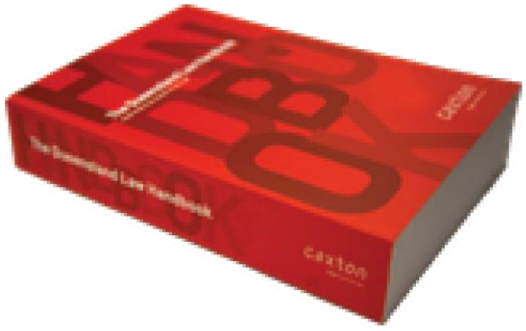


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# Sentencing

## CHAPTER CONTENTS

# INTRODUCTION

In Queensland, the *Criminal Code Act 1899* (Qld) (Criminal Code) and other legislation set out the punishments that can be imposed for particular offences, while the *Penalties and Sentences Act 1992* (Qld) (Penalties and Sentences Act) outlines sentencing guidelines and a wide range of sentencing options for judges and magistrates that must be adhered to when sentencing adult offenders. The guidelines make it clear that the only purpose for which sentences may be imposed are to administer just punishment, facilitate rehabilitation, ensure deterrence and denunciation, and to protect the community.

The *Youth Justice Act 1992* (Qld) (Youth Justice Act) provides sentencing guidelines and options for the sentencing of juvenile offenders (offenders younger than 18 years of age).

Commonwealth offences are dealt with under the *Crimes Act 1914* (Cth) (Crimes Act) and other Commonwealth legislation.

The *Corrective Services Act 2006* (Qld) (Corrective Services Act) contains some rules in relation to parole eligibility for people sentenced to longer periods of imprisonment for violent and sexual offences.

This chapter focuses on the current sentencing options available to the courts under the Penalties and Sentences Act, under which the majority of sentences are imposed.

# GENERAL CONSIDERATIONS WHEN SENTENCING AN OFFENDER

There are several factors the court must consider when deciding on an appropriate sentence, including (s 9(2) Penalties and Sentences Act):

- the principle that a sentence of imprisonment should only be imposed as a last resort, and that a sentence that allows an offender to stay in the community is preferable
- the maximum and minimum penalty prescribed for an offence
- the nature of an offence and seriousness of the harm caused
- the extent to which an offender is to blame for an offence
- any damage, injury or loss caused by an offender
- the offender's age, character and intellectual capacity
- the presence of any aggravating or mitigating factors concerning an offender (e.g. whether the offender was a participant in a criminal organisation at the

time the offence was committed, or whether the offender is a victim of domestic violence)

- the prevalence of an offence
- how much assistance an offender gave to law enforcement agencies in the investigation of an offence or other offences
- time already spent in custody by an offender for an offence before being sentenced
- sentences already imposed on an offence that have not yet been served
- sentences that an offender is liable to serve because of the revocation of a previous order because of the offenders' contravention of certain conditions
- if an offender is the subject of a community-based order, the offender's compliance with the order as disclosed in a report given by an authorised corrective services officer
- if an 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
- the principal that the court should not refuse to make a community-based order merely because of a physical, intellectual or psychiatric disability suffered by an offender, or an offender's sex, education level or religious beliefs
- any other relevant circumstances.

If the offence involved violence, the above factors do not apply (s 9(2A) Penalties and Sentences Act). Instead, the sentencing court must consider (s 9(3) Penalties and Sentences Act):

- the risk of physical harm to any members of the community if a custodial sentence were not imposed
- the need to protect any members of the community from the risk of physical harm
- the personal circumstances of any victim of an offence
- the circumstances of an offence, including the death or injury to any member of the public or any loss or damage caused by the offence
- the nature and extent of the violence used, or intended to be used, in the commission of an offence
- an offender's disregard for public safety

- an offender's past record, including any attempted rehabilitation and their number of previous offences of any type
- an offender's age, character and antecedents
- an offender's remorse (or lack of remorse)
- any medical, psychiatric, prison or other relevant report in relation to an offender
- anything else about the safety of the members of the community that the court considers relevant.

When sentencing an offender for an offence of a sexual nature committed in relation to a child under 16 years, the court must order that the offender serve a term of imprisonment, unless there are exceptional circumstances (s 9(4) Penalties and Sentences Act).

An offender's voluntary intoxication by drugs or alcohol is not a mitigating factor that the court may have regard to when sentencing an offender (s 9(9A) Penalties and Sentences Act).

The court is required to treat each of an offender's previous conviction as an aggravating factor if it is reasonable to do so (s 9(10) Penalties and Sentences Act). Whether it is reasonable to do so may depend upon how much time has elapsed between each conviction and whether similar offences were involved, however, the sentence that is imposed must not be disproportionate to the seriousness of the current offence (s 9(11) Penalties and Sentences Act).

The court must treat the fact that an offence is a domestic violence offence as an aggravating factor when determining the appropriate sentence for the offender, unless exceptional circumstances of the case exist (s 9(10A) Penalties and Sentences Act). Conversely, if an offender is themselves a victim of domestic violence, the court must treat, as a mitigating factor:

- the effect of the domestic violence on the offender (unless the court considers it not reasonable to do so because of the exceptional circumstances)
- if an offence can be wholly or partly attributed to the effect of domestic violence on the offender.

The age of the offender is a relevant consideration for the court to take into account in sentencing. Youthful offenders will often be given sentences that allow them the opportunity for rehabilitation (see *R v Lovell* [1999] 2 Qd R 79). In some cases, the court may consider that an elderly person (perhaps with disabilities or with a previously unblemished record) would receive a more lenient sentence that they otherwise might have in similar circumstances.

