Report on Sentencing Trends and Practices 2007–2008

NSW SENTENCING COUNCIL

June 2009

A report of the NSW Sentencing Council pursuant to section 100J (1) (c) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

The views expressed in this report do not necessarily reflect the private or professional views of individual Council members or the views of their individual organisations. A decision of the majority is a decision of the Council—Schedule 1A, clause 12 *Crimes (Sentencing Procedure) Act 1999* (NSW).

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1. Assistant Commissioner Paul Carey was appointed to the Council on 2 June 2008 and attended as an observer prior to this date.
2. Ms Jennifer Mason became Director General of the Department of Community Services in March 2008. Prior to this appointment, she was the Director General of the Department of Juvenile Justice.
3. Ms Penny Musgrave was appointed to the Council on 25 February 2008.

Former members

The Hon Alan Abadee AO RFD QC, Chairperson

The Hon J P Slattery AO QC, Deputy Chairperson

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4. Ms Butler is the Executive Officer of the DNA Review Panel and assisted the Council on a volunteer basis during 2008.
5. December 2007 to July 2008.
6. May–June 2008.
7. October 2007 to February 2008.
8. From August 2008.
9. March 2007 to June 2008.
10. Ms Merridew is a Graduate officer with the NSW Law Reform Commission and assisted the Council on a volunteer basis on the penalties attaching to sexual offences reference.
11. To January 2008.
12. To December 2007.

INTRODUCTION AND OVERVIEW

The NSW Sentencing Council ('the Council') is now in its sixth year of operation. This is its fifth statutory report on sentencing trends and practices,[13] and covers the period September 2007–December 2008.

Part One of this Report details changes to the membership of the Council and reports on the activities in which the Council has been engaged during the period under review, particularly those conducted pursuant to its newly acquired educative function. Government responses to Council reports are also considered.

Part Two provides an update of the projects the Council has completed in 2007–08 and describes those projects on which it continues to work. New references and initiatives are also discussed.

Part Three details some significant sentencing issues that have arisen over the past year, including case law, legislative amendment and useful publications.

Part Four comprises Annexure to the Report.

13. Section 100J(1)(c) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) requires the Sentencing Council to 'monitor, and to report annually to the Minister on, sentencing trends and practices, including the operation of the standard non-parole periods and guideline judgments'.

PART ONE: THE COUNCIL

Functions

The NSW Sentencing Council is an independent public body established in February 2003 under the *Crimes (Sentencing Procedure) Act 1999* (NSW). It was the first sentencing council established in Australia.[14]

The Council advises and consults with the Attorney General in connection with sentencing matters, in accordance with its statutory functions. These are set forth in s 100J of the *Crimes (Sentencing Procedure) Act*.

Broadly, its functions are:

- to advise and consult with the Attorney General on standard non-parole periods;
- to advise and consult with the Attorney General on guideline judgments;
- to monitor, and report annually to the Attorney General on sentencing trends and practices; and
- at the request of the Attorney General, to prepare research papers or reports on particular sentencing matters.

The Council has not included its usual statistical review on trends or provided any comment on the operation of the standard non-parole period scheme (SNPP) in this report. It is of the opinion that the analysis conducted in the Council's report for 2006–07 and those of previous years provided sufficient detail of the schemes' effectiveness. A similar analysis will be deferred for another two years to allow for any trend to emerge.

The Council notes that, as it recorded in 2006–07, there have been no guideline judgments delivered in the period under review.

14. The Victorian Sentencing Advisory Council was established in 2004 under amendments to the *Sentencing Act 1991* (Vic).

Objectives

The objective of the Council is to strengthen public acceptance, understanding and confidence in the sentencing process.

Council Membership

There were several changes to the membership of the Council during the period under review.

NSW Police Assistant Commissioner Catherine Burn APM, and Laura Wells, former Director of the NSW Attorney General's Department Criminal Law Review Division, retired from the Council. As the members on the Council with expertise and experience in law enforcement, and the representative of the Attorney General's Department respectively, their experience and input into the Council's deliberations was much appreciated.

The Council formally welcomes the appointments of Assistant Commissioner Paul Carey, NSW Police and Penny Musgrave, Criminal Law Review Division, Attorney General's Department.

Council Business

The Council continues to meet on a monthly basis with Council business being completed at these meetings and out of session.

The Council has maintained its relationship with the NSW Bureau of Crime Statistics and Research (BOCSAR), the Judicial Commission of New South Wales, the NSW Law Reform Commission, and the Attorney General's Department through periodic meetings in 2007–08. Such meetings expand the knowledge base of the Council while avoiding potential duplication of work.

The Council's relationship with the above bodies extends to cooperation on specific projects. For instance, the Judicial Commission and BOCSAR provided the Council with data, statistics and general advice,

particularly in relation to the references on periodic detention and sexual assault offences. The Council also embarked on a joint research project with BOCSAR, conducting a phone survey of over 2000 New South Wales residents to examine public confidence in the criminal justice system.

The Council met regularly with the Criminal Law Review and Legislation and Policy Division of the Attorney General's Department to discuss issues surrounding possible Government implementation of the Council's recommendations, such as those arising out of the Sexual Assault Offences reference, the Review of Periodic Detention and the Fines Reference.

Relationships were also maintained with external agencies, representatives of which have sometimes attended Council meetings in the capacity of observers.[15] The following bodies were consulted regarding the development and implementation of a number of references and overlapping projects, including:

- the Department of Corrective Services—periodic detention and serious sex offenders;
- the Department of Juvenile Justice—programs for juvenile sexual offenders; and
- the NSW Ombudsman—the Council's reference on fines and penalty notices.

During 2008 the Council sought to forge a closer relationship with the members of the private bar and both defence and prosecution offices. To that end, it contracted two barristers from Forbes Chambers to advise on a Council project examining alternative sentencing options for young offenders who have committed serious offences such as murder or sexual assault. The Public Defenders Office and the Crown also provided assistance by reviewing another Council project, involving

15. Observers have full speaking and debating rights but are not entitled to cast a vote in respect of Council business.

the sentencing of Aboriginal defendants and the application of the *Fernando* principles.

Considerable input into a Council project was also provided by Mr Ken Shadbolt, former District Court Judge and Chair of the Parole Board, and current Chair of the DNA Review Panel. Mr Shadbolt and the DNA Review Panel Executive Officer, Anna Butler, provided invaluable advice and assistance in respect of the Council's examination of the penalties attaching to sexual assault offences in New South Wales.

The Council has contributed to the development and agenda of other sentencing councils and like bodies in Australia, and discussions have been held with them regarding our legislation and core activities. For example, the Executive Officer participated in a statutory review of the Victorian Sentencing Advisory Council and was consulted by the Tasmanian Law Reform Institute regarding the establishment of a sentencing council in that state.

Profile

The Council's profile in the community has benefited through papers presented by its former and current members.

In 2007 *Penal Populism: Sentencing Councils and Sentencing Policy* was published through Willan Press in the United Kingdom (UK) and Federation Press in Australia. The publication was the culmination of the Victorian Sentencing Advisory Council's 2006 conference 'Sentencing and the Community: Politics, Public Opinion and the Development of Public Opinion Conference on Sentencing'. The publication featured a chapter by the NSW Sentencing Council's former Deputy Chairperson, the Hon J Abadee AO RFD QC, titled 'Sentencing in the Community: Politics, Public Opinion and the Development of Sentencing Policy'. A review of the publication, by Justice Gilles Renaud of the Ontario Superior Court, has been accepted for publication in the Canadian Journal of Criminology.

During 2007–08 a number of Council reports were the subject of comment in the New South Wales Parliament, in the form of Questions Without Notice, Bills, responses in Budget Estimates and other mentions. In all the Council was cited 12 times in this reporting period, on issues as diverse as sexual offences, child pornography, alcohol-related violence, periodic detention, the development of community-based sentencing options and fines-related debt.[16]

The Council's work has also been the subject of review or comment by other agencies. The NSW Ombudsman's Annual Report 2007–2008 noted the significant overlap between the Council's work on the effectiveness of fines as a sentencing option and that office's own planned project on the impact of fines on vulnerable communities. Rather than pursuing that project itself, the Ombudsman met with the Council to discuss combining the research undertaken to date.

In Tasmania, the Law Reform Institute considered the Council's 2004 report *Abolishing Prison Sentences of 6 Months or Less in its Final Report*

16. New South Wales, *Parliamentary Debates*, Legislative Council, Crimes (Sentencing Procedure) Amendment Bill 2007, 23 October 2007, 3042–3 (John Hatzistergos, Attorney General); New South Wales, *Parliamentary Debates*, Legislative Assembly, Crimes (Sentencing Procedure) Amendment Bill 2007, 24 October 2007, 3313 (Barry Collier); New South Wales, *Parliamentary Debates*, Legislative Council, Question Without Notice: Community Views in Sentencing, 8 November 2007, 3736–7 (John Hatzistergos, Attorney General); New South Wales, *Parliamentary Debates*, Legislative Council, Question Without Notice: Rural Imprisonment Rates—Local-based Sentencing, 6 March 2008, 5974 (John Hatzistergos, Attorney General); New South Wales, Parliamentary Debates, Legislative Council, Question Without Notice: Sentencing Trends, 15 May 2008, 7653 (John Hatzistergos, Attorney General); New South Wales, *Parliamentary Debates*, Legislative Council, Question Without Notice: Child Pornography, 5 June 2008, 8251 (John Hatzistergos, Attorney General); New South Wales, Parliament Transcript, Justice Budget Estimates, 17 October 2008 (John Hatzistergos, Attorney General); New South Wales, *Parliamentary Debates*, Legislative Council, Question Without Notice: Sentencing Options, 22 October 2008, 10317 (John Hatzistergos, Attorney General); New South Wales, *Parliamentary Debates*, Legislative Council, Question Without Notice: Sexual Assault Penalty Reform, 28 October 2008, 10628 (John Hatzistergos, Attorney General); New South Wales, *Parliamentary Debates*, Legislative Assembly, Question Without Notice: Alcohol-related Violence, 30 October 2008, 10954 (Nathan Rees, Premier); New South Wales, *Parliamentary Debates*, Legislative Council, Crimes Amendment (Sexual Offences) Bill 2008, 26 November 2008, 11705–6 (John Hatzistergos, Attorney General); New South Wales, *Parliamentary Debates*, Legislative Council, Fines Further Amendment Bill 2008, 4 December 2008, 12655 (Greg Smith), 12659 (Bill Collier).

on Sentencing.[17] In the same report, the Law Reform Institute referred to the Council's discussion of consistency in sentencing contained in its 2005 report *How Best to Promote Consistency in Sentencing in the Local Court*.[18]

In November 2008, the NSW Parliamentary Library Research Service published an E-Brief updating the state of the law relating to child pornography.[19] This publication specifically reviewed the proposals for reform relating to child pornography recommended by the Council in its report on *Penalties Relating to Sexual Assault Offences in New South Wales*, released on 25 October 2008.

As a result of the publication throughout the year of a number of reports, the Council also received significant media coverage on a number of references, with articles appearing in the major State papers and regional media outlets.

Educative Function

Under the *Crimes and Courts Legislation Amendment Act 2006* (NSW), s 100J of the *Crimes (Sentencing Procedure) Act 1999* (NSW) was amended in February 2007 so that the Council's functions now include the education of the public on sentencing matters.

Pursuant to this function, the Council accepted an invitation from the Australian Human Rights Commission (formerly the Human Rights and Equal Opportunity Commission) to participate in a discussion on public confidence in the courts and judiciary in New South Wales. The discussion, held in February 2009, is part of the Judicial Accountability Study Visit, a delegation of judges and officials of the Supreme People's Court of the People's Republic of China, conducted under the auspices of the China-Australia Human Rights Technical Cooperation Program, a bilateral program between the governments of Australia and China,

17. Tasmania Law Reform Institute, Sentencing, Final Report No 11 (2008), 94–5.
18. Tasmania Law Reform Institute, Sentencing, Final Report No 11 (2008), 53–4.
19. Griffith, G., 'Child Pornography Law Update' (E-Brief 2/08, NSW Parliamentary Library Research Service, 2008).

which the Australian Human Rights Commission manages on behalf of the Australian Agency for International Development (AusAID). Mr Nicholas Cowdery, the Director of Public Prosecutions, represented the Council at this event.

The Council will also assist in updating the *Sentencing Information Package* during 2009. The booklet is jointly produced by the New South Wales Attorney General's Department, Victims of Crime Bureau, the Criminal Law Review Division and the New South Wales Sentencing Council and was previously revised in July 2007.

As discussed further in Part 2 the Council will also finalise its report on public attitudes towards sentencing in New South Wales. The paper, which complements the joint Council-BOCSAR report *Public Confidence in the New South Wales Criminal Justice System* (August 2008) reviews the key findings of the survey in the context of the literature and examines existing public confidence initiatives so as to present a co-ordinated strategy to redress the public's lack of confidence in the New South Wales criminal justice system.

PART TWO: PROJECTS UPDATE

Projects completed in 2007–08

The Council produced reports on four references for the Attorney General during 2007–08.

Penalties relating to Sexual Assault Offences in New South Wales

In October 2007 the Attorney General requested that the Council examine penalties relating to sexual assault offences in New South Wales. Part One (volumes 1 and 2) was published in October 2008. The report examines whether the penalties currently attaching to sexual offences in New South Wales are appropriate, in accordance with the following terms of reference:

- whether or not there are any anomalies or gaps in the current framework of sexual offences and their respective penalties;
- if so, advise how any perceived anomaly or gap might be addressed;
- advise on the use and operation of statutory maximum penalties and standard minimum sentences when sentences are imposed for sexual offences and whether or not statutory maximum penalties and standard minimum sentences are set at appropriate levels;
- advise whether or not 'good character' as a mitigating factor has an impact on sentences and sentence length and if so whether there needs to be a legislative response to the operation of this factor; and
- advise on whether it is appropriate that the 'special circumstance' of sex offenders serving their sentences in protective custody may form the basis of reduced sentences.

Volume 1 contains the discussion identified above, while Volume 2 contains a comprehensive statistical analysis of individual sexual offences, and sets out some relevant case law.

The Council's recommendations included:

- increasing the penalty for possession of child pornography from five years to a maximum of 10 years imprisonment;
- increasing the penalty for obtaining a benefit from child prostitution from 10 years imprisonment to 14 years;
- increasing the maximum penalty for indecency offences committed against children in the context of the production of child pornography to 10 years imprisonment from a sentence range of two to seven years (bringing the penalty in line with child pornography);
- increasing the penalty for causing sexual servitude in circumstances of aggravation from 19 years to 20 years imprisonment (in line with the *Criminal Code* (Cth));
- increasing the penalty for sexual assaults that are committed by breaking and entering into a victim's house above the current 14 year maximum;
- creating a new aggravated offence of having sexual intercourse with a child under 10 years, with a penalty in excess of 25 years;
- creating a new offence of meeting a child, or travelling with the intention of meeting a child, following grooming where that involved the communication of indecent material or suggestions made to the child to meet for sexual purposes, similar to United Kingdom laws with penalties ranging from six months to 10 years;
- creating new offences of voyeurism and aggravated voyeurism, similar to United Kingdom laws, with penalties ranging from six months to two years;

- creating new aggravated offences of filming for an indecent purpose and installing a device to facilitate filming for an indecent purpose with a maximum penalty of five years;
- creating a new offence of inciting one or more persons to commit a sexual offence, with penalties commensurate to the offence the person was incited to commit;
- clarifying that child pornography offences include 'pseudo' images which may be produced without real children, or which comprise manipulated photos or images of real children;
- introducing a definition of 'producing' child pornography into the legislation;
- prohibiting courts from taking into account good reputation, good character and lack of criminal history as mitigating factors when these same characteristics have been used to gain people's trust to commit their crimes; and
- removing the artistic purpose defence for child pornography that depicts children as the victim of torture, cruelty or physical abuse or children engaged in sexual activity.

