid,*[67] where the NSW Court of Criminal Appeal (NSWCCA) reviewed authorities on the issue, including interstate authorities, and stated:

> In sentencing a domestic violence offender, and in particular a repeat domestic violence offender, specific and general deterrence are important factors, together with the requirement of powerful denunciation by the community of such conduct and the need for protection of the community. Recognition of the harm done

54 *Relative* is defined in s 6 of the CDPV Act.

55 The *Crimes (Domestic and Personal Violence) Amendment (Review) Act* 2016 (Sch 1[7]; uncommenced) will expand the definition of *domestic relationship* to include two persons who have been married to, or had a de facto or intimate personal relationship with, the same person. The note accompanying s 5(2) states that: "A woman's ex-partner and current partner would therefore have a domestic relationship with each other for the purposes of this Act even if they had never met".

56 *Crimes (Sentencing Procedure) Act* 1999 (CSP Act), s 6 and Pt 6.

57 CSP Act, s 7 and Pt 5; *Crimes (Sentencing Procedure) Regulation* 2010, cl 14(1)(c).

58 CSP Act, s 21A(2)(d).

59 The Note to s 12 sets out a number of consequences that may result from such a recording. It will be relevant in relation to bail proceedings; for the purpose of determining whether a person's behaviour amounts to intimidation or stalking; and, to ss 27 and 49 of the CDPV Act, which require police to make applications for AVOs where the person has already committed a domestic violence offence. Further, the recording can be taken into account as an aggravating factor under s 21A(2)(d) of the CSP Act when determining the appropriate sentence for an offence.

60 The *Crimes (Domestic and Personal Violence) Amendment (Review) Act* 2016 (Sch 1[19]; uncommenced) will amend this to *serious offence* as defined under s 40(5) of the CDPV Act.

61 CDPV Act, s 39.

62 Sections 3A(b), 3A(c) and 3A(f) respectively.

63 See for example *R v Glen* (unrep, 19/12/94, NSWCCA); *R v Edigarov* (2001) 125 A Crim R 551 at [41]; *R v Dunn* (2004) 144 A Crim R 180 at [47]; *Munda v Western Australia* (2013) 249 CLR 600 at [55].

64 (2013) 249 CLR 600.

65 ibid at [54].

66 ibid.

67 (2006) 164 A Crim R 179.

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> to the victim and the community as a result of crimes of domestic violence is important.[68]

The mere prevalence of the commission of acts of violence by men against women in domestic relationships justifies a significant emphasis on general deterrence,[69] as does the fact that domestic violence typically involves the assertion of power and control over the victim.[70] A distinguishing characteristic of many cases is the offender's notion "that he (and it is almost invariably a male) is entitled to act as he did pursuant to some perverted view of the rights of a male over a female with whom he is or was intimately connected".[71] This element of self-justification can often lead to repeated episodes of violence and a "prevailing mindset"[72] which elevates the need for specific deterrence[73] and also requires significant weight to be attributed to community protection and denunciation.[74]

Further, as stated by the Victorian Court of Appeal in *Pasinis v R*:[75]

> The victims of such violence are often so enveloped by fear that they are incapable of either escaping the violence or reporting it to the authorities. The key to protection lies in deterring the violent conduct by sending an unequivocal message to would-be perpetrators of domestic violence that if they offend, they will be sentenced to a lengthy period of imprisonment so that they are no longer in a position to inflict harm.[76]

The existence of a domestic relationship between an offender and the victim is not to be regarded as rendering an offence of a lesser criminality; the seriousness of an offence is always to be assessed on its facts.[77] The courts have recognised that a victim who is a partner may be in a more, rather than a less, vulnerable position regarding the wrongful acts of the offender.[78] Often it is difficult for a woman subjected to domestic violence to escape given the vulnerable financial and emotional situation in which they find themselves.[79] The High Court has observed that imposing a lesser punishment by reason of the victim's identity as the offender's partner would create a group of second-class citizens, a state of affairs entirely at odds with the fundamental idea of equality before the law.[80]

The above principles are consistently applied and reiterated in first instance sentencing decisions from all levels of the court hierarchy. In reflecting on the sentencing task for an offender's murder of his de facto partner, Schmidt J in *R v Murray*[81] observed that "[o]ffences involving domestic violence, of which very often, but not always, women and children are the victims, are particularly abhorred in our civil society, because they are committed by the very people who should be interested in protecting, rather than harming, those who they have injured".[82] Garling J described the dynamics of domestic violence in *R v Mahon*:[83]

> Typically, the male partner will inflict physical violence upon his weaker and more vulnerable female partner. Such physical violence is often, but not always, accompanied by verbal abuse and other forms of abuse including controlling behaviour, bullying, verbal and physical threats and any conduct which denies or in any way prevents the female partner exercising her freedom to go about her ordinary life in the way she chooses. Domestic violence is antithetical to a democratic society where individual freedom is cherished; it undermines the principle of the [sic] gender equality.[84]

68 ibid at [86].
69 *R v Greene* [2001] NSWCCA 258 at [16] citing *R v Glen* (unrep, 19/12/94, NSWCCA); *R v Mahon* [2015] NSWSC 25 at [102].
70 *R v Hamid* (2006) 164 A Crim R 179 at [66]–[77]; *R v Burton* [2008] NSWCCA 128 at [97].
71 *Vragovic v R* [2007] NSWCCA 46 at [33]. See also *R v Dunn* (2004) 144 A Crim R 180 at [47]; *Mencarious v R* [2014] NSWCCA 104 at [8], [23].
72 *DPP (NSW) v Vallelonga* [2014] NSWLC 13 at [32].
73 *Hiron v R* [2007] NSWCCA 336 at [39].
74 *Ahmu v R* [2014] NSWCCA 312 at [83]. See also *R v Dunn* (2004) 144 A Crim R 180 at [47].
75 [2014] VSCA 97.
76 ibid at [57].
77 *Hussain v R* [2010] NSWCCA 184 at [80]; *R v Eckermann* [2013] NSWCCA 188 at [35].
78 *Hussain v R*, ibid.
79 *R v Hamid* (2006) 164 A Crim R 179 at [75].
80 *Munda v Western Australia* (2013) 249 CLR 600 at [55].
81 [2015] NSWSC 1034.
82 ibid at [4].
83 [2015] NSWSC 25.
84 ibid at [101].

In *R v Cullen*,[85] Harrison J noted the prevalence in society of violence perpetrated by men against female intimate partners and went on to state:

> This malignant cycle of domestic violence is given significant publicity and media attention without corresponding or equivalent success in its prevention … I have considerable doubt that murders or assaults that are committed by men in the context of physical or psychological dominance or control over women are ever or often influenced by a rational appreciation of the penal consequences. The importance of general deterrence … therefore has to be approached with caution. However, the importance of retribution is quite another thing. There is an uncontroversial and recognized need to emphasise clearly that violent and controlling men who commit such crimes against women will be punished severely.[86]

Judge Henson, Chief Magistrate, in *DPP (NSW) v Vallelonga*[87] stated that "[r]egrettably violent conduct within relationships is an entrenched social reality in our society … The seeming inability to eradicate domestic violence from society warrants a strong response from the legal system, and for good reason". In *Police v Poolman*,[88] Magistrate Dare SC stated:

> I will continue to apply the principles of binding authority which the higher courts have made plain are required in sentencing for offences of this type as well as according with legitimate community expectations. Until this message is spread and applied consistently at all levels of the justice system more women will continue to be assaulted and perpetrators will continue to thumb their nose at the law by evading their just desserts.[89]

Similarly, it has been stated in the District Court[90] that "[t]he community has long since ceased to be tolerant of crimes of violence committed against women, young or old, by people who believe that they have got the right to act in the way they do simply because they have been in some type of relationship".[91]

Domestic violence involving children

The courts have also acknowledged the need for similar considerations when violence is perpetrated against children. The particularly vulnerable position of children who are exposed to domestic violence and the impact that such exposure can have on their current and future physical, psychological and emotional well-being was explicitly recognised by Parliament with the introduction of the CDPV Act.[92] The vulnerability of children and the relationship of trust between parents and their children is discussed in further detail below.[93] In *R v Pitcher*,[94] the NSWCCA emphasised the significance of general deterrence when children are victims of domestic violence, stating:

> Young children cannot protect themselves from the acts of adults. They cannot lodge complaints about criminal behaviour perpetrated upon them. They are entirely reliant upon their parents or those in custodial situations to care for them and protect them … the only protection which society can give to young children is the protection afforded by the courts. The courts must make clear by their sentences that acts of violence on young children, whether within or without a custodial situation, will not be tolerated in our society, and that criminal acts of violence against young children will result in appropriately severe sentences. Deterrence through the severity of sentence, is the only way in which young children can be protected.[95]

85 [2015] NSWSC 768.
86 ibid at [32].
87 [2014] NSWLC 13 at [28]. In that case, his Honour concluded that a suspended sentence, although sufficient to meet the purpose of denunciation would not support the principle of general deterrence as "it would in the eyes of the community be tantamount to no penalty at all": at [43].
88 [2014] NSWLC 3.
89 ibid at [49].
90 *R v Frankiewicz* [2015] NSWDC 309.
91 ibid at [74].
92 CDPV Act, s 9(3)(f). This factor was not explicitly recognised in the first scheme under the *Crimes Act* 1900 (the now repealed Pt 15A, Div 1A). However, it was explicitly recognised in the second scheme under the *Crimes Act* at s 562E(3)(f) (Pt 15A, Div 2) which was substituted by the *Crimes Amendment (Apprehending Violence) Act* 2006 (commencing on 12 March 2007 and repealed upon the commencement of the CDPV Act on 10 March 2008). For a reading on the impact of children's exposure to domestic and family violence, see K Richards, "Children's exposure to domestic violence in Australia" (2011) 419, *Trends & issues in crime and criminal justice*, Australian Institute of Criminology.
93 See **Aggravating factors** at pp 28–32 and **Domestic homicide** at pp 20–25.
94 (unrep, 19/2/1996, NSWCCA).
95 ibid. These remarks have been applied in *R v Smith* [2005] NSWCCA 286 at [54]; *R v APM* [2005] NSWCCA 463 at [44]; *R v Cockburn* [2006] NSWDC 131 at [23]; *R v Jones* [2006] NSWDC 132 at [22]; *R v Youkhana* [2015] NSWDC 314 at [79]–[80].

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Children may also become victims of domestic violence in circumstances of volatile relationships and acrimonious relationship breakdowns. In *CAR v R*,[96] the court held that "a very clear message must … be sent to persons involved in marital disputes … that however distressing those experiences may be, the community will not tolerate the use of children as pawns in such disputes".[97]

The victim and sentencing proceedings

Both the CSP Act and the common law require a sentencing court to have regard to the effect of the crime on the victim.[98] The High Court has made it clear that there is an obligation on the State to vindicate the dignity of each victim of violence and protect them from repeated episodes of violence.[99] However, exceptional caution should be exercised in the receipt and use of evidence of forgiveness by the victim in cases involving domestic violence. More than 20 years ago in *R v Glen*,[100] Simpson J (as her Honour then was) observed:

> For too long the community in general and the agencies of law enforcement in particular, have turned their backs upon the helpless victims of domestic violence. Acceptance of the victim's word that he/she forgives the offender, casts too great a burden of responsibility upon one individual already in a vulnerable position. Neither the community, the law enforcement agencies, nor the courts can be permitted to abdicate their responsibility in this fashion.[101]

It is a fact known by the courts and community that victims of domestic violence frequently, and clearly contrary to their own interests and welfare, forgive their attackers.[102] If forgiveness of the victim is accorded weight by the courts, it operates contrary to the interests of other victims.[103]

The weight given to the fact that a victim has forgiven his or her attacker when considering general deterrence will depend on the offence and the circumstances and is a matter for determination by the sentencing judge.[104] However, the victim's attitude cannot over-reach the need for strong denunciation and general deterrence where an offence involves serious objective circumstances.[105] Reconciliation between the victim and offender is to be given little, if any, weight in circumstances of domestic violence where general deterrence is of particular importance.[106]

These views were reflected in *R v Palu*[107] where the court said:

> Sentencing proceedings are not a private matter between the victim and the offender, not even to the extent that the determination of the appropriate punishment may involve meting out retribution for the wrong suffered by the victim. A serious crime is a wrong committed against the community at large and the community is itself entitled to retribution … Matters of general public importance are at the heart of the policies and principles that direct the proper assessment of punishment, the purpose of which is to protect the public, not to mollify the victim.[108]

In *Shaw v R,*[109] the court held that the sentencing judge did not err in being cautious about giving any weight to aspects of the victim's statutory declaration where she addressed her

96 [2009] NSWCCA 138.

97 ibid at [53]. See also *R v Fraser* [2005] NSWCCA 77 at [42], where the court endorsed similar remarks made in the South Australian case of *R v Hull* [1997] SASC 6087.

98 *Porter v R* [2008] NSWCCA 145 at [54]; *Siganto v The Queen* (1998) 194 CLR 656 at [29]; CSP Act, ss 3A(g) (one of the purposes of sentencing), 21A(2)(g) (aggravating feature that the injury, emotional harm, loss or damage caused by the offence was substantial) and Pt 3, Div 2 (victim impact statements).

99 *Munda v Western Australia* (2013) 249 CLR 600 at [54].

100 *R v Glen* (unrep, 19/12/94, NSWCCA). Simpson J's comments in *R v Glen* were applied in *R v Burton* [2008] NSWCCA 128 at [105] and *R v Palu* (2002) 134 A Crim R 174 at [37]. See also *R v Begbie* (2001) 124 A Crim R 300 at [57]–[59]; *R v Kershaw* [2005] NSWCCA 56 at [24], [28]–[29]; *Efthimiadis v R* [2013] NSWCCA 276 at [67] and *R v Qutami* (2001) 127 A Crim R 369 at [37].

101 *R v Glen*, ibid.

102 ibid. In *R v Newman* (2004) 145 A Crim R 361 at [83], Howie J noted that there may be the comparatively rare cases where forgiveness of the accused by the victim may be a relevant fact and most cases, where this issue has been considered, have been in the context of domestic violence; *R v Bradford* (unrep, 6/5/88, NSWCCA). See also *R v Rowe* (unrep, 3/10/96, NSWCCA).

103 *R v Glen*, ibid.

104 *R v Quach* [2002] NSWCCA 173 at [28].

105 *R v Begbie* (2001) 124 A Crim R 300 at [43].

106 *R v Berry* [2000] NSWCCA 451 at [32]; *R v Yin* (unrep, 9/11/88, NSWCCA).

107 (2002) 134 A Crim R 174.

108 ibid at [37], applied in *Efthimiadis v R* [2013] NSWCCA 276 at [67] and *Efthimiadis v R (No 2)* [2016] NSWCCA 9 at [87].

109 [2008] NSWCCA 58.

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own responsibility for the deterioration in the relationship, her desire to withdraw her statement to police and her desire for her family to be reunited. This is because victims of domestic violence may be "actively pressured to forgive their assailants or compelled for other reasons to show a preparedness to forgive them".[110] Further, such "self-interest denying forgiveness" is well known to the courts as a factor inhibiting the prosecution of domestic violence offences.[111]

Similar observations were made by the Victorian Court of Appeal in *R v Hester*[112] where a victim impact statement (VIS) was tendered in which the victim said she was partly to blame for one of the offences because she provoked the offender, and that she and the offender had resolved their problems and wanted an ongoing relationship. The court held the sentencing judge did not err by failing to take into account that part of the VIS in which the victim assumed blame.[113]

A helpful example of the application of the above principles in the Local Court can be found in *DPP (NSW) v Vallelonga*.[114]

Particular offences

It is important to note that the sentencing process functions within defined parameters as described by Hunt CJ at CL in *R v MacDonell*:[115]

> The sentencing procedures in the criminal justice system depend upon sentencers making findings as to what the relevant facts are, accepting the principles of law laid down by the Legislature and by the courts, and exercising a discretion as to what sentence should be imposed by applying those principles to the facts found.[116]

The sentence imposed for an offence will depend on the factual basis from which the court proceeds, including conclusions made about the offender's conduct, history and other personal circumstances.[117] The court should not take facts into account in a way that is adverse to the interests of the offender unless those facts have been established beyond reasonable doubt.[118] The offender bears the burden of proving on the balance of probabilities matters which are submitted in his or her favour.[119] The hidden nature of domestic violence and the history and dynamics of the relationship between the victim and the offender can present practical difficulties for a court during the fact-finding process.