The courts must also take into account whether the offender has pleaded guilty (s 13 Penalties and Sentences Act) or has cooperated with law enforcement agencies (s 13APenalties and Sentences Act). Additionally, if the court convicts an offender of a personal offence (i.e.an offence committed against another person), it may also make a non-contact order that the offender not contact the victim or an associate, or that the offender not go to a stated place for a stated period of time (pt 3A Penalties and Sentences Act).

## SERIOUS VIOLENT OFFENCES

As part of the sentencing process, the court can declare that an offender has been convicted of a 'serious violent offence' (pt 9A Penalties and Sentences Act).

Schedule 1 of the Penalties and Sentences Act includes a wide range of violent and sexual offences and also other offences that have the potential to cause harm to another person including bomb hoaxes, escaping from lawful custody, riot and dangerous operation of a vehicle.

If an offender is sentenced to a period of imprisonment of 10 years or more in relation to an offence listed in sch 1 of the Penalties and Sentences Act, then the offender is automatically declared to be convicted of a serious violent offence.

If an offender is sentenced to a period of imprisonment between 5 and 10 years in relation to an offence listed in sch 1 of the Penalties and Sentences Act, or if an offender is sentenced to any period of imprisonment in relation to any offence involving serious violence or that resulted in serious harm to another person (regardless of whether it is an offence listed in sch 1 of the Penalties and Sentences Act), then the sentencing court has the discretion to declare that the offender has been convicted of a serious violent offence. That discretion is unfettered, but must be exercised judicially and with regard to all relevant circumstances including the consequences of such a declaration (as discussed below).

If the court declares than an offender has been convicted of a serious violent offence then, unless another date is fixed by the court, the offender's parole eligibility date is the day after the offender has served the lesser of:

- 80% of the offender's term of imprisonment or
- 15 years.

The court may fix an offender's parole eligibility date, however, it must not be sooner than the date equivalent to 80% of the term of the offender's imprisonment.

## MULTIPLE OFFENCES

An offender convicted of more than one offence is sentenced separately for each offence. The court may order that the sentences be served at the same time

(concurrently) or one after the other (cumulatively). In most instances, sentences are ordered to be served concurrently (s 155 Penalties and Sentences Act). This means that the total length of time served is equal to the length of the longest of the sentences imposed.

In some instances, the court must order that sentences be served cumulatively, for example when an offender has committed a serious violent offence listed in sch 1 of the Penalties and Sentences Act and the offence was committed while the offender was already serving a term of imprisonment, on parole, on leave of absence from prison or at large after escaping from custody (s 156A Penalties and Sentences Act).

## ABSOLUTE OR CONDITIONAL DISCHARGE

If a court considers that an offence warrants no punishment or only a nominal punishment, then the court may order that the offender be released absolutely (ss 17 and 19(1)(a) Penalties and Sentences Act). Such orders are given quite rarely and only for the most minor offences.

Before making an order discharging an offender, the court must consider the offender's character, age, health and mental condition, the nature of the offence, the circumstances (if any) under which the offence was committed that make the offence less serious and anything else the court considers relevant to the decision to make such an order (s 18 Penalties and Sentences Act).

## RECOGNISANCE

A recognisance is a promise, entered into and recorded before a court, to appear in court when called upon to do so, pay a certain amount of money, keep the peace and be of good behaviour for a specified period.

The Penalties and Sentences Act allows the imposition of recognisance when the court considers that it is appropriate that no punishment or only a nominal punishment should be imposed (s 17(1) Penalties and Sentences Act) for property-related offences (s 23 Penalties and Sentences Act) and other offences (ss 30, 32 Penalties and Sentences Act).

In most cases, if the court makes a recognisance order, it cannot record a conviction (ss 16, 22 Penalties and Sentences Act), however if the offender is convicted on indictment then the court has a discretion whether or not to record a conviction (s 29 Penalties and Sentences Act).

## Drug diversion

In certain circumstances, the court may impose a condition that an offender released on recognisance must participate in a drug assessment and education session by a certain date (called a 'drug diversion condition').

A drug diversion condition can only be imposed if:

- the court is a drug diversion court (as at the time of writing, each Magistrates Court and Childrens Court constituted by a magistrate is a drug diversion court)
- the offender is an 'eligible drug offender'
- the offender consents to participating in a drug assessment and education session.

An offender is an eligible drug offender if the person (s 19(2A) Penalties and Sentences Act):

- has plead guilty to an eligible drug offence (i.e. an offence of unlawful possession of a dangerous drug under s 9 of the *Drugs Misuse Act 1986* (Qld)) where each dangerous drug mentioned in the charge is a dangerous drug, the total quantity of each of the dangerous drugs mentioned in the charge does not exceed the prescribed quantity, and the court considers that each dangerous drug mentioned in the charge was for the person's personal use (s 15D Penalties and Sentences Act)
- has not previously been convicted of a 'disqualifying offence' and does not have a charge for a disqualifying offence pending in court
- has not previously received two or more drug diversion alternatives.

Some examples of a disqualifying offence include offences of a sexual nature, offences for trafficking, supplying or producing dangerous drugs, or offences involving violence against another person (s 15E Penalties and Sentences Act).

Whether or not the court imposes a drug diversion condition (or any other condition), if the offender consents, the court may also impose a condition that the offender complete a drug and alcohol assessment referral course (called a DAAR course) by a certain date (called a DAAR condition) (s 19(2B) Penalties and Sentences Act).