In response to the Council's Report, the Government announced that it would draft new sexual offences legislation to create new offences and increase penalties for certain sexual offences.[20] These laws came into effect on 1 January 2009.[21]

It also established a Sexual Offences Working party, headed by Supreme Court Justice Elizabeth Fullerton, and a Child Pornography Working Party, headed by District Court Judge Peter Berman, to further develop responses to issues identified in the Council's report as being of concern. The working groups will begin work in early 2009.

20. The Hon John Hatzistergos MLC, 'Major Government Crackdown on Sex Offences' (Press Release, 25 October 2008); The Hon J Hatzistergos MLC, 'New Year Signals Start of New Laws' (Press Release, 31 December 2008); The Hon J Hatzistergos MLC, 'Tough New Laws on Sexual Predators Commence' (Press Release, 31 December 2008).
21. *Crimes Amendment (Sexual Offences) Act 2008* (NSW).

A Draft Report Part 2 (Volume 3) of the Sexual Offences reference was provided to the Attorney General in late December 2008. It examines alternative sentence regimes incorporating community protection through extended supervision, and possible alternative responses to address repeat offending committed by serious sexual offenders. It is anticipated that this report will be delivered in final form in 2009.

At the Attorney Generals' request, the Council is currently undertaking further research into preventive detention schemes in other jurisdictions, including England, France, Germany and the Netherlands, and the Council will deliver a supplementary report on this research during the early part of 2009.

Public Attitudes Towards Sentencing

In October 2007 the Attorney General requested that the Council conduct a survey of the public perceptions of sentencing in accordance with the following terms of reference:

1. the level of public confidence in the various aspects of the criminal justice system (bringing people to justice, meeting the needs of victims of crime, respecting the rights of people accused of crime, dealing with cases promptly and efficiently, punishing offenders); and
2. whether those who lack confidence tend to be less well informed about crime and criminal justice.

The Council was requested to report to the Attorney by July 2008.

The Council undertook the reference in partnership with the BOCSAR. Based on the British Crime Survey, a survey was designed to ascertain the extent to which the public is uninformed about sentencing and to identify ways in which it might be more effectively informed.

A joint Council-BOCSAR bulletin, *Public Confidence in the New South Wales Criminal Justice System*,[22] was published in November 2008. It reports the findings of a telephone survey of a little over 2,000 residents, matched, as closely as possible to the New South Wales population in terms of age, sex and residential location. The bulletin's main findings are that:

- Most people in New South Wales are either very or fairly confident that the New South Wales criminal justice system respects the rights of accused persons and treats them fairly;
- However, many less people are confident the justice system is effective in bringing people to justice and meeting the needs of victims of crime.
- A high proportion (66%) of New South Wales residents feel that the sentences imposed on convicted offenders are either 'a little too lenient' or 'much too lenient'.
- This lack of confidence in sentencing and the criminal justice system, however, was strongly associated with mistaken beliefs about crime and criminal justice.
- Confidence in sentencing and some aspects of criminal justice was more pronounced among those who are better educated and among those who draw their information about crime and justice from broadsheet newspapers or educational institutions as opposed to tabloid newspapers, TV/radio news or talk-back radio.

The Council is currently undertaking a literature review of key research in this field and is examining promising methods that can be used to educate the public about sentencing and the criminal justice system. Some promising prospects under consideration include:

22. Jones, C. Weatherburn, D. and McFarlane, K., 'Public confidence in the New South Wales criminal justice system', (Crime and Justice Bulletin: No 118, Contemporary Issues in Crime and Justice, NSW Sentencing Council and the NSW Bureau of Crime Statistics and Research, 2008).

- supplying Plain English booklets about the sentencing process and what it means to receive a sentence;
- developing an accessible, user-friendly website to explain sentencing principles; and
- giving seminars and talks to schools, social groups and community organisations such as Rotary and Probus.

The Council will report to the Attorney General on these and other initiatives in early 2009.

Review of Periodic Detention

In June 2007 the Attorney General asked the Council to review the current system of periodic detention in New South Wales. Specifically, the Council was requested to evaluate:

- the advantages and disadvantages of periodic detention when compared with other sentencing options;
- whether the scheme should be modified or replaced with an alternative sentencing option; and
- whether the scheme was compatible with the direction outlined in the State Plan, Priority R2: Reducing re-offending.

The Council's report was released in January 2008. It identified a number of issues of concern with the current scheme, including:

- eligibility restrictions, such as the exclusion of offenders who have previously served six months or more in full-time custody, and the limited availability of periodic detention for offenders in rural areas;
- the lack of rehabilitation programs for offenders serving sentences of periodic detention; and
- current statutory provisions which do not permit courts to order supervision as a condition of parole to periodic detainees.

A majority of the Council considered these and other issues to be of sufficient concern to support the replacement of periodic detention with an alternative sentencing option and recommended that a new form of sentence be adopted in New South Wales. This alternative, the 'Community Corrections Order' (CCO), would be a new form of intensive community supervision which could require compliance with conditions such as a curfew or residential requirement, compulsory participation in rehabilitation or educational programs, and the performance of community work, while retaining the possibility of full-time imprisonment for any failure to meet these requirements.

In October 2008 the Government invited public comment on a proposed new model of community-based sentence, the Intensive Corrections Order,[23] which was largely based on the Council's recommendations contained in the Periodic Detention report. A number of submissions were received and it is anticipated that legislative amendments to introduce the new model will be introduced to Parliament in 2009.

Report on Sentencing Trends and Practices 2006–2007

The 2006–07 report was the Council's fourth statutory report on sentencing trends and practices and covered the period September 2006–August 2007. It was released in July 2008.

The report examined significant sentencing issues that had arisen during the year, such as the impact of aggravating and mitigating factors in the sentencing exercise (s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW)); indefinite sentencing; the sentencing of Aboriginal offenders; mentally ill and intellectually disabled offenders and limiting terms.

23. The Hon John Hatzistergos, *Media Release: Community Views Sought On New Sentencing Option*, 22 October 2008.

It also contained an analysis of standard non-parole scheme offences where there had been were 10 or more matters to December 2005. The key findings were that:

- sentences have generally been more consistent;
- there has been an increase in the non-parole period imposed for some offences; and
- there has been an increase in the percentage of offenders incarcerated for some scheme offences.

Current projects

The Council has a number of references and projects currently underway.

Review of arson laws

In February 2009 the Premier announced that the NSW Attorney Generals' Department Criminal Law Review Division would undertake a review of the laws relating to arson, in the light of the recent New South Wales and Victorian bushfires. The review will examine the type of sentences that have been imposed for arson offences, the standard minimum sentences given and their range, and will include a comparison of interstate and other jurisdictional practices. The Council will be consulted as part of this review.

Alcohol-related violence

In October 2008 the Premier, Nathan Rees, announced that the Council had been asked to conduct a review of sentencing of offenders convicted of alcohol related violence offences, in accordance with the following terms of reference:

1. the current principles and practices governing sentencing for offences committed whilst the offender is intoxicated;

2. the current principles and practices governing sentencing for alcohol related violence, including violence offences where a glass or bottle is used as a weapon (commonly known as 'glassing');
3. whether the intoxication of the offender should be added as an aggravating factor in sentencing under s 21A of the *Crimes (Sentencing Procedure) Act* 1999;
4. the identification of any changes required to penalties or sentencing practices to address the issue of 'glassing';
5. the identification of any other changes required to penalties or sentencing practices to address alcohol related violence; and
6. any other relevant matter.

The Council has received a number of submissions and conducted research on this topic. It is to provide a report to the Attorney General by 27 March 2009.

Reductions in penalties at sentence

In its previous annual reports on Sentencing Trends and Practices, the Council noted that several cases had come before the Court of Criminal Appeal involving an error in the discount that was allowed in setting the sentence. In its 2006–07 report the Council indicated that it intended to monitor the manner and extent to which discounts are given, as well as the incidence of error arising in this respect as detected in appeals to the Court of Criminal Appeal.[24]

In January 2008 the Attorney General announced that the Council had been requested to examine discounts on sentence in accordance with the following terms of reference:

1. the current principles and practices governing reductions in sentence,

24. NSW Sentencing Council, *Sentencing Trends and Practices 2006-2007*, 24.

2. how factors leading to a discount on sentence are taken into account, particularly where several factors must be considered at the same time,
3. the application of the totality principle to offenders being sentenced for multiple offences,
4. the effect of charge negotiation,
5. the use of a 'Form 1' to deal with additional offences, and
6. any other relevant matter.

The review does not include the Criminal Case Conferencing trial, as this is being considered through a separate process.

The Council is to report to the Attorney General by June 2009.

The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices

In November 2005, the then Attorney General, the Hon Bob Debus MP, asked the Council to consider the effectiveness of fines as a sanction, and the consequences for those who do not pay them. The Council was specifically directed to examine the use of driver license sanctions to enforce fine default, and to explore any possible connection to increased imprisonment rates arising out of ss 25 and 25A of the *Road Transport (Driver Licensing) Act 1998* (NSW).

The Council's Interim Report and an accompanying monograph 'Judicial Perceptions of Fines as a Sentencing Option: A Survey of NSW Magistrates', were published in August 2007.

The reports identified issues of concern in current procedures regarding the imposition and collection of fines and penalty notices, including:

- a lack of more meaningful alternative sanctions for disadvantaged offenders;
- the difficulty of taking into account the capacity of the offender to pay; and

- administrative difficulties in enforcement, such as the inability of magistrates to grant extensions to pay beyond 28 days.

The Attorney General, the Hon John Hatzistergos, responded by establishing an Interagency Working Group to further develop and implement the Council's proposals.[25]

In December 2008 the Parliament passed the *Fines Further Amendment Act 2008* (NSW). The Act seeks to improve the system for the administration and enforcement of court fines and penalty notices and implements recommendations arising from the Council's 2006 Interim Report. Of particular note, the Act:

- provides a scheme to allow certain vulnerable groups of people to mitigate a fine by undertaking activities under a work and development order, such as completing a drug and alcohol program;
- extends the power for penalty notices to be partially written off; and
- creates separate suspended and cancelled driver offences arising from non-payment of a fine or penalty notice.

Also in December, the NSW Law Reform Commission received a reference to examine the laws relating to the use of penalty notices in New South Wales. In carrying out this Inquiry, the Commission is to have regard to:

1. whether current penalty amounts are commensurate with the objective seriousness of the offences to which they relate;
2. the consistency of current penalty amounts for the same or similar offences;

25. The Hon John Hatzistergos, *Media Release: Improving the Effectiveness of Fines in NSW*, 25 August 2007.

3. the formulation of principles and guidelines for determining which offences are suitable for enforcement by penalty notices;
4. the formulation of principles and guidelines for a uniform and transparent method of fixing penalty amounts and their adjustment over time;
5. whether penalty notices should be issued to children and young people, having regard to their limited earning capacity and the requirement for them to attend school up to the age of 15. If so: (a) whether penalty amounts for children and young people should be set at a rate different to adults; (b) whether children and young people should be subject to a shorter conditional 'good behaviour' period following a write-off of their fines; and (c) whether the licence sanction scheme under the *Fines Act 1996* (NSW) should apply to children and young people;
6. whether penalty notices should be issued to people with an intellectual disability or cognitive impairment; and
7. any related matter.

Provisional Sentencing for Young Offenders

In its 2005–06 Report on Sentencing Trends and Practices the Council identified as an area of potential future research the difficulties that arise in the application of current sentencing principles when determining the appropriate length of a sentence for the small number of children who commit serious offences such as murder. Concerns have been expressed relating to the uncertainty in making diagnostic and prognostic assessments regarding the development of the child at the time of sentence, as is required as part of the sentencing process.

The Sentencing Council embarked on a review of the issues identified by Wood CJ in *R v SLD* [2002] NSWSC 758, specifically, whether the Court should have the ability to sentence an offender initially to be detained at her Majesty's pleasure, with provision for review and re-

sentencing at a later date, for example at the age of 21 years, or after five years in custody.

Two barristers from the private bar were then engaged to consider the views of the courts, criminal justice agencies and various stakeholders in respect of a proposal to develop a special category of sentencing known as 'provisional sentencing' when dealing with young offenders dealt with after conviction or plea for serious criminal offences. Provisional sentencing as a concept would allow for a notional sentence to be imposed at an initial sentencing procedure, with an ability to later vary or adjust that sentence during the course of the service of the sentence, according to a variety of factors that might include assessments as to the offender's capacity to rehabilitate, and as to future dangerousness, and take into account a better understanding of any mental health conditions that may have emerged or become apparent as the child matured.

In addition views were also sought from child and adolescent mental health professionals, agencies and stakeholders in order to ascertain the desirability of a modified sentencing regime for this group, from the mental health perspective, and to consider the scope of any proposed scheme.

The Council intends to publish its findings in monograph form during 2009.

Sentencing Aboriginal Offenders

In its 2005–06 Report on Sentencing Trends and Practices, the Council identified a number of Court of Criminal Appeal decisions that have illustrated the difficulties that may be experienced when sentencing an Aboriginal offender.

The so-called *Fernando* principles[26] set forth principles that may be relevant to the sentencing of an Aboriginal offender. The principles were intended to be indicative of some of the factors leading a person of

26. From the decision of *R v Fernando* (1992) 76 A Crim R 58.

Aboriginal background into offending behaviour, and as a consequence to be relevant for sentencing, rather than a comprehensive declaration of sentencing practice.[27] The principles were considered by the NSW Law Reform Commission 'to be accepted and applied in New South Wales'.[28]

Determining when the principles are enlivened has proven to be a contentious issue. It has been suggested that attempts to define and limit contemporary Aboriginal experience fail to appreciate that 'every Indigenous person [whether or not from a deprived background or from a rural/remote area] is a member of a visible racial minority in a community that is often not tolerant of racial minorities'.[29]

The Council initiated an examination of the issue by considering over 100 cases in which the principles have been discussed, as well as recommendations made in respect of the sentencing of Aboriginal offenders in the past.

With the assistance of the Public Defenders' office and the Office of Director of Public Prosecutions, the Council's review will be released in monograph form, during 2009.

PART THREE: SIGNIFICANT SENTENCING DEVELOPMENTS

Legislative developments

The following section draws heavily from the Judicial Commission of New South Wales' Judicial Information Research System (JIRS) and the Lexis Nexis Criminal Law News bulletins[30] to identify significant legislative developments that occurred throughout 2008. Reference

27. *R v Morgan* (2003) 57 NSWLR 533, [20]–[21] (Wood CJ at CL).
28. NSW Law Reform Commission, *Sentencing Aboriginal Offenders*, Report 96: (2000) [2.21].
29. Flynn, M., 'Not Aboriginal Enough—For Particular Consideration When Sentencing' (2005) 6(9) *Indigenous Law Bulletin* 15, 15.
30. Berman, P., Howie, R. and Hulme, R. (eds), *Criminal Law News* (Lexis Nexis Butterworths).

was also made to the Bills' respective Explanatory Notes and to correspondence between the Attorney General's Department and the Council Chair.

Crimes (Sentencing Procedure) Amendment Act 2007 (NSW)[31]

The Act amended the *Crimes (Sentencing Procedure) Act 1999* (NSW) with the amendments to apply to offences whenever committed, save for those where there has been a conviction or plea prior to 1 January 2008.[32]

Seven additional aggravating factors were put in place under s 21A(2) of the Act:

> (ca) the offence involved the actual or threatened use of explosives or a chemical or biological agent;
>
> (cb) the offence involved the offender causing the victim to take, inhale or be affected by a narcotic drug, alcohol or any other intoxicating substance;
>
> (ea) the offence was committed in the presence of a child under 18 years of age;
>
> (eb) the offence was committed in the home of the victim or any other person;
>
> (ia) the actions of the offender were a risk to national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* of the Commonwealth);
>
> (ib) the offence involved a grave risk of death to another person or persons; and
>
> (o) the offence was committed for financial gain.

