



ALS

Aboriginal Legal Service (NSW/ACT) Limited

OUTLINE OF SUBMISSIONS COVID 19 and SENTENCE

Version 1, 22 March 2020¹.

1. COVID 19 is a global pandemic virus. Locally in NSW it is an epidemic, which is having a serious effect on the community at large. It is a virus presenting with symptoms including fever, a sore throat and respiratory issues². It has a high death rate.

FACTS ABOUT COVID 19 / CORONAVIRUS

2. COVID 19 has the following population features:
 - As of 11 March 2020 there were some 118000 cases worldwide, with a number of deaths falling at 4291 people³;
 - This amounts to a death rate of 3.6%.
 - When compared to influenza – Australian Bureau of Statistics Figures for influenza from 2017 suggest a death rate of around 0.5%⁴.
 - US figures for 2018-2019 suggest the comparable death rate for influenza is around 0.1%⁵.
 - COVID 19 is apparently between 36 and 72 times more deadly than influenza.
3. COVID 19 is not currently capable of vaccination. Influenza is capable of vaccination, which affects population rates of transmission and infection.
4. The Commonwealth Government information about COVID 19 describes people who are most at risk as follows⁶:

¹ First draft prepared by Jeremy Styles, Aboriginal Legal Service (NSW/ACT) Limited solicitor, Redfern, with consideration of the Public Defender's submissions on bail and with some analytical assistance from members of the NSW Bar.

² "What you need to know about Coronavirus (COVID 19): <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/what-you-need-to-know-about-coronavirus-covid-19> - accessed 20 March 2020.

³ <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> - accessed 20 March 2020.

⁴ <https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/3303.0~2017~Main%20Features~Deaths%20due%20to%20influenza~5> – accessed 20 March 2020.

⁵ <https://www.cdc.gov/flu/about/burden/index.html> - accessed 20 March 2020.

⁶ "What you need to know about Coronavirus (COVID 19): <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/what-you-need-to-know-about-coronavirus-covid-19> - accessed 20 March 2020

- In Australia, the people most at risk of getting the virus are those who have:
- recently been in a high risk country or region (mainland China, Iran, Italy or Korea)
 - been in close contact with someone who has a confirmed case of COVID-19

Based on what we know about coronaviruses, those most at risk of serious infection are:

- people with compromised immune systems (such as people who have cancer)
- elderly people
- Aboriginal and Torres Strait Islander peoples (as they have higher rates of chronic illness)
- people with chronic medical conditions
- people in group residential settings
- people in detention facilities

5. COVID 19 infections have been reported in at least one correctional facility in NSW⁷.

PARTICULAR ISSUES FOR ABORIGINAL PEOPLE

6. Aboriginal people in NSW are almost one-and-a-half times more likely to have a disability or long-term health condition than non-Aboriginal people — 53% compared with 29%⁸. Aboriginal and Torres Strait Islander people suffer disproportionately from diseases of the respiratory system, particularly pneumonia⁹.

COMMUNICATION OF DISEASE IN CUSTODIAL SETTINGS

7. It is uncontroversial that disease transmission increases in residential and detention settings; the World Health Organisation noted the rate of tuberculosis in prisons in the Europe in 2002 was 84 times higher than in the general population¹⁰.

BANNING OF PERSONAL VISITS IN CORRECTIONAL SETTINGS

8. Social visits to correctional centres are currently banned until Sunday 22 March 2020¹¹. This is expected to continue

⁷ <https://www.smh.com.au/national/nsw/chances-are-might-get-it-2700-on-infected-cruise-ship-not-checked-upon-sydney-arrival-20200320-p54cdu.html> - accessed 22 March 2020.

⁸ Judicial Commission Equality before the Law Benchbook Chapter 2 “Aboriginal People”, <https://www.judcom.nsw.gov.au/publications/benchbks/equality/section02.html> - accessed 20 March 2020.

⁹ Williams, Gracey, Smith; “Hospitalisation of Aboriginal and non-Aboriginal Patients for Respiratory Tract Diseases in Western Australia, 1988 – 1993.” International Journal of Epidemiology, Vol 26, Np 4, pg 797

¹⁰ http://www.euro.who.int/_data/assets/pdf_file/0017/231506/Good-governance-for-prison-health-in-the-21stcentury.pdf .