If an offender contravenes either a drug diversion condition or a DAAR condition, then the court may bring the offender back before the court and record a conviction and sentences the offender for the offence with which the offender was originally charged, or make any other order that the court could have made

as if the offender had not been released on recognisance (s 20 Penalties and Sentences Act).

For further discussion of alternative sentences to terms of imprisonment for drug offences in Queensland see the *Queensland Law Handbook* chapter on Drugs.

## Recognisance for property-related offences

When an offender has been convicted of a property-related offence, a court may adjourn the sentencing of the offender for not more than six months and release the offender upon a recognisance on the condition that the offender agree to reappear before the court to be sentenced at the time and place specified in the order or at an earlier time (s 24 Penalties and Sentences Act). Recognisance may be ordered with or without sureties. A surety is a person who agrees to provide an amount or forfeit a sum of money or property if the offender does not attend court when required. If the court orders recognisance for a property related offence, it cannot record a conviction (s 22 Penalties and Sentences Act).

The offender may be required to reappear before the court at an earlier time if, for example, the court wishes to see what steps the offender has taken to restore, reinstate or provide compensation for the victim's property (s 25 Penalties and Sentences Act).

If the offender fails to appear at the time specified in the recognisance order or at an earlier time (if called upon by the court), the recognisance may be forfeited and a warrant issued for the offender's arrest. Upon the offender's apprehension, the court may sentence the offender in respect of the offence for which the recognisance was originally granted or make any other order that the court could have made and may record a conviction against the offender (s 27 Penalties and Sentences Act).

The recognisance terminates if the offender is called upon to appear at an earlier time or when the offender appears at the time specified in the order (s 28 Penalties and Sentences Act). In sentencing the offender, the court may have regard to the steps (if any) the offender has taken in relation to the aggrieved person's property.

## Fixed-period recognisance

If an offender is convicted summarily (i.e. by the Magistrates Court), they may be released on a recognisance, with or without sureties, on the condition that the offender keep the peace and be of good behaviour for a period fixed by the court which must not be longer than one year (s 31 Penalties and Sentences Act).

If an offender is convicted on indictment (i.e. by the District Court or Supreme Court), then, in addition to or instead of any other sentence, they may be released

on recognisance, with or without sureties, on the condition that the offender keep the peace and be of good behaviour for a period fixed by the court (s 30 Penalties and Sentences Act). If an order for a recognisance is made by the District or Supreme Court, then the period during which the offender must keep the peace and be of good behaviour may (but not must) exceed one year. Furthermore, the court may order than an offender be imprisoned until they enter into the recognisance, however, the period of imprisonment must not exceed one year nor, together with any other imprisonment that is ordered for the offence, the longest term of imprisonment for which the offender might be sentenced to be imprisoned without a fine.

### General recognisance

Any court may, instead of imposing another sentence, release an offender if the offender enters into a recognisance (with or without sureties) on the conditions that the offender must (s 32 Penalties and Sentences Act):

- appear before the court to be sentenced at a future sitting of the court or, if called on, within a period stated by the court
- keep the peace and be of good behaviour in the meantime.

(Section 32 of the Penalties and Sentences Act).

If the court makes a recognisance order in those circumstances, then the court has a discretion whether or not to record a conviction (s 29 Penalties and Sentences Act).

## RESTITUTION, COMPENSATION AND RESTORATION

In addition to any other sentence, a court may order an offender to pay restitution or compensation for property loss or destruction connected with the commission of the offence (s 35 Penalties and Sentences Act). If the offence caused any injury to any person (not just the actual victim of the offence), compensation may also be ordered.

A community-based order (e.g. a community service order) may contain a specific requirement that restitution or compensation is to be made, and failure to comply with such a requirement will amount to a breach of that order.

In making an order for compensation or restitution, a court has the discretion to record a conviction (s 34 Penalties and Sentences Act). The court may also order that if the person fails to pay the compensation or make restitution in accordance with the order, that the person be sentenced to a period of imprisonment (s 36(2) Penalties and Sentences Act). Such an order:

- cannot exceed one year of imprisonment if a person is convicted on indictment in the District or Supreme Court
- cannot exceed six months of imprisonment if an offender is convicted summarily in the Magistrates Court (s 37 Penalties and Sentences Act).

The court may extend the time within which the restitution is to be made or the compensation is to be paid upon written application (s 38 Penalties and Sentences Act).

Failure to comply with a restitution or compensation order can result in the offender being required to appear and show cause as to why an order of imprisonment should not be enforced (s 39(2) Penalties and Sentences Act).

If the court is satisfied that the order of imprisonment should not be enforced against the offender, the court may:

- accept payment of the amount ordered to be paid by the offender in full (s 39A(a) Penalties and Sentences Act)
- make an order that the unpaid amount be paid by instalments if the offender has not been paying the amount by instalments (s 39A(b) Penalties and Sentences Act)
- make an order that the proper officer register the prescribed particulars of the unpaid amount under the *State Penalties Enforcement Act 1999* (Qld) (s 39A(c) Penalties and Sentences Act).

If the offender fails to appear, a warrant will be issued to arrest and bring the offender before the court to show cause as to why the order of imprisonment should not be enforced.