31. Assented to on 1 November 2007 and commenced on 1 January 2008.
32. Judicial Information Research System (online), *Crimes (Sentencing Procedure) Amendment Act 2007* (Announcements, 9 January 2008), referring to *Crimes (Sentencing Procedure) Amendment Act 2007* (NSW) sch 2 pt 17.

Additionally, the aggravating factor under s 21(2)(d) (having a record of previous convictions) was amended to add 'particularly if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences' (as defined in s 562A of the *Crimes Act 1900* (NSW)).

The mitigating factor of remorse under s 21A(3)(i) was also amended to provide for remorse only if the offender has provided evidence of accepting responsibility for his or her actions and the offender has acknowledged any injury, loss or damage caused by his or her actions, and/or has made reparation for this injury, loss or damage.[33]

The Act also included eleven new offences as standard non-parole period offences (Part 4, Division 1A, Table), as follows:

- murder of a child—25 years;
- reckless causing of grievous bodily harm in company—5 years;
- reckless causing of grievous bodily harm—4 years;
- reckless wounding in company—4 years;
- reckless wounding—3 years;
- organised car or boat rebirthing activities—4 years;
- cultivation, supply or possession of a large commercial quantity of a prohibited plant—10 years;
- unauthorised sale of a prohibited firearm or pistol—10 years;
- unauthorised sale of firearms on an ongoing basis—10 years;
- unauthorised possession of more than three firearms, any one of which is a prohibited firearm or pistol—10 years; and
- unauthorised possession or use of a prohibited weapon (where prosecuted on indictment)—3 years.

33. Judicial Information Research System (online), *Crimes (Sentencing Procedure) Amendment Act 2007* (Announcements, 9/1/2008), referring to *Crimes (Sentencing Procedure) Amendment Act 2007* Schedule 1 [1]-[7]; New South Wales Parliament, *Crimes (Sentencing Procedure) Amendment Bill 2007*, Explanatory Notes.

Additionally, the standard non-parole period for an offence of aggravated indecent assault of a child under 10 years under s 61M(2) of the *Crimes Act 1900* (NSW) was increased from five to eight years. [34]

In the second reading speech the Attorney General expressed the view that the new standard non-parole period offences 'send a clear message to the community that the Government will not tolerate crimes of personal violence, which are especially abhorrent when done in company'.[35]

In relation to the increase in the standard non-parole period for s 61M(2) the Attorney General stated: 'it is important that an offence committed against a child less than 10 years carry a higher standard minimum sentence'.

The Attorney General stated in relation to the addition of s 21A(2)(ea), that it was directed at providing additional protection for children in the community; in relation to the addition of s 21AA(a)(eb) that it would preserve the notion of sanctity of the home, whereby individuals are entitled to feel safe from harm of any kind; and in relation to the amendments concerning the mitigating factor of remorse, that

> It is reasonable to expect that where claims of remorse are made in mitigation there is some relevant and identifiable action by an offender demonstrating an acceptance of responsibility for his or her behaviour …We believe that victims have the right to be kept informed of how the accused will be tried and punished, and to be involved in that process, which includes the right to have validated any claim of remorse. [36]

34. Judicial Information Research System (online), *Crimes (Sentencing Procedure) Amendment Act 2007* (Announcements, 9 January 2008), referring to *Crimes (Sentencing Procedure) Amendment Act 2007* sch 1 [8]–[10], [12]–[14]; Explanatory Notes, *Crimes (Sentencing Procedure) Amendment Bill 2007* (NSW).
35. New South Wales, *Parliamentary Debates*, Legislative Council, 17 October 2007, 2668 (John Hatzistergos, Attorney General and Minister for Justice).
36. New South Wales, *Parliamentary Debates*, Legislative Council, 17 October 2007, 2668 (John Hatzistergos, Attorney General and Minister for Justice).

Courts and Crimes Legislation Further Amendment Act 2008 (NSW)[37]

This Act effected amendments made to various Acts. Of significance for sentencing law are the following:

- amendment of the *Criminal Appeal Act 1912* (NSW) to give the Court of Criminal Appeal the jurisdiction to deal with Crown and offender appeals against sentences imposed by the Drug Court when exercising the criminal jurisdiction of the District Court or a Local Court.[38] This was introduced to rectify an anomaly highlighted by the Court of Criminal Appeal in *Bell v The Queen* [2007] NSWCCA 369, where it was found that an offender had to take two appeals in two different jurisdictions (that being the District Court or the Court of Criminal Appeal) depending on whether the Drug Court dealt with his or her matter under s 24 or Part 2 of the *Drug Court Act 1998* (NSW). The amendment allows all sentences imposed by the Drug Court to be dealt with by the Court of Criminal Appeal; [39]
- amendment to the *Criminal Procedure Act 1986* (NSW) so as to allow the common law offence of false imprisonment be tried summarily in the Local Court unless there is an election by the prosecution or defence to deal with the matter on indictment. [40] Until the amendment the offence could only be prosecuted on indictment; [41]

37. Assented to on 8 December 2008. Date of commencement, except s 4 and schs 4, 7 [11], 11, 14 [1]–[8] and [10]–[15], 16, 17, 19, 22, 24 and 29, assent, s 2(1); date of commencement of s 4 and schs 4, 7 [11], 11, 14 [1]–[8] and [10]–[15], 16, 17, 19, 22, 24 and 29: not in force.
38. Explanatory Notes, Courts and Crimes Legislation Further Amendment Bill 2008 (NSW) 2.
39. New South Wales, *Parliamentary Debates*, Legislative Council, 27 November 2008, 11,975 (John Hatzistergos, Attorney General and Minister for Industrial Relations).
40. Explanatory Notes, Courts and Crimes Legislation Further Amendment Bill 2008 (NSW) 2.
41. New South Wales, *Parliamentary Debates*, Legislative Council, 27 November 2008 (John Hatzistergos, Attorney General and Minister for Industrial Relations).

- amendment to the *Crimes Act 1900* (NSW) to create a new offence of intentionally or recklessly destroying or damaging property in company with a maximum penalty of six years imprisonment (or 11 years imprisonment by way of fire or explosives).[42]

The Government, in its second reading speech, referred to recent property damage on ATM machines and in high schools by gangs when introducing the legislation. [43]

Children (Criminal Proceedings) Amendment Act 2008 (NSW)[44]

The Act amended the *Children (Criminal Proceedings) Act 1987* (NSW) and other legislation. Significant amendments included:

- The making of further provision with respect to the detention of adults in juvenile detention centres: a person of or above 18 and under 21 years of age who is currently serving or has previously served a term of imprisonment in an adult correctional centre can no longer serve a term of imprisonment in a juvenile detention centre, except where there are special circumstances (s 19(1A)).[45]
- The basis on which special circumstances can be found are defined (s 19(4), ie, the offender is vulnerable on account of illness or disability; the only available educational, vocational training or therapeutic programs that are suitable to the offender's needs are those available in detention centres; or there would be an unacceptable risk of harm to the offender if they were committed to a correctional centre).[46]

42. Explanatory Notes, Courts and Crimes Legislation Further Amendment Bill 2008 (NSW) 7.
43. New South Wales, *Parliamentary Debates*, Legislative Council, 27 November 2008 (John Hatzistergos, Attorney General and Minister for Industrial Relations).
44. Assented to on 1 July 2008 and proclaimed to commence (except s 6) on 3 November 2008 (s 2(1) and Gazette 138 of 31 October2008); s 6 commenced on assent (s 2).
45. Explanatory Notes, *Children (Criminal Proceedings) Amendment Bill 2008* (NSW) 1, 4 referring to *Children (Criminal Proceedings) Amendment Bill 2008* (NSW) sch 1 [15]; Judicial Information Research System (online), *Children (Criminal Proceedings) Amendment Act 2008* (Announcements, 4 November 2008).
46. Explanatory Notes, Children (Criminal Proceedings) Amendment Bill 2008 (NSW) 4, referring to Children (Criminal Proceedings) Amendment Bill 2008 (NSW) sch 1 [16]; Judicial Information Research System (online), *Children (Criminal Proceedings) Amendment Act 2008* (Announcements, 4 November 2008).

- Allowing the imposition of good behaviour bonds when a matter is discharged with no conviction upon a finding of guilt (s 33(1)(a)) or as an alternative to a control order when the control order is suspended. This brings the legislation more in line with sentencing options for adult offenders.[47]
- Allowing a fine to be imposed in addition to a probation order (s 33(1)(e1)), and for a child to be released on probation in addition to a community service order (s 33(1)(f1)) (previously these were alternative penalties). [48]
- Restrictions on the number of control orders able to be imposed (consecutive or concurrent) being removed so that any number of consecutive or concurrent control orders can be made, provided that the total period for which the person is detained under those orders does not exceed three years (ss 33A(4) and 33A(5)). [49]
- The Children's Court is no longer required to set the non-parole period at the time of the imposition of a suspended control order, instead being required to set the non-parole period if the person later contravenes the good behaviour bond and the bond is revoked (s 41A(3)(b)—making the legislation more consistent with sentencing options for adult offenders).[50]
- The provisions of the *Crimes (Sentencing Procedure) Act 1999* (NSW) with respect to Victim Impact Statements are to apply in

47. Explanatory Notes, Children (Criminal Proceedings) Amendment Bill 2008 (NSW) 4, 5, referring to Children (Criminal Proceedings) Amendment Bill 2008 (NSW) sch 1 [18], [19]; Judicial Information Research System (online), *Children (Criminal Proceedings) Amendment Act 2008* (Announcements, 4 November 2008).
48. Explanatory Notes, Children (Criminal Proceedings) Amendment Bill 2008 (NSW) 5, referring to Children (Criminal Proceedings) Amendment Bill 2008 (NSW) sch 1 [20], [21]; Judicial Information Research System (online), *Children (Criminal Proceedings) Amendment Act 2008* (Announcements, 4 November 2008).
49. Explanatory Notes, Children (Criminal Proceedings) Amendment Bill 2008 (NSW) 5, 6, referring to Children (Criminal Proceedings) Amendment Bill 2008 (NSW) sch 1 [30]–[34]; Judicial Information Research System (online), *Children (Criminal Proceedings) Amendment Act 2008* (Announcements, 4 November 2008).
50. Explanatory Notes, Children (Criminal Proceedings) Amendment Bill 2008 (NSW) 6, referring to Children (Criminal Proceedings) Amendment Bill 2008 (NSW) sch 1 [25], [45]; Judicial Information Research System (online), *Children (Criminal Proceedings) Amendment Act 2008* (Announcements, 4 November 2008).

> the same way as they would when dealing with similar offences in the Local Court (s 33C(2)).[51]

Principles in relation to the exercise of functions under the Act under s 6 were amended to add:

> (f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties,
>
> (g) that it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions,
>
> (h) that, subject to the other principles described above, consideration should be given to the effect of any crime on the victim.[52]

In its second reading speech the Government indicated that this legislation would allow the Children's Court more flexibility in formulating appropriate penalties for young offenders, allow the court to ensure the child is adequately supervised and bring penalties more in line with sentencing for adult offenders.[53]

The Court's view was recently encapsulated in *ID, PF and DV v Director General, Department of Juvenile Justice* [2008] NSWSC 966.

In that matter, the three offenders were sentenced to terms of imprisonment but ordered by the Court to serve their non-parole periods in a juvenile facility under s 19 of the *Children (Criminal Proceedings) Act*

51. Explanatory Notes, Children (Criminal Proceedings) Amendment Bill 2008 (NSW) 6, referring to Children (Criminal Proceedings) Amendment Bill 2008 (NSW) sch 1 [37]; Judicial Information Research System (online), *Children (Criminal Proceedings) Amendment Act 2008* (Announcements, 4 November 2008).
52. Explanatory Notes, Children (Criminal Proceedings) Amendment Bill 2008 (NSW) 3, referring to Children (Criminal Proceedings) Amendment Bill 2008 (NSW) sch 1 [8]; Judicial Information Research System (online), *Children (Criminal Proceedings) Amendment Act 2008* (Announcements, 4 November 2008).
53. New South Wales, *Parliamentary Debates*, Legislative Council, 24 June 2008, 9,011 (John Hatzistergos, Attorney General, Minister for Justice, and Acting Minister for Education and Training).

1987 (NSW), which allows for such an order to be made for certain offenders [54] if 'special circumstances' were found by the Court.

Under s 28 of the *Children (Detention Centres) Act 1987* (NSW) the three offenders were transferred to adult correctional facilities by order of the Acting Director-General Department of Juvenile Justice. The three offenders applied to the Supreme Court seeking prerogative and declaratory relief under ss 29 and 75 *Supreme Court Act 1970* (NSW).

Justice Johnson determined that:

- the Plaintiffs were entitled to procedural fairness before any decision was made to transfer them to an adult correctional centre, and that they were denied this procedural fairness;
- in making the decision to transfer, the First Defendant failed to have regard to relevant factors he was bound to take into account. The decision making process involved application of an inflexible policy which did not have regard to the individual circumstances of each Plaintiff; and
- accordingly the decision to transfer each Plaintiff under s 28 of the *Children (Detention Centres) Act 1987* (NSW) was not made according to law and was therefore nullified.

Orders were made to have the three plaintiffs transferred back to Juvenile Detention Centres.

Crimes (Sentencing Procedure) Amendment (Life Sentences) Act 2008 (NSW)[55]

The Act amended Schedule 1 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) dealing with applications to the Supreme Court for the redetermination of life sentences.

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54. These being that the offender is under 21 years of age, and noting that the offender is not eligible to serve a sentence of imprisonment as a juvenile after the person has reached 21 years of age unless the non-parole period or term of sentence will end within six months of the juvenile turning 21.
55. Assented to on 1 July 2008 and commenced operation upon assent.

As of 17 June 2008 an offender serving a life sentence who was sentenced prior to the 1989 'truth in sentencing laws' is restricted to only one application for the re-determination of his life sentence: clause 2A(1)–(2). Applications that are withdrawn do not count (clause 2A(4)).[56] Applications can be withdrawn only with leave of the Supreme Court (clause 6A(1)), in which case any further application can be made to the Supreme Court only with leave of the court (clause 6A(2)). The Supreme Court may also direct that the offender not make the further application for a specified time (clause 6A(2)(b)).[57]

Criminal Case Conferencing Trial Act 2008[58]

The Act was introduced in response to the Government's concerns with the 'trend' in late entry of pleas of guilty, and after consideration of the statistics revealed in the BOCSAR publication New South Wales Criminal Courts Statistics Annual Report 2006. [59]

The Act established a 12-month trial scheme with respect to certain indictable proceedings in certain courts (Downing Centre and Central Local Courts), to codify the discounts on sentence to be allowed by the courts in respect of guilty pleas, to reduce the maximum amount of sentence discount that may be allowed for guilty pleas, and to require compulsory case conferences between legal representatives in order to determine whether there is any offence to which the accused will plead guilty prior to committal for trial or sentence.[60]

56. Explanatory Notes, Crimes (Sentencing Procedure) Amendment (Life Sentences) Bill 2008 (NSW), 2, referring to Crimes (Sentencing Procedure) Amendment (Life Sentences) Bill 2008 (NSW) sch 1 [2]; Judicial Information Research System (online), *Crimes (Sentencing Procedure) Amendment (Life Sentences) Act 2008* (Announcements, 2 July 2008).
57. Explanatory Notes, Crimes (Sentencing Procedure) Amendment (Life Sentences) Bill 2008 (NSW), 2, referring to Crimes (Sentencing Procedure) Amendment (Life Sentences) Bill 2008 (NSW) sch 1 [2]; Judicial Information Research System (online), *Crimes (Sentencing Procedure) Amendment (Life Sentences) Act 2008* (Announcements, 2 July 2008).
58. Assented to and commenced on 16 April 2008 (Gazette 44, 24 April 2008, 2789).
59. New South Wales, *Parliamentary Debates*, Legislative Council, 2 April 2008 (John Hatzistergos, Attorney General and Minister for Justice).
60. Explanatory Notes, Crimes Case Conferencing Trial Bill 2008, referring to Crimes Case Conferencing Trial Bill 2008 (NSW) sch 1 [2]; Judicial Information Research System (online), *Crimes Case Conferencing Trial Act 2008* (Announcements, 2 May 2008).