Specific sentencing principles will be applied depending on the type of domestic violence related offence that has been committed. This section examines the more common offences committed in a domestic violence context and the sentencing principles of particular relevance to those offences.

Contravene an apprehended domestic violence order (ADVO)

In *John Fairfax Publications Pty Ltd v Ryde Local Court*,[120] Spigelman CJ explained the underlying purposes of the ADVO scheme:

> The legislative scheme for apprehended violence orders serves a range of purposes which are quite distinct from the traditional criminal or quasi-criminal jurisdiction of the Local Court. The legislative scheme is directed to the protection of the community in a direct and immediate sense, rather than through mechanisms such as deterrence. Individuals can obtain protection against actual or threatened acts of personal violence, stalking intimidation and harassment. Apprehended Violence Orders constitute the primary means in this State of asserting the fundamental right to freedom from fear. The

110 ibid at [27]. See also *R v Quach* [2002] NSWCCA 173 at [28]; *R v Berry* [2000] NSWCCA 451 at [32]; *R v Rowe* (1996) 89 A Crim R 467 at 472–473; *R v Fahda* [1999] NSWCCA 267 at [26]. In *Shaw v R*, the victim's forgiveness was, however, given some weight on re-sentencing because it indicated favourable prospects of rehabilitation: at [45].
111 *Shaw v R*, ibid.
112 [2007] VSCA 298.
113 ibid at [13].
114 [2014] NSWLC 13.
115 (unrep, 8/12/95, NSWCCA).
116 ibid. See Judicial Commission of NSW, *Sentencing Bench Book*, 2006–, "Fact finding at sentence" at [1-400]ff.
117 *The Queen v Olbrich* (1999) 199 CLR 270 at [1].
118 *Filippou v The Queen* (2015) 89 ALJR 776 at [64].
119 ibid at [27]–[28], adopting what was said in *R v Storey* (1996) 89 A Crim R 519 at 530.
120 (2005) 62 NSWLR 512.

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> objects served by such orders are quite distinct from those that are served by civil adversarial proceedings or proceedings in which an arm of the State seeks to enforce the criminal law.[121]

The power for courts to make ADVOs to protect people from domestic violence is a means by which the CDPV Act aims to achieve its objects.[122]

The offence of contravening an AVO is set out in s 14(1) of the CDPV Act:[123]

> A person who knowingly contravenes a prohibition or restriction specified in an apprehended violence order made against the person is guilty of an offence.

The offence carries a maximum penalty of imprisonment for 2 years or 50 penalty units,[124] or both. As of 2009, it is also an offence under s 14(9) to attempt to commit an offence against s 14(1), which is punishable as if the attempted offence had been committed.[125]

In addition, s 14(4) of the CDPV Act provides:

> Unless the court otherwise orders, a person who is convicted of an offence against subsection (1) must be sentenced to a term of imprisonment if the act constituting the offence was an act of violence against a person.

If a court determines not to impose a sentence of imprisonment, it must give its reasons for not doing so.[126] The presumption of imprisonment contained in s 14(4)[127] commenced in 1993.[128] It is unique to NSW because it is predicated on the act constituting the breach being one of violence, and applies to a first offence. The Northern Territory and Western Australia provide for presumptions of imprisonment in other circumstances.[129] The courts of superior record have yet to consider the interaction between s 5(1) of the CSP Act (the principle of imprisonment as a last resort) and s 14(4) of the CDPV Act.

The courts have recognised that when an AVO is contravened, the person intended to be protected is left without protection, the court's authority is undermined and the rule of law is compromised.[130] As stated in *R v Sjahadi*:[131]

> If apprehended violence orders are not respected as orders of the Court, they lose any efficacy … The flagrant disregard of such orders for reasons of personal convenience warrants condign punishment.[132]

A "very grave example" of a breach of an AVO is illustrated by *R v Archer.*[133] In that case, although the offender murdered the victim (his former partner), the breach offence was made out by his

121 ibid at [20], referring to the now repealed Pt 15A of the *Crimes Act* 1900. These observations were confirmed in *Browning v R* [2015] NSWCCA 147 at [5]: see also Judicial Commission of NSW, *Sentencing Bench Book*, 2006–, "Domestic violence offences" at [63-515] and JJ Spigelman, "Violence against women: the dimensions of fear and culture" (2010) 84 *ALJ* 372.

122 CDPV Act, s 9(2)(a).

123 The offence was originally s 562I of the *Crimes Act* 1900. The provision, entitled "Offence of contravening order", was inserted into the *Crimes Act* by the *Crimes (Personal and Family Violence) Amendment Act* 1987, which commenced on 21 February 1988. Upon the commencement of the *Crimes Amendment (Apprehended Violence) Act* 2006 on 12 March 2007, the provision was substituted and renumbered as s 562ZG of the *Crimes Act*. With the commencement of the CDPV Act on 10 March 2008, the offence was removed from the *Crimes Act* and inserted into the CDPV Act as s 14 with a new title of "Offence of contravening apprehended violence order".

124 One penalty unit is equal to $110 under s 17 of the CSP Act.

125 Section 14(9) was inserted by Sch 1.4[4] of the *Criminal Legislation Amendment Act* 2009, which commenced on 19 May 2009.

126 CDPV Act, s 14(6).

127 In the ALRC and NSWLRC, n 7, at [12.157]ff, the Commissions noted divided views of stakeholders as to whether legislation should contain provisions directing courts to adopt a particular approach on sentencing for breach of AVO offences, such as s 14(4), and concluded at [12.186]–[12.187] that: "The Commissions do not support the inclusion … of provisions directing courts to adopt a particular approach on sentencing for breach of a protection order where such legislative direction removes the exercise of judicial discretion … as a general principle, the Commissions consider that imprisonment should be regarded as a sentencing option of last resort."

128 *Crimes (Domestic Violence) Amendment Act* 1993, Sch 1(8)(b), which commenced on 19 December 1993.

129 The Northern Territory has a presumption of imprisonment "for at least 7 days" where the offender has previously been convicted of a contravention offence: *Domestic and Family Violence Act* (NT), ss 121(2) and 122(2) (adult and juveniles offenders respectively). In Western Australia, a presumption of imprisonment exists where the offender has been convicted of at least two contravention offences within the two years preceding their conviction for the relevant offence: *Restraining Orders Act* 1997 (WA), s 61A.

130 *R v Archer* [2015] NSWSC 1487 at [114].

131 [2013] NSWSC 540.

132 ibid at [29].

133 [2015] NSWSC 1487 at [113]. For the s 14(1) offence, the offender received a sentence of imprisonment for 1 yr 9 mths partly accumulated on the sentences for the offender's other offences: at [183].

presence in the victim's home in an intoxicated state. The precise condition prohibiting the offender from approaching the victim within 12 hours of consuming alcohol had been crafted by the court because the victim had previously "expressed tragically prophetic fear of what the offender may do when he was drunk". It was the flagrant disregard of that condition which led the court to conclude that the offending was of such a grave nature.[134]

In the Joint Commission Family Violence Report, the Commissions recommended that the timing of the breach should also be considered a relevant sentencing factor in appropriate circumstances.[135] It was said that where an order is contravened only a short time after its implementation, or breached for a second or subsequent time, a lack of respect for the court is demonstrated which should be taken into account in assessing the objective seriousness of the offence.[136]

The ADVO/assault sentencing scenario

It is very common for a court to be faced with a scenario where the ADVO has been breached by the offender assaulting the protected person. The prosecution often charge both the ADVO contravention and the assault separately.[137] *Pearce v The Queen*[138] holds that such a charging practice is permissible providing the court has regard to the overlapping nature of the charges; the task of the court is to recognise that the offender is to be sentenced for two offences constituted by one act and to ensure the offender is not punished twice for common elements between offences.[139]

In *DPP (NSW) v Murray,*[140] the offender was charged with assault occasioning actual bodily harm and knowingly contravening an AVO (the assault being the act in contravention of the AVO). The Supreme Court, applying *Pearce v The Queen*,[141] found it was an error for the magistrate to convict and sentence the offender for the AVO offence and permanently stay the assault charge.[142] Although the offences arose out of a single incident they contained different ingredients. A conviction for both offences did not result in the offender being convicted twice for the assault.[143] The remedy to such a situation was not in staying one charge but in addressing the overlap in sentencing.[144]

In *Smith v R*,[145] the NSWCCA held the sentencing judge had made no error in finding an offence of breaking and entering with intent to commit serious indictable offence was aggravated by being one of domestic violence, even when the offence of contravening an ADVO was taken into account on a Form 1. This did not involve double counting because contravening an ADVO does not necessarily involve the commission of an offence in the nature of domestic violence; there are other, non-violent, ways in which such an order can be contravened.[146]

Relevance of the victim's conduct/consent in sentencing

Breaches of AVOs can occur in factual circumstances where the protected person initiated a breach by contacting the offender or inviting them to their home. In *R v Frankiewicz*,[147] the sentencing

134 ibid at [115]–[116].
135 ALRC and NSWLRC, n 7, at [12.181].
136 ibid at [12.181], citing the Sentencing Advisory Council (Vic), *Sentencing practices for breach of family violence intervention orders: final report*, 2009, App 1, [2.15]; see also [5.179].
137 In ALRC and NSWLRC, ibid, at [12.117], the Commissions noted stakeholder observations that where an ADVO breach also amounts to a criminal offence, police may not lay charges for both, and found that police concerns about duplication should not be a reason for not charging an offender with both types of offences, as courts would apply the totality principle in sentencing the offender.
138 (1998) 194 CLR 610.
139 ibid at [40]; *Pearce v The Queen* was applied in *R v Hilton* (2005) 157 A Crim R 504 where the applicant was charged with 11 counts of obtaining money from child prostitution under s 91E(1) of the *Crimes Act* 1900 and eight counts of using premises for child prostitution under s 91F(1). The court held that he was doubly punished for his conduct: at [19].
140 [2008] NSWSC 1161.
141 (1998) 194 CLR 610.
142 [2008] NSWSC 1161 at [13].
143 ibid at [8], [13].
144 ibid at [12], [13], applying the explanation of *Pearce v The Queen* (1998) 194 CLR 610 in *Davis v R* [2006] NSWCCA 392 at [96].
145 [2013] NSWCCA 209.
146 ibid at [40].
147 [2015] NSWDC 309.

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judge noted that "even if the victim had invited the prisoner to her home the prisoner had no right to be there".[148]

The question of whether legislation should prohibit a court from considering a victim's consent to a breach of a protection order as a mitigating factor in sentencing was raised in the Joint Commission Family Violence Report,[149] where it was concluded that prohibiting a court from considering all the circumstances of an offence would constitute an unjustified departure from ordinary sentencing principles and an inappropriate fetter on judicial discretion. This conclusion was consistent with the views of a number of stakeholders, including the Local Court of NSW, which had submitted: [150]

> Due to the complex and diverse nature of family relationships … it would be ill-advised to prevent the courts from taking into account the conduct of the victim that contributes to an offence in the course of sentencing …
>
> In taking into account the consent of the victim, it is, of course a matter for the Court's discretion in determining what weight to attribute to the fact on sentencing. For instance, in the event of a protected person inviting the offender to her or his home in contravention of a condition not to approach the protected person, and the offender subsequently committing an act of physical violence against the protected person one might expect that the victim's initiation of the original breach might carry limited, if any, weight, as a mitigating factor.

The Joint Commission Family Violence Report also recommended that when considering the weight to be given to the victim's initiation or consent to any breach, a court should also be conscious of the history of the relationship and the potential that any consent may have been given by the victim under pressure or coercion.[151] It should also be borne in mind that while a victim may initiate or consent to contact prohibited under an order, he or she can never be taken to consent to any violent acts committed in breach of that order.[152]

The impact on the victim of the penalty imposed on the offender

The potential impact of particular sentencing options on a victim of family violence may be a relevant consideration in sentencing for breach of protection orders.[153] The imposition of a fine for example, may cause financial hardship to both the victim and any dependants of the offender as the fine may be paid from joint finances or negatively impact the offender's ability to provide child support.[154] A court is bound to have regard to an offender's means to pay a fine when exercising its discretion to fix the fine amount.[155] The NSW Local Court raised this problem in its submissions to the ALRC and NSWLRC, stating:[156]

> the punishment of an offender may well have an adverse impact upon the victim or any children of a relationship ... This might include financial hardship due to the imposition of a fine, emotional, relational and financial hardship due to the imposition of a custodial sentence, or more generally the risk of reprisal against a victim by an offender who regards the punishment as being the "fault" of the victim.

Assault and wounding offences

Parliament has created a framework of assault and wounding offences in the *Crimes Act* 1900, with a hierarchy of seriousness based on the degree of harm inflicted upon the victim and the intention of the offender.[157] The offences encompass a wide spectrum of conduct, from common assault to

148 ibid at [29]. Similarly, the Sentencing Guidelines Council (UK), *Breach of a protective order*, Definitive guideline, 2006, at www.sentencingcouncil.org.uk/wp-content/uploads/web_breach_of_protective_order.pdf, p 6 [4.13], accessed 20 October 2015, emphasises that "it is the responsibility of the offender and not the victim to ensure that the order is complied with".

149 ALRC and NSWLRC, n 7, at [12.86].

150 ibid at [12.81]–[12.82].

151 ibid at [12.88], citing the Sentencing Advisory Council (Vic), *Sentencing practices for breach of family violence intervention orders: final report*, 2009, App 1, [2.9], with approval.

152 ibid at [12.89].

153 ibid at [12.181], citing with approval the Sentencing Advisory Council (Vic), *Sentencing Practices for Breach of Family Violence Intervention Orders: Final Report*, 2009, App 1, [1.1]–[1.3], [1.5].

154 H Douglas, "The criminal law's response to domestic violence: what's going on?" (2008) 30(3) *Sydney Law Review* 439 at 465, and NSWLRC, *Apprehended Violence Orders*, Report No 103, 2003 at [10.44].

155 *Fines Act* 1996, s 6(a).

156 ALRC and NSWLRC, n 7, at [12.155].

157 *Crimes Act* 1900, Pt 3 (Offences against the person).

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offences where the offender has the intention to inflict a particular type of harm with maximum penalties ranging from 2 to 25 years imprisonment.[158]

Between January 2008 and June 2009, common assault was the most common domestic violence related assault offence for which offenders were sentenced in the Local and District Court, followed by assault occasioning actual bodily harm.[159] Figures such as these are relevant to the sentencing process because the prevalence of an offence is permitted to have a bearing on the sentence imposed by reason of the application of the principle of general deterrence.[160] Further, the courts have frequently emphasised the need to treat domestic violence assault offences seriously because they so commonly involve male offenders exercising their violent nature against comparatively defenceless females.[161]

Historically, 70% of strangulation offences were charged as common assaults because many victims who survive strangulation have minimal visible injuries making it difficult to prove a more serious assault charge.[162] However, in 2014 a new basic offence of strangulation was inserted into the *Crimes Act* 1900 to capture the true criminality of such offences.[163]

The appropriate sentence for an assault or wounding offence will depend on the elements of the offence, the maximum penalty, the standard non-parole period (where applicable), the extent and nature of the injury,[164] the degree of violence,[165] and the intention with which the offender inflicts the harm.[166] Where committed in a domestic violence context, the general sentencing principles set out in *R v Hamid,*[167] referred to above, will also apply. For example, general deterrence will be of particular significance because of the prevalence of such offences.[168] Powerful denunciation of the offence by the courts will also be important.[169] In *Sabongi v R*[170] the court said that such offences "must be denounced by the courts in order to send a clear message to the community that they cannot be tolerated".[171] Until that message is "spread and applied consistently at all levels, more women will continue to be assaulted and perpetrators will continue to do the assaulting".[172]

158 Common assault contrary to s 61 of the *Crimes Act* 1900 has a maximum penalty of 2 years while assault causing death when intoxicated (s 25(A)(2) of the *Crimes Act*), wounding or inflicting grievous bodily harm with intent to cause grievous bodily harm (s 33), choking, suffocating or strangling (s 37) and administering intoxicating substance to commit an indictable offence (s 38) carry a maximum of penalty of 25 years: ss 25A(2), 33, 37, 38, respectively of the *Crimes Act*.