## Restoration of property

If an offender is convicted on indictment of a charge of which the unlawful obtaining of property by the offender is an element of the charge then the District Court or the Supreme Court can order the restoration of property to its owner or a person who is legally entitled to its possession (s 194(1) Penalties and Sentences Act). The order may be enforced as a judgment and is binding on the offender and any other person claiming ownership through the offender as determining the ownership of the property (s 194(2) Penalties and Sentences Act). Either court can also order that any personal property in the offender's possession and that appears to have been directly or indirectly obtained as a result of the offence be delivered to the person who appears to the court to be entitled to the property (s 194(3) Penalties and Sentences Act).

If an offender is convicted in the Magistrates Court of an offence relating to property, the court may release the offender without imposing any sentence if the offender pays damages (which may include the person's legal costs) to the person who is entitled to the property the subject of the offence (s 190 Penalties and Sentences Act).

### Compensation for personal injuries

For a full discussion of compensation for victims of crime see the chapter on Assisting Victims of Crime.

## FINES

When an offender is found guilty of an offence, the court may impose a fine regardless of whether or not it records a conviction (s 44 Penalties and Sentences Act). One fine may be imposed for multiple offences (s 49 Penalties and Sentences Act). The court may impose a fine in addition to, or instead of, any other sentence (e.g. in addition to imprisonment or another order). The legislation that contains the offence of which the offender is convicted will usually specify the maximum fine for the specific offence. Unless the legislation provides otherwise, the court may impose a fine that is lower than the maximum fine that is specified (s 47 Penalties and Sentences Act).

Fines are expressed in penalty units. The value of a penalty unit is updated regularly to account for inflation. As at the date of writing, one penalty unit is equivalent to $161.30. The value of a penalty unit can be found at s 3 of the *Penalties and Sentences Regulation 2015* (Qld).

In determining the amount of the fine and how it is paid, the court must, as far as practicable, consider the financial circumstances of the offender and the burden that payment of the fine will impose on the offender (s 48 Penalties and Sentences Act). In considering the offender's financial circumstances, the court must take into account any existing order or proposed order for restitution or compensation, or for the confiscation of the proceeds of crime. If the court considers that it would be appropriate to impose a fine and also to make a restitution or compensation order, but it is obvious to the court that the offender would not be able to pay both, then the court must place more importance on the order for restitution or compensation (although it may still impose a fine). In determining the amount of the fine, the court may also consider any loss or damage to any person's property caused by the offence and the value of any benefit received by the person.

If the court imposes a fine, then the court has three options:

- order that the fine be paid by a specific time (s 51 Penalties and Sentences Act)

- order that the fine be paid by way of instalments (s 50 Penalties and Sentences Act)
- refer the fine to the State Penalties Enforcement Registry for registration (s 51 Penalties and Sentences Act)

When imposing a fine, the court may also make an order for a term of imprisonment that the offender will face in default of payment.

## Fine option orders

The court may order that a fine be converted into a 'fine option order' (s 53 Penalties and Sentences Act). A fine option order allows a convicted person to perform unpaid community service instead of paying their fine. An offender may apply for a fine option order immediately after a fine is imposed, or within the time set for payment of the fine (ss 53–55 Penalties and Sentences Act).

A court may only make a fine option order if the court is satisfied that the offender:

- is unable to pay the fine in accordance with the original order
- or the offender's family would suffer economic hardship
- is a suitable person to perform community service under a fine option order (s 57 Penalties and Sentences Act).

The number of community service hours required to be performed must satisfy the justice of the case. The number of hours ordered must not be more than five hours for each penalty unit, or part of a penalty unit, that was imposed as a fine under the original order (s 69 Penalties and Sentences Act).

The number of community service hours required to be performed under a fine option order can be reduced in whole or in part if the offender subsequently pays the fine or part of the fine that was originally imposed (s 70 Penalties and Sentences Act). The offender's program of community service to be undertaken to satisfy the fine option order will be supervised by a corrective services officer.

A fine option order is subject to similar requirements to those that are imposed for a community service order. If any of those requirements is not met, then the court may extend the period in which community service is to be performed. The fine option order may also be revoked for non-compliance, in which case the offender will immediately be liable to serve the period of imprisonment that was specified as the default period in the original fine order (s 74 Penalties and Sentences Act). The period of imprisonment will be reduced to reflect any partial payment of the fine or partial performance of the community service prior to the offender's non-compliance (s 82 Penalties and Sentences Act).

### Review of fine option orders

A fine option order may be revoked if the court is satisfied that:

- the offender is not able to comply with the order because the offender's circumstances have materially changed since the fine option order was made
- the offender is no longer willing to comply with the fine option order
- the offender's circumstances were not accurately presented to the court when the order was originally made (s 79 Penalties and Sentences Act).

If a fine option order is revoked, the court may confirm the original order, vary the original order or revoke the original order and resentence the offender for the offence for which the order was made. In determining how to resentence the offender, the court must take into account the extent to which the offender had complied with the original order and the fine option order prior to its revocation (s 80 Penalties and Sentences Act).

### Failure to pay fine

Fines are enforced by the State Penalties Enforcement Registry (SPER) under the *State Penalties Enforcement Act 1999* (Qld).

If a person fails to pay a fine by the due date, then the court will refer the fine to SPER so that enforcement action may be taken.

There are many steps that SPER may take to recover the fine amount including sending letters of demand, suspending a person's driver licence, seizing a persons' property and garnishing a person's wages.

If the fine remains unpaid, then SPER may seek to have a warrant issued for the person's arrest and imprisonment. Once a warrant has been served, the only option to avoid imprisonment is to pay the full outstanding amount.

## COMMUNITY-BASED ORDERS

### Probation orders

A probation order is a community-based order where the offender is allowed to remain in the community under the supervision of a corrective services officer and must comply with certain conditions.

