Chapter 13
Sentencing options

Chapter 13—Sentencing options

A. Sentencing options and relevant legislation

13-1 Overview

Below is a summary of sentencing options and the legislation they fall under. These options are discussed in more details throughout this chapter.

Sentencing option	Relevant legislation
Discharge	s 19 *Penalties and Sentences Act 1992* (Qld) (PSA)
s 190 orders	s 190 PSA
Good behaviour bonds, including drug diversion	Drug diversion—s 15B–15F, ss 16–19, ss 20–21 PSA Property offences—ss 22–28 PSA Other bonds—ss 29–33 PSA
Fines/fine option orders	ss 44–51, 52–89, 185 PSA ss 65, 79, 63, 104, 119 *State Penalties Enforcement Act 1999* (Qld) (SPEA)
Community service orders	ss 100–109 PSA
Probation	ss 90–99 PSA
Intensive correction orders	ss 111–119 PSA
Imprisonment	ss 152–160H PSA ss 205, 209, 213 *Corrective Services Act 2006* (Qld) (CSA)
Other orders	
Restitution and compensation	ss 34–43 PSA
Non-contact orders	ss 43A–43F PSA

B. Discharge

13-2 Where a court may discharge

If a defendant is convicted of a trivial offence or there is some other extenuating circumstance, under s 19 of the Penalties and Sentences Act, the court may discharge the defendant absolutely or place them on a good behaviour bond for up to three years without recording a conviction.

The court will do this if it considers it appropriate to impose only a nominal punishment.

In minor stealing matters where the defendant has spent some time in custody, absolute discharge may still be appropriate (see *Thirty v Stuart* [1995] QCA 509).

C. Orders under s 190 of the Penalties and Sentences Act

13-3 Section 190 orders

If a magistrates court convicts someone of an offence relating to property, it may release the person without imposing any sentence if the defendant pays an amount ordered by the court. This amount is to be for damages and may include costs (Penalties and Sentences Act, s 190). The order is a sentence and an act that gives right to appeal (s 191).

D. Good behaviour bonds, including drug diversion

13-4 Types of bonds

There are three kinds of bonds under the Penalties and Sentences Act:

- s 19 bond as described above
- ss 30, 31 or 32 bond
- s 24 bond for property-related offences.

These three bonds are discussed further below.

13-5 Bonds under s 19

These bonds can be given in relation to indictable or summary offences under any Act. No conviction is recorded.

Section 19 bonds are also given for drug diversion. Drug diversion involves entering into a recognisance with a condition to attend a drug education session (s 19(2A)).

Drug diversion is available for people charged with:

- possession of a dangerous drug in quantity not exceeding the schedule amount (i.e. a quantity which would have be to dealt with in the Supreme Court) s 9
- possessing things used in relation to administration of a drug s 10(2)
- failing to take care with a syringe s 10(4)
- failing to dispose of a syringe s 10(4A).

Drug Diversion is not available for people who have current proceedings or convictions for the following offences:

- offences of a sexual nature
- trafficking, supply, producing or possessing dangerous drugs dealt with, or to be dealt with, in the Supreme Court

- indictable offences including violence other than common assault and serious assault (340(1)(a) or (1)(b)).

If a defendant appears suitable for Drug Diversion, they will be assessed by a Court Diversion Officer at court. The officer will complete an assessment form which may include details of the drug education appointment. This form will be provided to the court by the assessing officer.

Court diversions can be offered on no more than two occasions (s 15C(2)(c)). This includes a diversion under the Police Diversion Program and the Court Diversion Program.

13-6 Bonds for property-related offences

When a defendant is convicted of an offence relating to property, they may be placed on a s 24 bond. The court adjourns the sentencing to a date within six months and releases the defendant on a recognisance. The recognisance will require the defendant to return for sentence if called and may also require them to restore property, reinstate property, or pay compensation for damage caused to property.

13-7 Bonds under ss 30, 31 and 32

Section 30 bonds are available for indictable offences.

Section 31 bonds are available for summary offences. These bonds cannot be for more than one year, and contain the condition that the defendant must keep the peace and be of good behaviour.

Section 32 bonds are available instead of any other penalty.

If an order is made for compensation as part of a s 19 bond, check that it complies with the provisions of s 35.

Example case 1

In the case of *R v Ferrari* [1997] 2 Qd R 472; [1997] QCA 73, an order was made under s 19(3) for the payment of compensation. The appellate court held that the condition could not stand because the magistrate could not be satisfied, on the evidence before the court, that the offender participated with a co-offender to cause the damage for which the order for compensation had been made.

Example case 2

In rare cases, s 19 orders may be available for stealing offences, such as *Thirty v Stuart (supra)*, where the applicant took the complainant's bag from the steps of a church. A witness saw and contacted the police. The applicant left the bag, including about $100 cash, in a place where it could easily be found. When he saw police in the area, he approached them and volunteered that he was the person who had taken the bag. He said that he had taken the bag because he wanted to buy dinner. The bag was returned to the owner before she realised it had been taken.

The magistrate imposed a sentence of 30 days imprisonment. The applicant was aged 20 years and had no previous convictions. The appellate court found that the circumstances of this case took it out of the ordinary. The court noted that most stealing offences will not be appropriately dealt with under s 19(1). However, the court found that the offence and its surrounding circumstances, including the two days spent in custody pre-sentence, were such that, by the time the magistrate heard the matter, a nominal penalty was appropriate. The court released the applicant absolutely under s 19.

E. Fines

13-8 How fines can be imposed

Fines can be imposed with or without recording a conviction. One fine may be imposed for multiple offences (Penalties and Sentences Act, s 49).

13-9 Amount of fine

Maximum fines where the Act does not prescribe limits:

	Magistrates court	District court	Supreme Court
Individual	165 penalty units	4175 penalty units	No limit
Corporation	835 penalty units	No limit	No limit

See s 5 for the definition of 'penalty units' ($100 as at time of printing).

In determining the amount of the fine, the court must take into account the offender's financial circumstances and the burden that paying the fine will place on the offender (s 48).

13-10 Time to pay

A court has three options when imposing a fine:
- allow time to pay (s 51)
- order the fine be paid by instalments (s 50)
- refer the fine to the State Penalties Enforcement Registry (SPER) for registration (s 51).