159 C Ringland and J Fitzgerald, "Factors which influence the sentencing of domestic violence offenders", BOCSAR *Crime and Justice Statistics, Bureau Brief*, Issue paper no 48, July 2010, p 2 (Table 1). Between January 2008 and June 2009, 7,351 cases (where common assault was the principal offence), were finalised in the NSW Local and District Courts, followed by 4,737 for the breach of an AVO and 3,469 for assault occasioning actual bodily harm.

160 *R v Johnson* [2004] NSWCCA 140 at [33]; *R v Taylor* [2000] NSWCCA 442 at [48]; *R v Whyte* (2002) 55 NSWLR 252 at [145]. However, prevalence will have no bearing on the assessment of the objective gravity of a particular offence: *R v Johnson* at [14]. See also the comments of RS Hulme J in *R v Corbett* (2008) 181 A Crim R 522 at [7], applied in *Police v Giallourakis* [2010] NSWLC 24 at [40]–[41].

161 *Shillingsworth v R* [2010] NSWCCA 19 at [39], [40].

162 *Crimes Amendment (Strangulation) Act* 2014, commenced 5 June 2014, Second Reading Speech, Crimes Amendment (Strangulation) Bill 2014, NSW, Legislative Assembly, *Debates*, 7 May 2014, p 28314.

163 *Crimes Act* 1900, s 37. The basic offence carries a maximum penalty of 10 years imprisonment (s 37(1)) whereas the aggravated form of the offence carries a maximum penalty of 25 years imprisonment (s 37(2)).

164 *R v Mitchell* (2007) 177 A Crim R 94 at [27]; *Siganto v The Queen* (1998) 194 CLR 656 at [29]; *R v Zhang* [2004] NSWCCA 358 at [18]. In *R v Douglas* [2007] NSWCCA 31, the court held that the number of blows and the circumstances in which they were delivered were relevant to the objective seriousness of the offence: at [12]. It is not necessary for the victim's injuries to be classified as the "worst type" for an offence to fall into the "worst case" category; the nature of the offender's conduct may also bring it within that category: *R v Westerman* [2004] NSWCCA 161 at [17]. *R v Baquayee* [2003] NSWCCA 401 and *R v Stokes and Difford* (1990) 51 A Crim R 25 are examples of worst category cases for an offence under s 33 of the *Crimes Act* 1900.

165 *R v Bloomfield* (1998) 44 NSWLR 734 at 740; *R v Zhang* [2004] NSWCCA 358 at [18]. This is the case even where the consequences of the attack are minimal: *R v Kirkland* [2005] NSWCCA 130 at [33].

166 *R v Wiki* (unrep, 13/9/1993, NSWCCA); *R v Mitchell* (2007) 177 A Crim R 94.

167 (2006) 164 A Crim R 179 at [86].

168 ibid at [68].

169 ibid at [86].

170 [2015] NSWCCA 25.

171 ibid at [44].

172 *Police v Giallourakis* [2010] NSWLC 24 at [42].

In *Hiron v R*,[173] the offender, who had just been released from prison, committed a number of assaults occasioning actual bodily harm upon his pregnant de facto wife. The court held that "offences for violent attacks in domestic settings … must be treated with real seriousness." Relevant to the assessment of criminality was the fact that after each individual assault offence, which all involved separate episodes of violence, the offender was afforded the opportunity to reflect upon his actions and appreciate that the violent abuse of his partner was wrong.[174]

In sentencing for domestic violence related assault offences, the principle in *The Queen v De Simoni*[175] prohibits a court taking into account factors which would result in the offender being sentenced for a more serious assault than that charged.[176] The court should be careful not to double count harm by taking into account the general statutory aggravating factor of "injury, emotional harm, loss or damage caused by the offence was substantial" under s 21A(2)(g) of the CSP Act, where substantial harm is already an element of the offence.[177]

Intimidation or stalking

The offence of stalking or intimidating another person with intent to cause the other person to fear physical or mental harm is set out in s 13 of the CDPV Act. It is a serious indictable offence with a maximum penalty of 5 years imprisonment or 50 penalty units, or both. However the offence is usually dealt with summarily.[178] *Intimidation* and *stalking* are both defined within the CDPV Act[179] and encompass a variety of conduct. From 19 May 2009, s 13(5) was inserted[180] to provide that a person who attempts to commit an offence against s 13(1) is guilty of that offence and is punishable as if the offence attempted had been committed.

Where an offender pleads guilty to, or is found guilty of, an offence against s 13, the court hearing the proceedings is required to make an AVO for the protection of the person against whom the offence was committed, whether or not an application for such an order has been made.[181]

In *Collins v R*,[182] the sentencing judge had assessed an intimidation offence to be "well above the middle of the range of objective seriousness for offences of this kind". When allowing an appeal on the basis that the sentence[183] was manifestly excessive,[184] the court endorsed the sentencing judge's statement that the offending "could have been worse".[185] The fact no specific threats were made,[186] the victim had benefited from physical isolation by locking herself into a room and was not alone nor deprived of the prospect of obtaining assistance or telling others of her plight (as those she was with were able to phone police) were all relevant considerations in forming a view of the appropriate penalty.[187] So too was the fact police had attended the scene during the course of the events giving rise to the charge and the situation was not apparently so bad as to have led to the offender's immediate arrest.[188]

173 [2007] NSWCCA 336.
174 ibid at [34]. See also *R v Dunn* (2004) 144 A Crim R 180.
175 (1981) 147 CLR 383 at 389.
176 *Nowak v R* (2008) 183 A Crim R 526 at [22]; *Mitchell v R* [2010] NSWCCA 145 at [27]–[30].
177 CSP Act, s 21A(2); *Betts v R* [2015] NSWCCA 39.
178 Statistics on the Judicial Commission of NSW's Judicial Information Research System (JIRS) show that over a 4-year period, from October 2011 to September 2015, the Local Court finalised 12,578 cases under s 13(1). In comparison, over a 7-year period, from October 2008 to September 2015, 71 cases of the same offence were finalised by the District and Supreme Courts. These statistics refer only to cases of adult offenders where the s 13(1) offence was the *principal offence* (defined as the offence that attracts the most serious penalty). For further details setting out the counting rules, refer to the "Explaining the statistics" webpage under "Sentencing Information" on JIRS. The link can be accessed from the "Statistics" page.
179 CDPV Act, ss 7 and 8 respectively.
180 *Criminal Legislation Amendment Act* 2009, Sch 1.4[1].
181 CDPV Act, s 39.
182 [2010] NSWCCA 13.
183 ibid at [5]. The sentence was for 3 years imprisonment with a non-parole period of 1 yr 8 mths 15 days.
184 ibid at [52]. The applicant was re-sentenced for the intimidation offence to a sentence of 1 yr 6 mths imprisonment with a non-parole period of 1 yr 2 mths.
185 ibid at [50].
186 ibid at [45]. However, the court recognised that: "unspecified or unarticulated threats may be as troublesome or intimidating and in some respects more so, than verbal abuse alone or even verbal abuse in association with acts that are physically threatening".
187 ibid at [45]–[49].
188 ibid at [49].

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In *Kelly v R*,[189] the court rejected the submission that a lack of verbal threats rendered the intimidation less serious, stating that in some instances "verbal threats may be seen as bluster, while violent behaviour by a man perceived to have a loaded gun in a residential home, without any demand, explanation or verbal threat, may appear highly intimidating".[190]

In dealing with an intimidation offence involving threats to publish a video of a previous sexual encounter unless the victim agreed to further sexual intercourse, the Local Court held a submission that the offence was at the lower end of the range of objective seriousness was misconstrued.[191] Such conduct was said to be of a type "all reasonable members of the community would regard as outrageous"[192] and was required to be "discouraged with firmness"[193] through an emphasis on general and particular deterrence.[194]

Break and enter offences

The offences of break, enter any house or other building and commit a serious indictable offence and break, enter any house or other building with intent to commit a serious indictable offence are set out in ss 112 and 113 respectively of the *Crimes Act* 1900. Both sections provide for a basic, aggravated and specially aggravated form of the offence.[195] A break and enter offence can encompass a wide range of conduct[196] and an assessment of the criminality of the offence will depend on the serious indictable offence charged and the aggravating factor(s) where the offence charged is the aggravated form.

The fact that a break and enter offence occurs in the context of domestic violence is a matter that must be given attention by the sentencing judge.[197] This is because a "victim who is a relative, and particularly a wife, may be in a more, rather than a less, vulnerable position with regard to the wrongful acts of the offender" than a stranger.[198] The significance of the domestic violence nature of a break and enter offence was emphasised by the court in *R v Eckermann*:[199]

> Home invasions by strangers are undoubtedly serious examples of an offence contrary to s 112(2), but so may be break and enters where an offender has previously been in a domestic relationship with the occupant of the house, particularly when there has been a history of domestic violence. In such cases, the victim's fearfulness should not be underestimated. An offence does not become less serious by virtue of a prior domestic relationship between an offender and the victim. The objective gravity of the crime is to be assessed on its facts.[200]

Where an offender breaks into the home of someone with whom they have (or have had) a domestic relationship, the sentencing judge is entitled to take into account, as an aggravating feature under s 21A(2)(eb) of the CSP Act, the fact that the offence occurred in the victim's home.[201] As the court said in *Palijan v R* "there is … something particularly repugnant about the forced entry of an offender into a house and violating the safety of that place by carrying out an attack" on those who reside there.[202]

189 [2007] NSWCCA 357. The applicant was charged with breaking, entering and committing a serious indictable offence contrary to s 112(2) of the *Crimes Act* 1900. The serious indictable offence was for intimidation contrary to s 562AB (rep) of the *Crimes Act*.

190 *Kelly v R*, ibid at [32].

191 *Police v Trevail* [2012] NSWLC 1 at [30]. The court found that the correct characterisation of the offence was towards the upper end of the middle range: at [24].

192 ibid at [27].

193 ibid at [32].

194 ibid at [31].

195 The applicable maximum penalties range from 10 years imprisonment (s 113(1) of the *Crimes Act* 1900) to 25 years imprisonment (s 112(3)).

196 *Lovell v R* [2006] NSWCCA 222 at [63].

197 *R v Campbell* [2014] NSWCCA 102 at [33]. In *R v Campbell*, the offender was convicted of breaking and entering into his ex-wife's home and committing a serious indictable offence (intimidation) in circumstances of special aggravation (armed with a dangerous weapon) contrary to s 112(3) of the *Crimes Act* 1900. The court held that the sentencing judge erred by not giving attention to the fact that the offence occurred in a domestic context and involved multiple victims: at [33].

198 *Hussain v R* [2010] NSWCCA 184, per Davies J at [80], applied in *R v Eckermann* [2013] NSWCCA 188 at [35].

199 *R v Eckermann*, ibid.

200 ibid at [35].

201 *Palijan v R* [2010] NSWCCA 142 at [21]–[22]; *R v Bennett* [2014] NSWCCA 197 at [13]; *Smith v R* [2013] NSWCCA 209 at [46]–[47]. To do so does not amount to double counting because the elements of a break and enter offence in s 112(2) do not require that the premises be the home of the victim. For further discussion on the application of s 21A(2)(eb) see **Aggravating factors** at pp 28–32.

202 *Palijan v R,* ibid at [22].

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Further, it was not an error for the sentencing judge in *Smith v R*[203] to have regard to the fact that the motivation for the offender's entrance into the premises was the breakdown of the domestic relationship together with the circumstance of aggravation in the charge (knowing that there were persons inside).[204] This is because the circumstance of aggravation of knowing a person is inside the premises in which the offender is breaking into, is not limited to domestic violence situations.[205] Similarly, it will not amount to double counting for the court to treat the fact that an offence constituted domestic violence as an aggravating factor in circumstances where the Crown specifies intimidation as the serious indictable offence under s 112(2) and a breach of ADVO offence had been placed on a Form 1.[206]

Where the break and enter is committed following provocation by the victim (for example, the offender was motivated by revenge because of alleged conduct by the victim towards the offender's relative) this may warrant a reduction in sentence.[207] However, in *R v Eckermann*[208] the sentencing judge was found to have erred by attributing excessive weight to the offender's motive for entering the house (a concern for his children) in assessing the objective seriousness of the offence.[209]

In *Shaw v R,*[210] the court held that the vulnerability of the victim (the offender's ex-partner) relative to the offender,[211] and the fact the offender had breached his position of trust,[212] did not elevate the offender's conduct to a level which was objectively high. Had the offender "planned a forced entry, armed himself for that purpose, and then used the tool as a weapon to inflict injury, the offence would properly be categorised in that way."[213] In *Croaker v R,*[214] the fact that the break and enter offence was one involving domestic violence where the victim had moved away from the offender after an earlier assault upon her and she was in the security of her own home when he broke in and assaulted her were matters relevant to the assessment of the objective seriousness of the offence.[215]

Kidnapping/detain for advantage

Section 86(1) of the *Crimes Act* 1900 provides for the basic offence of kidnapping.[216] Aggravated and specially aggravated forms of the offence are set out in ss 86(2) and (3) respectively.[217] The fact that a kidnapping occurs in a domestic context, as distinct from being detained by a stranger, does not lessen the gravity of the offence.[218] However, it remains important for the court to consider the nature of the relationship between the offender and victim when determining the appropriate sentence.[219]

In assessing the objective seriousness of a kidnapping offence the court must take into account all of the circumstances of the detention such as the duration of the detention, the person being detained and the purpose of the detention.[220]

203 [2013] NSWCCA 209.
204 ibid at [42].
205 ibid at [39].
206 ibid at [43]. For further discussion see **Intimidation or stalking** at pp 16–17.
207 *Lovell v R* [2006] NSWCCA 222 at [63]; *R v Price* [2005] NSWCCA 285 at [23]; *R v Millar* [2005] NSWCCA 202 at [43]; *R v Tory* [2006] NSWCCA 18 at [37]. See also **Provocation — s 21A(3)(c)** at pp 32–33.
208 [2013] NSWCCA 188.
209 ibid at [41], [44]–[45].
210 [2008] NSWCCA 58.
211 CSP Act, s 21A(2)(l).
212 CSP Act, s 21A(2)(k).
213 *Shaw v R* [2008] NSWCCA 58 at [37] applying *Lovell v R* [2006] NSWCCA 222 at [63]–[65]. See also *R v Davies* [2004] NSWCCA 319 at [34].
214 [2008] NSWCCA 232.
215 ibid at [27].
216 Section 86(1) provides that a person who takes or detains a person, without the person's consent: with the intention of holding the person to ransom, or with the intention of committing a serious indictable offence, or with the intention of obtaining any other advantage, is liable to 14 years imprisonment.
217 The aggravated and specially aggravated forms of the offence have maximum penalties of 20 and 25 years imprisonment respectively.
218 *Heine v R* [2008] NSWCCA 61 at [40]; *Raczkowski v R* [2008] NSWCCA 152 at [46]; *Hussain v R* [2010] NSWCCA 184 at [68]; *R v Eckermann* [2013] NSWCCA 188 at [35]–[36]; *R v Speechley* (2012) 221 A Crim R 175 at [55]; *R v Ball* [2013] NSWCCA 126 at [88]; *R v Newell* [2004] NSWCCA 183 at [32].
219 *NM v R* [2012] NSWCCA 215 at [59]; *Boney v R* (2008) 187 A Crim R 167 at [106]; *R v Hendricks* [2011] NSWCCA 203 at [86]–[87]; *Norman v R* [2012] NSWCCA 230 at [60]; *Bellchambers v R* [2011] NSWCCA 131 at [47]ff.
220 *R v Speechley* (2012) 221 A Crim R 175 at [55]; *R v Ball* [2013] NSWCCA 126 at [88]; *R v Newell* [2004] NSWCCA 183 at [32].