In relation to discounts for pleas of guilty, the Act set out that a 25% discount must be allowed if the offender pleads guilty at any time before committal, a discount of up to 12.5% may be allowed if the offender pleads guilty at any time after committal, and a discount of greater than 12.5% but not greater than 25% may be allowed for a guilty plea after committal if substantial grounds exist for allowing a greater discount (s 17).[61]

The NSW Sentencing Council is currently conducting a reference examining the operation of reductions in penalty at sentence. It is to report to the Attorney General in July 2009. The terms of reference specifically exclude consideration of the Criminal Case Conferencing trial, as the operation of the trial is being evaluated elsewhere.

Crimes Amendment (Sexual Offences) Act 2008 (NSW)[62]

The Act gives effect to recommendations of the NSW Sentencing Council contained in its report on Penalties attaching to Sexual Assault Offences in New South Wales.

The Act amended the *Crimes (Sentencing Procedure) Act 1999* (NSW) so as to provide that good character, or a lack of previous convictions, are not to be taken into account as a mitigating factor if this circumstance was of assistance to the offender in committing a 'child sexual offence'. In sentencing a sexual offender the Court must also not take into account as a mitigating factor the fact that an offender will be a registered sex offender as a consequence of the offence. This includes the offender being subject to orders under the *Child Protection (Offenders Registration) Act 2000* (NSW), the *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) or the *Crimes (Serious Sex Offenders) Act 2006* (NSW) (see

61. Explanatory Notes, Crimes Case Conferencing Trial Bill 2008, referring to Crimes Case Conferencing Trial Bill 2008 (NSW) sch 1 [2]; Judicial Information Research System (online), *Crimes Case Conferencing Trial Act 2008* (Announcements, 2 May 2008).
62. Assented to on 8 December 2008. Date of commencement 1 January 2009, s 2(1) and GG No 158 of 19 December 2008, 12,303 (with qualifications as to the commencement of sch 1 [10]: see s 2(2) of the amending Act).

the new s 24A[63] : NB: compare this to the reasoning in *TMTW v The Queen* [2008] NSWCCA 50). It also provides that standard non-parole periods do not apply to an offender who was under 18 years of age at the time of the commission of the offence.[64]

The Act also amended the *Crimes Act 1900* (NSW) by providing for the addition of several new sexual offences, including an aggravated offence under s 66A of sexual intercourse with a child under the age of 10 years (maximum penalty life imprisonment); an aggravated act of indecency offence with or towards a child under 16 years of age where the offender knows that the act of indecency is being filmed for the purposes of the production of child pornography; a child grooming offence; an incitement to commit a sexual offence; and new voyeurism and related offences. New circumstances of aggravation were included in relation to the offence of sexual intercourse of a child between 10 and 16 years, and the offence of aggravated sexual assault. Maximum penalties for the offences of indecent assault against child between 10–16 years, causing sexual slavery, child prostitution and possessing child pornography, were increased.[65]

Crimes Amendment Act 2007[66] (NSW)

The Act amended the *Crimes Act 1900* (NSW) in various ways, including removing the term 'maliciously' from the Act and replacing

63. Explanatory Notes, Crimes Amendment (Sexual Offences) Bill 2008 (NSW), referring to Crimes Amendment (Sexual Offences) Bill 2008 (NSW) sch 2.4 [1]–[3]; New South Wales, *Parliamentary Debates*, Legislative Council, 26 November 2008 (John Hatzistergos, Attorney General, Minister for Justice and Minister for Industrial Relations); Judicial Information Research System (online), *Crimes Amendment (Sexual Offences) Act 2008* (Announcements, 22 December 2008).
64. Explanatory Notes, Crimes Amendment (Sexual Offences) Bill 2008 (NSW), referring to Crimes Amendment (Sexual Offences) Bill 2008 (NSW) sch 2.4 [1]–[3]; Judicial Information Research System (online), *Crimes Amendment (Sexual Offences) Act 2008* (Announcements, 22 December 2008).
65. Explanatory Notes, Crimes Amendment (Sexual Offences) Bill 2008 (NSW), referring to Crimes Amendment (Sexual Offences) Bill 2008 (NSW) sch 1; New South Wales, *Parliamentary Debates*, Legislative Council, 26 November 2008 (John Hatzistergos, Attorney General, Minister for Justice and Minister for Industrial Relations); Judicial Information Research System (online), *Crimes Amendment (Sexual Offences) Act 2008* (Announcements, 22 December 2008).
66. Assented to on 27 September 2007 at which point some provisions commenced, other provisions proclaimed to commence 15 February 2008.

it with 'intentionally or recklessly' in some offences, 'recklessly' in other offences, and removing it entirely with no replacement in other offences.[67]

Of significance for sentencing however, is that the recast offences (s 35(1) recklessly cause grievous bodily harm in company, maximum penalty 14 years; s 35(2) recklessly cause grievous bodily harm, maximum penalty 10 years; s 35(3) reckless wounding in company, maximum penalty 10 years, and the recast offence of s 35(4) reckless wounding, maximum penalty of seven years)[68] amounts to an increase in penalties for grievous bodily harm offences as compared with the old ss 35(1) and 35(2) maliciously inflict grievous bodily harm/wound (previously seven years maximum) and maliciously inflict grievous bodily harm/ wound in company (previously 10 years maximum).

Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Act 2008 (NSW)[69]

This Act amended the *Crimes (Sentencing Procedure) Act 1999* (NSW) in relation to the receipt of victim impact statements, which included:

- Amendments to s 30 make it clear that victim impact statements may include photographs, drawings and other images.[70]
- Amendments to s 30A provide that a victim's impact statement may be prepared by a person having parental responsibility for the victim, a member of the primary victim's immediate family or any other representative of the victim on the victim's behalf (where the victim is incapable of providing information

67. Explanatory Notes, New South Wales Parliament, *Crimes Amendment Act 2007* (NSW); Judicial Information Research System (online), *Crimes Amendment Act 2007* (Announcements, 15 February 2008).
68. Explanatory Notes, New South Wales Parliament, *Crimes Amendment Act 2007* (NSW); Judicial Information Research System (online), *Crimes Amendment Act 2007* (Announcements, 15 February 2008).
69. Assented to on 5 November 2008 and commenced on 1 January 2009.
70. Explanatory Notes, Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Bill 2007 (NSW), referring to Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Bill 2007 (NSW) sch 1 [8]; Judicial Information Research System (online), *Crimes Amendment Act 2007* (Announcements, 22 December 2008).

for or objecting to a victim impact statement by virtue of age, impairment or other incapacity). The amendments to this section were to make it clear that this provision provides to children.[71]

- The new ss 30A(3) and 30A(4) enable a victim who is eligible to give evidence via closed circuit television to read the victim impact statement to the court by way of the same CCTV arrangements.[72]
- The definition of 'personal harm' in s 26 is amended by replacing the term 'mental illness or nervous shock' with 'psychological or psychiatric harm' (to reflect modern legal terms).[73]
- A witness to a prescribed sexual offence who has suffered personal harm as a result of the offence will be treated as a victim for the purposes of the provisions, and therefore is eligible to provide a victim impact statement.[74]
- Previously victim impact statements were able to be received in proceedings for certain serious offences involving death, the infliction of actual bodily harm, sexual assault or an act of actual or threatened violence. The application of the scheme was extended to 'prescribed sexual offences' as defined by the

71. Explanatory Notes, Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Bill 2007 (NSW), referring to Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Bill 2007 (NSW) sch 1 [9]; Judicial Information Research System (online), *Crimes Amendment Act 2007* (Announcements, 22/12/2008).
72. Explanatory Notes, Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Bill 2007 (NSW) referring to Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Bill 2007 (NSW) sch 1 [11]; Judicial Information Research System (online), *Crimes Amendment Act 2007* (Announcements, 22 December 2008).
73. Explanatory Notes, Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Bill 2007 (NSW); New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 August 2008, 9665 (Barry Collier, Parliamentary Secretary); Judicial Information Research System (online), *Crimes Amendment Act 2007* (Announcements, 22 December 2008).
74. Explanatory Notes, Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Bill 2007 (NSW) referring to Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Bill 2007 (NSW) sch 1 [3]; Judicial Information Research System (online), *Crimes Amendment Act 2007* (Announcements, 22 December 2008).

Criminal Procedure Act 1986 (NSW) (to clarify that it is not limited to offences under s 61I).[75]

Crimes (Domestic and Personal Violence) Act 2007 (NSW)[76]

The object of the Act is to repeal and re-enact Part 15A of the *Crimes Act 1900* (NSW) (which dealt with the issuing and enforcement of apprehended domestic violence orders and apprehended personal violence orders by the courts), with modifications. The Explanatory Notes to the Bill stated that this will:

- enable the charge in respect of an offence to indicate whether the offence is a domestic violence offence (as defined),
- require a court in criminal proceedings where a person has been found guilty of a domestic violence offence to direct that a recording be made in the person's criminal record that the offence was a domestic violence offence, and to direct that similar recordings be made in relation to previous domestic violence offences committed by a person;
- require a court when making an apprehended domestic violence order or interim apprehended domestic violence order for an adult to include as a protected person under the order any child with whom the adult has a domestic relationship, unless there are good reasons for not doing so;
- require a court, where a person is charged with a serious personal violence offence, to make an interim apprehended violence order to protect the victim of the alleged offence;

75. Explanatory Notes, Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Bill 2007 (NSW) referring to Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Bill 2007 (NSW) sch 1 [2], [5], [7]; New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 August 2008, 9665 (Barry Collier, Parliamentary Secretary); Judicial Information Research System (online), *Crimes Amendment Act 2007* (Announcements, 22 December 2008).
76. Assented to on 7 December 2007 and proclaimed to commence on 10 March 2008.

- incorporate the offence of stalking or intimidating with intent to cause someone to fear physical or mental harm (previously under s 545AB *Crimes Act 1900* (NSW));
- set out the application procedures and provisions relating to apprehended violence order proceedings, rather than, as was the case, providing for Part 6 of the *Local Courts Act 1982* (NSW) to apply.

The Act also amends the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) so as to enable a police officer to require a person to disclose his or her identity if the police officer reasonably suspected that an Apprehended Violence Order had been made against the person, and to expand the range of dangerous implements that a police officer might search for in a dwelling provided the police officer reasonably believes they may have been used or that they may be used to commit a domestic violence offence.[77]

Children (Criminal Proceedings) Amendment (Youth Conduct Orders) Act 2008 (NSW)[78]

The legislation was introduced to amend the *Children (Criminal Proceedings) Act 1987* (NSW) as a two-year trial diversionary program to address the reasons for anti-social behaviour in young people.

Under the Act, offences falling under the *Young Offenders Act 1997* (NSW) will apply to youth conduct orders.

The legislation introduces the program in the Campbelltown, Mount Druitt and New England Local Area Commands for children of at least 14 years and less than 18 years of age at the time of the commission of the offence or alleged offence, and less than 19 years of age when it is first proposed to make a youth conduct order, and allows for continued participation whilst under 21 years of age.

77. Explanatory Notes, Crimes (Domestic and Personal Violence) Bill 2007 (NSW) 'Overview'.
78. The Act was assented to on 13 November 2008 but has not commenced at the time of writing (28 January 2009).

Interim and final youth conduct orders can be made for those assessed as suitable, and final youth conduct orders do not exceed 12 months.

A conduct plan provides for the type of conduct a child must, or must not, engage in while a youth conduct order is in place. A Children's Court is not required to make a finding as to guilt, if a finding has not yet been made, while such an order is in place. There are enforcement provisions available to the Children's Court (a warning system, power to vary or revoke the order).

At the end of the order, if a finding of guilt has not yet been made, the Children's Court may dismiss the charge, or embark upon a finding of guilty or not guilty, and sentence as appropriate. A child's compliance will be taken into account at the time of sentencing. [79]

The NSW Law Society welcomed the scheme. [80]

79. Explanatory Notes, *Children (Criminal Proceedings) Amendment (Youth Conduct Orders) Bill 2008* (NSW); New South Wales, *Parliamentary Debates*, Legislative Council, 23 October 2008, 10490 (John Hatzistergos, Attorney General, Minister for Justice and Minister for Industrial Relations).
80. Law Society of New South Wales, 'Youth Conduct Order Trial a Welcome Initiative' (Press Release, 23 October 2008).

Cases

The following section draws heavily from the Judicial Commission of New South Wales' Judicial Information Research System (JIRS) and the LexisNexis Criminal Law News bulletins.

The Council notes the following decisions of relevance for sentencing practice.

Skaf, Bilal v The Queen; Skaf, Mohammed v The Queen [2008] NSWCCA 303[81]

Date of judgment: 17 December 2008

Appeal details: Appeal by the offenders against conviction and sentence.

Charges: Mohammed: Accessory before the fact to aggravated sexual intercourse without consent (in company) (Count 1).

Bilal: Aggravated sexual intercourse without consent (in company) (Count 2); aggravated sexual intercourse without consent (in company, second degree) (Count 3).

Appeals against conviction dismissed.

Appeals against sentence allowed by the Court.

The offences the subject of appeal occurred in August 2000 and were known as 'the Gosling Park offences' as a means of differentiating them from other offences for which the offenders had been sentenced and which were not the subject of appeal. The Court dismissed the appeals against conviction in relation to the Gosling Park offences.

In relation to the sentence of Bilal Skaf, the sentencing judge had partially cumulated these sentences on other offences also occurring

81. This case is included not because it makes any new statements of law, but because of the media attention it received.

in August 2000 for which he had previously received sentences ('the Northcote Park offences' and 'the Bankstown offences'). Without going into the detail of the sentences (which can be found from [81]–[105]) it is sufficient to say that the Court determined that the sentencing judge had failed to afford adequate weight to the principle of totality [98].

In saying this, the Court noted that the sentencing judge had faced a difficult and challenging task of sentencing in relation to a very serious offence committed only days after another similar and serious episode, requiring a balance between the demand for retribution and deterrence and the principle of totality, and in light of the fact that the sentence had to be guided by the Court of Criminal Appeal's treatment of the other offences when it reduced and restructured the sentences for 'the Northcote Park' and 'Bankstown' offences [100]–[101].

The Court reduced the sentences of Bilal Skaf, which resulted in aggregate and global sentences with non-parole periods which were reduced by two years.

The sentence of Mohammed Skaf was also reduced [106]–[113].

Dousha v The Queen [2008] NSWCCA 263

Date of judgment: 1 December 2008

Appeal details: Appeal by the offender.

Charges: Assault with act of indecency child under 16 years (x6), sexual Intercourse with child between 10 and 16 years (under authority), sexual intercourse with child under 10 years.

Appeal allowed by Fullerton J, with whom the other members of the Court agreed.

The case considered, among other things, the submission that *Featherstone v The Queen* [2008] NSWCCA 71 was authority for the proposition that when there is a small number of cases presented a sentencing judge should be able to discern a sentencing pattern. Fullerton J rejected this notion.

> [42] Featherstone is not authority for the proposition that whenever a small number of cases are presented a sentencing judge should be able to discern a sentencing pattern. To the contrary. It is simply a statement by the Court that on that particular occasion, and having regard to the information placed before it, a pattern could be discerned. As I have sought to make clear I do not regard it as open to the sentencing judge in the present case to have discerned a pattern from the very limited number and wholly dissimilar range of cases placed before her.
>
> [43] In the absence of statistical and non-statistical data her Honour was obliged to adopt the approach which was settled in *R v MJR* [2002] NSWCCA 129; 54 NSWLR 368 and *AJB v R* [2007] NSWCCA 51; 169 A Crim R 32.

