

# **Threats to Kill**

*s 338B Criminal Code*

**From 1 January 2014**

**Transitional Sentencing Provisions:** This table is divided into thirds based on the three relevant periods of Sentencing Provisions:

- Post-transitional provisions period
- Transitional provisions period
- Pre-transitional provisions period

These periods are separated by a row which shows when the transitional provisions were enacted, and another showing when they were repealed.

## Glossary:

imp	imprisonment
susp	suspended
conc	concurrent
cum	cumulative
PG	plead guilty
agg	aggravated
burg	burglary
sex pen	sexual penetration without consent
AOBH	assault occasioning bodily harm
GBH	grievous bodily harm
dep lib	deprivation of liberty
att	attempted
TES	total effective sentence
SIO	suspended imprisonment order
CBO	community based order
BAC	blood alcohol content
DUI	driving under the influence
disq	disqualification

No.	Case	Antecedents	Summary/Facts	Sentence	Appeal
6.	<p><i>Pureau v The State of Western Australia</i></p> <p>[2017] WASCA 115</p> <p>Delivered 26/06/2017</p>	<p>24 yrs at time offending. 26 yrs at time sentencing.</p> <p>Convicted after trial.</p> <p>Born in NZ; arrived in Australia aged 17 yrs.</p> <p>Prior criminal history; including a conviction of AOBH in a domestic setting.</p> <p>Employed plasterer.</p> <p>No illicit substance or alcohol use.</p>	<p>Ct 3: Threat to kill. Ct 4: Agg AOBH. Ct 5: Dep lib.</p> <p>The victim, M, was several wks pregnant and had been in relationship with appellant approx 6 wks. They shared a home with three other people.</p> <p>M left to attend appointments, borrowing appellant's mobile phone and car. When she returned he was angry with her for being away for so long. They argued and he abused and spat in M's face. She called out for someone to call the police, however other occupants did not do so as illicit substances were in the house.</p> <p>Appellant left the house. Other occupants bound M with tape and assaulted her. Bulk of injuries caused by others.</p> <p>Appellant returned. Armed with a knife and taser and wearing gloves, he ordered M into a room and told her he was going to kill her. He pointed the knife and threatened her with the taser, telling her the more she screamed the more pain he would inflict. He att to taser M in the face but she raised her arms to protect herself, the taser cut her thumb.</p> <p>Appellant pulled M's hair and dragged her from room. She was subjected to further threats and assaults before she was able to</p>	<p>Ct 3: 3 yrs imp (cum). Ct 4: 2 yrs imp (conc). Ct 5: 3 yrs imp (cum).</p> <p>TES 6 yrs imp. EFP.</p> <p>The judge found appellant's overall offending constituted a very serious example of domestic violence and the real seriousness of the offence was his threats to unlawfully kill M and the deprivation of liberty. The real harm was psychological.</p> <p>Appellant denied the offending.</p> <p>Lack of remorse and genuine empathy.</p>	<p>Dismissed.</p> <p>Appeal challenged the individual sentences on cts 3 and 5 and concerned totality.</p> <p>At [75] ... M was defenceless and particularly vulnerable by reason of the greater physical strength of the appellant and her pregnancy. The offences occurred in a domestic setting. The fact that the offences were committed in such a setting increases the seriousness of what the appellant did. It does not matter that their relationship was brief.</p> <p>At [76] ... Although the offences occurred in the one transaction, the imposition of conc sentences would have resulted in a TES that would be an inadequate and inappropriate reflection of the overall criminality of the appellant's conduct.</p>