¹¹ <https://www.correctiveservices.justice.nsw.gov.au/Pages/CorrectiveServices/coronavirus-important-information-for-visitors-to-correctional-centres-.aspx> - accessed 20 March 2020.

9. Access to family visits is a minimum standard for incarcerated prisoners. It improves social integration and this should improve prospects of rehabilitation and reintegration to community on release. It should improve recidivism.
10. Social visits reduce prisoner's social isolation. Social isolation increases maladaptive behaviours¹² along with reducing self regulation and decreasing pro social behaviours¹³.

GENERAL JUDICIAL CONSIDERATIONS

11. Considerations of individual justice apply when considering the impact of COVID 19. The particular situation of an individual should be considered (see *Bugmy v R* (2013) 249 CLR 571 at [41]). The increasing prevalence of the virus gives rise to three general facts relevant to Court proceedings:
 12. FIRST, there is a demonstrable risk that incarceration exposes an inmate to a heightened likelihood of contracting COVID 19, in circumstances where there is a high mortality rate.
 13. SECOND, for people facing full time custodial sentences, there is an apprehended risk of infection and mortality.
 14. THIRD, there are current restrictions on the availability of personal visits to all inmates in NSW, which impact on the permissible social contacts for prisoners. It is a restriction on a right held otherwise.

PARTICULAR FACTUAL CONSIDERATIONS

1. Further factual issues may apply in particular cases (including):
 2. FOURTH, an elderly person is more at risk of serious infection
 3. FIFTH, an Aboriginal or Torres Strait Islander person may be at greater risk of serious infection,
 4. SIXTH a person with a medical issue causing immune suppression is at greater risk of serious infection,
 5. SEVENTH a person with chronic illnesses is at greater risk of serious infection.

¹² R.F. Baumeister & C.N DeWall, "The Inner Dimension of Social Exclusion: Intelligent Thought and Self-Regulation Among Rejected Persons" (2005) *Journal of Personality and Social Psychology*, 888, 589-604: See [Kentwell v R \(No 2\) \[2015\] NSWCCA 96](#) at [94] affirming [R v Gareth Mullaya LEWIS \[2014\] NSWSC 1127](#)

¹³ Twenge [and Baumeister] et al, [Social Exclusion Decreases Prosocial Behaviour](#), *Journal of Personality and Social Psychology* 2007 Vol 91, No 1 56-66 at: https://pdfs.semanticscholar.org/6f0f/a239d654b6ea88f61ac0287e364f80583237.pdf?_ga=2.157715578.11048355.1584822963-711317426.1584822963 - accessed 22 March 2020; Baumeister et al, [Social Exclusions Impairs Self Regulation](#), *Journal of Personality and Social Psychology*, 2005, Vol 88, No 4, 589 – 604, at https://pdfs.semanticscholar.org/0c0a/b1921672245dcddcc00f626a3b485840c267.pdf?_ga=2.157714554.11048355.1584822963-711317426.1584822963 - accessed 22 March 2020.

6. EIGHTH, a person with drug or alcohol addiction may be at greater risk of serious infection due to a suppressed immune response,
7. NINTH, a person suffering from a mental illness may struggle more than others with increased isolation in custody due to social distancing measures.
8. TENTH, Custody may create exceptional, or general hardship to third parties, particularly family members.

SENTENCE LAW APPLICABLE

9. Sentences of imprisonment are a measure of last resort: s5(1) *Crimes (Sentencing Procedure) Act 1999 (CPSA)*. Consideration of general sentencing principles will not be avoided by consideration of issues to do with COVID 19. All principles should be considered and balanced.
10. In sentence proceedings, the *Evidence Act 1995 (Evidence Act)* does not generally apply: s4 *Evidence Act*. Generally, matters which aggravate a sentence must be proven beyond a reasonable doubt by the Crown, and matters mitigating a sentence proved on the balance of probabilities by the offender: *The Queen v Olbrich* (1999) 199 CLR 270 at [27]–[28].
11. Where considerations on sentence are relevant to multiple principles, Courts should be cautious not to double count¹⁴.
12. The increasing prevalence of COVID 19, and its epidemic status, can be considered in sentence proceedings in the following principled ways.