If a client cannot pay the fine in the time the court allows, they can apply to the clerk of the court for an extension of time. The application must be in writing and is normally granted only when the offender has made a reasonable effort to pay in the time allowed and the application is made within the time allowed.

If the court refers the matter to the SPER, the defendant will not have to pay the administration fee incurred when a fine is referred to the SPER during or after time allowed to pay.

If the fine is not paid in the time allowed by the court or court registrar, the registrar will refer the fine to the SPER (State Penalties Enforcement Act, s 34, and Penalties and Sentences Act, s 185A).

The SPER is then responsible for collecting the outstanding fine. They will send a letter to the defendant and give them 28 days to decide whether to:
- pay the amount in full
- apply to pay by instalments
- apply for a financial assessment to determine whether they are eligible for a fine option order.

If the defendant does not respond, they may have to pay additional fees and are potentially liable to a number of actions, including having their drivers licence suspended, property seized and sold or wages paid directly by employer to SPER, or a warrant issued for their arrest and imprisonment.

13-11 Default of payment

When imposing a fine, a court may make an order for either imprisonment or execution against property in default of payment. These orders are most commonly known as 'default days' or 'levy and distress'.

Under s 185 of the Penalties and Sentences Act, a person who does not pay a penalty as required may be imprisoned. The maximum period of imprisonment is 14 days per penalty unit. Default days must be served cumulatively with any other period of imprisonment unless the court orders otherwise (s 185(2b)).

Example case 1

Dart v Jacklin & Ingerson [2007] QDC 371—excessive fines reduced

Ms Dart was dealt with in the magistrates court on 21 February 2007 for five charges: one charge of public nuisance, three charges of stealing and common assault. The magistrate fined her $600 for the public nuisance, in default 24 days with no time to pay, and $1200 for the other offences with 48 days in default with no time to pay.

The first charge related to her causing a disturbance at the Department of Child Safety when Ms Dart was not allowed to see her child.

The other offences all occurred on 12 December and related to her stealing a DVD player valued at $149 from Woolworths, underwear from Big W valued at $89.40, and four DVDs, three chap sticks, six hair bands, a packet of girls underwear and a packet of chocolates from Supa IGA valued at $120.28.

The common assault involved her throwing a cigarette butt at the security officer of Supa IGA, who had stopped her on suspicion of stealing.

Ms Dart had a criminal history with relatively minor charges where no prison sentence had been involved and only one previous occasion involving stealing—on 6 April 2006 when she was convicted and placed on probation for two years.

The District Court found the learned magistrate's sentencing discretion miscarried in relation to each of the penalties he had imposed. The court found they were manifestly excessive and should be set aside. The offences in question did not warrant such penalties.

The District Court imposed a recognisance of $200 for 12 months for the first offence and a fine of $450 to be referred to SPER in default.

Example case 2

R v Stephens [2006] QCA 123—fine halved, court compared amount of fine to total assets

On 10 November 2005 Barry Stephens pleaded guilty to a count on an indictment charging that on 25 May 2002 at Brisbane he had attempted to obtain dishonestly a sum of money from NRMA Insurance Ltd, and that the intended benefit to him from the dishonesty was $23,000.

On 11 November 2005, he was sentenced to 12 months' imprisonment, wholly suspended for an operational period of three years, and fined $20,000. That fine was to be paid on or before 11 November 2006 in default of six months' imprisonment.

The Court of Appeal found that the $20,000 fine was manifestly excessive, considering Mr Stephens' age (65 at time of offence), lack of prior convictions, his limited assets and his status as a pensioner, coupled with the lack of any benefit to him from his attempted fraud.

The fine was approximately 10 per cent of all his assets; the court reduced the fine to $10,000.

F. Fine option orders

13-12 When a court may make a fine option order

A court may order that a fine be converted into a fine option order. This involves a person agreeing to perform community service in lieu of paying their fine. There is a maximum of five hours of community service per penalty unit (s 69).

A court will make such an order when they are satisfied that the person either:

- is unable to pay the fine
- would suffer economic hardship and is a suitable person to perform community service.

A fine option order is structured similarly to a community service order. It includes the requirements to report to corrective services, perform community services as required, notify of changes of address and employment, and not leave Queensland without permission (s 67).

The person must complete the community service hours within one year, unless the court provides another time period in the order.

If the person does not apply for a fine option order on the day of sentence, provided they are given a fixed time to pay the fine, they may apply for an order any time before the end of the fixed period (s 55).

There is no limit on the total number of hours under a fine option order compared with a community service order.

Example case 1

Sprenger v Sanderson [1992] 1 Qd R 580

A magistrate sentenced the applicant on 22 charges of receiving stolen goods and false pretences. The court imposed fines totalling $2850 but made cumulative fine option orders for each totalling 448 hours of community service.

The appeal was made on the basis that, under the Corrective Services Act, the limit on community service was a total of 240 hours.

The court held that there was no prescribed limit on the number of hours. The amount of community service was at the court's discretion. (Note: s 238 of the Corrective Services Act is essentially the same as the current provision under s 69 of the Penalties and Sentences Act.)

G. Community service orders

13-13 When a court may make a community service order

A community service order (CSO) can be made when a defendant is convicted of a regulatory offence or any offence punishable by a term of imprisonment and consents to the order being made (Penalties and Sentences Act, ss 101 and 106).

The order requires the defendant to perform 40–240 hours of community service in one year, unless otherwise stated by the court.

The court can make an order for community service and probation (s 109).

Section 103 sets out the requirements of a CSO, including that the defendant:

- not commit another offence during the order
- report and receive visits as required
- perform community service in a satisfactory way
- notify corrective services or changes of residence or employment within two business days
- not leave Queensland without permission.

Some magistrates will require defendants to be assessed by a probation and parole officer to confirm whether they are suitable for a community-based order. For magistrates courts other than the Brisbane Magistrates Court at Roma Street, this may require the registry to contact a probation and parole district office to arrange for an officer to attend the court.

Example case 1

R v Marsden [2003] QCA 473—appeal from three years' probation and 240 hours CSO for common assault—new sentence 120 hours CSO

Mr Marsden was 37 years old with no previous convictions. He pleaded guilty in the district court to common assault of his wife.