Fullerton J noted that in those latter cases attention was given to the proper approach to the specification of a non-parole period in cases where offences were committed prior to the introduction of the *Sentencing Act*.

Heatley v The Queen [2008] NSWCCA 226

Date of judgment: 2 October 2008

Appeal details: Appeal by the offender against sentence.

Charges: Manslaughter, armed robbery.

Appeal dismissed by McClellan CJ at CL (with whom the other members of the Court agreed) despite error being demonstrated because no less severe sentence was warranted in law.

McClellan CJ at CL (with whom the other members of the Court agreed) considered the relevance in sentencing proceedings of prior offences on the criminal record of an offender, where the prior offences had resulted in verdicts of not guilty by reason of mental illness. It was noted that in that situation although a conviction was not recorded, a special verdict involves a finding that the offender has carried out the actus reus of the offence. It was also noted that the sentencing judge recognised that they

were not strictly part of the appellant's criminal record, but that they had 'limited relevance' [41].

The Court held that the sentencing judge had erred by taking into account the previous offences for which there had been special verdicts as demonstrating that the subject armed robbery offence was not uncharacteristic and revealed an attitude of disobedience to the law. It stated:

> [43] As would be the case in respect of a child lacking legal capacity to commit a crime an act committed by a person whilst lacking the mental capacity to commit a crime should not be considered part of his criminal history or reflective of his or her attitude toward obedience to the law. Only offences of which a person has been convicted are relevant to a later sentencing task. The decision in *R v Price* [2005] NSWCCA 285 is instructive. In that case although the offender was found guilty a conviction was not entered the offender being given the benefit of s 10 of the *Crimes (Sentencing Procedure) Act*. This Court held that prior offending was not relevant to a later sentencing process. The present case is analogous.[82]

R v Carroll [2008] NSWCCA 218

Date of judgment: 19 September 2008

Appeal details: Crown appeal against sentence.

Charges: Manslaughter.

Appeal allowed by McClellan CJ at CL with whom Hislop J. agreed, Simpson J contra.

McClellan CJ at CL (with whom Hislop J agreed, Simpson J contra) considered the appropriateness of a sentence of periodic detention in a

82. Extracted with additional paragraphs in '*Heatley v R* [2008] NSWCCA 226' (2008) 15(10) *Criminal Law News* [2458].

case of manslaughter which occurred by way of a headbutt to the face of the victim. His Honour stated:

> [21] Indiscriminate acts of violence of the type committed by the respondent which lead to the death of another deserve severe punishment. It will be a rare case where the appropriate punishment for a manslaughter committed in these circumstances does not involve a term of full time custody. This was not such a rare case. The community has a justifiable concern about the level of violence associated with young people and alcohol in our community. Where that violence results in a death of another the community rightly expects the courts to impose a sentence which not only provides appropriate punishment but which will unequivocally send a message that violence is unacceptable.[83]

Simpson J noted:

> [38] There are no absolutes in sentencing law but it is a very unusual case of manslaughter that does not call for a sentence of full-time custody. Having said that, however, it is apposite to recall that it has long been recognised that manslaughter is a crime which may be committed in circumstances of such variety as to give to rise to sentences of equal variety: see, for example, *R v Schelberger*, unreported, NSWCCA, 2 June 1988, per Yeldham, Grove and McInerney JJ; *R v Elliott*, unreported, NSWCCA, 14 February 1991, per Hunt, Campbell and Newman JJ.[84]

83. Extracted (with additional paragraphs) in '*R v Carroll* [2008] NSWCCA 218' (2008) 15(9) *Criminal Law News* [2450].
84. Extracted (with additional paragraphs) in '*R v Carroll* [2008] NSWCCA 218' (2008) 15(9) *Criminal Law News* [2450].

Neal v The Queen [2008] NSWCCA 212

Date of judgment: 8 September 2008

Appeal details: Appeal by the offender against sentence

Charges: Break, enter and commit serious indictable offence.

Appeal dismissed by Price J, with whom the other members of the Court agreed.

Price J (with whom the other members of the Court agreed) considered the seriousness of domestic violence committed in the home of the applicant's partner's parent. The facts of the case were that the complainant was assaulted by the applicant in her home, she escaped to her father's premises at the rear of the premises, and then the applicant broke and entered the front door of the father's premises and assaulted the father of the complainant.

It was held that similar principles with respect to sentencing for domestic violence offences applied to this type of situation:

As the Judge remarked (ROS at [23]):

> 'The first [offence] involved a vicious attack upon a defenceless woman in her own home. The second involved an equally vicious attack upon a defenceless elderly man in his own home.'
>
> [26] Offences for violent attacks in domestic settings, this Court has emphasised, must be treated with real seriousness. Important factors in sentencing a domestic violence offender are specific and general deterrence, denunciation of the offending conduct and protection of the community: see, for example, *R v Edigarov* (2001) 125 A Crim R 551.
>
> [27] There is no good reason, in my opinion, why those principles should not apply to an offender who in pursuit of his domestic partner has broken into her father's home and then assaulted him. The victim was a 60 year old man with a heart condition. The

> applicant's conduct was violent, cowardly and inexcusable. The lack of significant damage to the home or significant actual injury occasioned to the victim, to my mind, does little to diminish the seriousness of the offence. [85]

Kerr v The Queen [2008] NSWCCA 201

Date of judgment 29 August 2008

Appeal details: Appeal by the offender against sentence.

Charges: Aggravated detain for advantage (occasioning actual bodily harm), Form 1 offence of aggravated detain for advantage (occasioning actual bodily harm).

Appeal allowed by Price J, with whom the other members of the Court agreed.

Price J considered, amongst other things, the effect of a threat of violence to an offence of aggravated kidnapping. His Honour stated:

> [51] In view of the arguments advanced for the applicant, it is necessary to recognise that circumstances which increase the seriousness of the unlawful detention are not confined to the period within which the victim is detained or to the actual use of violence. A real threat of violence and the presence of a weapon, like a knife, capable of killing or inflicting serious injury are factors of aggravation even though actual injury may not be occasioned to the victim.
>
> [52] When actual bodily harm is occasioned and/or the kidnapping is committed in company, the statutory scheme for the offence of kidnapping in Division 14 of the Crimes Act elevates the basic offence (s 86(1)) to an aggravated offence (s 86(2)) or a specially aggravated offence under s 86(3).

85. Extracted (with additional paragraphs) in '*Neal v R* [2008] NSWCCA 212' (2008) 15(9) *Criminal Law News* [2452].

> [53] Greater weight is to be given, in my view, to considerations of protection of society, general and specific deterrence when violence is threatened or actual violence is used in the kidnapping.

Thewlis v The Queen [2008] NSWCCA 176

Date of judgment: 28 July 2008

Appeal details: Appeal by the offender against sentence.

Charges: Maliciously inflict grievous bodily harm with intent, Malicious wounding with intent to cause grievous bodily harm

Appeal allowed by Simpson J, Spigelman CJ agreeing with comment, Price J agreeing with both.

The applicant was sentenced in relation to one count of malicious wounding with intent to cause grievous bodily harm and one count of maliciously inflict grievous bodily harm with intent. The offences involved two victims. Immediately after stabbing the second victim the applicant went to the home of the next door neighbour and asked them to call emergency services, returning to the original scene to remain with the victim until the arrival of the ambulance: [10]–[12].

The Court determined that this conduct warranted mitigation of sentence:

> [39] This was an unusual case, in that the applicant took immediate, almost instantaneous, steps to ameliorate the consequences of his crimes; and, further, that, in the case of Ms Hodgson, those steps may well have had substantial beneficial, and ameliorative, effects.

The Court noted that this conduct did not go to an assessment of the objective seriousness of the offence (the offence having been completed by this time) and nor was it an *Ellis*[86] type situation where the offender was entitled to leniency for voluntary disclosure of otherwise

86. *R v Ellis* 1986) 6 NSWLR 603.

undetected guilt: [38]. The Court determined that it should be taken into account 'as a particular, and unusual, circumstance which may be called ameliorative conduct, justifying a measure of leniency on that particular basis': [40]. The Court continued:

> '[41] The notion is not unique. There have been cases, such as property crimes, where leniency is justified because reparation has been voluntarily made prior to any charges being brought or anticipated. That is an appropriate analogy.
>
> [42] My researches have yielded no explicit statement of principle to the effect that voluntary rectification can operate in mitigation of sentence. Indeed, in respect of property crimes, it has been held that voluntary repayment of the proceeds of the criminality cannot be used to 'purchase mitigation': R v Phelan (1993) 66 A Crim R 446 at 448, per Hunt CJ at CL. But that very circumstance was accepted on a relevant sentencing factor in R v Conway [2001] NSWCCA 51; 121 A Crim R 177, per Heydon JA, in R v Berlinsky [2005] SASC 316, and in Dowling v Phillips, Supreme Court of WA, 15 August 1995 per Heenan J. (And these were, in contrast to the present, cases where the ameliorative conduct occurred after the offender was charged, or when aware that he or she was to be charged. (That is not here of great importance: there could have been no doubt that the applicant would have been identified as the perpetrator of the attacks, and charged.)
>
> [43] In my opinion it ought now be accepted that, in an appropriate case—and, it may be said, there are few examples of appropriate cases, at least that came before this Court—conduct of the kind engaged in by the applicant warrants some consideration in mitigation of sentence. (I stress that I have twice referenced to 'mitigation of sentence'. That is different from, and not to be

> confused with, mitigation of the offence: the latter concept is concerned with the evaluation of objective gravity.)[87]"

Spigelman CJ agreed and added, with reference to *R v Phelan* (1993) 66 A Crim R 446, that 'something special' is required for ameliorative conduct to result in mitigation of sentence: [4].

Tector v The Queen [2008] NSWCCA 151

Date of judgment: 4 July 2008

Appeal details: Appeal by the offender against sentence.

Charges: Use carriage service to procure persons under 16 years (x3) s 474.26(1) *Criminal Code* (Cth).

Appeal allowed by Hall J, with whom the other members of the Court agreed.

Factors significant to the determination of sentence in this case were outlined by the Court: [94]. Consideration was also given to the effect on sentence of the nature of the sexual activity proposed in the commission of the offence.

Hall J stated:

> [95] Communications that fall within s.474.26 may, of course, relate to a range of proposed sexual activity between sender and recipient of varying degrees of seriousness as the definition of 'sexual activity' indicates: s.474.28(11).
>
> [96] A communication, for example, that expresses an intention to engage in sexual intercourse in contrast to some lesser form of sexual activity is a relevant circumstance in the assessment of the gravity of an offence.
>
> [97] However, a communication that contravenes the section may be deliberately or strategically expressed in terms that propose a lower level of sexual activity in order to enhance the prospects

87. Extracted (with additional paragraphs) in '*Thewlis v R* [2008] NSWCCA 176' (2008) 15(8) *Criminal Law News* [2439].

of initially establishing a relationship between the sender and the recipient and/or to disguise an existing intention to engage in a more serious level of sexual activity than that proposed. In other words, what may be termed a 'low level' of proposed sexual activity may be considered by a 'sender' to be more effective in encouraging, enticing or inducing etc a child than one that blatantly conveys a high level of sexual activity.

[98] It may, on the facts of a particular case, be open to a sentencing judge in assessing the gravity of a s.472.62(1) offence, not to accept the terms of a communication as a true reflection of the level of sexual activity the sender had in mind, at least where, for example, the 'sender' has a relevant history of serious past offending involving sexual activity with children. In other words, the terms of a communication may, but may not always be fully accepted on their face in the assessment of the gravity of an offence under the section.

[99] With these considerations in mind, the sentencing judge was correct in having regard to the nature of the offence at which the legislation was directed. It was appropriate for him to consider the nature of the proposed sexual activity in this case as one amongst other factors to be taken into account in assessing the objective seriousness of the offending.

Rosenthal v The Queen [2008] NSWCCA 149

Date of judgment: 2 July 2008

Appeal details: Appeal by the offender against sentence.

Charges: Dangerous driving occasioning grievous bodily harm. Related offence on s 166 certificate of Drive whilst disqualified.

Appeal allowed by Hidden J, with whom the other members of the Court agreed.

The Court held that being a disqualified driver or on bail for other offences were not factors relevant to the consideration of the ideas of 'abandonment of responsibility' or 'high moral culpability' as outlined in the *Whyte*[88] guideline judgment dealing with offences of dangerous driving:[89]

> [16] From the passage in the remarks on sentence quoted above, it appears that, in determining that the offence amounted to a 'serious abandonment of responsibility', his Honour had regard to the fact that the applicant was a disqualified driver and was on bail for other offences. Clearly, his Honour used the expression 'abandonment of responsibility' in the context of the guideline promulgated in Whyte (supra). However, the notion of abandonment of responsibility or high moral culpability in the guideline is directed to the objective gravity of the offence. It is concerned, where relevant, with the extent to which the driver was affected by alcohol or a drug and, generally, with the course of driving and the danger posed by it in its attendant circumstances. So much is apparent from the aggravating factors, on which a finding of abandonment of responsibility might be based, referred to by the Chief Justice in Whyte at [216]–[217].

88. *R v Whyte* (2002) 55 NSWLR 252.
89. '*Rosenthal v R* [2008] NSWCCA 149' (2008) 15(7) *Criminal Law News* [2422].

> [17] It does not appear to me that the fact that a driver was disqualified, let alone the fact that he or she was on bail for other offences, is relevant to that assessment. Of course, they are matters relevant to sentence generally as they bear on the issue of deterrence, both personal and general. However, I am satisfied that his Honour fell into error in taking them into account on the question of abandonment of responsibility. [90]

Porter v The Queen [2008] NSWCCA 145

Date of judgment: 26 June 2008

Appeal details: Appeal by the offender against sentence.

Charges: Break enter and steal (x2), maliciously damage property by fire (x5).

Appeal allowed by Johnson J, with whom the other members of the Court agreed.

Johnson J stated that in his view the aggravating factor under s 21A(2)(j) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) 'the offence was committed while the offender was on conditional liberty in relation to an offence or alleged offence' included a situation where the offender was on a s 10 bond in relation to an offence for which imprisonment is not an available sentence.

His Honour stated from [86]:

> … Nevertheless, it seems to me that the purpose of s.21A(2)(j) is to capture the common law principle that an offence committed whilst a person is subject to conditional liberty, whether on bail or whilst subject to a good behaviour bond or a community service order or periodic detention or parole, constitutes an aggravating factor for the purpose of sentence. The essence of the provision is that the offender commits a further offence whilst subject to an order of a court in criminal proceedings requiring, amongst other

90. Extracted in '*Rosenthal v R* [2008] NSWCCA 149' (2008) 15(7) *Criminal Law News* [2422].

> things, that the offender be of good behaviour. I do not consider that the term 'conditional liberty' in the section is confined to circumstances where the foundational offence giving rise to the conditional liberty is one which itself must be punishable by imprisonment.
>
> [87] Even if this view was wrong, however, the common law principle remains applicable given that s.21A does not purport to codify the law in this area: s.21A(1). Even if the commission of the offences whilst the Applicant was subject to a s.10 good behaviour bond for trespass did not constitute the statutory aggravating factor, it would constitute an available aggravating factor at common law. I approach the sentencing of the Applicant upon the basis that his commission of these offences, whilst being subject to a good behaviour bond, was an aggravating factor on sentence.

R v Burton [2008] NSWCCA 128

Date of judgment: 20 June 2008

Appeal details: Crown appeal.

Charges: Common assault (x3), assault occasioning actual bodily harm (x2), detain for advantage, influencing a witness

Appeal upheld by Johnson J, with whom the other members of the Court agreed.