PROTECTION OF THE COMMUNITY

13. Protection of the community is an orthodox statutory sentencing principle: s3A CSPA. The close proximity of prisoners and the possibility of high rates of infection COVID 19 poses a health risk to prisoners (as part of the community).
14. The community at large is at risk through the potential for community spread through released prisoners and through prison staff. The community can be protected through decarceration, and reduction in prison population density.

HEALTH ISSUES

¹⁴ See for instance: General Considerations being taken into account on fixing a term and finding special circumstances: see *R v Fidow* [2004] NSWCCA 172 at [18]. Mental health issues giving rise to a verdict of Mansaulghther by diminished responsibility are not further counted on sentence: see [Catley v R \[2014\] NSWCCA 249](#).

15. The Judicial Commission Sentencing Bench Book (the Bench Book)¹⁵ says at [10-450]:

Generally, ill-health will be a factor **tending to mitigate punishment only when it appears that imprisonment will be a greater burden on the offender by reason of his or her state of health, or when there is a serious risk of imprisonment having a gravely adverse effect on the offender's health**: *R v Smith*, per King CJ at 317; *Bailey v DPP*; *R v Badanjak* at [9]–[11]; *R v Achurch* at [118]; *Pfeiffer v R* [2009] NSWCCA 145; *R v L* (unrep, 17/6/96, NSWCCA)...[Emphasis added].

In *R v Higgins* (2002) 133 A Crim R 385, the applicant suffered from the HIV virus. The court held that the criminal system could not give priority to the applicant's health and must tailor the sentence with an eye to the overriding concern of the welfare and protection of the community generally, as far as common humanity will allow: per Howie J at [32].

HARDSHIP OF CUSTODY

16. By forceful analogy, the hardship of an offender's custody (usually relating to protective custody) is relevant to sentence. In relation to COVID 19, a sentence of custody in the present medical climate is more onerous than a "normal" sentence.
17. It is likely that inmates and detainees will be increasingly isolated and "locked in" for medical reasons.
18. The Judicial Commission Sentencing Benchbook says (at [10-500] accessed 20 March 2020):

The hardship that will be suffered by a prisoner in gaol because he or she will be in protective custody, is a matter to be taken into account in sentencing. Protective custody can only be taken into account in mitigation in the determination of the sentence or in the finding of special circumstances where there is evidence that the conditions of imprisonment will be more onerous: *RWB v R* (2010) 202 A Crim R 209 at [192]–[195]; *R v LP* [2010] NSWCCA 154 at [21]...

19. The approach should be evidence based: *R v Durocher-Yvon* (2003) 58 NSWLR 581; A mathematical approach to reduction of sentence is not appropriate: *Clinton v R* [2009]

SAFETY OF PRISONERS IN CUSTODY

20. The hardship analogy extends to the safety of prisoners in custody; The Bench Book says (at [10-500]):

Safety of prisoners

¹⁵ <https://www.judcom.nsw.gov.au/sentencing/>, Accessed 20 March 2020.

In *York v The Queen* (2005) 225 CLR 466, the High Court set aside a partially suspended sentence of imprisonment that had been substituted by the Court of Appeal of the Supreme Court of Queensland and reinstated a wholly suspended sentence that had been imposed by the sentencing judge. The majority of the court had held that it would be bowing to pressure from criminals if the offender were able to avoid a custodial sentence because of the risk to her safety while in prison. **However, the High Court made it clear that the safety of a prisoner is a relevant consideration in determining an appropriate sentence. In the particular circumstances of this case, there was persuasive evidence before the sentencing judge that the prisoner could not be protected in the Queensland prison system.** McHugh J said at [31] that:

the duty of sentencing judges is to ensure, so far as they can, that they do not impose sentences that will bring about the death of or injury to the person sentenced.

At [32] McHugh J further said:

Where a threat exists — as it often does in the case of informers and sex offenders — recommendations that the sentence be served in protective custody will usually discharge the judge’s duty. Here the learned sentencing judge concluded on persuasive evidence that no part of the Queensland prison system could be made safe for Mrs York. That created a dilemma for the sentencing judge. She had to balance the safety of Mrs York against the powerful indicators that her crimes required a custodial sentence. In wholly suspending Mrs York’s sentence, Atkinson J appropriately balanced the relevant, even if conflicting, considerations of ensuring the sentence protected society from the risk of Mrs York re-offending and inflicting condign punishment on her on the one side and ensuring the sentence protected her from the risk of her fellow inmates committing serious offences against her on the other side. In suspending the sentence, the learned judge made no error of principle. Nor was the suspended sentence manifestly inadequate.