When imposing a probation order, the court has discretion whether or not to record a conviction (s 90 Penalties and Sentences Act)

Probation orders may be combined with community service orders and are often given to young offenders who the court considers would benefit from the supervision and direction of such an order.

Under a probation order, an offender may be released on probation:

- immediately, for a period not less than six months or more than three years (in which case the court has a discretion whether or not to record a conviction) (s 92(1)(a) Penalties and Sentences Act)
- after a period of imprisonment not exceeding 12 months, for a period not less than nine months or not more than three years (in which case the court must record a conviction) (s 92(1)(b) Penalties and Sentences Act).

Every probation order must contain the requirements that the offender must (s 93 Penalties and Sentences Act):

- not commit another offence during the period of the order
- report to an authorised corrective services officer at the place and within the time specified in the order
- report to and receive visits from the officer as directed by an authorised corrective services officer
- take part in counselling and satisfactorily attend any other programs as directed by the court or an authorised corrective services officer during the probation period
- notify an authorised corrective services officer of any change of the offender's home address or employment within two business days after the change happens
- not leave or stay outside of Queensland without the prior permission of an authorised corrective services officer
- comply with every reasonable direction of an authorised corrective services officer.

A probation order may also contain additional conditions such as a requirement that the offender to submit to medical, psychiatric or psychological treatment or comply with other conditions that the court thinks necessary to cause the offender to behave in a way acceptable to the community or to stop the offender from committing further offences (s 94 Penalties and Sentences Act).

Before making a probation order, the court must explain, in a language or way likely to be readily understood by the offender (s 95 Penalties and Sentences Act):

- the purpose and effect of the probation order
- the consequences of contravening the requirements of the probation order

- that the probation order may be amended or revoked on application by the offender, an authorised corrective services officer or the director of public prosecutions.

Finally, the offender must agree to the probation order being made and agree that they will comply with the requirements of the probation order (s 96 Penalties and Sentences Act).

A probation order is terminated (s 99 Penalties and Sentences Act):

- at the end of its period
- if the offender is sentenced or further sentenced for the offence for which the probation order was made
- if the probation order is revoked because:
    - the offender is no longer able to comply with the probation order because of a material change in the offender's circumstances
    - the offender's circumstances were wrongly stated to the court when the probation order was made
    - the offender is no longer willing to comply with the probation order.

## Community service orders

A community service order requires an offender to perform unpaid community service under the supervision of a corrective services officer for a certain number of hours stated in the order.

When imposing a community service order, the court has discretion whether or not to record a conviction (s 100 Penalties and Sentences Act).

The type of community service to be performed under the order be decided by the corrective services officer, having regard to the skills and abilities of the offender and the community service work that is available.

Community service orders may be combined with a probation order and are a particularly useful sentencing option for an offender who the court considers would benefit from giving something back to the community.

Every community service order must contain the requirements that the offender must (s 103 Penalties and Sentences Act):

- not commit another offence during the period of the order
- report to an authorised corrective services officer at the place and within the time specified in the order

- report to and receive visits from the officer as directed by an authorised corrective services officer
- perform, in a satisfactory way, community service directed by an authorised corrective services officer for the number of hours stated in the order and at the times directed by the officer
- notify an authorised corrective services officer of any change of the offender's home address or employment within two business days after the change happens
- not leave or stay outside of Queensland without the prior permission of an authorised corrective services officer
- comply with every reasonable direction of an authorised corrective services officer.

The total number of hours of community service stated in the order must not be less than 40 hours or more than 240 hours, and must be completed within one year of making the order or another time allowed by the court (s 103(2A) Penalties and Sentences Act).

Before making a community service order, the court must explain, in a language or way likely to be readily understood by the offender (s 105 Penalties and Sentences Act):

- the purpose and effect of the community service order
- the consequences of contravening the requirements of the community service order
- that the community service order may be amended or revoked on application by the offender, an authorised corrective services officer or the director of public prosecutions.

Finally, the offender must agree to the community service order being made and agree that they will comply with the requirements of the community service order (s 106 Penalties and Sentences Act).

A community service order is terminated (s 108 Penalties and Sentences Act):

- when the offender performs community service for the number of hours stated in the order and in accordance with the other requirements of the order
- if the offender is sentenced or further sentenced for the offence for which the community service order was made
- if the community service order is revoked because:

- the offender is no longer able to comply with the community service order because of a material change in the offender's circumstances
- the offender's circumstances were wrongly stated to the court when the community service order was made
- the offender is no longer willing to comply with the community service order.

If an offender is convicted of:

- affray
- grievous bodily harm
- wounding
- common assault
- assault occasioning bodily harm
- assaulting, resisting or obstructing a police officer (or any other person aiding a police officer) while acting in the execution of their duties
- assaulting, resisting or obstructing a public officer while acting in the execution of their duties or because they have performed a function of their public office
- assaulting or obstructing a police officer in the performance of their duties

and the offence is committed in a public place and while the offender was adversely affected by an intoxicating substance then, unless the court is satisfied that the offender is not capable of complying with the order because of any physical, intellectual or psychiatric disability, the court must make a community service order for the offender regardless of whether it also makes another order (s 108B Penalties and Sentences Act). If a community order is made in those circumstances but the offender is detained in custody or on remand or is serving a period of imprisonment in a corrective services facility, then the community service order is suspended for the period the offender is detained or imprisoned and the period for performance of the community service order is extended by that period (s 108D Penalties and Sentences Act).