Johnson J referred to previous decisions of *R v Newman & Simpson* [2004] NSWCCA 102 at [79]–[87], *R v Palu* (2002) 134 A Crim R 174, [37], and *R v Glen* (9 December 1994 unreported, BC9403423) which expressed principles of law in relation to domestic violence offences and the receipt of the attitude of a victim towards sentencing. His Honour referred to the fact that the attitude of a victim towards sentencing ought not to have played a part on sentence (noting that the sentencing judge appeared to attach little weight to the victim's views) and reiterated

the comments of Simpson J in Glen in relation to arguments of general deterrence in cases of domestic violence: [102]–[104]. Johnson J then stated in relation to the s 323(a) influence witness offence:

> [105] The statement of Simpson J in *R v Glen* is doubly important in this case. It emphasises the need for caution where a victim of a domestic violence offence expresses forgiveness and urges imposition of a lenient sentence for the offender. Further (and importantly), Simpson J's statement supports the need for a significant element of general deterrence where a s.323(a) offence is committed by a domestic violence offender who seeks to dissuade criminally the victim from giving evidence in the proceedings.[91]

Yun v The Queen [2008] NSWCCA 114

Date of judgment: 2 June 2008

Appeal details: Appeal by the offender against sentence.

Charges: Murder.

Appeal upheld.

The Court applied the reasoning of *Apps v The Queen* [2006] NSWCCA 290 to the effect that 'intention to kill alone cannot establish that a particular instance of the crime of murder is above the mid range of seriousness' when assessing objective seriousness: [27].

The Court found that the sentencing judge had erred when assessing the objective seriousness for the purpose of the standard minimum non-parole period, in focussing solely upon the finding that at the relevant time the applicant had an intention to kill. The Court pointed out that His Honour did not take into account other circumstances relating to the commission of the offence that were also relevant to the objective seriousness: [28]–[29].

91. Extracted (with additional paragraphs) in '*R v Burton* [2008] NSWCCA 128' (2008) 15(6) *Criminal Law News* [2411].

Silvano v The Queen [2008] NSWCCA 118

Date of judgment: 2 June 2008

Appeal details: Appeal by the offender against sentence.

Charges: Assault with intent to rob armed with a dangerous weapon, murder, malicious shooting with intent to do grievous bodily harm.

Appeal dismissed by James J, with whom the other members of the Court agreed.

The principle of extra-curial punishment was considered. It was recognised that the principle requires that loss or detriment be imposed on the offender, but not by the sentencing court, for the purpose of punishment or by reason of the offender having committed the offence (*R v Daetz*; *R v Wilson* (2003) 139 A Crim R 398) and that occasionally the principle extends in application to cases where an offender received serious injuries, be they inflicted by others or self-inflicted, in the course of, or shortly after, committing the offence,: [29]–[30]. However:

> [35] In my opinion, it is not sufficient to enable injuries suffered by an offender in prison to be taken into account as extra-curial punishment, that the injuries would not have been suffered, if the offender had not been arrested and remanded in custody as a result of having committed the offences. If such a connection between the offences and injuries suffered by a prisoner was sufficient, then injuries suffered by a prisoner could be taken into account as extra-curial punishment, even if they had resulted merely from some mishap occurring in the prison, such as the prisoner accidentally falling.
>
> [36] Of course, if an offender has suffered injuries while he is in prison awaiting sentence, and as a consequence of the injuries

> the offender's conditions of custody will be more than usually onerous, that matter can be taken into account in the sentencing of the offender. [92]

R v PB [2008] NSWCCA 109

Date of judgment: 26 May 2008

Appeal details: Crown appeal against sentence.

Charges: Armed robbery with wounding.

Appeal allowed by Bell JA, with whom the other members of the Court agreed.

Bell JA held, among other things, that the sentencing judge erred in overlooking the fact that the subject offence was an aggravated offence under s 98 to which is attributed a higher maximum penalty than the maximum penalty for the guideline offence under *R v Henry* (1999) 46 NSWLR 346: [24].

> [25] This was an offence that involved the infliction of significant physical injury. It was committed in company. The relevance of the Henry guideline to the sentencing of the respondent is that it states a range that is below the range that is appropriate for this offence.

Christodoulu v The Queen [2008] NSWCCA 102

Date of judgment: 15 May 2008

Appeal details: Appeal by the offender against sentence.

Charges: Common assault (x3); intimidate with intent to cause fear; break, enter and intimidate in circumstances of aggravation (knowing person present) and special aggravation (wounding) (Form 1: assault police); assault police, maliciously damage property (x3).

92. Extracted (with additional paragraphs) in '*Silvano v R* [2008] NSWCCA 118' (2008) 15(6) *Criminal Law News* [2410].

Appeal dismissed by Grove J, with whom Johnson J agreed, Campbell J contra.

The Court held that the sentencing judge did not err in not taking into account as a mitigating factor the injuries suffered by the applicant in the course of committing the offences: [43]. The offences occurred over a number of days and arose over a dispute he had with his wife. The injuries resulted from the applicant deliberately inserting a syringe containing hydrochloric acid into his arm just prior to his arrest, resulting in a permanent disability to his arm: [35]–[37].

The majority considered the principle of extra curial punishment as a mitigating factor, with reference to *R v Daetz* [2003] 139 A Crim R 398 and Sharpe v The Queen [2006] NSWCCA 255: [38]. The case was distinguished from cases such as *Alameddine v The Queen* [2006] NSWCCA 317 and *R v Haddara* (1997) 95 A Crim R 108 which involved unintentional self-inflicted injury:

> [41] It is a step beyond Alameddine and Haddara to seek to extend the availability of a mitigatory element to a deliberately self inflicted injury as distinguished from occasions where the injury was, although self inflicted and in the course of crime commission, unintentional.
>
> [42] Insofar as the taking into account of extra curial punishment may be described as a principle, there is no authority for extending it to deliberately caused injury and such an extension should not, in my opinion, be recognised. [93]

Campbell J agreed that there was no error in declining to take the injury into account as a mitigating factor in this case, however, as he could envisage situations in which submissions could be made that a self inflicted injury should be taken into account in mitigation, he wished to leave open the possibility for this argument to be made and stated he

93. Extracted (with additional paragraphs) in '*Christodoulou v R* [2008] NSWCCA 102' (2008) 15(6) Criminal Law News [2407].

'would prefer to leave undecided whether there are no circumstances at all in which injury or detriment that a criminal causes to himself or herself can operate as a mitigating factor': [2].

IE v The Queen [2008] NSWCCA 70

Date of judgment: 21 April 2008

Appeal details: Appeal by the offender against sentence.

Charges: Aggravated indecent assault (in company), aggravated sexual assault in company (deprivation of liberty) (x3), attempted aggravated sexual assault in company (deprivation of liberty).

Appeal dismissed by Latham J, with whom the other members of the Court agreed.

Latham J referred to *R v Way* (2004) NSWLR 168 and noted that at [86], after discussing factors relevant to the objective seriousness of an offence, the Court there had stated:

> Other matters which may be said to explain or influence the conduct of the offender or otherwise impinge on her or his moral culpability, for example, youth or prior sexual abuse, are more accurately described as circumstances of the offender and not the offence. (italics not in original).

Latham J pointed to the case of *R v P* [2004] NSWCCA 218 at [34], where the offender's youth was recognised as a purely subjective consideration: [19]. Her Honour also pointed out that there would be difficulties with 'double dipping' if the youth of an offender was considered relevant to the consideration of the objective seriousness of the offence as youth would then be taken into account at two stages of the sentencing process: firstly when considering the objective seriousness of an offence and secondly when making a determination as to the weight to be attributed to the principles of general deterrence and rehabilitation. This would distort the sentencing exercise: [20].

R v Chea [2008] NSWCCA 78[94]

Date of judgment: 21 April 2008

Appeal details: Crown appeal against sentence; two of Chea's co-offenders appealed the severity of their sentences.

Charges: Chea and others faced charges under s 307.2(1) *Criminal Code* (Cth) of importing marketable quantity of border controlled drug.

Crown appeal dismissed by James J, with the other members of the Court agreeing. Sentence appeals of co-offenders Oum and Yin allowed.

Section 16G of the *Crimes Act 1914* (Cth) stipulated that a sentence of an offender had to take into account if a Federal offence was to be served in a state such as New South Wales where sentences were not subject to remissions: [41]. After considering the relevant case law, the Court of Criminal Appeal noted that while s 16G was in force the usual practice was for a court to reduce sentences for Commonwealth offences served in these states by about a third to account for the lack of remissions. It also observed that the repeal of s 16G would in all probability result in an increase in the length of sentences for federal offenders. James J then summarised the state of the law:

> [43] Accordingly, the ranges of sentences indicated by the Court of Criminal Appeal in *Wong* have no status as guidelines, although they do have continuing utility as indicating the general pattern of sentences before *Wong*; the ranges of sentences in *Wong* make no assumption as to whether there has been a plea of guilty, so that if there has been a plea of guilty an allowance can be made for the plea of guilty; and the ranges of sentences in *Wong* are not to be increased by any fixed percentage because of the repeal of s 16G of the *Commonwealth Crimes Act*. [95]

94. This case is included as it provides a useful summary of the relevance of the guideline judgement of *R v Wong; R v Leung* (1999) 48 NSWLR 340 in light of the High Court judgment of *Wong v The Queen* (2001) 207 CLR 584 and subsequent Court of Criminal Appeal decisions.
95. Extracted (with additional paragraphs) in '*R v Chea* [2008] NSWCCA 78' (2008) 15(5) *Criminal Law News* [2396].

Adams v The Queen (2008) 244 ALR 270; [2008] HCA 15

Date of judgment: 23 April 2008

Appeal details: Appeal by the offender.

Charges: Possessing prohibited imports s 233B *Customs Act 1901* (Cth).

Appeal dismissed by Gleeson CJ, Hayne, Crennan and Kiefel JJ; Heydon J would have revoked special leave.

The appellant contended that he should have been sentenced on the basis that the narcotic which was found in his possession, 'MDMA or ecstasy, is less harmful to users and to society than heroin': [6]. This submission was rejected.

The Court noted the legislative approach which was to discriminate between different narcotic substances in designating the trafficable and commercial quantities (eg, the trafficable quantity of heroin and cocaine was two grams, trafficable quantity of MDMA was 0.5 grams), but applying the same penalty regime to the designated quantities. This was compared with New Zealand and Canada which grade drugs according to the observations by the legislature of their harmfulness, as opposed to quantities: [2]–[3].

The Court stated:

> Generalisations which seek to differentiate between the evils of the illegal trade in heroin and MDMA are to be approached with caution, and in the present case are not sustained by evidence, or material of which judicial notice can be taken.
>
> [10] An equally serious difficulty for the appellant's argument is in seeking to reconcile it with the scheme of the Customs Act in relation to penalties. In fixing the trafficable and commercial quantities of heroin and MDMA respectively, and applying the same maximum penalties to the quantities so fixed, Parliament has made its own judgment as to an appropriate penal response to

> involvement in the trade in illicit drugs. The idea that sentencing judges, in the application of that quantity-based system, should apply a judicially constructed harm-based gradation of penalties (quite apart from the difficulty of establishing a suitable factual foundation for such an approach) cuts across the legislative scheme. This problem was recognised by the Court of Criminal Appeal of New South Wales in *R v Poon* [7]. A similar problem in relation to Victorian legislation underlay the decision in *Pidoto* and *O'Dea* noted above.[96]

It should be noted that similar considerations were raised in *R v Corbett* [2008] NSWCCA 42, a judgment handed down prior to Adams on 4 March 2008, when considering the drug GBL in the context of the *Criminal Code Act 1995* (Cth).

Miletic v The Queen [2008] NSWCCA 74

Date of judgment: 10 April 2008

Appeal details: Appeal by the offender against sentence.

Charges: Ongoing supply prohibited drug, supply prohibited drug (x7), knowingly take part supply prohibited drug, supply (deemed) prohibited drug.

Appeal dismissed by Hoeben J, with whom the other members of the Court agreed.

Hoeben J considered the principle of totality as enunciated in *Pearce v The Queen* (1998) 194 CLR 610 and as interpreted in the two judge bench judgment of *R v Myers* [2002] NSWCCA 162.

Hoeben J determined that he could not agree with the interpretation stated in *Myers* to the effect that first each offence must be considered separately, secondly consideration must be given to whether the sentences imposed should be made concurrent or cumulative (or partially one or the other), and thirdly the principle of totality must

96. Extracted (with additional paragraphs) at '*Adams v R* (2008) 244 ALR 270' (2008) 15(5) *Criminal Law News* [2398].

be considered. Hoeben J noted that *Myers* was a two judge bench and stated:

> [28] In relation to the extract from Myers, relied upon by the applicant, I regret that I cannot agree with Kirby J that *Pearce v R* (1998) 194 CLR 610 requires that concurrency and cumulation need to be considered prior to and separately from totality. I find it difficult to see how cumulation and concurrency can be considered separately from totality. The relevant statement from *Pearce* is at 624:
>
> 'A judge sentencing an offender for more than one offence must fix an appropriate sentence for each offence and then consider questions of cumulation or concurrence, as well, of course, as questions of totality.'
>
> This in terms does not mandate the sequence of reasoning in *Myers*. [97]

Hoeben J referred to *R v MMK* [2006] NSWCCA 272.

R v Lenati [2008] NSWCCA 67

Date of judgment: 27 March 2008

Appeal details: Crown appeal on sentence.

Charges:. Aggravated detain for advantage (in company), maliciously inflict grievous bodily harm with intent, robbery in company, aggravated break, enter and commit serious indictable offence (in company) (x2).

Appeal dismissed by Simpson J, with whom the other members of the Court agreed.

> The offender failed to comply with his undertaking to give future assistance to police and the Crown brought the appeal under s 5DA of the *Criminal Appeal Act 1912* (NSW): [8], [11].

97. Extracted (with additional paragraphs) in '*Miletic v R* [2008] NSWCCA 74' (2008) 15(5) *Criminal Law News* [2394].

The Court found that it should exercise its discretion not to interfere with the discount to sentence received by the respondent for the following reasoning. An offender whose sentence has been subject to several considerable discounts may result in the offender losing some of the benefit of these discounts through the application of the principle that a discounted sentence must not be unreasonably disproportionate to the criminality of the offence.[98]

The accumulation of the various discounts that applied to the respondent's sentence was therefore moderated by the operation of s 23(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and the general sentencing principle of proportionality.[99] The Court reasoned:

> If - and I emphasise if - the discount allowed to an offender by reason of past assistance is reduced because he/she has also undertaken to provide future assistance, but the proportionality principle operates to moderate the discount that would otherwise have been allowed, then, if the basis for the moderation evaporates, the offender is (at least arguably) entitled to be returned to the position he/she would have been in had that moderation not been imposed.[100]

The Court was mindful of the constraints imposed by s 23(3) and the principle of proportionality, and had regard to the delay by the Crown in appealing the matter as well as the short period of time left until the expiration of the respondent's non-parole period. The Court determined not to exercise its discretion to intervene under s 5DA of the *Criminal Appeal Act*. [101]

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98. Judicial Information Research System (online), CCA Summary—*R v Lenati* [2008] NSWCCA 67, referring to *R v Lenati* [2008] NSWCCA 67, [35].
99. Judicial Information Research System (online), CCA Summary—*R v Lenati* [2008] NSWCCA 67, referring to *R v Lenati* [2008] NSWCCA 67, [37].
100. Extracted (with additional paragraphs) "*R v Lenati* [2008] NSWCCA 67' (2008) 15(4) *Criminal Law News* [2381].
101. Judicial Information Research System (online), CCA Summary—*R v Lenati* [2008] NSWCCA 67, referring to *R v Lenati* [2008] NSWCCA 67, [40], [41], [49].