He was placed on probation for three years and ordered to do 240 hours' community service with special conditions that he undertake an anger management course and have no contact with the complainant. A conviction was also recorded.

The assault involved an argument with his wife, during which he threw a can of baby food at her but missed. He then walked towards her and hit her with his fist or forearm four or five times to the head. At the time, she had one of the children on her hip. She fell to the floor, got up and was slapped across the face by the applicant.

When interviewed, Mr Marsden told the police that he did not dispute his wife's version of events and that he had 'lost it'. There was a full hand-up committal and a timely plea of guilty.

The court found that probation would be of little assistance to Mr Marsden because of his age and other personal circumstances.

The sentence was set aside and a new sentence of 120 hours' community service was imposed. No conviction was recorded.

Example case 2

R v Vincent; ex parte Attorney-General [2001] 2 Qd R 327; [2000] QCA 250—court makes a CSO and imposes a wholly suspended sentence for different offences

At [13] 'The present combination will be invalid only if the imposition of a community service order is inconsistent with concurrent imposition of a suspended imprisonment order. In our view there is no inconsistency between such orders. If, prior to completing the community service, the offender committed another offence and was required by the court to serve the suspended term or part of it, there is no reason why the balance of the community service could not be performed after the offender's release. Section 103(2)(b) requires that the necessary number of hours must be performed "within one year of the making of the order *or another time allowed by the court*" (our emphasis). This gives the court jurisdiction to extend the time for performance of the community service order to such time as might be thought reasonable having regard to the interruption brought about by the activation of the suspended sentence. We see no necessary inconsistency or conflict of the kind identified in *R v M ex parte Attorney-General*. It is neither necessary nor desirable to extend the restrictive effect of *R v Hughes* into the present sentencing options'.

H. Probation

13-14 When a court may order probation

Under the Penalties and Sentences Act, probation can be ordered when a person is convicted of any offence punishable by a term of imprisonment or regulatory offence other than in default of fine payment (s 92). A defendant must consent to the court making a probation order (s 96).

Probation orders can be made for periods of not less than six months or more than three years (s 92). The court has discretion about whether to record a conviction.

Prison and probation can be ordered if the imprisonment period does not exceed one year and the probation is between nine months and three years in duration (s 92(2)). A conviction must be recorded with this kind of order.

Under s 93, the mandatory conditions of a probation order include 'requirements that the offender—

'(a) must not commit another offence during the period of the order; and
(b) must report to an authorised corrective services officer at the place, and within the time, stated in the order; and
(c) must report to, and receive visits from, an authorised corrective services officer as directed by the officer; and
(d) must take part in counselling and satisfactorily attend other programs as directed by the court or an authorised corrective services officer during the period of the order; and
(e) must notify an authorised corrective services officer of every change of the offender's place of residence or employment within 2 business days after the change happens; and
(f) must not leave or stay out of Queensland without the permission of an authorised corrective services officer; and
(g) must comply with every reasonable direction of an authorised corrective services officer'.

Section 94 sets out additional requirements that a court can add to an order, including submitting to medical treatment and making compensation.

13-15 Programs on probation

Corrective Services offer a range of programs for people on probation. Reference to the availability of specific programs can form part of your submission about why probation is an appropriate order.

These programs include:

- Turning Point: Preparatory Program—which helps people prepare to change their offending behaviour. This program helps people weigh up the pros and cons of changing their behaviour and helps them become more confident about their ability to make positive changes in their lives.
- Getting SMART—a moderate-intensity substance abuse program which teaches people to use cognitive behavioural therapy principles, theories, tools and techniques to abstain from any type of addictive behaviour.
- Making Choices program—which addresses general offending behaviour and helps participants examine how they came to offend, while also helping them recognise points where different choices could be made. Different versions of this program have been developed for male and female offenders.
- Cognitive Self-Change program—high-intensity cognitive behavioural intervention specifically for high-risk adult prisoners for whom the repeated use of violence is part of a general pattern of antisocial behaviour and criminality.
- Ending Family Violence program—which tackles violence within Indigenous families and develops culturally appropriate solutions to protect adults and children from the effects of domestic violence.
- Ending Offending program—which meets the needs of Aboriginal and Torres Strait Islander offenders in a culturally appropriate manner. The overall aim is to modify the drinking and offending behaviour of Indigenous offenders.

13-16 Offices

Defendants given probation (or parole) are required to report to a probation and parole office within a specified period of their sentence. It may be useful to consider which is their closest office:

Beenleigh
Brisbane Central—Spring Hill
Brisbane North—Chermside
Brisbane South—Buranda
Bundaberg
Burleigh Heads
Caboolture
Cairns
Cleveland
Emerald
Gladstone
Gympie
Hervey Bay
Inala
Innisfail
Ipswich
Kingaroy
Logan City
Mackay
Mareeba
Maroochydore
Mt Gravatt
Mt Isa
Noosa Heads
Pine Rivers
Redcliffe
Rockhampton
Toowoomba
Roma
Southport
Thuringowa
Thursday Island
Townsville
Wynnum

Example case 1

R v Holmes [2008] QCA 259—ICO sentence appealed, replaced with probation order

Mr Holmes pleaded guilty to one count of possession of a dangerous drug, three counts of supplying a dangerous drug and one count of possession of money suspected to be the proceeds of selling a dangerous drug. The original sentence was 12 months' imprisonment to be served via an intensive correction order.

Mr Holmes was found with four tablets and admitted in a record of interview to selling four tablets. He sold the tablets for the same amount he paid for them.

The matter proceeded by way of full-hand up with a plea entered at committal.

Mr Holmes was 19 at the time of the offence and 20 at sentence. He was an apprentice electrician. References, a psychologist's report and a letter from Mr Holmes were tendered at sentence.

The court held that insufficient weight had been placed on Mr Holmes' cooperation. The court substituted a sentence of two years' probation without recording a conviction.

Example case 2

Kylie-Maree Corkill v Steven L Wilson [2009] QDC 13—appropriate additional conditions for probation

Ms Corkill was convicted of one count of assault occasioning bodily harm and sentenced to 12 months probation, with special conditions, and ordered to pay $750 compensation to the victim.