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When committed in the context of domestic violence, that assessment must involve "an examination of the immediate acts of [the offender] in the context of his [or her] violent control of the victim".[221] For example, in *Ball v R*[222] the offender's conduct of unlawfully detaining his ex-girlfriend in a motor vehicle while it was driven recklessly and at high speed was said to add a very serious dimension to the gravity of the offence.[223] The "abuse of power" and "violence of the offender, occurring as it did in a domestic-type setting" was also relevant to the objective seriousness of the kidnapping.[224]

In *Kerr v R,*[225] the court held that greater weight is to be given to considerations of the protection of society, and general and specific deterrence when violence is threatened or actual violence is used in a kidnapping.[226] A "real threat of violence and the presence of a weapon, like a knife, capable of killing or inflicting serious injury", both of which were factors present in *Kerr v R*, are factors of aggravation even though actual injury may not be occasioned to the victim.[227]

It is not the case that before a kidnapping offence can come within the most serious category, the detention must be for the purpose of ransom.[228] The presence or absence of a particular type of advantage within s 86(1) (the purpose of the detention) is not decisive in a determination of the seriousness of the particular kidnapping offence before the court.[229]

However, in *Boney v R,*[230] the court held that the sentencing judge imposed "unjustifiably high" sentences for three kidnapping offences committed in a domestic violence context. Although the detentions were "far from short" (hours, not days), they were "far less" than the circumstances envisaged by s 86. RS Hulme J observed:[231]

> it is to be borne in mind that [the] provision covers also detention for the purposes of ransom, detention that might well extend for much longer than occurred in this case and in circumstances where a victim might be blindfolded, in an unknown location and completely out of contact with anyone not an offender.[232]

The offences in *Boney v R* were distinguishable from other kidnappings because the victim knew the offender and was "capable of making some assessment of the situation", which was "not one where she had to endure the terror of an unknown kidnapper". The case was not one where a victim "is seized by a complete stranger about whom she knows nothing and who, for all the victim knows, may well kill her when the intercourse is over".[233]

Sexual assault

It is instructive here to recall that the common law of England held that a husband could not be guilty of a rape committed upon his wife. By marriage a wife irrevocably consented to sexual intercourse with her husband.[234] The High Court in *PGA v The Queen*[235] held, in a detailed discussion, that even if the immunity had existed at one time, it had ceased to exist by 1935.[236] Sexual assaults are commonly committed in domestic relationships. The courts have held that the fact that a sexual assault occurred in a domestic context does not lessen its gravity.[237]

221 *R v Burton* [2008] NSWCCA 128 at [95].
222 [2013] NSWCCA 126.
223 ibid at [89].
224 *R v Ball* [2013] NSWCCA 126 at [98]. In allowing the Crown appeal, the court held that an intensive correction order did not sufficiently address the issues of specific or general deterrence. A full-time custodial sentence was required: at [117], [146], [149].
225 [2008] NSWCCA 201. The offender was convicted of the aggravated kidnapping of his ex-girlfriend. The offence was committed over some hours and involved extensive actual and threatened violence including threats to kill, while the victim was tied up with duct tape.
226 ibid at [53]. See also *Jeffries v R* (2008) 185 A Crim R 500.
227 [2008] NSWCCA 201 at [51].
228 *R v Newell* [2004] NSWCCA 183 at [32].
229 ibid; *R v Ball* [2013] NSWCCA 126 at [101].
230 (2008) 187 A Crim R 167.
231 ibid; McClellan CJ at CL and Mathews AJ agreeing at [1] and [125] respectively.
232 ibid at [112].
233 ibid at [106].
234 M Hale, *The history of the pleas of the Crown*, London, 1736. The immunity of a husband was abolished in England in 1991; see *R v R* [1992] 1 AC 599.
235 (2012) 245 CLR 355.
236 ibid at [64]. Heydon and Bell JJ in separate judgments dissented.
237 *R v Cortese* [2013] NSWCCA 148 at [55]; *R v Hamid* (2006) 164 A Crim R 179; *Heine v R* [2008] NSWCCA 61 at [40]; *R v Harvey* (unrep, 23/8/96, NSWCCA).

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However, one common circumstance in which a pre-existing relationship has been found to diminish the seriousness of a sexual offence is where it suggests some prevarication or at least initial consent on the part of the victim.[238] This circumstance has been contrasted to an assault committed by a stranger where there is no such potential prevarication.[239] Where the offender is a stranger, a further element of fear and terror would be expected but the fact the victim knew the offender and trusted him or her will "provide little comfort".[240]

Domestic homicide

It is self-evident that murder and manslaughter are the most serious offences of domestic violence.[241] General deterrence, community protection and denunciation in sentencing for domestic violence are particularly significant when that violence escalates to the loss of a person's life. As stated in *R v Serutawake*,[242] "far too many killings occur in a domestic setting … it is incumbent upon the courts to impose sentences which will hopefully operate to deter others from behaving in a similar way in the future".[243] It is not enough to pay lip service to general deterrence; when death is the result, the principle must be reflected in the imposition of a lengthy gaol sentence.[244]

Murder

An offence of murder attracts a maximum penalty of imprisonment for life[245] and a standard non-parole period of 20 years, or 25 years when the victim was a child under 18 years of age.[246]

The court is required to impose a sentence of imprisonment for life if satisfied that the level of culpability in a murder offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through such a sentence.[247] There are degrees of seriousness in any murder and determination of the appropriate sentence for an individual offence will depend upon the nature of the offender's conduct and the part played in the events giving rise to the victim's death.[248] Murders committed in a domestic context are not to be regarded as a separate category of murder attracting a particular range of sentences.[249]

Manslaughter

Manslaughter carries a maximum penalty of 25 years[250] but does not attract a standard non-parole period. There are two broad categories of manslaughter. Voluntary manslaughter involves the requisite intent for murder, but the culpability of the offender's conduct is reduced by excessive self-defence[251] or by reason of provocation (or more recently, extreme provocation) or substantial impairment by abnormality of mind.[252] Involuntary manslaughter is the product of common law and contains two categories, manslaughter by unlawful or dangerous act and manslaughter by criminal negligence, neither of which requires intent to kill or inflict grievous bodily harm.[253] Many cases of domestic manslaughter involving child victims[254] are involuntary manslaughter.

238 *Bellchambers v R* [2011] NSWCCA 131 at [47]; *NM v R* [2012] NSWCCA 215 at [59]; *R v Cortese* [2013] NSWCCA 148 at [55].
239 *R v Cortese,* ibid at [50]. See also *Boney v R* (2008) 187 A Crim R 167 at [106]; *NM v R*, ibid.
240 *ZZ v R* [2013] NSWCCA 83 at [103].
241 *R v Murray* [2015] NSWSC 1034 at [99].
242 [2014] NSWSC 1762.
243 ibid at [22].
244 *R v Johnson* [2015] NSWSC 31 at [61].
245 *Crimes Act* 1900, s 19A(1).
246 CSP Act, Pt 4, Div 1A.
247 CSP Act, s 61(1). Imprisonment for life has been imposed for some murders committed in a domestic context: see, for example, *R v Knight* [2001] NSWSC 1011 (the offender murdered her de facto partner and mutilated his body); *R v Sievers* [2002] NSWSC 1257 (the offender murdered his partner and had a prior conviction for murdering his wife 20 years earlier); and, *R v Gonzales* [2004] NSWSC 822 (the offender murdered both his parents and his sister). The life sentences were confirmed by the NSWCCA in *Knight v R* (2006) 164 A Crim R 126, *Sievers v R* (2004) 151 A Crim R 426 and *Gonzales v R* (2007) 178 A Crim R 232 respectively.
248 *R v JB* [1999] NSWCCA 93 at [33].
249 *Knight v R* (2006) 164 A Crim R 126 at [26]; *Gonzales v R* (2007) 178 A Crim R 232 at [175].
250 *Crimes Act* 1900, s 24.
251 ibid, s 421.
252 *The Queen v Lavender* (2005) 222 CLR 67 at [2]; *Lane v R* (2013) 241 A Crim R 321 at [50].
253 See *Lane v R* (2013) 241 A Crim R 321 at [51]–[65] for a useful discussion on the types of involuntary manslaughter.
254 See **Child victims** at pp 23–24.

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Manslaughter is a protean crime; it has the widest range of culpability of all offences.[255] There is no hierarchy of seriousness within the legal categories of manslaughter. Ultimately, it is the facts of the specific case which determine the objective gravity of the offence.[256] Given these characteristics, courts have cautioned against reliance on statistical data for sentencing.[257]

The partial defence of provocation and extreme provocation

In 2014, the partial defence of provocation was repealed and replaced with the more limited "extreme provocation".[258] The amendments were prompted by recommendations made by the NSW Legislative Council Select Committee on the Partial Defence of Provocation,[259] which was established following community concern regarding the outcome in *Singh v R*.[260] The offender in *Singh v R* was found guilty of manslaughter on the basis of provocation after he repeatedly slit his wife's throat with a box cutter when she told him that she never loved him and would have him deported to India.[261]

The new defence provides that an act causing death is done in response to extreme provocation "if and only if":

(a) the act of the accused that causes death was in response to conduct of the deceased towards or affecting the accused, and

(b) the deceased's conduct was a serious indictable offence, and

(c) the deceased's conduct caused the accused to lose self-control, and

(d) the deceased's conduct could have caused an ordinary person to lose self-control to the extent of intending to kill or inflict grievous bodily harm on the deceased.[262]

Conduct of the deceased does not constitute extreme provocation if the conduct was only a non-violent sexual advance to the accused, or the accused incited the conduct in order to provide an excuse to use violence against the deceased.[263] Like the previous defence, and to ensure the continued protection of long-term victims of domestic violence,[264] the deceased's provocative conduct need not occur immediately before the act causing death.[265]

The new serious indictable offence threshold[266] was introduced to recognise a person's right to personal autonomy and ensure that infidelity or leaving a relationship will never provide a foundation for the partial defence.[267] In the Second Reading Speech given by Reverend the Honourable Fred Nile MP, specific reference was made to the serious indictable offence threshold:

> Despite this restriction, victims of domestic violence would be able to rely upon the partial defence in appropriate cases. Domestic violence, particularly long-term abuse, generally includes conduct involving serious indictable offences such as the range of assaults in the *Crimes Act* 1900. Even where abuse is psychological, it may amount to the serious indictable offence of stalking or intimidation set out in section 13 of the *Crimes (Domestic and Personal Violence) Act* 2007.[268]

255 *R v Forbes* (2005) 160 A Crim R 1 at [133]–[134]; *R v Blacklidge* (unrep, 12/12/95, NSWCCA).
256 *R v Dally* (2000) 115 A Crim R 582 at [64]; *R v Hoerler* (2004) 147 A Crim R 520 at [29] applying *R v Isaacs* (1997) 41 NSWLR 374; *R v Mohamad Ali* [2005] NSWSC 334 at [56].
257 *R v Vongsouvanh* [2004] NSWCCA 158 at [38]; *R v Wood* [2014] NSWCCA 184 at [59].
258 *Crimes Amendment (Provocation) Act* 2014, Sch 1.
259 NSW Legislative Council Select Committee on the Partial Defence of Provocation, *The partial defence of provocation: final report*, 2013.
260 [2012] NSWSC 637.
261 The offender was sentenced to a non-parole period of 6 years with a balance of term of 2 years.
262 *Crimes Act* 1900, s 23(2).
263 ibid, s 23(3).
264 Second Reading Speech, Crimes Amendment (Provocation) Bill 2014, NSW, Legislative Council, *Debates*, 5 March 2014, p 27033.
265 *Crimes Act* 1900, s 23(4).
266 ibid, s 23(2)(b). *Serious indictable offence* is defined in s 4(1) of the *Crimes Act* 1900 to mean an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more.
267 Second Reading Speech, Crimes Amendment (Provocation) Bill 2014, n 264.
268 ibid.

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However, it should be noted that the offence of common assault was the most common domestic violence related offence in the NSW Local and District Courts between January 2008 and June 2009.[269] The offence carries a maximum penalty of 2 years imprisonment,[270] and is therefore not a serious indictable offence capable of meeting the threshold of extreme provocation.[271]

Factual matters

Intimate partner homicides

The most common form of domestic homicide is that where the offender and the victim have been in an intimate relationship.[272] In *R v Archer*,[273] the sentencing judge observed that "it is rare that a week goes by in Australia without a woman somewhere in the country being murdered by her spouse or partner … That is something of which we as a community should be ashamed, and which the courts must seek to address when sentencing offenders".[274]

The grave consequences of an intimate partner homicide were aptly described in *R v Meyn (No 6)*:[275] "It has destroyed her life and most of his, deeply wounded the adults around him, inflicted irreparable harm on their two infant children and created a bitter legacy for them to inherit".[276] Similarly, it was observed in *R v Lechmana*[277] that:

> A very young child has been deprived of her mother at the hands of her father. The long term effects upon her are incalculable. These matters do not of course justify any increase upon the sentence that is otherwise warranted according to law. However, they serve as a reminder of the value of a human life and of the loss to the community at large.[278]

Relationship breakdown as a trigger

The breakdown of an intimate relationship will sometimes be a trigger for intimate partner homicide. Between 1 July 2000 and 30 June 2012, 63% of the women who were killed by their former intimate partner had ended the relationship with that partner within the three months prior to their death.[279] In such cases considerations of general deterrence, retribution and denunciation are highly significant; married persons have the right to choose their own destiny and when an offender inflicts violence upon them for exercising that right, significant penalties will be imposed.[280] Nor can a person's exercise of their right to leave a marriage or relationship ever, of itself, meet the definition of provocative behaviour so as to constitute a mitigating circumstance.[281]

Motive for the offence

The controlling attitude of a domestic violence perpetrator towards the victim is a distinguishing characteristic of many cases of domestic violence. In *R v Cheung*,[282] Allen J stated:

> There are those within the community whose approach to the relationship between a man and a woman is that if the man has what might be called a grand passion for the woman, which completely overwhelms him, there is somehow a degree of respectability in him giving vent to that grand passion by … in an extreme case, taking her life … There is no respectability in that at all. It is arrogance. I do accept that having such a grand passion, if it can be so called, can diminish, for sentencing, the importance of the element of personal deterrence. But it certainly does not diminish the importance of the element of general deterrence. Indeed, the very misconception that such a grand passion affords a degree of respectability to what otherwise is abhorrent makes it all the more important that,

269 C Ringland and J Fitzgerald, "Factors which influence the sentencing of domestic violence offenders", n 159, p 2.
270 *Crimes Act* 1900, s 61.
271 However, an assault occasioning actual bodily harm (under s 59 of the *Crimes Act* 1900) does meet the threshold of a serious indictable offence.
272 NSW DVDRT, *Annual Report*, n 44, p 5. Of the 280 domestic homicide victims killed between 1 July 2000 and 30 June 2012, 165 (59%) were killed by a current or former intimate partner.
273 [2015] NSWSC 1487.
274 ibid at [174].
275 [2013] NSWSC 243.
276 ibid at [72].
277 [2010] NSWSC 849.
278 ibid at [31].
279 NSW DVDRT, *Annual Report*, n 44, p 6.
280 *R v Maglovski (No 2)* [2013] NSWSC 16 at [91]. A subsequent severity appeal to the NSWCCA was dismissed: *Maglovski v R* [2014] NSWCCA 238.
281 *R v Maglovski (No 2)*, ibid at [81]. See also **Provocation — s 21A(3)(c)** at pp 32–33.
282 (unrep, 11/12/1995, NSWCCA).