			escape.  Between everyone involved, ordeal lasted more than five hrs.		
5.	<b>MacCauley v The State of Western Australia</b>  [2017] WASCA 65  Delivered 23/03/2017	23 yrs at time offending. 24 yrs at time sentencing.  Convicted after early PG (20%).  Short criminal history; prior weapon and breach VRO convictions.  Parents separated aged 5 yrs.  Born in NZ; moved to Australia with her mother as a child and lived 'a transient life'.  Tenuous relationship with her mother, a substance abuser; close to her two sisters.  Left home at 14 yrs.  In a new relationship at time sentencing.  Commenced abusing alcohol and illicit substances at an early age.	<u>Indictment</u> Ct 1: Crim damage. Ct 2: Agg burg (dwelling). Ct 3: Threat to kill.  <u>Section 32 notice</u> Ch 1: Agg assault. Ch 2: Breach VRO. Ch 3: Breach bail.  MacCauley and victim 2 had been in a relationship. The victim had custody of their young son and lived with his mother, victim 1.  A VRO was in place protecting the victim's mother from MacCauley.  MacCauley, distressed by difficulties in seeing her son consulted a GP, who diagnosed panic disorder, social anxiety and stress/adjustment disorder. She was medicated and placed on a treatment plan.  The following day MacCauley, in company with police, attended victim 1's property to take possession of a car. Due to a dispute over ownership of the vehicle police were unable to assist. MacCauley became upset and refused further police assistance.	<u>Indictment</u> Ct 1: 9 mths imp (conc). Ct 2: 2 yrs imp. Ct 3: 12 mths imp (conc).  <u>Section 32 notice</u> Ch 1: No further penalty. Ch 2: No further penalty. Ch 3: 1 mth imp (conc).  TES 2 yrs imp. EFP.  The sentencing judge described the offending as very serious. He accepted that at the time of the offending the appellant was suffering from an adjustment disorder and was experiencing stress and, on the balance of probabilities, she found it difficult to make calm and rational choices and was disinhibited in her behaviour due to her	Allowed.  Appeal concerned new psychiatric evidence.  Re-sentenced.  Ct 1: 6 mths imp (conc). Ct 2: 18 mths imp. Ct 3: 9 mths imp (conc).  TES 18 mths imp.  EFP.  At [42] ... diagnosis of adjustment disorder was incorrect. Rather, the appellant was suffering from a moderately severe major depressive disorder... 'considerable causal relationship' between the depressive disorder and her offending.  At [51] Although the disorder did not deprive the appellant of her ability to discern right from wrong, or of her ability to form an

			<p>After police left MacCauley smashed six windows and entered victim 1's house. She attempted to strike victim 2 with a mirror and threatened to kill both victims and herself. Picking up a shard of glass she threatened victim 1, lunging at him a number of times. Outside, MacCauley used a shovel to damage a vehicle belonging to victim 1.</p> <p>Restrained until police arrived MacCauley was taken for medical treatment as she displayed and expressed suicidal intent.</p> <p>MacCauley was bailed to appear in the Magistrate's Court but failed to attend.</p>	<p>heightened emotional state.</p> <p>The sentencing judge found no evidence the appellant suffered any recognised psychiatric disorder.</p>	<p>intent, it is now apparent that the appellant's mental state was a mitigating factor of greater significance than the sentencing judge was in the position to assess.</p>
4.	<p><b><i>Cleminson v The State of Western Australia</i></b></p> <p><b>[2017] WASCA 58</b></p> <p>Delivered 15/03/2017</p>	<p>25 yrs at time offending.</p> <p>Convicted after PG (25% discount).</p> <p>Lengthy criminal history; including convictions for agg AOBH and common assault.</p> <p>Childhood 'fairly dysfunctional'.</p> <p>Completed yr 12.</p> <p>Irregular employment history.</p> <p>Father of a six-yr-old child; no contact with his ex-partner and child.</p> <p>History of alcohol and drug abuse.</p>	<p><u>Indictment</u></p> <p>Ct 1 &amp; 3: Criminal damage. Ct 2: Threat to kill. Ct 4: Armed to cause fear. Ct 5: Poss firearms. Ct 6: Assault public officer.</p> <p><u>Section 32 Notice</u></p> <p>Ch 1: Discharging a firearm. Ch 2: Refusing a disease test.</p> <p>The victims are Cleminson's mother KC, and her partner GJ. They lived in a family and domestic relationship on an isolated property.</p> <p>Agitated Cleminson took some of his belongings and set fire to them. The fire was extinguished. He said 'I'm going to kill everyone'. Inside he smashed items, including two power boxes to the house and</p>	<p><u>Indictment</u></p> <p>Ct 1: 6 mths imp (conc). Ct 2: 2 yrs imp (cum). Ct 3: 12 mths imp (conc). Ct 4: 2 yrs imp (cum). Ct 5: 2 yrs imp (conc). Ct 6: 12 mths imp (conc).</p> <p><u>Section 32 Notice</u></p> <p>Ch 1: 6 mths imp (conc). Ch 2: 2 mths imp (cum).</p> <p>TES 4 yrs 2 mths imp. EFP.</p> <p>The sentencing judge described the overall</p>	<p>Dismissed – on papers.</p> <p>Appeal concerned length of sentence for ct 4 and totality.</p> <p>At [26] ... Although the offences were committed on the same day in one (extended) incident, some accumulation of the sentences was appropriate in order to properly reflect the appellant's overall criminality.</p>