The special conditions were that she not consume any alcohol or enter licensed premises.

The court found that the additional conditions were draconian and that the magistrate had not explained why he felt they were necessary for her rehabilitation.

The conditions were removed from the order.

The court also set aside the order for compensation, as it held that the magistrate merely adopted a figure from another statutory regime *Criminal Offence Victims Act 1995* (COVA) arbitrarily without weighing up other considerations.

I. Intensive correction orders

13-17 When a court may impose an intensive correction order

If a court sentences a defendant to an imprisonment term of one year or less, the court may make an intensive correction order (ICO) as an alternative to actual imprisonment.

The effect of the order is that the defendant serves the imprisonment sentence by way of intensive correction in the community rather than a prison.

While, practically, it is a term of imprisonment, it is similar to a combination of probation and community service with stringent conditions and severe consequences for breach.

The orders contain the same provisions as probation. However, they also prescribe that the defendant visit or receive visits from corrective services at least twice a week, reside in a community residential facility if required and perform community service.

A conviction must be recorded when a court makes an ICO.

An ICO is the final option before the imposition of an actual custodial sentence (see *R v Tran; ex parte Attorney-General* (2002) 128 A Crim R 1; [2002] QCA 21).

J. Imprisonment

13-18 When a court may order imprisonment

Generally, imprisonment is a sentence of last resort (Penalties and Sentences Act, s 9(2)).

This principle does not apply to offences that:

- involve the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person
- result in physical harm to another person
- are of a sexual nature, committed in relation to a child under 16 years
- relate to possessing child abuse games, films, or photographs
- involve possessing, making or distributing child exploitation material.

There are some offences for which imprisonment is mandatory, including:

- murder
- driving under the influence where there have been two prior convictions in the last five years for the same offence, dangerous operation, or on indictment for any offence in connection with or arising out of the driving of a motor vehicle.

13-19 Concurrent versus cumulative sentences

Generally, an imprisonment sentence must be served concurrently with all other imprisonment terms (s 155). All sentences may be ordered to be served cumulatively, but must be cumulative if the offence is:

- listed in the Serious Violent Offence Schedule
- committed while serving a term of imprisonment
- committed on parole, or other leave from prison
- committed whilst unlawfully at large, or
- an offence under s 33(1) of the Bail Act.

As discussed above, imprisonment ordered as a period in default of payment for fines will be serviced cumulatively with any other sentence of imprisonment unless the court orders otherwise (s 185(2)(b)).

13-20 Wholly or partially suspended sentences

A court may order that an imprisonment sentence be suspended where a court sentences an defendant to imprisonment for five years or less (s 144(1)).

The court can order that the sentence be wholly or partially suspended. The court must set an operational period, which must be at least the same period as the imprisonment, and less than five years.

The defendant must not commit another offence punishable by imprisonment during the term of the suspended sentence or the court must deal with them under s 147.

Section 147(2) requires a court to order the defendant to serve all the suspended sentence unless it believes it would be unjust to do so.

The court will consider the following factors to determine whether it is unjust to order the defendant to serve the whole term:

- the nature and circumstances of the subsequent offence
- the proportion between culpability for the subsequent offence and consequences of activating the whole of the suspended imprisonment

- antecedents, including previous similar offences
- attempts at rehabilitation
- the seriousness of the original offence
- any special circumstances that would make it unjust to impose the whole term.

If satisfied that it is unjust to order the defendant to serve the whole term, the court may either:
- extend the operational period of the suspended sentence for no more than one year from the date of the original order
- order the defendant to serve part of the imprisonment.

The ordinary rules relating to parole apply to the activation of a suspended sentence.

13-21 Pre-sentence custody

Time spent in custody for an offence or group of offences and for no other reason ordinarily must be declared as time already served under a sentence (s 159A).

Time cannot be declared if a person is serving a sentence or on remand for other offences. It may be taken into account.

However, if a person is charged with several offences committed on different occasions and has been in custody on those charges alone, the time starts when first arrested, even if the person is not convicted of the first offence/s with which they were charged (s 159A(4))

To assist the court, the prosecuting authority must give the court a pre-sentence custody certificate (s 159(4A)).

13-22 Parole

Due to the 2006 changes to the legislation, there are now only two kinds of release from prison: court-ordered parole and board-ordered parole.

This means a court has two options at sentence: order either a parole release date or parole eligibility date.

Sections 160A–E ensure that there is only ever one release or eligibility date for an offender, no matter how many times they have been sentenced (s 160F)

Court-ordered parole (parole release date) (s 160B(3))

A court can set a parole release date where:
- the sentence is three years or less
- the offence is not a serious violent offence (see Schedule)
- the offence is not a sexual offence
- the person has not had parole cancelled under ss 205 or 209 of the Corrective Services Act.
- Board-ordered parole (parole eligibility date) (ss 160B(2), 160C, 160D, 213)
- A court can order the date after which a person will be eligible to apply for board-ordered parole if the sentence is more than three years.

The court may make an order for a parole eligibility date whether or not the offence is a serious violent offence or sexual offence.

If a person already has a parole release date or a parole eligibility date, the court must order a new parole eligibility date. The new date must not be earlier than the previous date.

Transitional provisions—post-prison, community-based release

A date recommended under former s 157 as the date that a defendant can be eligible for post-prison, community-based release is taken to be the parole eligibility date fixed for the defendant (s 213)

Release on parole

The court can fix any day as a parole release date (s 160G).

If the release date is the last day of the sentence, they do not have to report and a court-ordered parole order does not have to be issued (s 160G(2)).

When released on parole, a person is required to report to a probation and parole office usually within 24 hours or on the next business day. Failing to do so makes them unlawfully at large under the Corrective Services Act (Penalties and Sentences Act, s 160G(4)).

When parole is cancelled

Under s 209 of the Corrective Services Act, a prisoner's parole order is automatically cancelled if the prisoner is sentenced to another period of imprisonment during the period of the order.

Under s 209(3)(b) of the Corrective Services Act, there are some exceptions where the relevant imprisonment period:

'(i) is required to be served under an intensive correction order; or

(ii) is wholly suspended under the *Penalties and Sentences Act 1992*, part 8; or

(iii) is wholly suspended because of an order, under the *Drug Court Act 2000*, section 20(1)(a), contained in an intensive drug rehabilitation order'.