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> for the purpose of general deterrence, it be made perfectly clear that such an approach will not be tolerated in this civilised society.[283]

In *Mencarious v R*,[284] the sentencing judge found that the offender did not regard his marriage as a partnership but saw his wife as a subordinate who was subject to his dictates.[285] The NSWCCA found that a significant part of the offender's motivation in murdering his wife "was his attitude to the status of his wife as opposed to his own, a view which the court sees all too frequently in cases of so called domestic violence" and that this rendered general deterrence "of a particular point" and the crime extremely serious.[286]

In *R v Stephenson*,[287] the offender caused the victim's death by punching her in the head during an argument. Although the conduct was held to be "entirely out of character",[288] the fact that the manslaughter had occurred in a domestic context and required general deterrence was acknowledged.[289] The sentencing judge held:

> However, a number of the factors in the cases examined by Johnson J [in *R v Hamid*] are not present in this case. Unlike so many violent crimes committed in the domestic context, this offence was not part of a pattern of physical abuse by a man who dominated his weaker partner, born of a sense of entitlement to treat her in that way.[290]

Challenges between cultural equality and gender equality

Intimate partner homicide may also present courts with the challenge of balancing objectives of cultural equality and diversity against the protection of women from gender based violence.[291] An exceptional example of this challenge arises in the context of honour killings. In *Iskandar v R*,[292] the NSWCCA endorsed the sentencing judge's statement that:

> No society or culture that regards itself as civilised can tolerate to any extent, or make any allowance for, the killing of another person for such an amorphous concept as honour … the whole basis and origin of honour killings is the notion that a woman is the chattel or possession of a man … Such a notion has no place in this country.[293]

Similarly, in *R v Maglovski (No 2)*,[294] it was held that even if it had been established that the offender had a cultural understanding of wife killing as a form of ritual cleansing "it would be highly unlikely to assist any offender in the assessment of the appropriate sentence in this country for an offence of murder". Such an understanding, if present at the time of the offence, would suggest that more weight would need to be given to both general and specific deterrence.[295]

Child victims

The abhorrence with which society views violence against children and the need for general deterrence and denunciation has been discussed above.[296] The trust reposed in a parent by a child is of the utmost importance.[297] In *R v Fraser*,[298] the NSWCCA found there was a heightened need for denunciation and general deterrence given the offender's anger directed towards his wife played a significant role in determining to kill his three children.[299] The court endorsed[300] the following

283 These remarks were applied in *R v Macadam-Kellie* [2001] NSWCCA 170 at [41] and *R v Elphick* [2000] NSWSC 977 at [14].
284 [2014] NSWCCA 104.
285 ibid at [7].
286 ibid at [23].
287 [2007] NSWSC 672. A severity appeal to the NSWCCA was dismissed: *Stephenson v R* [2008] NSWCCA 266.
288 [2007] NSWSC 672 at [15]. The agreed facts asserted that the relationship did not involve prior acts of violence but was volatile in the sense it was characterised by jealousy and an "obsessive quality": at [6].
289 Similar observations were made in *R v Meyn (No 6)* [2013] NSWSC 243 at [73]: "considerations of general and specific deterrence are especially significant in cases involving extreme levels of domestic violence, even if they are not premeditated".
290 *R v Stephenson* [2007] NSWSC 672 at [17].
291 JJ Spigelman, "Violence against women: the dimensions of fear and culture" (2010) 84 *ALJ* 372 at 382.
292 [2013] NSWCCA 235.
293 *Iskandar v R*, ibid at [17]. See also [31]. The offender had entered into a joint criminal enterprise with his father to kill the victim who was having an affair with the offender's mother.
294 [2013] NSWSC 16.
295 ibid at [73].
296 See **Overarching sentencing principles** at pp 9–10 ("Domestic violence involving children").
297 *R v Abrahams* [2013] NSWSC 952 at [62] applying *R v Ha* [2008] NSWSC 1368 at [42].
298 [2005] NSWCCA 77.
299 ibid at [42]. The offender administered sleeping tablets to the children (aged 4, 5 and 7 years) and drowned them in the bath, before setting a "ghastly" scene with the deliberate intention that his wife would be the one to discover it: at [17]–[18]. See also *R v Farquharson* [2009] VSC 469 at [5].
300 *R v Fraser*, ibid at [42].

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remarks of Lander J in the South Australian case of *R v Hull*:[301]

> This is a case where aspects of general deterrence are important. Many persons become involved in marital disputes and many of those disputes often become heated and some unfortunately become violent. Too often, sadly, children become pawns in those marital disputes. That is bad enough but those who do become involved in marital disputes must clearly understand that they cannot visit violence upon their children for any reason whatsoever, but in particular for the purpose of upsetting or punishing their spouse. Such action, it should be understood, will attract very severe punishment. The community ought to be able to expect that the courts will be quick to protect the defenceless, particularly children.

Given the protean nature of manslaughter[302] and the fact that child killing by a parent or carer does not occur frequently, it is "notoriously difficult"[303] to create or deduce a sentencing pattern from past cases.[304]

There have been some recent cases of manslaughter by gross criminal negligence where a parent or guardian fails to obtain medical assistance for a child following the infliction of injuries.[305] In *R v KJ*,[306] a 7-year-old child was the victim of ongoing neglect, physical and emotional abuse, primarily instigated by his mother's partner. The offender (the victim's mother) left the victim alone and unconscious for over 24 hours after the infliction of the ultimately fatal assault on him by her partner. The sentencing judge remarked "it seems absurd that there could ever be a need to discourage mothers, or parents more broadly, from killing their young children … however, the issue of importance in this particular case is more acutely concerned with deterring inaction or procrastination when action is called for, especially when timidity or fear may be lurking".[307]

Manslaughter by unlawful and dangerous act on the other hand will commonly involve the adult treating the child in a violent manner with ultimately fatal consequences.[308] In *R v Sutton*,[309] Adams J stated that although an offender may not intend or foresee serious injury as a result in such a case, general deterrence remained relevant "since what must be brought into clear relief is the necessity to avoid violent dealing with children, given their fragility and the potential for catastrophic consequences".[310]

Homicides committed by domestic violence victims

The court may be faced with a difficult sentencing exercise in some instances of intimate partner homicide where the offender has been the victim of domestic violence throughout the relationship and takes the life of the perpetrator of that violence. Not even extreme domestic discord can excuse the taking of a human life.[311] In *Morabito v R*,[312] the NSWCCA emphasised that "no matter what the circumstances a victim of domestic mistreatment is not entitled to take the law into his or her own hands".[313] It is only in the most exceptional cases involving a history of domestic violence perpetrated by the deceased that a non-custodial sentence may be appropriate.[314]

301 [1997] SASC 6087.
302 *R v Forbes* (2005) 160 A Crim R 1 at [133]–[134]; *Nguyen v The Queen* (2016) 90 ALJR 595 at [34].
303 *R v Green* [1999] NSWCCA 97 at [24].
304 *R v Hoerler* (2004) 147 A Crim R 520 at [41] applied in *R v Forrest* [2013] NSWSC 377 at [35] and *BW v R* (2011) 218 A Crim R 10 at [66].
305 See, for example *BW v R* (2011) 218 A Crim R 10; *R v Wilkinson* [1999] NSWCCA 248; *R v O'Brien* [2003] NSWCCA 121; *R v Eriksson* [2001] NSWSC 781; *R v PFC* [2010] NSWSC 834.
306 [2015] NSWSC 767.
307 ibid at [71].
308 See, for example *R v Hoerler* (2004) 147 A Crim R 520; *R v Forrest* [2013] NSWSC 377; *R v LC* [2010] NSWSC 815.
309 [2010] NSWSC 1273.
310 ibid at [44].
311 *R v Melrose* [2001] NSWSC 847 at [27].
312 (1992) 62 A Crim R 82.
313 ibid at 6.
314 *R v Bogunovich* (1985) 16 A Crim R 456; *R v Roberts* (unrep, 31/8/89, NSWSC); *R v Alexander* (1994) 78 A Crim R 141; *R v Kennedy* [2000] NSWSC 109 at [56]. For example, in *R v Kennedy*, sentence was deferred upon the offender entering into recognisance to be of good behaviour for four years. The relationship was described at [5]: "the deceased punched and kicked the prisoner, pushed her down stairs, threatened to kill her, flogged her with a hose and a tyre inner tube and inflicted all manner of cruelty upon her. Her life was not her own. He frequently punished her for doing things without his permission. He punished her for talking to another man. He would not let her stay away from the house. She could go nowhere unless he approved".

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In *R v Silva*,[315] when sentencing an offender for the manslaughter of her abusive partner, Hoeben CJ at CL emphasised the need for the court to have regard to the sanctity of human life and the purposes of sentencing under s 3A of the CSP Act in particular denunciation.[316] However, his Honour concluded that there were exceptional circumstances in that case and a suspended sentence was imposed.[317]

Prior record

History of prior offences

Domestic violence offenders often have a prior history of violent offences. Section 21A(2)(d) of the CSP Act provides that an offender's record of previous convictions (particularly if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences)[318] can be taken into account at sentence as an aggravating factor.[319] The common law principles relating to the use of prior record, set out in the five judge bench decision of *R v McNaughton*,[320] remain applicable.[321]

Notwithstanding the terms of s 21A(2)(d), prior record is not an objective circumstance of the offence.[322] Generally, an offender's criminal history may be relevant in determining an offender's claim for leniency in the sentence[323] or to show whether the instant offence is an uncharacteristic aberration or the offender has manifested a continuing attitude of disobedience to the law.[324] In *Veen v The Queen (No 2)*,[325] the High Court held that a sentencing judge is entitled to have regard to an offender's history of criminal offending so as to give more weight to retribution, personal deterrence and the protection of the community than would be the case if such a record did not exist.[326] This principle was applied in *Jeffries v R*,[327] where the court held that the offender's "recidivist conduct demonstrated a propensity to act violently towards his partners, irrespective of the existence of legal orders intended to control his conduct and protect his partners".[328]

Further, it is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, shows their dangerous propensity or indicates a need to impose condign punishment to deter both them and others from committing further offences of a like kind.[329] In *R v Hamid*,[330] the court applied *R v McNaughton*[331] in a domestic violence context and said:

> The principle of proportionality requires the upper boundary of a proportionate sentence to be set by the objective circumstances of the offence, which circumstances do not encompass prior convictions … However, the Respondent's prior convictions are pertinent to an assessment as to where, within the boundary set by the objective circumstances, a sentence should lie by reference to his attitude

315 [2015] NSWSC 148.
316 ibid at [62]. The manslaughter was by way of excessive self-defence.
317 ibid at [63].
318 The words in parenthesis were inserted into s 21A(2)(d) by the *Crimes (Sentencing Procedure) Amendment Act* 2007 (Sch 1[2]), which commenced on 1 January 2008.
319 Under s 21A(6) of the CSP Act, *serious personal violence offence* is defined as a personal violence offence within the meaning of the CDPV Act (see s 4 for the definition of *personal violence offence*) punishable by imprisonment for life or a term of 5 years imprisonment or more. The definition in the CSP Act excludes some offences commonly committed in a domestic violence context such as common assault, which under s 61 of the *Crimes Act* 1900 has a maximum penalty of 2 years.
320 (2006) 66 NSWLR 566.
321 CSP Act, s 21A(4); *R v Wickham* [2004] NSWCCA 193 at [24]; *Muldrock v The Queen* (2011) 244 CLR 120 at [18].
322 *R v McNaughton* (2006) 66 NSWLR 566 at [25].
323 *Shaw v R* [2008] NSWCCA 58 at [21]; *Brown v R* [2014] NSWCCA 215 at [59]; *Veen v The Queen (No 2)* (1988) 164 CLR 465 at [14].
324 *R v Hibberd* (2009) 194 A Crim R 1 at [67], where the court said that the offender's prior criminal history of offences involving violence and breaches of ADVOs demonstrated "a continuing attitude of disobedience to the law". Similarly in *R v Mahon* [2015] NSWSC 25, the sentencing judge took into account the offender's prior history of domestic violence offences as an aggravating factor under s 21A(2)(d) in determining the appropriate sentence for the murder of the offender's de facto partner but emphasised that in doing so the offender was not being punished again for the criminality involved in those offences: at [74]. See also *Brown v R* [2014] NSWCCA 215 at [58]–[59]; [61] and *Aslett v R* [2006] NSWCCA 360 at [24].
325 (1988) 164 CLR 465.
326 ibid at [14]; *R v McNaughton* (2006) 66 NSWLR 566 at [15]–[35]; *MAK v R* (2006) A Crim R 159 at [51]; *R v Hamid* (2006) 164 A Crim R 179 at [86].
327 (2008) A Crim R 500.
328 ibid at [92], [93], applying *R v McNaughton* (2006) 66 NSWLR 566 at [26].
329 *Veen v The Queen (No 2)* (1988) 164 CLR 465 at [14]; cited in *Riggio v R* [2015] NSWCCA 223 at [91].
330 (2006) 164 A Crim R 179.
331 (2006) 66 NSWLR 566.

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of disobedience towards the law and increased weight to be given to retribution, personal deterrence and the protection of society.[332]

In *Clinton v R*,[333] the 18-year-old offender was convicted and sentenced for a number of domestic violence offences committed against his ex-partner.[334] The sentencing judge found that concerns about rehabilitation were tempered by aspects of the offender's prior history of domestic violence offences.[335] The offender submitted that his youth and the fact that one of the AVO contravention offences was related to the instant offences could not properly be regarded as showing a continuing disobedience to the law requiring an emphasis on specific deterrence. The submission was rejected because it misapprehended the "seriousness of domestic violence and the difficulty in stopping it". The offender was "exactly the kind of offender who needed to have the seriousness of his repeated offending brought home to him".[336]

A criminal record which does not involve actual violence may also be taken into account when considering whether leniency will be afforded to a domestic violence offender, where the record provides evidence of a "propensity to harassment in domestic situations" and a "failure to manage anger in the past".[337]

In many instances of domestic violence, a guilty plea to an offence charged is representative of broader criminality, including discreditable and uncharged conduct.[338] In determining the appropriate sentence, the court can have regard to the uncharged acts (as set out by the prosecution) but only for the purpose of rebutting an assertion by the offender that the offence was an isolated incident.[339] In *Douglas v R*,[340] the court held that it was open to the sentencing judge to refer to charges for which the offender was not convicted and conclude that the offences upon which he was convicted were not isolated instances in the relationship.[341]

The presence of a criminal record for a domestic violence offence may also impact on the type of penalty that may be imposed. See **Limits on the imposition of certain penalty options** at pp 37–38.

Absence of prior record

Just as the presence of a prior record can be taken into account as an aggravating factor under s 21A(2)(d) of the CSP Act, the absence of a criminal record can be a mitigating factor at sentence under s 21A(3)(e).[342] At common law, offenders without prior convictions may generally expect to be treated more leniently than those with previous convictions.[343] This principle acknowledges the fact that a first-time offender's lapse may be treated as exceptional, atypical and out of character.[344] The extent of leniency afforded to a first-time offender will depend upon the circumstances of the offence and other relevant features of the case.[345] In *R v Serutawake*,[346] the absence of prior record was taken into account as a mitigating factor where the offender had murdered his wife by repeatedly

332 (2006) 164 A Crim R 179 at [145].
333 [2014] NSWCCA 320.
334 ibid. The offences included intimidation, contravening an AVO, assault occasioning actual bodily harm, using an offensive weapon (a knife) with intent to intimidate and a property damage offence.
335 ibid. The offender had committed two common assaults, stalking offences and contravened an ADVO against the same victim before he was 17: at [33]. He was subject to an AVO and a good behaviour bond at the time of the offences being dealt with by the court: at [36].
336 ibid at [38].
337 *Shaw v R* [2008] NSWCCA 58 at [21].
338 ALRC and NSWLRC, n 7, at [13.154].
339 *R v EMC* (unrep, 21/11/96, NSWCCA) per Gleeson CJ, James J agreeing.
340 [2005] NSWCCA 419.
341 ibid at [149].
342 Section 21A(3)(e) of the CSP Act and the common law principles do not apply where the special rule for child sexual assault offences in s 21A(5A) is engaged. Section 21A(5A) provides that in determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence.
343 *Weininger v The Queen* (2003) 212 CLR 629 at [58]. The common law is preserved in s 21A(4): see *Muldrock v The Queen* (2011) 244 CLR 120 at [18].
344 *Weininger v The Queen*, ibid.
345 *Hammond v R* [2015] NSWCCA 89 at [30]. In *R v Walkington* [2003] NSWCCA 285, it was held that: "The circumstances referred to in s 21A not only require the finding of particular facts [the absence of record] but the characterisation of those facts in the light of the other circumstances to be found as important for the purposes of sentencing. Thus whether the particular matter does meet the particular criterion referred to in the section will be a matter for the judgment of the individual trial judge": at [28].
346 [2014] NSWSC 1762.

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stabbing her with a knife.[347] However, the sentencing judge also said general deterrence was a significant factor because: "Far too many killings occur in a domestic setting such as this".[348]

However, in some circumstances, the gravity of the offence may be so great that a lack of prior convictions will be given little or no weight. In *R v Marsh*,[349] the sentencing judge imposed a life sentence for a case that fell within the worst category of murder. In sentencing the offender, the judge found that his lack of prior convictions and previous good character were "completely overwhelmed by the objective seriousness of his offending".[350] Similarly in *Ryan v R*,[351] the court held that in the circumstances of that case the "absence of criminal history does not necessarily bespeak prospects of rehabilitation. That [the offender] could even contemplate a crime of the magnitude of the murder she organised suggests an absence of moral character".[352]

An absence of a criminal record will also have less significance where the offender is being sentenced for multiple offences.[353] Similarly, where the offence continues over an extended period with the offender avoiding conviction[354] or involves deliberate planning,[355] the lack of a prior record will be given less weight.