It is the responsibility of the authorities, not the courts, to ensure the safety of prisoners in custody. The fact that prisoners will have to serve their sentences in protection is a very important consideration to be taken into account in fixing the length of the sentence but it should not usually be permitted to dictate that the custody should not be full time: *R v Burchell* (1987) 34 A Crim R 148 at 151; *R v King* (unrep, 20/8/91, NSWCCA).

A STATE OF UNCERTAIN SUSPENSE

21. A Court should consider the hardship of custody where an offender bears a concern about the impact of COVID 19 on their health if (or when) incarcerated. The apprehension of risk and consequences of COVID 19 should be considered. This can

be described as a “state of uncertain suspense”. This impact on sentence is a forceful analogy from delay cases. The Bench Book says (at [10-530]):

The “state of uncertain suspense” (Street CJ in *R v Todd* at 519) — where an offender experiences a delay following the initial intervention of the authorities — is a matter which can entitle an offender to an added element of leniency: *R v Blanco* (1999) 106 A Crim R 303 at [11], [16] and *Mill v The Queen* at 64–66). Where an offender relies on such a mitigating factor, they must establish it on the balance of probabilities: *Sabra v R* [2015] NSWCCA 38 at [47], applying *The Queen v Olbrich* (1999) 199 CLR 270. In *Sabra v R*, the court held that the sentencing judge had erred in tending to the view that although the offender had evidently suffered anxiety and concern over the delay, greater consequences needed to be established before the delay could be taken into account: *Sabra v R* at [44]–[46]. ...

22. In respect of COVID 19, where there a state of uncertain suspense exists about transmission and consequences in custody, an offender should be entitled to “an added element of leniency” (after *Blanco*).

HARDSHIP TO THIRD PARTIES

23. A Court may consider in the hardship to an offender’s family or dependants. It may be that factual scenarios arise where the hardship due to COVID 19 may be considered. There is some controversy about the test applicable to third party hardship. The Bench Book describes the third party hardship as being open to consideration where hardship is “wholly”, “highly” or “truly” exceptional after *R v Edwards* (1996) 90 A Crim R 510, Gleeson CJ 515.
24. The Bench Book does not record recent judicial decisions where this strict approach to the test has been deprecated. In [Carter v R \[2018\] NSWCCA 138](#), McCallum J, (Leeming JA and Fullerton J agreeing) found that whilst reduction of sentence on family hardship is reserved for the ‘exceptional case’, it is one of the relevant factors “in the general mix” of subjective factors in determining the appropriate sentence. [Huynh v R \[2018\] NSWCCA 237](#) found similarly.

SPECIAL CIRCUMSTANCES

1. If a sentence of imprisonment is to be imposed, it is necessary to consider whether there are special circumstances to justify a departure from the normal statutory ratio on sentence: see s44 *CSPA*. The Bench Book at [7-514] says:

The full range of subjective considerations is capable of warranting a finding of special circumstances: *R v Simpson* (2001) 53 NSWLR 704 at [46], [60]. It will be comparatively rare for an issue to be incapable, as a matter of law, of ever constituting a “special circumstance”: *R v Simpson* at [60]

2. Relevantly the Judicial Commission refers with authority to the following categories:
3. FIRST, Ill health, Disability or mental illness

4. SECOND, Protective Custody, where evidence is provided.
5. It appears clear that the COVID 19 crisis could be considered as a basis for a finding of special circumstances should a term of imprisonment be imposed.

CONCLUSION

6. The impact of COVID 19 should be considered in sentence proceedings in NSW Courts.
7. COVID 19 must be considered within the matrix of evidence and principles applicable to sentence. Courts should consider that evidence in light of the following principles, where applicable:
 - a. The impact of health issues on sentence,
 - b. The hardship faced by prisoners, including through the banning of personal visits to prisoners,
 - c. The safety of prisoners in custody and the community at large,
 - d. The state of uncertain suspense,
 - e. Hardship to third parties.

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