When parole is suspended

The chief executive can suspend parole if they believe a person:

- failed to comply with the parole order
- poses a serious and immediate risk of harm to another
- poses an unacceptable risk of committing an offence
- is preparing to leave Queensland, other than under a written order granting leave.

A parole order can be amended if a person is believed to pose a serious and immediate risk of harm to themselves.

An order made by the chief executive to amend or suspend parole has effect for a maximum of 28 days (Corrective Services Act, s 201).

A parole board can amend, suspend or cancel parole for the same reasons listed above. That decision (subject to appeal) is final (Corrective Services Act, s 205).

Example case 1

R v Kitson [2008] QCA 86—if an unusual parole release date is to be ordered, the court ought to give reason and allow submissions

Mr Kitson was convicted of one count of unlawful possession of the dangerous drug methylamphetamine, one count of unlawful possession of the dangerous drug methadone and one count of possession of a mobile phone for use in connection with committing the crime of supplying a dangerous drug.

He was sentenced to 12 months on each count, with an order that he be released on parole on 29 August 2008.

The appeal was on the grounds that the sentence was manifestly excessive, particularly the specification of a parole release date after three-quarters of the sentence would have been served.

The appeal was successful. The court held that, for a release date after the halfway point of the head sentence, the court ought to give reasons and the parties should have been given an opportunity to be heard on the issue. The court substituted a sentence of 15 months' imprisonment with a parole release date fixed after six months on 29 May 2008.

Example case 2

R v Leu; R v Togia (2008) 186 A Crim R 240; [2008] QCA 201—parole dates past halfway

In this case, the head sentence for the co-accused was five years' imprisonment with a parole eligibility date after three years. The court did not give reasons for setting the date past the halfway mark and the appellate court found there were none. The sentences were reduced and the parole eligibility dates brought forward.

Example case 3

Sobieralski v Commissioner of Police [2009] QCA 90—imprisonment and fines

This case discussed the appropriateness of combining imprisonment with substantial monetary penalties. The court noted that it is important to consider whether the fines will be paid or are likely to lead to a cumulative sentence of imprisonment. The court held that, in such a case, it is important to consider whether the effective sentence imposed offends against the totality principle referred to by the High Court in *Mill v The Queen* (1988) 166 CLR 59; [1988] HCA 70.

Example case 4

Moore v Lewis [2008] QDC 105—imprisonment for animal cruelty set aside; 18 months probation confirmed

Mr Moore was sentenced by the magistrates court at Caboolture on one count of animal cruelty. He was sentenced to one month's imprisonment and an 18 month probation order. He was granted bail after five days in custody.

Mr Moore was 17 years old at the time of the offence and 18 at sentence. He had a minor history (public nuisance, fare evasion, police obstruction). For this offence, he had kicked a kitten twice in a park. The kitten was later found dead.

The appellate court held that s 9(2) still applied. Imprisonment was a last resort and the need for a deterrent did not justify a custodial sentence. The order for imprisonment was set aside.

Example case 5

R v Coutts [2008] QCA 380—imprisonment set aside; probation ordered

Ms Coutts pleaded guilty in the Toowoomba District Court to assault occasioning bodily harm (AOBH). She was sentenced to three months' imprisonment with a parole release date set at the end of that period.

Ms Coutts had a criminal history for various street offences and was on probation for another AOBH at the time of sentence.

The relevant offence related to a fight in a nightclub where Ms Coutts had pushed the complainant over and, when the complainant had given her 'the finger', dragged her several metres by her hair.

Ms Coutts was 19 years old at the time of the offence and 21 at sentence. Her personal circumstances were very unfortunate—she had a very young child, issues with drug addiction and previous experience of domestic violence.

The original sentencing court received a report from the probation office that was not favourable for Ms Coutts.

The appellate court took into account the fact that Ms Coutts had made very significant efforts at rehabilitation. She had completed the 100 hours community service order for the prior conviction after being granted bail. She had also met her bail conditions.

The order for imprisonment was set aside and a new order made for two years and three months of probation.

K. Other orders

13-23 Restitution and compensation

A court can make an order for restitution or compensation under s 35 of the Penalties and Sentences Act. The order can include a number of conditions, including how much is to be paid, who will be paid and the timeframe for payment.

Restitution or compensation payments may be ordered for offences taken into account under s 189. Compensation may be ordered in favour of a person even if they are not the victim of the specific offence.

The court can make an order whether or not it records a conviction (s 34). The payment of restitution and compensation can be referred to the SPER (s 36(c)).

The court can also set default days for non-payment, though the maximum imprisonment term it can order is:
'(a) if the order is made on indictment—1 year; or
(b) if the order is made on summary conviction—6 months' (s 37).

13-24 Non-contact orders

When a court convicts someone of a personal offence (an indictable offence committed against the person of someone), it has the power to make a non-contact order.

The court can only make the order if they are satisfied that there is an unacceptable risk that the person will injure, threaten, harass or damage the property of the victim (s 43C(3)).

The order can require a person to not contact named people, or go to a place or within a certain distance of a place.

The maximum length of a non-contact order is two years. (However, under s 43C(2)(a), if the person has been sentenced to imprisonment, the two years does not start until they are released from prison.)

It is an offence to contravene a non-contact order. The maximum penalty is 20 penalty units or one year's imprisonment (s 43F).

13-25 Banning orders under Part 3B of the Penalties and Sentences Act

A banning order is an order that prohibits an offender from entering or remaining in stated licensed premises or a stated area near licensed premises.

A court can make a banning order if a person is convicted of offence that involves the use, threatened use or attempted use of unlawful violence to a person or property, whether or not a conviction was recorded.

Banning orders run for a maximum of one year (or one year after the end of the term of imprisonment or operational period of suspended imprisonment if either of these penalties are imposed for the offence): s 43I(2).

An order may only be imposed if a court is satisfied that the offender poses an unacceptable risk to the good order of licensed premises or safety and welfare of others: s 43J.

A banning order must be explained to an offender: s 43K. An offender must be given a copy but a failure to do so will not invalidate the order: s 43M.

An application can be brought to amend or revoke an order under s 43L.