## Graffiti removal order

If an offender is convicted of:

- wilful damage to property in a public place (or visible from a public place) in circumstances where the damage is caused by spraying, writing, drawing, marking, painting, scratching or etching

- possessing a graffiti instrument (e.g. a can of spray paint) that is reasonably suspected of having been used for graffiti, is being used for graffiti or is reasonably suspected of being about to be used for graffiti

then, unless the court is satisfied that the offender is not capable of complying with the order because of any physical, intellectual or psychiatric disability, the court must make a special type of community service order called a graffiti removal order.

As the name suggests, a graffiti removal order requires an offender to perform unpaid graffiti removal service under the supervision of a corrective services officer for a certain number of hours stated in the order.

The court may impose a graffiti removal order regardless of whether or not it records a conviction or also makes another order (s 110A(2) Penalties and Sentences Act).

Every graffiti removal order must contain the requirements that the offender must (s 103 Penalties and Sentences Act):

- not commit another offence during the period of the order
- report to an authorised corrective services officer at the place and within the time specified in the order
- report to and receive visits from the officer as directed by an authorised corrective services officer
- perform, in a satisfactory way, graffiti removal service directed by an authorised corrective services officer for the number of hours stated in the order and at the times directed by the officer;
- notify an authorised corrective services officer of any change of the offender's home address or employment within two business days after the change happens
- not leave or stay outside of Queensland without the prior permission of an authorised corrective services officer
- comply with every reasonable direction of an authorised corrective services officer.

The total number of hours of graffiti removal service stated in the order must not be more than 40 hour and must be completed within one year of making the order or another time allowed by the court (s 110C(2) Penalties and Sentences Act).

As with a community service order and probation order, before making a graffiti removal order, the court must explain, in a language or way likely to be readily understood by the offender (s 110D Penalties and Sentences Act):

- the purpose and effect of the graffiti removal order
- the consequences of contravening the requirements of the graffiti removal order
- that the graffiti removal order may be amended or revoked on application by the offender, an authorised corrective services officer or the director of public prosecutions.

The court may make a combination of orders that includes a graffiti removal order, a community service order and/or a probation order, however (ss 110E and 110F Penalties and Sentences Act):

- the court must make separate orders and must not impose one order as a requirement of another order
- if the court makes both a graffiti removal order and a community service order, the total number of hours for both orders must not exceed 240 hours
- if the court makes more than one graffiti removal order, the total number of hours for the orders must not exceed 40 hours
- if the offender contravenes the requirements or any one order and is consequently dealt with for the original offence, the other orders are discharged.

A graffiti removal order is terminated (s 110I Penalties and Sentences Act):

- when the offender performed graffiti removal service for the number of hours stated in the graffiti removal order and in accordance with the other requirements of the graffiti removal order
- if the offender is sentenced or further sentenced for the offence for which the graffiti removal order was made
- if the graffiti removal order is revoked because the court is satisfied that the offender is not capable of complying with the graffiti removal order because of any physical, intellectual or psychiatric disability.

## Intensive correction orders

An intensive correction order can only be made if the court has:

- recorded a conviction (s 111 Penalties and Sentences Act)
- sentenced an offender to a term of imprisonment of one year or less (s 112 Penalties and Sentences Act)

The effect of an intensive correction order is that the offender serves their sentence of imprisonment by way of intensive correction in the community, rather than in a prison (s 113(1) Penalties and Sentences Act).

An offender subject to an intensive correction order will not be taken to have been sentenced to a term of imprisonment for the purposes of any legislation providing for the disqualification for, or loss of, office or the forfeiture of benefits (s 113(2) Penalties and Sentences Act). An intensive correction order is usually imposed as a last resort (on people who have a history of offending) before an offender is given a sentence of actual imprisonment (to be served in a prison).

Every intensive correction order must contain the requirements that the offender must (s 114 Penalties and Sentences Act):

- not commit another offence during the period of the order
- report to an authorised corrective services officer at the place and within the time specified in the order
- report to and receive visits from an authorised corrective services officer at least twice each week that the order is in force
- perform, in a satisfactory way, any community service that an authorised corrective services officer may direct during the period of the order
- if an authorised corrective services officer directs, reside at community residential facilities for periods (not longer than seven days at a time)
- notify an authorised corrective services officer of any change of the offender's home address or employment within two business days after the change happens
- the offender must not leave or stay outside of Queensland without the prior permission of an authorised corrective services officer
- comply with every reasonable direction of an authorised corrective services officer.

An authorised corrective services officer must not direct an offender to attend programs or perform community service for more than 12 hours in a week, however, unless the court or an authorised corrective services officer otherwise directs, the offender must attend programs for one-third of the time directed and perform community service for two-thirds of the time directed (ss 114(2) and (2A) Penalties and Sentences Act).

An offender may also be required to submit to medical, psychiatric or psychological treatment or comply with any other conditions that the court considers necessary to cause the offender to behave in a way that is acceptable to the community or to stop the offender from committing further offences (s 115 Penalties and Sentences Act). Before making an intensive correction order, the court must explain, in a

language or way likely to be readily understood by the offender (s 116 Penalties and Sentences Act):

- the purpose and effect of the intensive correction order
- the consequences of contravening the requirements of the intensive correction order
- that the intensive correction order may be amended or revoked on application by the offender, an authorised corrective services officer or the director of public prosecutions.

The offender must agree to the intensive correction order being made and agree that they will comply with the requirements of the intensive correction order (s 117 Penalties and Sentences Act).