Statutory aggravating and mitigating factors

Section 21A(1) of the CSP Act provides that the aggravating and mitigating factors referred to in ss 21A(2) and 21A(3) are "in addition to" any other matters required or permitted to be taken into account by the court under any Act or rule of law. A court is required to take into account factors listed under ss 21A(2) and (3) which are relevant and known to the court in determining the appropriate sentence for an offence.[356] However, the fact that any such factor is relevant and known does not require the court to increase or reduce the sentence for the offence.[357]

Under s 21A(1)(c), the court is permitted to take into account "any other objective or subjective factor that affects the relative seriousness of the offence". However, the court is prohibited under s 21A(4) from having regard "to any such aggravating or mitigating factor in sentencing if it would be contrary to any Act or rule of law to do so". Section 21A does not purport to codify the law[358] but "preserves the entire body of judicially developed sentencing principles" unless the common law is expressly ousted by Parliament.[359]

In *Weininger v The Queen*,[360] the plurality said that it is to invite error to present each factor for a sentencer as a choice between extremes, one classified as aggravating and the other as mitigating.[361] The absence of a factor which would elevate the seriousness of offending in a particular case is not a matter of mitigation.[362] However, s 21A contains a number of aggravating/mitigating binary outcomes for various factors which have been criticised by the courts.[363] For example, the circumstance that the injury, emotional harm, loss or damage caused by the offence was substantial is an aggravating factor under s 21A(2)(g), while the circumstance that the injury, emotional harm, loss or damage caused by the offence was not substantial is a mitigating factor under s 21A(3)(a).

347 ibid at [21].
348 ibid at [22].
349 [2012] NSWSC 208 at [48].
350 ibid; *Marsh v R* [2015] NSWCCA 154 at [192]. The life sentence imposed by the sentencing judge was confirmed by the NSWCCA at [201].
351 [2013] NSWCCA 175.
352 ibid at [76].
353 *R v Houlton* (2000) 115 A Crim R 104 at [29].
354 *R v Derbas* [2004] NSWCCA 174 at [25].
355 *Ha v R* [2008] NSWCCA 141 at [43].
356 CSP Act, s 21A(1).
357 CSP Act, s 21A(5).
358 *Porter v R* [2008] NSWCCA 145 at [87].
359 *Muldrock v The Queen* (2011) 244 CLR 120 at [18]. See s 21A(5A) (special rules for child sexual offences) for an example of where the common law in relation to good character is ousted.
360 (2003) 212 CLR 629.
361 ibid at [22].
362 *Saddler v R* (2009) 194 A Crim R 452 at [3]; *R v Woods* (2009) 195 A Crim R 173 at [52]–[53].
363 *Ha v R* [2008] NSWCCA 141 at [4].

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The aggravating and mitigating factors discussed below are not an exhaustive list but a selection of those that are most commonly applicable to offences committed in a domestic violence context.

Aggravating factors

Care must be taken in the application of s 21A(2) to avoid having additional regard to any aggravating factor in sentencing if it is an element of the offence. In addition, an aggravating factor must not be taken into account where it would be expected to result from the commission of the offence, or if doing so would breach the principle in *The Queen v De Simoni*.[364]

Offence committed in the presence of a child — s 21A(2)(ea)

The commission of an offence in the presence of a child under 18 years of age is an aggravating factor under s 21A(2)(ea) of the CSP Act. The provision recognises the deleterious effect that the commission of a crime, particularly one of violence, might have on a child's emotional well-being or moral values.[365] It is especially aggravating where the offender is a parent of the child,[366] as is likely to occur in circumstances of domestic violence.

To establish the aggravating factor there must be evidence that the child was actually witness to the offence or its immediate aftermath.[367] In *McLaughlin v R*,[368] the sentencing judge erred by finding that the "generalised" presence of the child, who was sleeping in the same room at the time of the assault, was sufficient to allow the aggravating feature to be taken into account.[369] In contrast, the sentencing judge in *R v Eckermann*[370] erred by overlooking the presence of the children as an aggravating factor in circumstances where the offender broke into his former partner's home and assaulted her, waking her three children who were terrified and yelled at the offender to stop.[371]

Offence committed in the home of the victim — s 21A(2)(eb)

Section 21A(2)(eb) of the CSP Act provides that an aggravating factor on sentence includes where "the offence was committed in the home of the victim or any other person". Domestic violence offences are often committed in the home where both the victim and the offender reside together. The interaction between s 21A(2)(eb) and the common law has been a vexed question. At common law, the commission of an offence in the victim's home can constitute an aggravating factor only when the offender is an intruder.[372] In *R v Comert*, Hidden and Hislop JJ stated "we are unable to see how a sexual assault on a woman by her husband is rendered more serious because it was perpetrated in the matrimonial home".[373] When the statutory aggravating factor under s 21A(2)(eb) commenced,[374] numerous authorities held the provision was confined by the common law position on the subject.[375]

However, in *Melbom v R*,[376] RA Hulme J acknowledged that "the plain words of s 21A(2)(eb) do not support the limitation that this Court has placed on their application" and that "it was never intended by Parliament that there should be the constraint upon their application that this Court has imposed".[377] Simpson J (Price J agreeing) shared RA Hulme J's reservations, stating that "it is, perhaps, time for re-examination by this Court

364 (1981) 147 CLR 383 at 389.
365 *Gore v R* (2010) 208 A Crim R 353 at [104].
366 ibid.
367 *R v Seymour* [2012] NSWSC 1010 at [43]–[44]. The judge declined to find that the aggravating factor was established as the child was asleep at all times.
368 [2013] NSWCCA 152.
369 ibid at [31].
370 [2013] NSWCCA 188.
371 ibid at [42], [43].
372 *R v Comert* [2004] NSWCCA 125 at [29]; *Ingham v R* [2011] NSWCCA 88 at [112].
373 *R v Comert*, ibid.
374 Section 21A(2)(eb) was inserted by Sch 1[3] of the *Crimes (Sentencing Procedure) Amendment Act* 2007, which commenced on 1 January 2008.
375 *EK v R* (2010) 79 NSWLR 740 at [79]; *Ingham v R* [2011] NSWCCA 88 at [112]; *BIP v R* [2011] NSWCCA 224 at [60]–[61]; *DS v R* (2012) 221 A Crim R 235 at [145]; *Essex v R* [2013] NSWCCA 11 at [72]–[73]; *Pasoski v R* [2014] NSWCCA 309 at [53]–[54].
376 [2013] NSWCCA 210.
377 ibid at [44], referring to Second Reading Speech, Crimes (Sentencing Procedure) Amendment Bill 2007, NSW, Legislative Council, *Debates*, 17 October 2007, p 2669, where it was noted that:

> The Government takes the position that any offence committed in the home of the victim, *even if it is also the home of the accused*, or in the home of another person, violates that person's reasonable expectation of safety and security. [Emphasis added.]

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of those previous decisions".[378] Subsequently in *Aktar v R*,[379] the issue was raised again but in the absence of argument from the parties on this issue the court declined to comment further.[380]

Although the High Court made passing reference to s 21A in *Muldrock v The Queen*[381] (the court observed that common law sentencing principles are law for the purposes of s 21A(4))[382] it has not yet dealt with the issue of the interaction between the common law and s 21A as a ground of appeal.

There is less difficulty in the application of s 21A(2)(eb) in circumstances where the offender and the victim are estranged. In *Monteiro v R*,[383] the victim and the offender had been living together but ended the relationship prior to the offender assaulting the victim. In that case, the premises in which the offences were committed were properly regarded as the home of the victim but not the offender, as the offender had moved out and attended the premises only to return his keys to the victim.[384] Likewise, the provision has been applied where an offender has broken into the home of a former partner.[385]

The injury, emotional harm, loss or damage caused by the offence was substantial — s 21A(2)(g)

Section 21A(2)(g) of the CSP Act provides that it is an aggravating feature if the injury, emotional harm, loss or damage caused by the offence was substantial. The provision is not limited to the identified harm to the victim but can potentially extend to the victim's spouse and dependants.[386]

A court cannot take into account harm that is an element of the offence[387] or that would effectively punish the offender for a more serious offence than that charged.[388]

Section 21A(2)(g) was applied in *Betts v R*[389] where the charge was of wounding with intent to murder, due to the victim's extensive injuries (including 20 stab wounds to the back, two collapsed/punctured lungs and a fractured spine) which clearly exceeded the elements of the offence charged.[390]

For the aggravating factor to be established on the basis of substantial emotional harm, there must be evidence that a victim had suffered "an emotional response significantly more deleterious than that which any ordinary person would have when subjected to" the offending.[391] The provision does not extend to harm which was not expected or could not reasonably have been foreseen to result from the commission of the crime.[392]

Sometimes a VIS is the primary evidence directed towards establishing this factor. It requires careful consideration in the circumstances of each case. The case for accepting a VIS as evidence of substantial harm is strengthened where no objection is taken to its contents, no question raised as to the weight to be attributed to it and no attempt made to limit its use.[393] Caution must be exercised where any of the following difficulties arise: the facts to which the VIS attests are in question; the victim's credibility is in question; the harm asserted goes well beyond that which may be expected; or the contents of the statement are the only evidence of harm.[394]

378 *Melbom v R* [2013] NSWCCA 210 at [2], [3].
379 [2015] NSWCCA 123.
380 ibid. Wilson J stated at [64] that although "this is not an appropriate occasion on which to make further comment … I respectfully agree with the comments of RA Hulme J in *Melbom*"; Hoeben CJ at CL agreeing at [1]; RA Hulme J agreeing at [2]. The evidence before the court in that case clearly established the aggravating feature on either interpretation of s 21A(2)(eb): at [67].
381 (2011) 244 CLR 120.
382 ibid at [18].
383 [2014] NSWCCA 277.
384 ibid at [94].
385 See *Smith v R* [2013] NSWCCA 209 at [44]–[47]; *Palijan v R* [2010] NSWCCA 142 at [21]–[22]; and, **Break and enter offences** at pp 17–18.
386 *Aslett v R* [2006] NSWCCA 360. The court endorsed the observation of the sentencing judge that the loss of a spouse and father can cause considerable emotional and, where the victim is the bread winner of the family, financial harm to any dependent family: at [37].
387 CSP Act, s 21A(2).
388 Applying the principle in *The Queen v De Simoni* (1981) 147 CLR 383 at 389.
389 [2015] NSWCCA 39.
390 ibid at [17], [26], [27].
391 *R v Youkhana* [2004] NSWCCA 412 at [26].
392 *R v Wickham* [2004] NSWCCA 193 at [25]; *Josefski v R* (2010) 217 A Crim R 183 at [38]–[39].
393 *R v Tuala* [2015] NSWCCA 8 at [78].
394 ibid at [77], [80]–[81]. Further, the court can only have regard to the consequences of an offence that were intended or could reasonably have been foreseen: *Josefski v R* (2010) 217 A Crim R 183 at [3]–[4], [38]–[39]. See also H Donnelly, "Assessing harm to the victim in sentencing proceedings" (2012) 24(6) *JOB* 45.

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Offence committed in breach of an ADVO or while the offender was on conditional liberty — s 21A(2)(j)

It is an aggravating feature under s 21A(2)(j) of the CSP Act if an offence "was committed while the offender was on conditional liberty in relation to an offence or alleged offence". It is also a matter of serious aggravation when a violent offence is committed by an offender in breach of an ADVO.[395] There is little distinction for the purposes of s 21A(2)(j) between a breach of bond, suspended sentence or parole and a breach of an ADVO.[396] ADVOs are made with the intention of regulating the conduct of persons who pose a risk to others. If they are ignored, the court's authority is undermined and the rule of law is compromised.[397]

In *Browning v R*,[398] when sentencing the offender for throwing an explosive substance on his wife with intent to burn,[399] Johnson J stated:

> Where a court has made an apprehended domestic violence order to protect a person, and then further orders are made by way of conditional liberty for criminal offences arising from breaches of that order, the commission of another offence, in breach of that conditional liberty, will constitute significant aggravating circumstances: s 21A(2)(j) *Crimes (Sentencing Procedure) Act* 1999. This is especially so where the offence against the protected person is of the very grave character of the s 47 offence in this case, with the offence being committed so soon after the applicant had been given the benefit of conditional liberty by order of the District Court.[400]

Similarly in *Jeffries v R*,[401] it was held to be a "significant aggravating factor"[402] that the offender had committed violent offences against his partner and child in "flagrant" breach of both bail (related to a violent offence against his partner) and an AVO intended to control his conduct towards his partner.[403]

The court stated in *McLaughlin v R*[404] that "if an offender sees fit repeatedly to visit violence upon a woman in breach of a bond and an apprehended violence order imposed months before with regard to the same behaviour and the same victim, he should expect to be imprisoned, and not for an insubstantial period".[405]

Abuse of a position of trust or authority — s 21A(2)(k)

It is an aggravating factor under s 21A(2)(k) of the CSP Act if "the offender abused a position of trust or authority in relation to the victim". The introduction of this statutory aggravating factor was not intended to extend the concept of breach of trust beyond the common law position.[406] There must have existed, at the time of the offending, a particular relationship between the offender and the victim that transcended the usual duty of care arising between persons in the community in their everyday contact or their business and social dealings.[407]

In *R v Hamid*,[408] the court recognised that the domestic violence offences committed by the offender against three separate intimate partners over a decade each involved a violation of trust.[409] However, it is unclear whether the existence of an intimate or familial relationship is sufficient of itself to establish s 21A(2)(k). In some instances, the aggravating factor has been applied due to the relationship between the offender and victim,[410]

395 *R v Archer* [2015] NSWSC 1487 at [111]; *Frigiani v R* [2007] NSWCCA 81 at [24].
396 *Sivell v R* [2009] NSWCCA 286 at [29].
397 *R v Archer* [2015] NSWSC 1487 at [111], [113].
398 [2015] NSWCCA 147.
399 *Crimes Act* 1900, s 47.
400 *Browning v R* [2015] NSWCCA 147 at [8], Gleeson JA and Garling J agreeing at [1] and [156] respectively.
401 (2008) 185 A Crim R 500.
402 ibid at [91].
403 ibid. See also *R v Burton* [2008] NSWCCA 128 at [72].
404 [2013] NSWCCA 152.
405 ibid at [49].
406 *Suleman v R* [2009] NSWCCA 70 at [26].
407 ibid at [22].
408 (2006) 164 A Crim R 179.
409 ibid at [143].
410 See, for example, *R v Naden* [2013] NSWSC 759 at [28] where s 21A(2)(k) was applied due to the familial relationship (of cousins) between the offender and the murder victim, as this was the reason the victim felt confident going out on her own with the offender at night. In *Shaw v R* [2008] NSWCCA 58, the court appeared to accept the Crown's submission that s 21A(2)(k) was established due to the status of the victim as the offender's former partner, but stated that "these matters do not in my view elevate the applicant's offending to a level which is objectively high": at [36].

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while in other instances the mere existence of a relationship has been insufficient.[411] Nonetheless, the relationship between the offender and the victim may be a factor relevant to the assessment of the relative seriousness of the offence pursuant to s 21A(1)(c).

The relationship between a parent and a child has, however, been explicitly recognised as a special relationship coming within the purview of the section.[412] It has been described as "the most important position of trust of all"[413] and "of the highest and utmost importance".[414]

The aggravating factor under s 21A(2)(k) may also be present when sexual offences are committed against child victims in a domestic context. However, care must be taken when the fact that the victim was under the authority of the offender is an element of the offence or the particularised circumstance of aggravation. In *MRW v R*,[415] the court held that abuse of trust and abuse of authority, both of which are referred to within s 21A(2)(k), are distinct concepts although they often arise from the same facts.[416] As only abuse of authority was an element of the offence charged in that case,[417] it was open to the sentencing judge to (cautiously) take the former into account on sentencing as an aggravating feature.[418]

However, in *Henderson v R*,[419] although the offender had taken advantage of the familial relationship and his age to sexually assault his niece, nephew and cousin, the court held that the factual circumstances were not within the purview of s 21A(2)(k) because at no stage was the offender responsible for the supervision of his relatives.[420]

Vulnerable victim — s 21A(2)(l)

Section 21A(2)(l) provides that it is an aggravating factor to be taken into account where "the victim was vulnerable, for example, because the victim was very young or very old or had a disability, or because of the victim's occupation".