It is an offence to contravene a banning order without reasonable excuse: s 43O. The maximum penalty is 40 penalty units or one year's imprisonment.

L. Drug Court

Referrals to Drug Court closed

On Friday 16 November 2012, the Queensland Government released the amendments to the Drug Court Regulations, which effectively stop any further referrals to the drug court.

Accordingly, if you have enquiries from clients or their families or other solicitors about the possibility of going to drug court, this sentencing option now no longer exists.

The drug court will still operate for the next few months, so it hasn't shut completely, but it will operate only to enable the current participants to continue treatment and be transitioned from the court to alternative sentencing options eventually, and deal with any participants on drug court warrants who surrender or are arrested.

If you have any questions please call the Drug Court Team on 3238 3496.

13-26 Eligibility and referral

The drug court offers some drug-dependent offenders an intensive drug rehabilitation order (IDRO) as an alternative to prison. Drug courts operate in the Beenleigh, Southport, Ipswich, Townsville and Cairns magistrates courts.

Drug court is available to people who are drug dependent and wish to plead guilty to drug-related offences. They must be likely to be sentenced to imprisonment and not have any outstanding charges for sexual offences or offences involving violence (except common assault, serious assault on police or assault with intent to steal).

'Practice Direction 3 of 2006' outlines how referrals are made. Basically, once a defendant has indicated a desire to have their matter transferred to the drug court, the referring court will contact the drug court coordinator to ensure that a vacancy exists. If there is a vacancy, the matter will then be adjourned to the magistrates court where the drug court is based.

The Drug Court Act requires people to be residing in certain postcodes to be eligible for referral. All of the correctional centres' postcodes are eligible.

People residing in the following postcodes are eligible:

Drug court	Postcodes
Beenleigh	4059, 4108, 4109, 4110, 4112, 4113, 4114, 4115, 4116, 4117, 4118, 4119, 4123, 4124, 4125, 4127, 4128, 4129, 4130, 4131, 4132, 4133, 4156, 4157, 4163, 4164, 4165, 4184, 4205, 4207, 4208, 4209, 4270, 4280
Cairns	4865, 4868, 4869, 4870, 4878, 4879
Ipswich	4059, 4069, 4070, 4073, 4074, 4075, 4076, 4077, 4078, 4106, 4108, 4110, 4124, 4163, 4300, 4301, 4303, 4304, 4305, 4306, 4307, 4340, 4346
Southport	4059, 4163, 4209, 4210, 4211, 4212, 4213, 4214, 4215, 4216, 4217, 4218, 4219, 4220, 4221, 4223, 4224, 4225, 4226, 4227, 4228, 4229, 4271, 4272
Townsville	4810, 4811, 4812, 4813, 4814, 4815, 4817, 4818, 4819

Drug court	Postcodes
Other eligible postcodes	4000, 4006, 4007, 4008, 4009, 4010, 4011, 4012, 4017, 4018, 4030, 4031, 4034, 4035, 4036, 4037, 4051, 4052, 4053, 4054, 4055, 4060, 4061, 4064, 4065, 4066, 4068, 4101, 4102, 4103, 4104, 4105, 4106, 4107, 4111, 4120, 4121, 4122, 4151, 4152, 4153, 4154, 4155, 4158, 4159, 4160, 4161, 4169, 4170, 4171, 4172, 4173, 4174, 4178, 4179, 4275, 4285, 4500, 4501, 4520, 4860, 4861, 4877, 4880, 4881, 4882, 4883, 4884, 4885
	4871, 4872, 4873 (if the person's place of residence is within a 100 km radius of the magistrates court at Cairns)

Appendix A
Sentencing principles—Penalties and Sentences Act

Part 2 (Governing Principles) of the *Penalties and Sentences Act 1992* (Qld) provides:

9 Sentencing guidelines

(1) The only purposes for which sentences may be imposed on an offender are—
- (a) to punish the offender to an extent or in a way that is just in all the circumstances; or
- (b) to provide conditions in the court's order that the court considers will help the offender to be rehabilitated; or
- (c) to deter the offender or other persons from committing the same or a similar offence; or
- (d) to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or,
- (e) to protect the Queensland community from the offender; or
- (f) a combination of 2 or more of the purposes mentioned in paragraphs (a) to (e).

(2) In sentencing an offender, a court must have regard to—
- (a) principles that—
  - (i) a sentence of imprisonment should only be imposed as a last resort; and
  - (ii) a sentence that allows the offender to stay in the community is preferable; and
- (b) the maximum and any minimum penalty prescribed for the offence; and
- (c) the nature of the offence and how serious the offence was, including—
  - (i) any physical, mental or emotional harm done to a victim, including harm mentioned in information relating to the victim given to the court under the *Victims of Crime Assistance Act 2009*, section 15; and
  - (ii) the effect of the offence on any child under 16 years who may have been directly exposed to, or a witness to, the offence; and
- (d) the extent to which the offender is to blame for the offence; and
- (e) any damage, injury or loss caused by the offender; and
- (f) the offender's character, age and intellectual capacity; and
- (g) the presence of any aggravating or mitigating factor concerning the offender; and
- (h) the prevalence of the offence; and
- (i) how much assistance the offender gave to law enforcement agencies in the investigation of the offence or other offences; and
- (j) time spent in custody by the offender for the offence before being sentenced; and
- (k) sentences imposed on, and served by, the offender in another State or a Territory for an offence committed at, or about the same time, as the offence with which the court is dealing; and
- (l) sentences already imposed on the offender that have not been served; and
- (m) sentences that the offender is liable to serve because of the revocation of orders made under this or another Act for contraventions of conditions by the offender; and

(n) if the offender is the subject of a community based order—the offender's compliance with the order as disclosed in an oral or written report given by an authorised corrective services officer; and

(o) if the offender is on bail and is required under the offender's undertaking to attend a rehabilitation, treatment or other intervention program or course—the offender's successful completion of the program or course; and

(p) if the offender is an Aboriginal or Torres Strait Islander person—any submissions made by a representative of the community justice group in the offender's community that are relevant to sentencing the offender, including, for example—

(i) the offender's relationship to the offender's community; or

(ii) any cultural considerations; or

(iii) any considerations relating to programs and services established for offenders in which the community justice group participates; and

(q) anything else prescribed by this Act to which the court must have regard; and

(r) any other relevant circumstance.