			<p>shed, cutting off the main power supply.</p> <p>KC left the property but GJ remained and hid outside, too frightened to go into the house.</p> <p>Cleminson said on several occasions ‘You fucking cunts, I’m going to kill you’. He unlocked a gun safe and removed two firearms, forced entry to a box of ammunition and loaded one of the rifles. Outside he fired a round into a target. He did not hold a firearms licence or permit.</p> <p>Police arrived and he submitted himself, unarmed, to police. As he was being assisted into the police vehicle he spat in the face of a police officer. A mixture of saliva and blood hit the officer in the eyes. He refused to undergo a mandatory blood test.</p>	<p>offending as very serious and found the offending was not uncharacteristic of the appellant.</p> <p>Lacks insight into causes of his offending behaviour; elevated risk of re-offending.</p>	
3.	<p><b><i>Bloomfield v The State of Western Australia</i></b></p> <p><b>[2017] WASCA 10</b></p> <p>Delivered 18/01/2017</p>	<p>28 yrs at time sentencing.</p> <p>Convicted after early PG (20% discount).</p> <p>Prior criminal history.</p> <p>Injured in MV accident aged 10-11; possible neurological damage.</p> <p>Gifted student; behavioural problems; left school year 11.</p> <p>Employed; labouring roles.</p> <p>Significantly affected by the death of</p>	<p><u>Indictment</u></p> <p>Ct 1: Threats to kill. Ct 2: Armed in circ likely to cause fear. Ct 3: Damage. Ct 4: Steal motor vehicle. Ct 5: Stealing.</p> <p><u>Section 32 Notice</u></p> <p>Ch 1: Poss prohibited weapon. Ch 2: Wilful drove motor vehicle in a dangerous manner. Chs 3&amp;12: DUI. Chs 4&amp;8: No authority to drive. Ch 5: Poss cannabis. Ch 6: Agg unlawful assault. Ch 7&amp;11: Refusing to stop.</p>	<p><u>Indictment</u></p> <p>Ct 1: 2 yrs imp Ct 2: 12 mths imp (conc). Ct 3: 9 mths imp (conc). Ct 4: 12 mths imp (conc). Ct 5: 9 mths imp (conc).</p> <p><u>Section 32 Notice</u></p> <p>Ch 1: 4mths imp (conc). Ch 2: 6 mths imp (conc). MDL disq 12 mths. Ch 3: 4 mths imp (conc); MDL disq 30</p>	<p>Allowed (life disq and disq on ch 2, otherwise dismissed).</p> <p>Appellant challenged MDL life disq for ch 12; appealed length of sentence for ch 11 and concerned totality.</p> <p><u>Section 32 Notice</u></p> <p>Re-sentenced on ch 12 to: MDL disq 30 mths. Cum with disq on ch 4, 8 &amp; 11. On ch 2 disq reduced to 9 mths (conc).</p>

