



COVID-19 and the impact on criminal court sentencing

Author: [Rachel Tierney](#)

Email: rtierney@gnl.com.au

Phone: 07 3361 0206

Date: Thursday April 16, 2020

COVID-19 has significantly impacted on the operation of the justice system, with [unprecedented procedural changes recently implemented by all courts](#). Procedures and decisions related to sentencing hearings, particularly where defendants are likely to receive a custodial sentence, have seen significant change.

COVID-19 has influenced court outcomes and results. Queensland courts (especially the higher courts) have been eager to continue hearing matters during this time (with necessary precautions in place and where possible, via telephone or video link), given the inevitable backlog of proceedings that will occur after the pandemic has passed.

Courts will not hear matters where imprisonment is certain

Courts will not hear matters where imprisonment is certain for defendants who are not already in custody. This is due to the risk posed by transferring individuals in and out of correctional and remand centres. In those cases, lengthy adjournments have been granted.

Sentencing hearings continue for defendants unlikely to receive a term of imprisonment

Where a defendant who is not in custody is unlikely to be sentenced to serve an actual period of custody, sentencing has proceeded. Pleas of guilty are also taking place where a defendant in custody is likely to be released.

COVID-19 considered an important factor during sentencing

What has been particularly interesting during this time are matters where the defendant is on the cusp of serving further time in custody or being sent into prison.

The courts (and advocates) have been astute to identifying COVID-19 as a mitigating factor in sentencing proceedings.

Accordingly, cases where the defendant may have quite rightly been sentenced to an actual period of imprisonment (or serving extra time in custody), are attracting a 'COVID-19 discount' across all jurisdictions.

Recent cases (across Australia) where courts have considered COVID-19 during sentencing

The following recent cases provide an indication of how courts have, to date, dealt with the COVID-19 pandemic in terms of sentencing.

DPP v Bourke

The Victorian Supreme Court was the first to acknowledge COVID-19 and take it into account as a sentencing consideration on 16 March 2020 in *DPP v Bourke* [2020] VSC 130.

The defendant pleaded guilty to an offence of reckless conduct. As is usual on pleas of guilty, the court attributed the defendant's plea of guilty to saving the cost and resources of a jury trial. The court said this was even more imperative given COVID-19 and accepted there was 'substantial utilitarian value' of the guilty plea in light of public health concerns relating to the pandemic and the practical management of a jury.

Brown (aka Davis) v The Queen - Victoria

The Victorian Court of Appeal in *Brown (aka Davis) v The Queen* [2020] VSCA 60, a trafficking and production matter, considered that the prohibition on personal visits in prison and the resultant, likely impact of that should give rise to a discount on sentence.

The court was reluctant to express a general statement of principle but accepted the situation was one which caused additional stress and concern for prisoners and their families; and the community at large. That this can be taken into account, and if so to what degree, depends on the particular circumstances of an individual case.

Sazimanoska v The Queen [2020] VSCA 66 and *Nyguen v The Queen* [2020] VSCA 76 - Victoria

Brown was cited in subsequent cases including *Sazimanoska v The Queen* [2020] VSCA 66 and *Nyguen v The Queen* [2020] VSCA 76. . These cases involved appeals against sentence, where both applicants relied on COVID-19.

In *Sazimanoska* there was mention of the applicant's husband requiring dialysis. There was emotional hardship experienced by her family and personal visits at prisons had been cancelled.

In *Nyguen* the applicant filed a further submission after the original appeal hearing regarding COVID-19 and the impact of the virus on his present conditions of incarceration.

In both cases, COVID-19 was not enough to render a successful appeal of the defendants' sentences.

R v Madex [2020] VSC 145 – Victoria

The Victorian Supreme Court found that the defendant's age led him to be in the higher risk category in respect of COVID-19 and would make custody more onerous.

DPP (Cth) v Politpoulos [2020] VCC 338 – Victoria

Politpoulos suffered from emphysema. While the court accepted that this caused more worry to him in terms of his susceptibility to catching the virus and made his experience of imprisonment more onerous, it did not have definitive medical information confirming he was at a higher risk of contracting the virus.

Accordingly, the court was not prepared to immediately release him from custody but moderated his sentence to an extent, to take into account the additional stress he was experiencing.

DPP v Morey (a pseudonym) [2020] VCC 320 - Victoria

Due to Morey's family residing in Perth and COVID-19, the court considered that he was likely to receive no visits in prison, at least for the time being.

The court also considered that it will play on his mind that his family and friends are isolated as would the worry about their health and wellbeing.

The court said these issues should play some part in mitigating Morey's sentence.

DPP v Tennison [2020] VCC 343 – Victoria

The suspension of prison visits and reduction in telephone calls was also considered in this case.

The court considered that this, along with the fact Tennison was unable to occupy himself with work in prison (prisoner work had been limited to essential tasks only), would cause additional stress during his time in custody.

The court also considered the stress associated with catching the virus in the confined prison environment a mitigating factor.

R v Hanna – Supreme Court of Queensland, Brisbane – Holmes CJ – 16 March 2020 – Queensland

The court acknowledged that COVID-19 would make life difficult in prison for a variety of reasons and there would likely be greater restriction on prisoners and facilities. This factor was taken into account by the court in fashioning an appropriate sentence.

Recent fraud case in Queensland

Recently in Queensland, a defendant's sentence of imprisonment for fraud offences was suspended forthwith after he had already served a significant period in custody.

His barrister made reference to the difficulties and uncertainty he and other inmates faced in light of the COVID-19 pandemic. Significantly for him, this included restriction on personal visits in prison.

R v Kempainen; R v Rose [2020] ACTSC 69 – Australian Capital Territory

The court acknowledged the present public health emergency due to the virus.

The court said it expected that as a result, imprisonment will be much more onerous than usual due to a significantly increased risk of contagion and a high risk of the prisoner spending long periods of confinement to a cell. This was taken into account by the court.

Defendants with outstanding matters

Defendants who intend to plead guilty should speak with their legal representative about proceeding with their sentence as early as possible and practicable during this time.

This is especially so where the defendant is not in custody and not at risk of serving a period of imprisonment as a result of their sentence; and for those in custody with prospects of securing release from prison upon the finalisation of their sentence.

Legal advice and assistance during COVID-19

We are delighted to advise that we returned to normal operations from our CBD premises on Monday 29 June 2020.

We continue to provide the best criminal law services during the coronavirus pandemic.

You can contact us by phone or email to arrange a consultation.

Phone: [07 3361 0222](tel:0733610222) (24/7)

Email: gnl@gnl.com.au

This blog is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.