(3) However, the principles mentioned in subsection (2)(a) do not apply to the sentencing of an offender for any offence—

(a) that involved the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person; or

(b) that resulted in physical harm to another person.

(4) In sentencing an offender to whom subsection (3) applies, the court must have regard primarily to the following—

(a) the risk of physical harm to any members of the community if a custodial sentence were not imposed;

(b) the need to protect any members of the community from that risk;

(c) the personal circumstances of any victim of the offence;

(d) the circumstances of the offence, including the death of or any injury to a member of the public or any loss or damage resulting from the offence;

(e) the nature or extent of the violence used, or intended to be used, in the commission of the offence;

(f) any disregard by the offender for the interests of public safety;

(g) the past record of the offender, including any attempted rehabilitation and the number of previous offences of any type committed;

(h) the antecedents, age and character of the offender;

(i) any remorse or lack of remorse of the offender;

(j) any medical, psychiatric, prison or other relevant report in relation to the offender;

(k) anything else about the safety of members of the community that the sentencing court considers relevant.

(5) Also, in sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years—

(a) the principles mentioned in subsection (2)(a) do not apply; and

(b) the offender must serve an actual term of imprisonment, unless there are exceptional circumstances.

(5A) For subsection (5)(b), in deciding whether there are exceptional circumstances, a court may have regard to the closeness in age between the offender and the child.

(6) In sentencing an offender to whom subsection (5) applies, the court must have regard primarily to—

(a) the effect of the offence on the child;

(b) the age of the child;

(c) the nature of the offence, including, for example, any physical harm or the threat of physical harm to the child or another; and

(d) the need to protect the child, or other children, from the risk of the offender re-offending;

(e) the need to deter similar behaviour by other offenders to protect children; and

(f) the prospects of rehabilitation including the availability of any medical or psychiatric treatment to cause the offender to behave in a way acceptable to the community; and

(g) the offender's antecedents, age and character; and

(h) any remorse or lack of remorse of the offender; and
(i) any medical, psychiatric, prison or other relevant report relating to the offender; and
(j) anything else about the safety of children under 16 the sentencing court considers relevant.

(6A) Also, the principles mentioned in subsection (2)(a) do not apply to the sentencing of an offender for the following offences—
(a) an offence against the *Classification of Computer Games and Images Act 1995*, section 28 if the objectionable computer game is a child abuse computer game under the Act;
(b) an offence against any of the following provisions of the *Classification of Films Act 1991*—
(i) section 41(3) or 42(3) or (4);
(ii) section 43, if the offence involves a child abuse film under the Act;
(c) an offence against any of the following provisions of the *Classification of Publications Act 1991*—
(i) section 14;
(ii) section 12, 13, 15, 16 or 17 if the offence involves a child abuse publication or child abuse photograph under the Act;
(d) an offence against the Criminal Code, section 228A, 228B, 228C or 228D.

(6B) In sentencing an offender to whom subsection (6A) applies, the court must have regard primarily to—
(a) the nature of any image of a child that the offence involved, including the apparent age of the child and the activity shown; and
(b) the need to deter similar behaviour by other offenders to protect children; and
(c) the prospects of rehabilitation including the availability of any medical or psychiatric treatment to cause the offender to behave in a way acceptable to the community; and
(d) the offender's antecedents, age and character; and
(e) any remorse or lack of remorse of the offender; and
(f) any medical, psychiatric, prison or other relevant report relating to the offender; and
(g) anything else about the safety of children under 16 the sentencing court considers relevant.

(7) If required by the court for subsection (2)(p), the representative must advise the court whether—
(a) any member of the community justice group that is responsible for the submission is related to the offender or the victim; or
(b) there are any circumstances that give rise to a conflict of interest between any member of the community justice group that is responsible for the submission and the offender or victim.

(8) In sentencing an offender, a court must not have regard to whether or not the offender—
(a) may become, or is, the subject of a dangerous prisoners application; or
(b) may become subject to an order because of a dangerous prisoners application.

(8) In determining the appropriate sentence for an offender who has 1 or more previous convictions, the court must treat each previous conviction as an aggravating factor if the court considers that it can reasonably be treated as such having regard to—
(a) the nature of the previous conviction and its relevance to the current offence; and
(b) the time that has elapsed since the conviction.

(9) Despite subsection (8), the sentence imposed must not be disproportionate to the gravity of the current offence.

(10) In this section—
actual term of imprisonment means a term of imprisonment served wholly or partly in a corrective services facility.
corrective services facility see the *Corrective Services Act 2006*, schedule 4.

10 Court's reasons to be stated and recorded

(1) If a court imposes a sentence of imprisonment, including a suspended sentence of imprisonment, it must—
(a) state in open court its reasons for the sentence; and
(b) cause the reasons to be—
(i) recorded in the transcript that is to be kept in the registry with the indictment; or
(ii) recorded in writing and kept in the office of the clerk of the court with the charge sheet; and

(c) cause a copy of the reasons to be forwarded to the chief executive (corrective services).

(2) A sentence is not invalid merely because of the failure of the court to state its reasons as required by subsection (1)(a), but its failure to do so may be considered by an appeal court if an appeal against sentence is made.

11 Matters to be considered in determining offender's character

In determining the character of an offender, a court may consider—

(a) the number, seriousness, date, relevance and nature of any previous convictions of the offender; and

(b) any significant contributions made to the community by the offender; and

(c) such other matters as the court considers are relevant.

12 Court to consider whether or not to record conviction

(1) A court may exercise a discretion to record or not record a conviction as provided by this Act.

(2) In considering whether or not to record a conviction, a court must have regard to all circumstances of the case, including—

(a) the nature of the offence; and

(b) the offender's character and age; and

(c) the impact that recording a conviction will have on the offender's—

(i) economic or social wellbeing; or

(ii) chances of finding employment.

(3) Except as otherwise expressly provided by this or another Act—

(a) a conviction without recording the conviction is taken not to be a conviction for any purpose; and

(b) the conviction must not be entered in any records except—

(i) in the records of the court before which the offender was convicted; and

(ii) in the offender's criminal history but only for the purposes of subsection (4)(b).