	<p>his father.</p> <p>Use of drug and alcohol from an early age. Using daily at time of offending.</p> <p>Mental health issues associated with substance abuse; deeply entrenched paranoid beliefs.</p>	<p>Ch 9: Breach bail. Ch 10: Poss drug paraphernalia and cannabis.</p> <p><u>Indictment</u> Bloomfield was visiting his mother when he became aggressive and abusive. Told to leave he grabbed a knife and held it to her throat, repeatedly telling her he was going to bash and kill her.</p> <p>Bloomfield left and returned a short time later, re-entered the house and punched a hole in the door. When his mother tried to leave he head butted her and squeezed the back of her neck. He smashed a window and stole \$600 cash and a scooter and damaged a gate as he left.</p> <p><u>Section 32 Notice</u> Bloomfield was driving at high speed. When asked to stop he drove erratically at speeds up to 126km per hr and swerved in and out of traffic. He was found in possession of a knuckleduster and had a BAC of 1.77. At the time he was disq from driving.</p> <p>On a personal bail undertaking Bloomfield failed to appear in the Magistrate's Court.</p> <p>Bloomfield was driving at high speed. To evade police he increased his speed and drove at up to 140km per hour and through a red light. Other vehicles were forced to brake and take evasive action. He eventually collided with another vehicle and struck</p>	<p>mths. Ch 4: 9 mths imp (conc); MDL disq 12 mths. Ch 5: 3 mths imp (conc). Ch 6: 3 mths (cum). Ch 7: 3 mths imp (conc); MDL disq 2 yrs. Ch 8: 12 mths imp (conc); MDL disq 12 mths. Chs 9-10: 4 mths imp (conc). Ch 11: 2 yrs 6 mths imp (cum); MDL disq 2 yrs. Ch 12: 6 mths imp (conc); MDL disq life.</p> <p>TES 4 yrs 9 mths imp.</p> <p>The sentencing judge characterised the threat to kill and reckless driving as serious examples of those offences. Armed with a knife he had the means to carry out the threat and his driving was 'appalling'.</p> <p>Considered his mental health problems and accepted he experienced</p>	<p>Total disq 78 mths.</p> <p>At [15] The sentencing judge made no order for accumulation of the periods of disq on [ch 12] ... the <i>Sentencing Act</i> provides that an order disqualifying an offender from holding or obtaining a driver's licence is to be conc with any other term for which the offender's licence is or may be disq or suspended unless the court orders that the term is to be cum on those terms.</p> <p>At [19] the sentence on ch 11 could be characterised as high but does not disclose error.</p> <p>At [68] ... the appellant's offending was so serious that the TES would not infringe that principle even if the sentence for the agg reckless driving offence had been held to have been manifestly excessive. The appellant committed multiple serious offences that involved persistent and violent aggression against</p>
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			traffic control lights. A search located cannabis and a smoking implement in the glovebox. He had a BAC of 0.200 and his MDL was disq.	paranoid delusions at time of offending. Remorseful, moderate risk of further offending.	his mother and a significant risk to members of public on more than one occasion.
2.	<b><i>FWB v The State of Western Australia</i></b>  <b>[2016] WASCA 118</b>  Delivered 11/07/2016	47 yrs at time sentencing. 42-44 yrs at time offending for indictment 1.  Convicted after PG (20% discount).  Prior criminal history; no prior sexual offending.  Left school aged 15 yrs.  Recent steady employment.  Regularly consumes alcohol and occasionally smokes cannabis. Daily use of amphetamines and heroin, but did not believe he had a substance abuse problem.  FWB on bail for indictment 1 at time offending on indictment 2.	<u>Indictment 1</u> Ct 1-4, 6-10: Sex pen of de facto child U 16 yrs. Ct 5: Indec dealings with de facto child U 16 yrs.  <u>Indictment 2</u> Ct 1: Dep lib. Ct 2: Threat to kill. Ct 3: Agg sex pen. Ct 4: GBH with intent.  <u>Indictment 1</u> FWB had been the de facto father of the victim, M, since she was about 2 yrs old.  When M was aged 11-12 yrs, FWB digitally penetrated her vagina twice (ct 1-2). He then penetrated her vagina with his penis (ct 3). He slapped M's face when she tried to escape. FWB then made M suck his penis, before masturbating and ejaculating on her face (ct 4). Later, M awoke with FWB touching her vagina (ct 5). The following night, FWB went into M's bedroom and had sexual intercourse with her (ct 6).  When M was aged 12-13 yrs, FWB filmed himself sexually abusing M over two hrs. FWB put his fingers in her vagina (ct 7) and	<u>Indictment 1</u> Ct 1-2 and 7: 2 yrs imp each (conc). Ct 3, 6 and 10: 6 yrs imp each (conc). Ct 4 and 9: 4 yrs imp each (conc). Ct 5: 1 yr imp (conc). Ct 8: 6 yrs (cum ct 3).  TES 12 yrs imp (cum with TES on indictment 2).  <u>Indictment 2</u> Ct 1: 1 yr imp (conc). Ct 2: 2 yrs imp (conc). Ct 3: 8 yrs imp (conc). Ct 4: 5 yrs imp (conc).  TES 8 yrs imp (cum with TES on indictment 1).  Overall TES 20 yrs imp.  EFP.  The sentencing judge described the offending	Allowed.  Appeal concerned totality.  Only re-sentenced on <u>indictment 1</u> to:  Ct 8: 6 yrs imp (cum with 2 yrs on ct 1).  TES 8 yrs imp (cum with TES on indictment 2).  TES 16 yrs imp.  EFP.  At [65] The charges in the first indictment were representative of a course of conduct.  At [66]... in relation to the first indictment... The two episodes of offending involved planning and premeditation... The offending occurred in the family home, a relatively isolated farmhouse, where