An intensive correction order is terminated (s 119 Penalties and Sentences Act):

- at the end of its period
- if the offender is sentenced or further sentenced for the offence for which the intensive correction order was made
- if the community service order is revoked because:
    - the offender is no longer able to comply with the intensive correction order because of a material change in the offender's circumstances
    - the offender's circumstances were wrongly stated to the court when the intensive correction order was made
    - the offender is no longer willing to comply with the intensive correction order.
- if the offender is committed to prison because of a contravention of the intensive correction order (as discussed below).

## BREACH OF COMMUNITY-BASED ORDERS

An offender who contravenes any requirement of a community-based order without reasonable excuse commits an offence punishable by a maximum penalty of 10 penalty units. As at the date of writing, one penalty unit is equivalent to $161.30. The value of a penalty unit can be found at reg 3 of the *Penalties and Sentences Regulation 2015* (Qld).

In addition to, or instead of, issuing a penalty, the court may also:

- make an order that any amount required to be paid pursuant to the community-based order concerned is to be paid immediately and enforce that payment

- with the offender's consent, make an order to increase the number of hours for which the offender is required to perform community service
- with the offender's consent, make an order to increase the number of hours for which the offender is required to perform graffiti removal service
- make an order extending the period of one year allowed for the offender to perform community service or graffiti removal service
- resentence the offender for the offence for which the community-based order was made.

In resentencing, the court must take into account the making of the community-based order and the extent of the offender's compliance with the community-based order. Upon resentencing, the original community-based order will be automatically discharged.

A community-based order may also be revoked or amended, and the offender may be resentenced if they are unable to, or no longer willing to, comply with the order, or if the offender's circumstances were not accurately presented to the court when the order was originally imposed (s 120 Penalties and Sentences Act).

An offender who breaches an intensive correction order may be sent to prison for the term of imprisonment that remained unexpired at the time of the breach (s 127 Penalties and Sentences Act).

## IMPRISONMENT

The Criminal Code and other Queensland legislation set out the maximum penalties that may be imposed upon people convicted of particular criminal offences. In most cases those maximum penalties are expressed as a term of imprisonment, however, in most cases lesser penalties (e.g. shorter periods of imprisonment or another form of penalty) will be imposed. One notable exception to that rule is where an offender is convicted of murder, in which case the maximum sentence—life imprisonment—is mandatory. In every other case, it is rare for a person to be given the maximum sentence, which is generally reserved for the very worst offenders who commit offences in the very worst circumstances.

If the court imposes a sentence of imprisonment, then it must record a conviction (s 152 Penalties and Sentences Act).

If the court sentences an offender to a term of imprisonment of three years or less for an offence that is not a serious violent offence or a sexual offence, then it must fix a parole release date (s 160B Penalties and Sentences Act). On the parole release date, the offender will be released from custody and the balance of the period of

imprisonment will be served by the offender in the community under supervision on parole.

Where an offender is sentenced to a term of imprisonment of more than three years for an offence that is not a serious violent offence or a sexual offence, or any period of imprisonment for an offence that is a serious violent offence or sexual offence, the court may fix the date the offender is eligible to apply for parole (ss 160C and 160D Penalties and Sentences Act). The parole eligibility date marks the date that the offender will be able to apply for parole, but whether the application is ultimately successful will be determined by the Parole Board.

As discussed above, in the case of a serious violent offence, the parole eligibility date cannot be earlier than the lesser of 80% of the offender's term of imprisonment or 15 years from the date of sentence.

## Life imprisonment

When an offender is sentenced to life imprisonment, the period of imprisonment that is actually served by the offender in custody is determined by the Parole Board, which has the power to approve or reject applications for parole. In general, an offender sentenced to life imprisonment must serve at least 15 years of their term of imprisonment (or 20, 25 or 30 years for certain murder convictions) before being eligible to apply for parole. Whether or not an offender is released on parole is a decision for the Parole Board, not the courts.

## Parole

When a prisoner is granted early release from prison, they are allowed to serve the remainder of their sentence of imprisonment on parole in the community under supervision. For further information on parole see the chapter on Prisons and Prisoners.

## Indefinite sentences

Schedule 2 of the Penalties and Sentences Act include a wide range of serious violent and sexual offences.

If an offender is convicted of an offence listed in sch 2 and the court considers that the offender is a 'serious danger to the community' then, instead of imposing a fixed term of imprisonment, the court may impose an indefinite sentence (pt 10 Penalties and Sentences Act). This means that, although a nominal term of imprisonment will be specified (as discussed below), the prisoner will be held in custody indefinitely and can only be released by court order as a result of a periodic review of the prisoner's circumstances.

An indefinite sentence can only be imposed if the court is satisfied that the offender is a serious danger to the community because of the offender's antecedents, character, age, health and mental condition, the severity of the violent offence and any other special circumstances. In determining whether an offender is a serious danger to the community, the court must consider whether the nature of the offence is exceptional, any medical, psychiatric, prison or other relevant report in relation to the offender, the risk of serious harm to members of the community if the indefinite sentence were not imposed, and the need to protect members of the community from that risk.

When imposing an indefinite sentence, the court must state in its order the term of imprisonment that it would have imposed had it not imposed an indefinite sentence. This 'nominal sentence' is relevant to the timing of the reviews of the indefinite sentence and any future discharge of the order (s 171 Penalties and Sentences Act).

## Suspended sentences

A suspended sentence of imprisonment is imposed when a court sentences an offender to a term of imprisonment and then suspends the whole or part of the sentence. This means that the offender serves either no actual imprisonment or only part of the term of imprisonment.