The Court considered whether individual discounts should be identified and subsequently accumulated when imposing sentences. Simpson J did not encourage this approach and referred to a process that was 'necessarily largely instinctive, but incorporating recognised legal principle'; Adams J did favour specifying each discount for individual items.[102]

Blundell v The Queen (Cth) [2008] NSWCCA 63

Date of judgment: 25 March 2008

Appeal details: Appeal by the offender.

Charges: Fraudulent misappropriation.

Appeal dismissed by Simpson J with whom Grove J agreed.

Simpson J considered and rejected the 'principle of parsimony', that is, that the minimum sentence that reflects the objective and subjective features of a case and satisfies the purposes of sentencing should be that which is imposed.

This principle as interpreted by Adams J in *DB v The Queen*; *DNN v The Queen* (2007) 167 A Crim R 393, but not endorsed by the other two members of the bench in that case, was examined by Simpson J with reference to the cases referred to by Adams J: *Webb v O'Sullivan* (1952) SASR 65, *R v Storey* (1996) [1998] 1 VR 359 at 366; *R v PP* (2003) 142 A Crim R 369 at 374: [39]–[46].

Simpson J stated:

> [47] I do not read these judgments as containing or endorsing a proposition that mandates that the minimum sentence that reflects the objective and subjective features of a case and satisfies the purposes of sentencing must be that which is imposed. That is inconsistent with the notion of a range of sentences, and the discretions properly open to sentencing judges. I do not accept

102. Judicial Information Research System (online), CCA Summary—*R v Lenati* [2008] NSWCCA 67, referring to *R v Lenati* [2008] NSWCCA 67, [44], [50.]

> that 'the principle of parsimony', at least as, on one construction of DB; DNN, it appears to have been interpreted by Adams J, is part of the sentencing law of NSW. In *Kelly v The Queen* [2007] NSWCCA 357 at [30] Basten JA rejected that construction of the judgment in DB; DNN. Adams J, who, coincidentally, was also a member of that Bench, agreed with Basten JA.' [103]

R v Carruthers [2008] NSWCCA 59

Date of judgment: 19 March 2008

Appeal details: Crown appeal.

Charges: Aggravated dangerous driving occasioning grievous bodily harm.

Appeal upheld by McClellan CJ with whom the other members of the Court agreed.

McClellan CJ considered the adequacy of a sentence of periodic detention in the case. He applied the guideline judgment of *R v Whyte* (2002) 55 NSWLR 252 at 284 and stated at [32]:

> Although there may be cases where a breach of s 52A(4) of the Crimes Act may justify this degree of leniency in my opinion this will rarely be appropriate: see *R v Whyte* (2002) 55 NSWLR 252 at 284. When the offence is committed with a very significant level of blood alcohol and causes serious injury to another person it will almost always be the case that a period of full time custody will be required to adequately meet the need for punishment, specific and general deterrence. In my opinion the present is such a case. Relevant to the sentence which should be imposed is that, although the other offences were committed many years ago, this is the respondent's third offence of drink driving. [104]

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103. Extracted (with additional paragraphs) in '*Blundell v R* (Cth) [2008] NSWCCA 63' (2008) 15(4) *Criminal Law News* [2379].
104. Extracted (with additional paragraphs) in '*R v Carruthers* [2008] NSWCCA 59' (2008) 15(4) *Criminal Law News* [2378].

Shaw v The Queen [2008] NSWCCA 58

Date of judgment: 14 March 2008

Appeal details: Appeal by the offender against sentence.

Charges: Aggravated break, enter and commit serious indictable offence (actual bodily harm), malicious damage to property.

Appeal allowed by Fullerton J with whom the other members of the Court agreed.

Fullerton J considered the remarks of the sentencing judge and stated at [24]:

> His Honour also regarded the applicant's remorse as outweighed by the need for general deterrence. I can detect no error in that approach. This Court has made it abundantly clear that in sentencing for domestic violence offences specific and general deterrence assume a particular importance as does the necessity that the sentence imposed be both protective of the community and a powerful denunciation by it of the offender's conduct (see *R v Hamid* [2006] NSWCCA 302; 164 A Crim R 179 at [65]–[88]).

TMTW v The Queen [2008] NSWCCA 50

Date of judgment 10 March 2008

Appeal details Appeal by the offender against sentence.

Charges: Common assault (x2), assault occasioning actual bodily harm (x4), aggravated indecent assault (victim under 16 years), malicious wounding

Appeal allowed by Simpson J, McClellan CJ at CL and James J agreeing.

The Court considered *R v KNL* (2005) 154 A Crim R 268 where it was held that in that case the circumstances of the *Child Protection (Offender's Registration) Act 2000* (NSW) could not be characterised as extra curial

punishment entitling mitigation of penalty. It was noted that in that case Latham J added:

> I do not mean to suggest that there could never be a case where extra-curial punishment might arise from the requirements of the *Offenders Registration Act*, but this case fell far short of any penal consequence being visited upon the respondent because of a conviction. Even allowing for some regard to the requirements of registration and the potential restriction on employment, that factor deserved very little weight.

Simpson J stated:

> [51] It is true that the present is an unusual case to come within the provisions of the *Offenders Registration Act*. The *Offenders Registration Act* is plainly designed to provide protection for the victims, past and potential, from individuals who pose a risk to them - that is, a risk that they will commit offences of a sexual nature. On no view of the present case could it be said that the applicant has a predilection sexually to molest children, or is likely to pose such a risk in the future. The *Offenders Registration Act* does not appear to envisage any exemption from its provisions, even where it can be clearly seen that an offender does not pose a relevant risk.
>
> [52] It seems to me that the regime that will be imposed upon the applicant for a period of 8 years could properly qualify for the description 'extra curial punishment'. The real question is whether that ought to operate in such a way as to reduce the sentence that is appropriate to the offending.
>
> [53] Bearing in mind that physical reporting is required only once in each year, I do not regard that requirement as such that it ought to be accorded any weight in the sentencing decision. There may well, however, be a less tangible burden on an offender such as the applicant. He is, for eight years after his release, to be branded a sexual offender, to be known, at least to local police, in that

> capacity, and will be reminded of his crime, something he would, no doubt, prefer to put out of his mind. I do not regard this as entirely irrelevant.[105]

Hughes v The Queen[2008] NSWCCA 48

Date of judgment: 10 March 2008

Appeal details: Appeal by the offender.

Charges: Dangerous driving occasioning death.

Appeal upheld by Grove J with whom the other members of the Court agreed.

The facts involved dangerous driving occasioning the death of the victim and the foetus of the victim.

Grove J held that if the sentencing judge had treated the death of the foetus as increasing the seriousness of the offence (which was concerned with the death of the victim) then this was an error by the sentencing judge. That is because the death of the foetus is encompassed in the death of the victim: [28], [33]. His Honour stated:

> [31] In *R v Tzanis* [2005] NSWCCA 274, where a sentencing judge in apparent reference to the legislated aggravating factor in s 21A (2)(g) of the *Crimes (Sentencing Procedure) Act 1999*, namely 'the injury, emotional harm, loss or damage caused by the offence was substantial' made what was described as the cryptic remark 'the harm caused by the offences was substantial', it was stated by Spigelman CJ that 'in the case of death there can be no issue of fact and degree'. In Tzanis there were two victims of dangerous driving, one suffering grievous bodily harm and the other fatal injuries.
>
> [32] That is not to say that the statement in *Tzanis* that in the case of death there can be no issue of fact and degree, taken in

105. Extracted (with additional paragraphs) in '*TMTW v R* [2008] NSWCCA 50' (2008) 15(3) *Criminal Law News* [2362].

> context, excludes consideration of the circumstances of death in a particular case. For example, it would obviously be relevant, and demonstrate greater objective seriousness, to cause death by prolonged torture than to cause immediate death, at least as a matter of generality.[106]

Grove J noted that it was not entirely clear how the sentencing judge had treated the death of the foetus: [33].

Scicluna v The Queen [2008] NSWCCA 24

Date of judgment: 19 February 2008

Appeal details: Appeal by the offender against sentence.

Charges:. Aggravated break, enter and steal

Appeal dismissed by Basten JA, Barr J agreeing, Adams J dissenting.

The applicant appealed his sentence of four years with a non-parole period of two years. He argued that there was a disparity in comparison with the sentence of his co-offender who was dealt with by the Drug Court by way of an 'initial sentence' of two years and three months (reduced to deduct pre-sentence custody) and suspended upon the co-offender entering the Drug Court program at the end of which he received a 12-month good behaviour bond.[107]

Basten JA held that the issue was 'justifiable sense of grievance', and as the applicant did not fall within the Drug Court Act statutory scheme any sense of grievance by not being afforded such leniency was not justified:

> …Where the statutory preconditions for its operation apply in relation to one co-offender, but not the other, the statute itself will operate to permit, or even mandate, disparate treatment. Accordingly, to the extent that the statutory scheme provides

106. Extracted (with additional paragraphs) in '*R v Hughes* [2008] NSWCCA 48' (2008) 15(4) *Criminal Law News* [2377].
107. '*Scicluna v R* [2008] NSWCCA 24' (2008) 15(3) *Criminal Law News* [2361]; *Scicluna v R* [2008] NSWCCA 24, [1]–[6].

for apparent leniency, through the suspension of a sentence, any sense of grievance felt by the co-offender who does not fall within the scheme is not a justified grievance. Rather, the discrepancy is mandated by statute.

[13] It follows that the suspension of Mr Haynes' sentence was a factor properly disregarded in sentencing the applicant. As already noted, there may be justification in seeking to compare the sentence imposed on the co-offender by the Drug Court with that imposed on the applicant. As already noted, there are difficulties in seeking to compare a fixed term with a sentence involving a non-parole period and a further balance of term, not involving compulsory confinement. If the initial sentence imposed by the Drug Court does not, of itself, warrant interference with the sentence of the applicant (as concluded above) the suspension of that sentence will not assist the applicant. [108]

108. Extracted (with additional paragraphs) in '*Scicluna v R* [2008] NSWCCA 24' (2008) 15(3) *Criminal Law News* [2361].

Publications

The Council notes the following publications of interest in relation to sentencing practices.

NSW

Gotsis, T., and Donnelly, H., '*Diverting Mentally Ill Disordered Offenders in the NSW Local Court*' (Monograph 31, Judicial Commission of New South Wales, 2008)

A survey was conducted of magistrates using a questionnaire sent via email in relation to the use of s 32 of the *Mental Health (Criminal Procedure) Act 1990* (NSW). The survey covered 2004–06. The section in question enables magistrates in summary proceedings to divert offenders from the criminal justice system and dismiss their charges either conditionally or unconditionally. [109]

The survey revealed that of those defendants who appeared in the local court, only a small portion were diverted under s 32(3) during the time period. Also, traffic offences were not predominant.[110]

Issues that arose from the survey were summarised and included:

- A mere 38 breaches were recorded throughout the Local Court for the period surveyed. It was submitted that this showed that magistrates were rarely using the ability to call up a defendant under s 32(3A) within six months for failing to comply with a s 32(3) order. The authors suggested further research is required to ascertain why this is.
- Further legislative clarification may be required as to exactly what the maximum permissible length of a s 32(3) order is (ie; is it six months by reference to the enforcement provisions, or is it otherwise?).

109. Gotsis, T. and Donnelly, H., 'Diverting Mentally Ill Disordered Offenders in the NSW Local Court' (Monograph 31, Judicial Commission of NSW, 2008) 1.
110. Gotsis, T. and Donnelly, H., 'Diverting Mentally Ill Disordered Offenders in the NSW Local Court' (Monograph 31, Judicial Commission of NSW, 2008) v.

- Adjournments were sometimes required in situations where treatment plans were not initially available, or were not satisfactorily prepared.
- Concern was expressed by the surveyed magistrates with respect to the adequacy of resources, as well as whether a deficit of community mental health care services was undermining the policy objectives of s 32. The authors noted that the NSW Legislative Council Select Committee on Mental Health expressed similar concerns. [111]

The operation of these provisions and the role of mental illness in relation to the criminal justice process generally is currently under review by the NSW Law Reform Commission.

Karpin, M., Poletti, P. and Donnelly, H., '*Common Offences in the NSW Local Court: 2007*' (Sentencing Trends and Issues No 37, Judicial Commission of New South Wales, 2008)

The Judicial Commission of New South Wales study examined sentencing patterns for the 20 most common proven offences dealt with by the Local Court in 2007 and compared them to previous studies conducted in 1992 and 2002.

Findings included that there had been a reduction in the number of offenders sentenced for high and mid range PCA (ie, prescribed concentration of alcohol) offences, and that there had been a general increase in the severity of penalties for high range PCA offences.[112]

People, J. and Trimboli, L., An Evaluation of the NSW Community Conferencing For Young Adults Pilot Program (NSW Bureau of Crime Statistics and Research, 2008)

Forum sentencing for young offenders aged between 18 and 25 years has been available through a pilot study at Liverpool, Tweed Heads,

111. Gotsis, T., and Donnelly, H., 'Diverting Mentally Ill Disordered Offenders in the NSW Local Court' (Monograph 31, Judicial Commission of NSW, 2008) v– ix.
112. Judicial Commission of New South Wales, 'Drink Driving Offences Attract Harsher Penalties in Local Court' (Press Release, 19 November 2008).

Murwillumbah, Byron Bay and Mullumbimby since 2005. It is aimed to divert young offenders convicted of non-violent offences to a conference and enables the participation of victims. A New South Wales BOCSAR evaluation study was conducted in 2007 concluding that conference participants were satisfied and most stakeholders were satisfied (and suggested changes). It also concluded that the offenders towards which the program was aimed were not being reached, and that there was little known about the rate of re-offending. It suggested that the length of the pilot program be extended in order to examine in more detail re-offending and enabling the program to reach more offenders.[113]

The Attorney General announced that forum sentencing would be extended to additional New South Wales Local Courts from 20 October 2008: Burwood, Newtown, Balmain, Campbelltown, Camden, Picton and Moss Vale.[114]

Local Court Practice Note 5 of 2008 (amended 20 October 2008) deals with the additional courts at which forum sentencing is now available, and the applicable procedure.[115]

Fitzgerald, J., '*Does Circle Sentencing Reduce Aboriginal Offending?*' (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 115, NSW Bureau of Crime Statistics and Research, 2008)

The only prior evaluation of New South Wales circle sentencing was published October 2003 just 18 months after the first circle sentence. It was based only on eight case studies.

113. People, J. and Trimboli, L. 'An Evaluation of the NSW Community Conferencing For Young Adults Pilot Program' (NSW Bureau of Crime Statistics and Research, 2008) 57.
114. NSW Attorney General's Department, 'Victims of Crime to Assist in Sentencing' (Press Release, 20 October 2008).
115. Chief Magistrate Graeme Henson, *Local Court Practice Note No 5 of 2008: Forum Sentencing Programme*. 11 July 2008.

This study compared a control group sentenced traditionally in the court setting, with a group comprised of circle sentences. It reported that:

- Circle sentencing participants offended less frequently in the 15 months after the circle than they did in the 15 months prior to the circle, however the same was true of the matched control group.
- There was not a significant difference in the time taken to re-offend between circle sentencing participants and the control group.
- There was not a significant difference between the treatment and control group in the percentage of offenders whose next offence was less serious than the initial offence.

BOCSAR concluded that circle sentencing had no effect on the frequency, timing or seriousness of re-offending, but identified the several collateral advantages it had including community participation in the sentencing process.[116]

BOCSAR suggested consideration be given to ways to improve the ability of circle sentencing to reduce offending. It suggested examining the idea of using Circle Sentencing in conjunction with other programs (eg cognitive behavioural therapy, drug and alcohol treatment, remedial education) which are known to have an effect on the risk factors of re-offending.[117]

A study conducted by the Cultural and Indigenous Research Centre found that seven of eight objectives were being met by Circle Sentencing.[118]

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116. Fitzgerald, J., 'Does Circle Sentencing Reduce Aboriginal Offending?' (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 115, NSW Bureau of Crime Statistics and Research, 2008) 6, 7.
117. Fitzgerald, J., 'Does Circle Sentencing Reduce Aboriginal Offending?' (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 115, NSW Bureau of Crime Statistics and Research, 2008) 7.
118. NSW Attorney General's Department, 'Circle Sentencing Strengthened After Evaluations' (Press Release, 16 July 2008).