			<p>then had sexual intercourse with her (ct 8). FWB made M suck his penis (ct 9), before having sexual intercourse with her again (ct 10). FWB continued the abuse and repeated the acts until he ejaculated onto her stomach. M was crying and was fearful of FWB who threatened to harm her or members of her family.</p> <p><u>Indictment 2</u> FWB and H (M’s mother) had been in a de facto relationship for 13 yrs, but had separated approx. 6 mths earlier.</p> <p>The dep lib charge (ct 1) was a continuing offence. When visiting H, FWB produced a knife and threatened to kill her, telling her that he loved her, couldn’t live without her and wanted her to suffer like she had made him suffer (ct 2). FWB tied H’s wrists with cable ties, forced her into a car and drove her to the vicinity of a country town. FWB ordered H out of the vehicle, removed her clothing had sexual intercourse with her until he ejaculated (ct 3). FWB stabbed H in the chest (ct 4) and during the struggle she cut her finger on the knife. When H got out of the car FWB dragged her by the hair back into the car. FWB said he was taking her for medical assistance but H feared for her safety and jumped from the moving car and ran to a nearby house. As a result of being stabbed H suffered a 5cm wound that caused one of her lungs to collapse.</p>	<p>against M as involving “the most gross breach of trust” and “at or near the top of the range of gravity, justifying the maximum penalty as a starting point”.</p> <p>Offending occurred when M was alone and FWB sometimes engineered opportunities to be alone with her. The sentencing judge said that the offending against M had features of sex pen without consent; offending was not the result of grooming.</p> <p>FWB’s offending against H “was a terrifying ordeal” and involved “criminality of the highest degree”.</p> <p>FWB was at a moderate to high risk of future sexual offending and a moderate risk of future violent offending, most likely family violence.</p>	<p>M was vulnerable and the appellant could abuse her for an extended period without fear of being discovered....The appellant filmed the offences the subject of cts 7, 8, 9 and 10. He had previously told M that once he had recorded the abuse he would stop offending against her. That was not the case... The appellant’s offending against M’s mother... would have adversely affected M in view of the threats to harm her family which the appellant made in the course of his offending against M.</p> <p>At [69] The appellant claimed to have little or no recollection of the offending and, accordingly, little weight could be given to any remorse. No victim empathy was apparent.</p> <p>At [70] the TES of 12 yrs’ imp, especially in the context of the PG, was not broadly consistent with reasonably comparable cases and was not</p>
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					<p>commensurate with the overall seriousness of the offending... The proper exercise of the sentencing discretion required lesser accumulation of the individual sentences.</p> <p>At [90] ...the TES of 8 yrs' imp for the offences in the second indictment was...well within the range open to the sentencing judge ... and reflects ... totality issues arising as a result of the appellant standing for sentence not only in relation to the offences in the second indictment but also the offences in the first indictment.</p> <p>At [91] the overall TES of 20 yrs' imp in relation to the first and second indictments, especially in the context of the PG, was not commensurate with the overall seriousness of the offending the subject of the first and second indictments.</p>
1.	<i>Fletcher v The State of Western</i>	38 yrs at time sentencing.	s317(1) <i>Criminal Code</i> AOBH x1. s378 <i>Criminal Code</i> Stealing x 1.	16 mths imp (cum). 3 mths imp (conc).	Allowed. (Mazza dissenting as to