This provision is "concerned with the weakness of a particular class of victim and not with the threat posed by a particular class of offender".[421] In *R v Williams*,[422] the sentencing judge erred by finding the victim was vulnerable upon the basis that the offender was a powerful man with violent tendencies, whereas the victim did not possess those characteristics.[423] Section 21A(2)(l) is not directed to vulnerability in a generalised sense; it is "vulnerability of a particular kind that attracts its operation".[424] The sentencing judge in *Betts v R*[425] fell into similar error by finding that s 21A(2)(l) applied because, while the victim was vulnerable in one sense, that vulnerability arose from the particular events of the day rather than the characteristics of any group of which she was a member.[426]

However, the vulnerability of the victim, in the sense considered in *R v Williams*, may still be taken into account as a matter relevant to the assessment of the objective seriousness of a domestic violence offence.[427] This is explicitly supported by the text of s 21A(1)(c) referred to earlier.

411 For example, *R v Bretherton* [2013] NSWSC 1339 at [45]. See also *Thorne v R* [2007] NSWCCA 10 at [84] where the court held the sentencing judge had misrepresented the situation and erred in finding that the offences gave rise to a breach of trust because the victim, the estranged wife of the offender, had provided the offender with a key to the house so that he could care for the children.

412 *Suleman v R* [2009] NSWCCA 70 at [22].

413 *R v Fazah* [2014] NSWSC 231 at [42]; *R v Ha* [2008] NSWSC 1368 at [42].

414 *R v Abrahams* [2013] NSWSC 952 at [62].

415 [2011] NSWCCA 260.

416 ibid at [77].

417 The offence charged was sexual intercourse with a child aged between 10 and 16 years, under authority, contrary to the *Crimes Act* 1900, s 66C(2) as it provided at the time of the offence in July/August 2002: ibid at [1].

418 *MRW v R* [2011] NSWCCA 260 at [77]–[78].

419 [2016] NSWCCA 8.

420 ibid at [54]–[56].

421 *R v Tadrosse* (2005) 65 NSWLR 740 at [26].

422 [2005] NSWCCA 99.

423 ibid at [40]. See also *R v Robinson* [2007] NSWSC 460 at [77], where Hall J stated that: "Whilst in a general sense, the victim was always vulnerable to the offender's intimidation and violence, that is not the vulnerability to which [s 21A(2)(l)] relates".

424 ibid at [41]. See also *R v Doolan* (2006) 160 A Crim R 54 at [26].

425 [2015] NSWCCA 39.

426 ibid at [30].

427 *R v Williams* [2005] NSWCCA 99 at [41]; *R v Archer* [2015] NSWSC 1487 at [107].

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One domestic violence context in which s 21A(2)(l) may be established is for offences involving child victims. That "the victim was very young" is explicitly set out within s 21A(2)(l) and has been held to apply, for example, in *R v Smith*,[428] a case where the offender had maliciously inflicted grievous bodily harm on his six-year-old de facto stepson by scalding his legs with hot water.[429] The aggravating factor may also be present in instances of domestic child sexual offences. In *PWB v R*,[430] Beazley JA (as her Honour then was) observed:

> [The] case law recognises the seriousness of sexual offending against younger persons, including, as a general proposition, that the younger the child, the more defenceless and vulnerable the child will be. The case law, over the last two decades at least, is consistently to the effect that in sexual offence cases, the younger the child, the more serious the criminality.[431]

Planning or premeditation — s 21A(2)(n)

At common law, the degree of planning or premeditation has long been recognised as a factor to be considered in weighing the seriousness of an offence.[432] Although planning is also referred to as an aggravating factor under s 21A(2)(n),[433] the fact an offence was planned does not of itself bring it within that provision; it is only when the particular offence is part of a more extensive criminal undertaking.[434] Similarly, the fact that there are several offences revealing some broad pattern of behaviour does not mean there is relevant "planning" for the purposes of s 21A(2)(n).[435]

Mitigating factors

The injury, emotional harm, loss or damage caused by the offence was not substantial — s 21A(3)(a)

Section 21A(3)(a) of the CSP Act provides that where the injury, emotional harm, loss or damage caused by the offence was not substantial, this may be a mitigating factor at sentence. When considering s 21A(3)(a), the court should not assume there is no lasting impact on a victim unless there is evidence to this effect.[436] The fact there is no substantial loss or damage resulting from the offence may reduce the need for retribution, however, it will not necessarily diminish the offender's criminality and will not impact on the weight to be given to most of the purposes of sentencing.[437]

Offence not part of a planned or organised criminal activity — s 21A(3)(b)

Where an offence is not planned or organised before its commission, this can be taken into account as a mitigating factor under s 21A(3)(b). In *R v Hibberd*,[438] the offender committed a number of sexual and common assaults on his pregnant de facto partner over a period of three days. The sentencing judge found the offences were spontaneous and to that extent a mitigating factor.[439]

Provocation — s 21A(3)(c)

In certain circumstances, when an offence is committed under provocation, this may be taken into account under s 21A(3)(c) to mitigate the seriousness of the offence.[440] The extent to which provocation will constitute a mitigating factor will depend on the relationship between the offender and victim and the circumstances of the particular case.[441] In *Williams v R*,[442] the court held that where

428 [2005] NSWCCA 286.
429 ibid at [49]. See also *R v APM* [2005] NSWCCA 463 at [44], which also involved the malicious infliction of grievous bodily harm, where the victim was a 10 week old baby.
430 (2011) 216 A Crim R 305.
431 ibid at [11].
432 *R v Morabito* (1992) 62 A Crim R 82.
433 "the offence was part of a planned or organised criminal activity".
434 *Williams v R* [2010] NSWCCA 15 at [20], applying *Fahs v R* [2007] NSWCCA 26 at [21].
435 *RL v R* [2015] NSWCCA 106 at [37].
436 *Bichar v R* [2006] NSWCCA 1 at [22]; *R v Solomon* (2005) 153 A Crim R 32.
437 *Ha v R* [2008] NSWCCA 141 at [43].
438 (2009) 194 A Crim R 1.
439 ibid at [44], [67]. The offence was found to be spontaneous in the following domestic violence cases: *Brown v R* [2014] NSWCCA 215 at [46]; *Stephenson v R* [2008] NSWCCA 266 at [6]; *Wilkins v R* [2009] NSWCCA 222 at [36].
440 *Williams v R* [2012] NSWCCA 172 at [42]. However, the absence of provocation is not a factor in aggravation and does not increase the objective seriousness of the offence: at [42]. *Williams v R* was applied in *R v JP* [2015] NSWCCA 267 at [53].
441 *R v Mendez* [2002] NSWCCA 415 at [16].
442 [2012] NSWCCA 172.

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provocation is established as a mitigating factor under s 21A(3)(c), it is a "fundamental quality of the offending" and may reduce the objective seriousness.[443] However, where the offender's conduct is "so far out of any reasonable proportion to the behaviour of the victim" it is unlikely to mitigate the sentence.[444]

Although s 21A(3)(c) permits the court to take into account provocation by the victim, there are very few cases where the provision has been applied in the context of domestic violence. However, in *Pitt v R*,[445] a manslaughter case, the "extreme" provocation of the victim (who resided with the offender) towards the offender was taken into account in mitigation of sentence under s 21A(3)(c).[446] Similarly in *Brown v R*,[447] the sentencing judge took into account, as a mitigating factor, that there was "some" provocation by the victim in circumstances where the offender was convicted of inflicting grievous bodily harm on his ex-partner after she refused to leave his premises. However, there was "nothing that could remotely justify [the] type of drunken violence perpetrated on [the female victim], or the degree of it ..."[448]

Evidence of "relationship tension and general enmity" leading up to a domestic violence offence, while part of the overall circumstances surrounding the offence, "does not constitute evidence of provocation such as to amount to mitigation".[449] It is important that a sentencing judge not enter into a determination of the merits of relationship disputes.[450] Distress at the breakdown of a relationship is no excuse for violence and will not, in most circumstances, establish provocation for the purposes of s 21A(3)(c).[451]

Provocation in the context of the offence of manslaughter is discussed above at pp 21–22.

Good character — s 21A(3)(f)

The fact that an offender is of good character may be taken into account in mitigation of sentence at common law and under s 21A(3)(f) of the CSP Act. The weight to be given to an offender's otherwise good character will vary according to all of the circumstances of the case, including "the character of the offence committed".[452] As the plurality explained in *Weininger v The Queen*:[453]

> Taking all aspects, both positive and negative, of an offender's known character and antecedents into account in sentencing for an offence is not to punish the offender again for those earlier matters; it is to take proper account of matters which are relevant to fixing the sentence under consideration.[454]

Less weight may be attributed to an offender's good character where general deterrence is important, the particular offence before the court is a serious one and there is a pattern of repeat offending over a significant period of time.[455] These factors will frequently apply to offences committed in a domestic violence context. Further, where a person has been convicted of an offence or offences which are shown by the Crown to be "representative", the offender should not be given credit for being of prior good character.[456] In the case of offences committed in a domestic violence context, it should be borne in mind that the offender's good reputation may be held only because the offences are committed in secret,

443 ibid at [42].
444 *R v Mendez* [2002] NSWCCA 415 at [16].
445 [2014] NSWCCA 70.
446 ibid at [57], [65]. The offender and victim had a history of violence which included a violent assault by the victim on the offender and refusal by the victim on several occasions to leave the offender's unit. The offender had sought help from the police in relation to the victim on numerous occasions.
447 [2014] NSWCCA 215.
448 ibid at [11], [46].
449 *Shaw v R* [2008] NSWCCA 58 at [26]. See also *Goundar v R* [2012] NSWCCA 87 at [24]–[27].
450 *R v Kotevski* (unrep, 3/4/98, NSWCCA).
451 *Walker v R* [2006] NSWCCA 347 at [7]; *R v Maglovski (No 2)* [2013] NSWSC 16. In *R v Maglovski (No 2)*, the sentencing judge held the fact the offender's spouse had advised him she wanted to end their relationship did not amount to a mitigating factor under s 21A(3)(c): at [81].
452 *Ryan v The Queen* (2001) 206 CLR 267 at [25], [143]; *R v Gent* (2005) 162 A Crim R 29 at [49]–[54]; *Smith v R* (1982) 7 A Crim R 437 at 442.
453 (2003) 212 CLR 629.
454 ibid at [32].
455 *R v Kennedy* [2000] NSWCCA 527 at [21]–[22].
456 *R v Weininger* (2000) 119 A Crim R 151 at [51]–[56]; *R v JCW* (2000) 112 A Crim R 466; *R v EMC* (unrep, 21/11/96, NSWCCA) per Gleeson CJ.

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behind closed doors.[457] Moreover, in some circumstances good character may be "completely overwhelmed by the objective seriousness of [the] offending".[458]

Statutory exception — child sexual offence — s 21A(5A)

Section 21A(5A) provides that an offender's good character or lack of previous convictions is not to be taken into account as a mitigating factor for a child sexual offence[459] if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence.[460] For s 21A(5A) to apply, the court should make an express statement that it is satisfied that an offender's good character or lack of previous convictions had been of assistance to the offender in the commission of the offence.[461]

Remorse — s 21A(3)(i)

The remorse shown by an offender can be taken into account as a mitigating factor under s 21A(3)(i) of the CSP Act where the offender has provided evidence that he or she has accepted responsibility for his or her actions, and the offender has acknowledged any injury, loss or damage caused by his or her actions or made reparation for such injury, loss or damage (or both).[462] Remorse means regret for the wrongdoing the offender's actions caused and, as a feature of post offence conduct, may be relied upon to mitigate an offender's sentence.[463] Merely being "upset and expressing regret are a long way removed from the acceptance of responsibility to which s 21A(3)(i) is directed".[464]

The question of whether an offender's remorse should be taken into account will depend on the evidence provided by the offender. Although there is no requirement for an offender to give evidence of remorse, where the offender does not enter the witness box, the court may give less weight to the evidence.[465] Even where an offender does give evidence, the sentencing judge is not obliged to accept an offender's assertions of contrition.[466] The strength of the Crown case is also a relevant consideration in evaluating any remorse shown.[467]

Remorse is a major factor in determining whether an offender is unlikely to re-offend (s 21A(3)(g)) or has good prospects of rehabilitation (s 21A(3)(h)) and without true remorse it is difficult for either of these findings to be made.[468] In *Efthimiadis v R*

457 Sentencing Guidelines Council (UK), *Overarching principles: domestic violence*, Definitive Guideline, 2006, at www.sentencingcouncil.org.uk/wp-content/uploads/web_domestic_violence.pdf, pp 5-6, [3.20]–[3.21], accessed 18 March 2016. The guideline states that one of the factors that can allow domestic violence to continue unnoticed for lengthy periods is the ability of the perpetrator to have two personae. It provides that, in respect of an offence committed in a domestic context, an offender's good character in relation to conduct outside the home should generally be of no relevance where there is a proven pattern of domestic violence behaviour. Positive good character will be of greater relevance where the court is satisfied that the offence was an isolated incident.

458 *R v Marsh* [2012] NSWSC 208 at [48]; *Marsh v R* [2015] NSWCCA 154 at [192], [201].

459 *Child sexual offence* is defined in s 21A(6) of the CSP Act.

460 Sections 21A(5A), (5B) and (6) were inserted by Sch 2.4[1] and [2] of the *Crimes Amendment (Sexual Offences) Act* 2008, which commenced on 1 January 2009. The exception in s 21A(5A) applies to the determination of a sentence for an offence whenever committed unless, before the commencement of the amendments on 1 January 2009, a court has convicted the person being sentenced of the offence or accepted a plea of guilty (which has not been withdrawn): CSP Act, Sch 2, Pt 19, cl 59(1). Section 21A(5A) has effect despite any Act or rule of law to the contrary: s 21A(5B). In *R v Stoupe* [2015] NSWCCA 175, the sentencing judge erred by failing to apply s 21A(5A) when sentencing a child care worker who had sexually assaulted a child under his care. However, in *AH v R* [2015] NSWCCA 51, the court held that it was an error to apply s 21A(5A) for offences committed against the offender's de facto partner's daughter.

461 *NLR v R* [2011] NSWCCA 246 at [31].

462 The two conditions applying to the use of remorse under s 21A(3)(i) were introduced by the *Crimes (Sentencing Procedure) Amendment Act* 2007. The Second Reading Speech states that "victims have the right to be kept informed of how the accused will be tried and punished, and to be involved in that process, which includes the right to have validated any claim of remorse": Second Reading Speech, Crimes (Sentencing Procedure) Amendment Bill 2007, NSW, Legislative Council, *Debates*, 17 October 2007, p 2669.

463 *Windle v R* [2011] NSWCCA 277 at [44] citing *Alvares v R* [2011] NSWCCA 33 at [44].

464 *R v A (No 5)* [2015] NSWSC 670 at [89].

465 *Butters v R* [2010] NSWCCA 1 at [17], [18]; *Pfitzner v R* [2010] NSWCCA 314. In *Pfitzner v R*, McClellan CJ at CL (Hislop and Price JJ agreeing) said at [33]: "When interviewed by the police or by a psychiatrist or psychologist it is unlikely that the offender's response will be challenged. It may be otherwise when the offender gives evidence. Furthermore, an issue of remorse may be susceptible to evaluation by consideration of an offender's demeanour, an opportunity which will be denied the sentencing judge unless the offender gives evidence".

466 *R v Stafrace* (1997) 96 A Crim R 452 per Hunt CJ at CL at 454, applied in *R v Nguyen* [2004] NSWCCA 438 at [21].

467 *R v Sutton* [2004] NSWCCA 225 at [12]; *R v Cameron* [2005] NSWCCA 357 at [24], citing *R v Sutton*.