(3A) Despite subsection (3)(b), the conviction may be entered in a record kept by a department, a prosecuting authority or the offender's legal representative if it is necessary for the legitimate performance of the functions of the department, prosecuting authority or legal representative.

(4) A conviction without the recording of a conviction—

(a) does not stop a court from making any other order that it may make under this or another Act because of the conviction; and

(b) has the same result as if a conviction had been recorded for the purposes of—

(i) appeals against sentence; and

(ii) proceedings for variation or contravention of sentence; and

(iii) proceedings against the offender for a subsequent offence; and

(iv) subsequent proceedings against the offender for the same offence.

(5) If the offender is convicted of a subsequent offence, the court sentencing the offender may disregard a conviction that was ordered not to be recorded but which, under subsection (3)(b)(ii), is entered in the offender's criminal history.

(6) If—

(a) a court—

(i) convicts an offender of an offence; and

(ii) does not record a conviction; and

(iii) makes a probation order or community service order for the offender; and

(b) the offender is subsequently dealt with by a court for the same offence in any way in which it could deal with the offender if the offender had just been convicted by or before it of the offence;

the conviction for the offence must be recorded by the second court.

(7) Despite subsection (6), the second court is not required to record the conviction for the offence if—

(a) the offender is the subject of a community service order or probation order; and

(b) the reason the court is dealing with the offender for the same offence is because the offender has applied for a revocation of the community service order or probation order; and

(c) the offender has not breached the community service order or probation order.

13 Guilty plea to be taken into account

(1) In imposing a sentence on an offender who has pleaded guilty to an offence, a court—

(a) must take the guilty plea into account; and

(b) may reduce the sentence that it would have imposed had the offender not pleaded guilty.

(2) A reduction under subsection (1)(b) may be made having regard to the time at which the offender—

(a) pleaded guilty; or

(b) informed the relevant law enforcement agency of his or her intention to plead guilty.

(3) When imposing the sentence, the court must state in open court that it took account of the guilty plea in determining the sentence imposed.

(4) A court that does not, under subsection (2), reduce the sentence imposed on an offender who pleaded guilty must state in open court—

(a) that fact; and

(b) its reasons for not reducing the sentence.

(5) A sentence is not invalid merely because of the failure of the court to make the statement mentioned in subsection (4), but its failure to do so may be considered by an appeal court if an appeal against sentence is made.

13A Cooperation with law enforcement authorities to be taken into account

(1) This section applies for a sentence that is to be reduced by the sentencing court because the offender has undertaken to cooperate with law enforcement agencies in a proceeding about an offence, including a confiscation proceeding.

(2) Before the sentencing proceeding starts, a party to the proceeding—

(a) must advise the relevant officer—

(i) that the offender has undertaken to cooperate with law enforcement agencies; and

(ii) that written or oral submissions or evidence will be made or brought before the court relevant on that account to the reduction of sentence; and

(b) may give to the relevant officer copies of any proposed written submissions mentioned in paragraph (a)(ii).

(3) After the offender is invited to address the court—

(a) the offender's written undertaking to cooperate with law enforcement agencies must be handed up to the court; and

(b) any party may hand up to the court written submissions relevant to the reduction of sentence.

(4) The undertaking must be in an unsealed envelope addressed to the sentencing judge or magistrate.

(5) If oral submissions are to be made to, or evidence is to be brought before, the court relevant to the reduction of sentence, the court must be closed for that purpose.

(6) The penalty imposed on the offender must be stated in open court.

(7) After the imposition of the penalty, the sentencing judge or magistrate must—

(a) close the court; and

(b) state in closed court—

(i) that the sentence is being reduced under this section; and

(ii) the sentence it would otherwise have imposed; and

(c) cause the following to be sealed and placed on the court file with an order that it may be opened only by an order of the court, including on an application to reopen the sentencing proceedings under section 188(2)—

(i) the written undertaking;

(ii) a record of evidence or submissions made relevant to the reduction of sentence and the sentencing remarks made under paragraph (b).

(8) The sentencing judge or magistrate may make an order prohibiting publication of all or part of the proceeding or the name and address of any witness on his or her own initiative or on application.

(9) In deciding whether to make an order under subsection (8), the judge or magistrate may have regard to—

(a) the safety of any person; and

(b) the extent to which the detection of offences of a similar nature may be affected; and

(c) the need to guarantee the confidentiality of information given by an informer.

(10) A person who contravenes an order made under subsection (8) commits an offence.

Maximum penalty—

(a) for an order made by a judge—5 years imprisonment; or

(b) for an order made by a magistrate—3 years imprisonment.

(11) In this section—

relevant officer means—

(a) for a proceeding before the Supreme or District Court—the sentencing judge's associate; or

(b) for a proceeding before a Magistrates Court—the relevant clerk of the court.

14 Preference must be given to compensation for victims

If a court considers—

(a) that it is appropriate—

(i) to make an order for compensation (whether under this or another Act); and

(ii) to impose a fine or make another order for payment of an amount of money; and

(b) that the offender can not pay both the compensation and the fine or amount;

the court must give preference to making an order for compensation, but may also impose a sentence other than that of imprisonment.

15 Information on sentence

(1) In imposing a sentence on an offender, a court may receive any information, including a report mentioned in the *Corrective Services Act 2006*, section 344, that it considers appropriate to enable it to impose the proper sentence.

(2) An authorised corrective services officer must not, in any information or report, recommend that a fine option order or community based order should not be made for an offender merely because of—

(a) any physical, intellectual or psychiatric disability of the offender; or

(b) the offender's sex, educational level or religious beliefs.

15A Audiovisual link or audio link may be used to sentence

(1) The court may allow anything that must or may be done in relation to the sentencing of an offender to be done over an audiovisual link or audio link, if the prosecutor and the offender agree to the use of the link.

(2) For sections 10(1) and 13(3) or (4), anything done, for an offender's sentencing, over an audiovisual link or audio link between the offender and the court sitting in open court is taken to be done in open court.

(3) The provisions of the *Evidence Act 1977* relating to the use of an audiovisual link or audio link in criminal proceedings apply for, and are not limited by, subsection (1).