<p><b>Australia</b></p> <p><b>[2014] WASCA 219</b></p> <p>Delivered 21/12/2014</p>	<p>Convicted after trial.</p> <p>Lengthy criminal record including convictions for violent offending.</p> <p>Regularly employed.</p> <p>Committed these offences shortly after being released to parole and the day after his parole was cancelled; Fled to Qld; Extradited to WA and served balance of sentence.</p> <p>On bail for these offences but cancelled as a result of failure to attend court.</p> <p>Co-offender Clinton Lucas convicted of AOBH and stealing and fined \$4000 for AOBH and \$1000 for stealing. Fine payable to victim.</p>	<p>s338B <i>Criminal Code</i> Threats to kill x1.</p> <p>The appellant believed his partner was having a relationship with another. The appellant telephoned his partner and threatened and abused her, demanding to know where he would find the victim. She declined to provide the information. The appellant arranged for his co-offender to go to a gymnasium where the victim frequented. Either the appellant or co-offender punched the victim to the side of the face. The victim suffered bruising and tenderness to his jaw, fell into the garden and dropped his bag. Both offenders found the bag and the co-offender picked it up and left.</p> <p>The appellant telephoned his partner on occasions, including an occasion when the appellant told her he had “sorted out” the victim. The appellant made threats to his partner that he was going to tie her to a chair, douse her with petrol and set fire to her. The appellant did not intend to carry out the threat. It was made to intimidate and overbear his partner’s will and it had that effect.</p>	<p>8 mths imp (conc).</p> <p>TES 2 yrs imp.</p> <p>EFP.</p> <p>Significant delay in proceedings.</p> <p>No PSR or Psychological Reports before the Sentencing Judge.</p>	<p>reasons in respect of ground 2).</p> <p>Re-sentenced to a total of 16 mths imp.</p> <p>At [25] Unjustifiable disparity is an appealable error although it may not always lead to an appeal being allowed and if allowed, identity of punishment in resentencing is not required.</p> <p>At [32] There is in my view an unjustifiable disparity in the type of sentences imposed on the co-offenders because a fine for the co-offender is the wrong type of sentence.</p>
<p><b><i>Transitional Provisions Repealed (14/01/2009)</i></b></p>				
<p><b><i>Transitional Provisions Enacted (31/08/2003)</i></b></p>				

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