468 *R v MAK* (2006) 167 A Crim R 159 at [41]. See also *Efthimiadis v R (No 2)* [2016] NSWCCA 9 at [88], applying *Ali v R* [2010] NSWCCA 35 at [47]. In *R v Serutawake* [2014] NSWSC 1762, a case where the offender murdered his wife by repeatedly stabbing her, the sentencing judge found the offender's remorse to be "genuine and extreme": at [18], [21].

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(No 2),[469] the offender did not express any remorse for soliciting to murder his ex-partner, notwithstanding the goodwill exhibited by the victim towards him. The court observed that while there can be rehabilitation without confession, evidence of genuine remorse and insight into the offending conduct remain powerful factors in respect of good prospects of rehabilitation and the unlikelihood of re-offending.[470]

In *Shaw v R*,[471] the offender was sentenced for aggravated break, enter and maliciously inflict actual bodily harm committed against his ex-partner. The court held that the offender's genuine display of remorse, as a mitigating factor under s 21A(3)(i), was outweighed by the need in cases involving domestic violence for general and specific deterrence, denunciation of the conduct involved, and protection of the community.[472]

The offender's childhood was marred by deprivation and violence

In many domestic violence cases, the offender has been raised against a background of violence.[473] An upbringing characterised by alcohol abuse and violence "may mitigate the sentence because [the offender's] moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way".[474] Such a background may leave a mark on a person throughout life and compromise the person's capacity to mature and learn from experience. It remains relevant even where the offender has had a long history of offending.[475] The majority in *Bugmy v The Queen* explained:

> An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender.[476]

Victim impact statements (VIS)

Part 3, Division 2 of the CSP Act sets out the statutory scheme for victim impact statements (VIS) which applies to all domestic violence offences dealt with in the Local, District and Supreme Courts.[477] *Victim impact statement* is defined in s 26 of the CSP Act. When sentencing an offender, a court may receive and consider a VIS if it considers it appropriate to do so.[478] There are no explicit statutory or other restrictions on the extent to which a sentencing judge may set out the contents of a VIS. The weight to be given to the statement is a matter for the court.[479] In *R v Thomas*,[480] Basten JA said:

> It is unfortunate that the Act gives no greater guidance as to the appropriate use of such a statement, especially where untested, for the purposes of determining sentence. However, it will often be appropriate to give weight to a victim impact statement where the conduct of the offender is otherwise established beyond reasonable doubt and the statement is restricted to subsequent effects on the victim.[481]

If a VIS is considered by the court in sentencing an offender, care must be taken to refer only to the impact on the victim of the offence before the court.[482]

469 [2016] NSWCCA 9.
470 ibid at [88].
471 [2008] NSWCCA 58.
472 ibid at [24].
473 See for example, in *R v Dalton* [2004] NSWSC 446 where Adams J at [14] commented that: "As so often happens, the victim becomes the perpetrator in a repeated cycle of violence".
474 *Bugmy v The Queen* (2013) 249 CLR 571 at [40]. In *Ingrey v R* [2016] NSWCCA 31 at [34]–[35], the court held that in using the word "may", the plurality in *Bugmy v The Queen* were not saying that a consideration of this factor is optional; it was a recognition that there may be countervailing factors, such as the protection of the community, which might reduce or eliminate its effect.
475 *Bugmy v The Queen*, ibid at [43].
476 ibid at [44].
477 CSP Act, s 27. Section 27 provides that Pt 3, Div 2 applies to all offences involving an act of actual or threatened violence.
478 CSP Act, s 28.
479 *SBF v R* (2009) 198 A Crim R 219 at [88].
480 [2007] NSWCCA 269.
481 ibid at [37], Latham J agreeing at [59].
482 *R v H* [2005] NSWCCA 282 at [56], applying *R v Bakewell* (unrep, 27/6/96, NSWCCA); *R v MA* [2001] NSWCCA 30. In *PWB v R* (2011) 216 A Crim R 305, RS Hulme J, with whom Harrison J agreed, held that the sentencing judge erred in her use of the victim impact statement (VIS) in circumstances where the statement referred to alleged offences other than those charged. It was only the impact of the charged offence that the judge was entitled to take into account: at [52]–[54].

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Details of the offender's conduct contained in a VIS which would denote a more serious offence cannot be taken into account by the sentencing judge, even where no objection is taken to the material, as this would breach the *De Simoni* principle.[483]

In the case of child sexual assault, harm to the victim is assumed and does not need to be proved beyond reasonable doubt.[484] However, where it is asserted that the offender caused injury, loss or damage beyond that ordinarily expected of the offence the additional injury, loss or damage must be proved beyond reasonable doubt.[485]

For a discussion on the use of a VIS in establishing an aggravating factor under s 21A(2)(g) of the CSP Act, see **The injury, emotional harm, loss or damage caused by the offence was substantial — s 21A(2)(g)** at p 29.

If a primary victim dies as a result of an offence, the court may receive, acknowledge and comment on a VIS given by a family member.[486] Section 28(4) of the CSP Act provides:[487]

> A victim impact statement given by a family victim may, on the application of the prosecutor and if the court considers it appropriate to do so, be considered and taken into account by a court in connection with the determination of the punishment for the offence on the basis that the harmful impact of the primary victim's death on the members of the primary victim's immediate family is an aspect of harm done to the community.

The provision reflects the purpose of sentencing outlined in s 3A(g), that is, to recognise the harm done to the victim of the crime and the community. *Family victim* is defined in s 26 as a member of the primary victim's immediate family, where the primary victim has died as a direct result of the offence.[488] The absence of a family member VIS does not give rise to an inference that the offence had little or no impact on the victim's immediate family.[489]

Totality

Domestic violence offences often involve the offender committing multiple offences against the same victim or a number of offences against multiple victims, such as previous partners or children.[490] In such circumstances, the principle of totality requires the court to impose a sentence which appropriately reflects the entirety of the offending conduct. In applying the totality principle, the question for the court is whether the sentence for one offence can comprehend and reflect the criminality for the other offence(s).[491] Where the offences are discrete and independent criminal acts, it is more likely that the sentence for one offence will not comprehend the criminality of the other(s) and there will be a need for a degree of accumulation between the various sentences.[492] The courts have said repeatedly that to ensure public confidence in the administration of justice, it is necessary to impose sentences "which do not suggest that multiple offences will be punished in the same way as one or two offences".[493] However, in determining the extent of concurrency and accumulation the court should avoid a sentence that is "crushing".[494]

Special considerations will be brought into play when issues of accumulation, concurrency and totality arise with respect to crimes of violence, including domestic violence.[495] The number of victims, period of offending, type of offence(s) and the nature of the conduct will be important. Further,

483 *The Queen v De Simoni* (1981) 147 CLR 383 at 389.
484 *DBW v R* [2007] NSWCCA 236 at [39].
485 *R v Youkhana* [2004] NSWCCA 412 at [26]; *R v Tuala* [2015] NSWCCA 8 at [57].
486 CSP Act, s 28(3). *Primary victim* is defined in s 26.
487 The provision was substituted by Sch 1[1] of the *Crimes (Sentencing Procedure) Amendment (Family Member Victim Impact Statement) Act* 2014, which commenced on 1 July 2014. The effect of the substitution was to abolish the prohibition expressed in *R v Previtera* (1997) 94 A Crim R 76 that a VIS by a family member of the deceased, dealing only with the effect of the victim's death on the family, is not relevant to the sentence.
488 *Member of the primary victim's immediate family* is defined in s 26 of the CSP Act.
489 CSP Act, s 29(4).
490 Part 4, Div 2 of the CSP Act sets out the provisions relating to the imposition of concurrent and consecutive sentences of imprisonment.
491 *Cahyadi v R* (2007) 168 A Crim R 41 at [27]; *R v MMK* (2006) 164 A Crim R 481 at [11], [13].
492 *Cahyadi v R*, ibid at [27]; *R v MMK*, ibid at [13]; *R v Gommeson* (2014) 243 A Crim R 534 at [130].
493 *R v Knight* (2005) 155 A Crim R 252 at [112]. See also *R v MAK* (2006) 167 A Crim R 159 at [18] where the court observed that: "Public confidence in the administration of justice requires the Court to avoid any suggestion that what is in effect being offered is some kind of discount for multiple offending".
494 *R v MAK*, ibid at [17]; *Paxton v R* (2011) 219 A Crim R 104 at [215].
495 *R v Gommeson* (2014) 243 A Crim R 534 at [108]–[109].

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when sentencing an offender for multiple domestic violence offences, the nature of the relationship between the offender and the victim will be relevant in determining the extent to which individual sentences should be accumulated.[496]

In *R v Hamid*,[497] the Crown appealed against a sentence imposed for a series of domestic violence offences committed by the offender against different partners over an eight-year period. In finding that the overall sentences failed to reflect the totality of the offences, the court said:

> Where there is a series of offences, some committed on one victim, others committed on another victim, there is a special need to ensure that concurrency of sentence does not gloss over that feature …[498]

Johnson J confirmed those observations in *R v Gommeson*[499] and added that where there are several victims of violent crime, "it is important for the sentences actually imposed to recognise the fact that several individuals have been victimised by the offending conduct".[500] In *Iskov v R*,[501] it was held that even though three offences[502] had been committed against the same victim (the offender's ex-partner) within a period of a few hours, the sentencing judge was required to make each sentence partly cumulative because the criminality in each offence could not be comprehended within the other offences.[503]

In *R v Campbell*,[504] it was an error for the sentencing judge to impose wholly concurrent sentences for a break, enter and commit an intimidation offence and an assault occasioning actual bodily harm offence involving his ex-partner because, while the two offences were committed as part of a single enterprise, the assault was a discrete offence calling for some separate punishment.[505] Similarly, in *R v Hibberd*,[506] the court held that the aggregate sentence imposed on the offender, who had repeatedly assaulted and sexually assaulted his partner, failed to adequately reflect the criminality involved because the offences occurred on different days and involved separate harm and humiliation.[507]

Limits on the imposition of certain penalty options

Home detention

Part 6, Division 2 of the CSP Act sets out the restrictions on the court's power to make home detention orders. Section 76 provides a list of offences for which a home detention order cannot be imposed.[508] In particular, s 76(g) provides that such a sentence cannot be imposed for a domestic violence offence against any person with whom it is likely the offender would reside, or continue or resume a relationship, if such an order were made.

Offenders with a certain criminal history are also ineligible for home detention.[509] For example, an offender is ineligible for home detention if he or she has within the last 5 years been convicted of a domestic violence offence against[510] or been subject to an AVO protecting,[511] a person with whom it is likely the offender would reside, or continue to resume a relationship if a home detention order were made. A home detention order may not be made where an offender has been convicted of a stalking or intimidation offence.[512]

496 *R v Hendricks* [2011] NSWCCA 203 at [86].
497 (2006) 164 A Crim R 179.
498 ibid at [133]. See also *R v KM* [2004] NSWCCA 65 at [56].
499 *R v Gommeson* (2014) 243 A Crim R 534.
500 ibid at [106].
501 [2011] NSWCCA 241.
502 Manslaughter, kidnapping and grievous bodily harm.
503 *Iskov v R* [2011] NSWCCA 241 at [91].
504 [2014] NSWCCA 102.
505 ibid at [41].
506 (2009) 194 A Crim R 1.
507 ibid at [73]. See also *Hiron v R* [2007] NSWCCA 336 at [32].
508 The list under s 76 includes offences of stalking or intimidation contrary to s 13 of the CDPV Act or ss 545AB (rep) or 562AB (rep) of the *Crimes Act* 1900: s 76(f).
509 CSP Act, s 77. For example a home detention order cannot be imposed on an offender who has at any time been previously convicted of a stalking or intimidation offence: s 77(1)(b).
510 CSP Act, s 77(1)(c). *Domestic violence offence* has the same meaning as it has in the CDPV Act (s 75 of the CSP Act).
511 CSP Act, s 77(1)(e).
512 CSP Act, s 77(1)(b).

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Further, a home detention order must not be made if the court considers it likely that the offender will commit any sexual offence or any offence involving violence while the order is in force, even where the offender has no history of committing offences of that nature.[513]

Intensive correction orders (ICOs)

Part 5, Division 2 of the CSP Act sets out sentencing procedures for the imposition of intensive correction orders (ICOs). In determining whether or not to make an ICO, the court is to have regard to the contents of an assessment report on the offender.[514] Under the regulations,[515] an ICO assessment report must take into account a number of specified matters including, relevantly, the likelihood that the offender will commit a domestic violence offence,[516] whether the offender will have suitable residential accommodation for the duration of an ICO,[517] and whether the making of an ICO would place at risk of harm any person who would be living with or in the vicinity of the offender.[518]

These legislative procedures do not prohibit the imposition of an ICO for domestic violence offences per se[519] but ensure the domestic violence nature of the offence is taken into account before an ICO is imposed. For example, in *DPP (NSW) v Vallelonga*,[520] the offender was convicted of seven counts of common assault and one count of assault occasioning actual bodily harm against his wife. An ICO was held to be "far from a soft option" and appropriate given the offender's ongoing rehabilitation, underlying mental health issues, lack of serious prior convictions, and being mindful of the need for denunciation, general and specific deterrence.[521]

In *R v Ball*,[522] the Crown successfully appealed against an ICO imposed for the offence of aggravated detain for advantage[523] committed against his ex-girlfriend. The court held that the sentence did not properly reflect the objective seriousness of the offence or the Form 1 offences, which were significant. Further, an ICO did not "sufficiently address" the issues of specific or general deterrence for such offences and a full-time custodial sentence was required.[524]

Conclusion

Offences committed in a domestic violence context have specific characteristics: the victim is personally targeted by the offender; the offence is usually part of a larger picture of physical and mental violence; the offender exercises power and control over the victim; the offender often thinks the offence is justified; the victim often forgives the offender against their own interest and/or accepts blame; and, there is a continuing threat to the victim's safety even where the victim becomes estranged from the offender. The victims of such violence are often so enveloped by fear that they are incapable of either escaping the violence or reporting it to the authorities.

Domestic violence has proved difficult to eradicate. It is regarded as endemic, problematic and entrenched. In NSW, a number of legislative and policy initiatives have been implemented with the aim of heightening awareness, reducing reoffending and recognising the position of victims of domestic violence. The enactment of the CDPV Act recognised

513 CSP Act, s 78(6).

514 CSP Act, ss 65, 67(2)(a) and 70. Pursuant to s 67(2)(a), in deciding whether or not to make an intensive correction order (ICO), the court is to have regard to, inter alia, an *assessment report*, which is defined in s 65 to mean a report prepared under s 70. Section 70 outlines what matters may be taken into account and provides that the regulations may make provision for or with respect to the conduct of investigations and the preparation of reports (s 70(3)).

515 *Crimes (Sentencing Procedure) Regulation* 2010, cl 14(1).

516 ibid, cl 14(1)(c).

517 ibid, cl 14(1)(d).

518 ibid, cl 14(1)(g).

519 In *Police v Trevail* [2012] NSWLC 1, Henson J, Chief Magistrate, imposed an ICO on the offender despite the fact he was being sentenced for a stalking and intimidation offence perpetrated against his ex-girlfriend and had two prior convictions for breaching an ADVO.

520 [2014] NSWLC 13.

521 ibid at [32], [45], [50].

522 [2013] NSWCCA 126.

523 *Crimes Act* 1900, s 86(2)(b). In *R v Ball*, ibid, the offences of assault occasioning actual bodily harm, use of an offensive weapon (a motor vehicle) with intent to commit an indictable offence, intentionally damaging property, and driving a motor vehicle without consent were taken into account on a Form 1 together with a related summary offence under s 166 of the *Criminal Procedure Act* 1986 of driving in a manner dangerous to another person.

524 *R v Ball*, ibid at [103], [111]–[113], [117], [146].

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the prevalence and insidious nature of domestic violence. It is for the courts to apply the legislative objectives of that Act, other relevant legislative provisions and common law sentencing principles.

Despite the challenges arising from the nature of domestic violence, sentencing courts will continue to be guided by the principles discussed in this publication. The existence of a domestic relationship between an offender and the victim does not render an offence of a lesser criminality. Particular significance must be attributed to general and specific deterrence, denunciation and protection of the community. The High Court has made clear that there is an obligation on the court to vindicate the rights and the dignity of each victim of violence.[525]

525 *Munda v Western Australia* (2013) 249 CLR 600 at [54]–[55].

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