Sentences of imprisonment for five years or less may be suspended (s 144 Penalties and Sentences Act). When imposing a suspended sentence, the court must also set an 'operational period' of five years or less. If the offender commits another offence punishable by imprisonment during the operational period, then the court must order the offender to serve the whole of the suspended period of imprisonment unless the court is of the opinion that it would be unjust to do so (e.g. because the subsequent offence was of a less serious nature, or because the court is satisfied that the offender has made a genuine effort at rehabilitation since the original sentence was imposed) (s 147 Penalties and Sentences Act). If the court does not order that the offender serve the whole of the suspended period, it may order that part of that period be served, or (in certain circumstances) extend the operational period. If the court does order that the offender be required to serve either the whole or part of the suspended period, then that imprisonment must be served immediately and concurrently with any other term of imprisonment that may be imposed on the offender by the court.

Parole does not apply to suspended sentences unless the whole sentence is later activated through the commission of a further offence within the operational period. If an offender is convicted of a further offence within the operational period and is required to serve the whole of the relevant sentence, then the same general

rules as to eligibility for parole apply to the sentence as if it had not been suspended.

If the court imposes a suspended sentence of imprisonment, then it must record a conviction (s 143 Penalties and Sentences Act).

# EFFECT OF CRIMINAL CONVICTION

## Criminal records

The Queensland Police Service keeps criminal records for all offenders. These records include details of arrests, court appearances, convictions, fingerprints (when applicable) and photographs.

If a person is found not guilty of an offence, a charge is dismissed or dropped, or a conviction is set aside or quashed on appeal, then that will not appear on a person's criminal record.

Although the information in a person's criminal history remains permanently on record, a person may be entitled to say that they have no previous convictions in certain circumstances. The disclosure of previous criminal convictions is discussed below.

It is an offence for police to disclose information from a person's criminal records other than for a prescribed purpose or in specific circumstances (s 12 *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) (CLRO Act) and s 10.1 *Police Service Administration Act 1990* (Qld) (PSA Act)). The Commissioner of Police may authorise the release of information in the possession of police (including a persons' criminal history) to police officers and to certain authorised government departments and public bodies (s 10.2 PSA Act).

## Legal disabilities

An offender will generally suffer legal disabilities as a result of a conviction. These disabilities are imposed by the law and society, and may last throughout the offender's life. Many offenders also limit their own career ambitions and involvement in community life because they fear disclosure of their conviction.

The extent of the detriment suffered will depend upon whether the court records a conviction against the offender. The Penalties and Sentences Act gives a judge or magistrate considerable discretion in deciding whether to record a conviction, depending upon what penalty has been imposed. In making the decision of whether or not to record a conviction, the court will consider the nature of the offence, the offender's character and age, and the impact that the recording of a conviction would have on the offender's economic and social wellbeing or employment prospects (s 12 Penalties and Sentences Act). In some circumstances

(e.g. when the court is imposing a prison sentence), the court must record a conviction.

In most cases, a conviction that is not recorded is taken not to be a conviction for any purpose, except for subsequent proceedings in relation to the same or other offences, or when the court is able to make certain orders under any legislation on the basis of the existence of a conviction (s 12(3) Penalties and Sentences Act).

## DISCLOSURE OF CRIMINAL CONVICTIONS

Generally, it is not necessary for a person to reveal a criminal conviction in a job or licence application unless specifically asked to do so in accordance with specific provisions of the CLRO Act. Examples where a person may be asked to reveal a criminal conviction include where the person is applying to become a police officer, teacher or lawyer. Most licence application forms do not require minor traffic violations to be disclosed.

A person is not obliged to disclose a conviction if no conviction was recorded. Similarly, a person need not disclose the fact that they were charged with an offence if the charge was dropped or dismissed, if they were acquitted, or if the conviction is set aside or quashed (s 5 CLRO Act).

A person who has had a conviction recorded may deny that conviction (under oath, affirmation or otherwise) if:

- the sentence that resulted from the conviction was non-custodial, or was for a term of 30 months  imprisonment or less
- enough time has passed
- the person has not broken the law again since they were convicted.

The time that must pass after which a person may deny their conviction (called the 'rehabilitation period') will depend on the type of offence.

For Queensland offences, the rehabilitation period is:

- ten years if the person was convicted in the Supreme or District Court as an adult
- five years in any other case (except for when restitution has been ordered, in which case the rehabilitation period is only until the restitution has been paid).

For Commonwealth offences, the rehabilitation period is:

- five years if the person was convicted as a child
- ten years in all other cases.

Even if a person's rehabilitation period has passed, there are many exceptions that would still require a person to disclose a previous conviction, for example where a court is making an order about a person or where a person is applying for a job that requires previous convictions to be disclosed (e.g. when applying to become a police officer, teacher or lawyer).

## OFFENDER LEVY

All adults who are sentenced for an offence in Queensland are required to pay an offender levy. The offender levy is an administrative fee applied by the court in order to help pay for law enforcement and administration costs. The levy is payable on each sentencing event, regardless of the outcome and whether or not a conviction is recorded. It is not considered to be a fine or to form part of the person's sentence. If a person is convicted of more than one offence at a particular sentence hearing, they are only liable to pay one offender levy.

As at the date of writing, the offender levy is $138.10 for a conviction in the Magistrates Court and $413.90 for a conviction in either the District Court or the Supreme Court.

# LEGAL NOTICES

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