After the results of these studies were published the Attorney General announced that work was to be done to meet the re-offending objective. He announced changes to the program would be implemented in order to strengthen it, including the better provision of drug and alcohol services, and stated that the government had committed $1.09 million toward circle sentencing in the 2008–09 financial year.[119] The Law Society of New South Wales announced that they supported this move.[120]

Weatherburn, D. and Trimboli, L., '*Community Supervision and Rehabilitation: Two Studies of Offenders on Supervised Bonds*' (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 112, NSW Bureau of Crime Statistics and Research, 2008)

This research was the first Australian research into the effectiveness of supervision in reducing re-offending. The authors concluded that the first study showed that, all things being equal, offenders placed on supervised bonds are not less likely to re-offend than a matched group of offenders placed on non-supervised bonds. They also concluded that offenders placed on supervised bonds generally re-offended at the same speed as those placed on bonds without supervision.[121]

The second study revealed that, the Probation and Parole Officers who were surveyed most frequently nominated, as being very important or extremely important to offender rehabilitation, mental health treatment, drug and alcohol treatment, and secure and affordable accommodation. The most frequently expressed concern among Probation and Parole Officers was the cost of private specialised mental health services; the principal concern with drug and/or alcohol services was the waiting lists; the most frequently cited barriers to offender employment were

119. NSW Attorney General's Department, 'Circle Sentencing Strengthened After Evaluations' (Press Release, 16 July 2008); New South Wales, *Parliamentary Debates*, Legislative Council, 13 November 2008, 11339 (John Hatzistergos)
120. Law Society of New South Wales, 'NSW Law Society Backs Circle Sentencing' (Press Release, 16 July 2008).
121. Weatherburn, D. and Trimboli, L., 'Community Supervision and Rehabilitation: Two Studies of Offenders on Supervised Bonds' (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 112, NSW Bureau of Crime Statistics and Research, 2008) 10.

lack of training and education and lack of social skills; and less than 40% said they had enough time to supervise offenders. [122]

BOCSAR concluded as the most likely explanation for the finding that supervision did nothing to reduce the risk of re-offending among offenders placed on supervised bonds in the year 2000 was that the level of supervision and support required by those offenders to reduce re-offending was not received.[123]

Lulham, R. and Fitzgerald, J., *'Trends in Bail and Sentencing Outcomes in New South Wales Criminal Courts: 1993–2007'* (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 124, NSW Bureau of Crime Statistics and Research, 2008)

Trends in bail and sentencing in New South Wales were analysed between 1993–2007. In relation to sentencing practices, it was found that the proportion of convicted offenders sentenced to prison in the Higher Courts increased for eight out of the ten offence categories, and the trend in average length of imprisonment increased in four out of the ten offence categories. 'Fraud' was the only offence category for which the average length of imprisonment decreased.

In the Local Court the proportion of offenders sentenced to prison increased significantly for eight out of the eleven offence categories, and the average length of imprisonment increased for nine out of the eleven offence categories. [124]

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122. Weatherburn, D. and Trimboli, L., 'Community Supervision and Rehabilitation: Two Studies of Offenders on Supervised Bonds' (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 112, NSW Bureau of Crime Statistics and Research, 2008) 17.
123. Weatherburn, D. and Trimboli, L., 'Community Supervision and Rehabilitation: Two Studies of Offenders on Supervised Bonds' (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 112, NSW Bureau of Crime Statistics and Research, 2008) 18.
124. Lulham, R. and Fitzgerald, J., 'Trends in Bail and Sentencing Outcomes in New South Wales Criminal Courts: 1993–2007' (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 124, NSW Bureau of Crime Statistics and Research, 2008) 1.

It was surmised that the increase in the restrictiveness in the administration of bail, and in the severity of sentencing might relate to the 50.3% increase in the New South Wales prison population over the same period.

The authors recommended targeted research and analysis to determine the possible contributors of this. They did point to the recent major sentencing reforms, particularly the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW), as well as the effect on magistrates and judges of media, community and political pressure to be harsher on criminals, as possible contributing factors.[125]

Smith, N. and Jones, C. '*Monitoring Trends in Re-offending among Adult and Juvenile Offenders Given Non-custodial Sanctions*' (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 110, NSW Bureau of Crime Statistics and Research, 2008)

BOCSAR developed a new technique for monitoring trends in re-offending and analysing the effectiveness of government policies called the Group Risk Assessment Model (GRAM). It recognised that changes in re-offending rates sometimes reflect nothing more than a change in profile of offenders coming before the court. Therefore, it developed a formula to predict what the re-conviction rate should be and compared the predicted rate to the observed reconviction rate. If the Government's correctional policies are working BOCSAR determined that the observed reconviction rate should be lower than expected.[126]

The study found that for juvenile offenders age, sex, Indigenous status, prior convictions and concurrent convictions were highly predictive of subsequent reconviction. For adult offenders the same offender

125. Lulham, R. and Fitzgerald, J., 'Trends in Bail and Sentencing Outcomes in New South Wales Criminal Courts: 1993–2007' (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 124, NSW Bureau of Crime Statistics and Research, 2008) 6.

126. NSW Bureau of Crime Statistics and Research, 'Monitoring Trends in Re-offending' (Press Release, 3 March 2008); Smith, N. and Jones, C., 'Monitoring Trends in Re-offending among Adult and Juvenile Offenders Given Non-custodial Sanctions' (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 110, NSW Bureau of Crime Statistics and Research, 2008) 2.

characteristics, in combination with the jurisdiction in which the offender was dealt with and the offender's most serious index offence, were found to be predictive.[127]

Applying the formula, BOCSAR concluded that there was no change in re-offending among adult offenders between 2003 and 2004 and a slight reduction in re-offending among juvenile offenders between 2002 and 2004. It also determined that adult offenders are much less likely to re-offend than juvenile offenders.[128]

Smith, N. and Jones, C., '*Monitoring Trends in Re-offending among Offenders Released from Prison*', (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 117, NSW Bureau of Crime Statistics and Research, 2008)

The Bulletin applied the GRAM model described above to measure re-offending among offenders released from custody. The study identified particular groups of offenders who were at greater risk of reconviction within two years of release, being younger offenders, Indigenous offenders, offenders released to parole, offenders who had served prison sentences of between two and 12 months, offenders with more prior convictions, offenders with a prior conviction for offences of breach justice order, non-aggravated violence or theft.

The study reported that when applying the model and making adjustments for offender characteristics, a comparison of the actual reconviction rates and the difference between the observed 2004 reconviction rate and predicted 2004 reconviction rate suggested no change in reconviction from 2002 to 2004, and from 2002 to 2003. It

127. Smith, N. and Jones, C., 'Monitoring Trends in Re-offending among Adult and Juvenile Offenders Given Non-custodial Sanctions' (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 110, NSW Bureau of Crime Statistics and Research, 2008) 1.
128. Smith, N. and Jones, C., 'Monitoring Trends in Re-offending among Adult and Juvenile Offenders Given Non-custodial Sanctions' (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 110, NSW Bureau of Crime Statistics and Research, 2008) 8.

concluded there was not a significant change in rates of re-offending in the periods.[129]

Rodwell, L. and Smith, N., *An Evaluation of the NSW Domestic Violence Intervention Court Model* (NSW Bureau of Crime Statistics and Research, 2008)

The authors reported that the Domestic Violence Intervention Court Model (DVICM) was piloted in Campbelltown and Wagga Wagga Local Courts from 12 September 2005 and 10 October 2005 respectively.[130]

The study found that victims reported that they were very satisfied with police response, and very satisfied with the support they received from the Victims Advocate and Client Advocate.[131] Other findings included:

- Wagga Wagga Local Area Command (LAC) had high charge rates for domestic violence prior to the trial which remained in place;
- the proportion of alleged domestic violence offenders charged by Campbelltown and Macquarie Fields LACs increased, however it was noted that there was an increase in charge rate across New South Wales;
- the percentage of matters finalised by guilty pleas remained stable in Campbelltown and decreased in Wagga Wagga. The percentage of matters withdrawn by the prosecution or dismissed by the courts remained stable; and
- court delays for matters that proceeded to hearing improved in Campbelltown but remained stable in Wagga Wagga.[132]

129. Smith, N. and Jones, C., 'Monitoring Trends in Re-offending among Offenders Released from Prison', (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 117, NSW Bureau of Crime Statistics and Research, 2008) 7.
130. Rodwell, L. and Smith, N., *An Evaluation of the NSW Domestic Violence Intervention Court Model* (NSW Bureau of Crime Statistics and Research, 2008) 3.
131. Rodwell, L. and Smith, N., An Evaluation of the NSW Domestic Violence Intervention Court Model (NSW Bureau of Crime Statistics and Research, 2008) 68; NSW Bureau of Crime Statistics and Research, 'Domestic Violence Intervention Court Model (DVICM) Evaluation' (Press Release, 21 May 2008).
132. NSW Bureau of Crime Statistics and Research, 'Domestic Violence Intervention Court Model (DVICM) Evaluation' (Press Release, 21 May 2008).

D'Apice, S., '*The Impact of the High Range PCA Guideline Judgment on Sentencing for PCA Offences in NSW*' (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 123, NSW Bureau of Crime Statistics and Research, 2008)

BOCSAR conducted a study surveying sentencing practices for PCA offences 8 September 2004 to 8 September 2006 following the issue of the guideline judgment[133], as compared with the 24 months immediately prior to the issuing of the guideline judgement; [134]

Findings of the study included:

- an increase in the severity and consistency of sentencing for High Range PCA offences including a 71% decrease in the use of s 10, an 8% increase in licence disqualification, a 65% decline in the average variation between courts in their use of s 10, as well as flow on effects with respect to the use of other sentencing options including an increase in the proportion of offenders given s 9 bonds, community service orders, suspended sentences, periodic detention, home detention and prison;
- with respect to Mid Range PCA offences a 30% fall in the use of s 10, a 10% increase in licence disqualification, a 22% decline in the standard deviation between courts in their use of s 10;
- flow on effects were also noted with respect to the use of other sentencing options, including an increase in the percentage of offenders who were fined and given s 9 bonds; and

133. *Application by the Attorney General under s 37 of the Crimes (Sentencing Procedure) Act for the Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol under s 9(4) of the Roads Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* [2004] NSWCCA 303.
134. D'Apice, S., 'The Impact of the High Range PCA Guideline Judgment on Sentencing for PCA Offences in NSW (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 123, NSW Bureau of Crime Statistics and Research, 2008) 2.

- changes with respect to sentencing low range PCA offences were minimal.[135]

Snowball, L., *'Does a Lack of Alternatives to Custody Increase the Risk of a Prison Sentence?'* (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 111, NSW Bureau of Crime Statistics and Research, 2008)

The study found that remote and regional offenders were less likely to receive a prison sentence than offenders in metropolitan areas. No interactive effect was found for Indigenous status and areas of resident suggesting that Indigenous offenders were more or less likely to be imprisoned within a particular area of residence.[136]

BOCSAR proposed some theories as to the reasons behind the results of the study—including that magistrates in remote and regional areas are conscious of the shortage of community based options and react to this by restricting their use of imprisonment. It was suggested that research into this possibility should be undertaken.

BOCSAR highlighted the need to ensure that the courts operating in regional or remote parts of New South Wales are provided with a wider range of sentencing options.[137]

135. NSW Bureau of Crime Statistics and Research, 'Sentencing Drink Drivers' (Press Release, 14 January 2009); D'Apice, S., 'The Impact of the High Range PCA Guideline Judgment on Sentencing for PCA Offences in NSW' (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 123, NSW Bureau of Crime Statistics and Research, 2008) 8, 9.
136. Snowball, L., 'Does a Lack of Alternatives to Custody Increase the Risk of a Prison Sentence?' (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 111, NSW Bureau of Crime Statistics and Research, 2008) 1.
137. Snowball, L., 'Does a Lack of Alternatives to Custody Increase the Risk of a Prison Sentence?' (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 111, NSW Bureau of Crime Statistics and Research, 2008) 4; NSW Bureau of Crime Statistics and Research, 'Does the Lack of Alternatives Increase the Risk of a Prison Sentence?' (Press Release, 27 February 2008).

NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics Report: 2007* (2008)

BOCSAR's New South Wales Criminal Courts Statistics Report 2007 was released 2 September 2008 and revealed certain trends with respect to sentencing including:

- the proportion of people given a prison sentence by a Local Court increased from 6.8% to 6.9% of those found guilty;
- the proportion of people given a prison sentence by a Higher Court increased from 66.7% to 69.9%;
- the proportion of people given a control order by the Children's Court increased from9.7% to 10.3%; and
- the proportion of Aboriginal and Torres Strait Islander people given sentences of imprisonment in the Local Courts slightly decreased from 18.8% to 18.1% of all Aboriginal and Torres Strait Islanders.[138]

Weatherburn, D., Jones, C., Snowball, L., and Hue, J., '*The NSW Drug Court: A Re-evaluation of its Effectiveness*' (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 121, NSW Bureau of Crime Statistics and Research, 2008); and University of Technology Sydney—Centre for Health Economics Research and Evaluation, *The Costs of the NSW Drug Court: Final Report* (NSW Bureau of Crime Statistics and Research, 2008)

The Drug Court commenced in February 1999 with the aim of tackling the underlying cause of involvement in crime (drug dependence or abuse) through programs of coerced treatment. Since its original evaluation in 2002 the Drug Court underwent changes with the aim of improving its cost effectiveness.[139]

138. NSW Bureau of Crime Statistics and Research, 'NSW Criminal Court Statistics 2007' (Press Release, 2 September 2008).
139. Weatherburn, D., Jones, C., Snowball, L., and Hue, J., 'The NSW Drug Court: A Re-evaluation of its Effectiveness' (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 121, NSW Bureau of Crime Statistics and Research, 2008) 1; NSW Bureau of Crime Statistics and Research, 'Drug Court Re-evaluation' (Press Release, 18 November 2008).

The re-evaluation conducted by CHERE (Centre for Health and Economics Research) showed that the total cost of the Drug Court program is $16.376 million per annum, as compared to the estimated cost of dealing with the same offenders via conventional sanctions which was $18.134 million per annum. The use of the ballot was found to have improved the cost-effectiveness of the Drug Court program, allowing Aboriginal and female offenders to re-enter the ballot if rejected on the first round did not add or detract to the Drug Court's cost, and increased urinalysis did add to the cost.[140]

Findings of the BOCSAR study showed that as compared with offenders given conventional sanctions, Drug Court participants in the present study were 17% less likely to be reconvicted for any offence, 30% less likely to be reconvicted for a violent offence and 38% less likely to be reconvicted for a drug offence at any point during the follow up period.[141]

BOCSAR commented that the results provided further evidence that the Drug Court program is more effective than conventional sanctions in reducing the risk of recidivism among drug related criminal offenders.[142]

Weatherburn, D. and Bartels, L., 'The Recidivism of Offenders Given Suspended Sentences in New South Wales, Australia' (2008) 48(5) *British Journal of Criminology* 667

The authors found that a comparison of the effect of suspended sentences on recidivism with that of supervised bonds resulted in no difference in the rates of reconviction following the imposition of these sentences. They hypothesised that the most likely explanation was that neither sanction exerted any effect on the risk of reoffending.[143]

140. NSW Bureau of Crime Statistics and Research, 'Drug Court Re-evaluation' (Press Release, 18 November 2008).
141. NSW Bureau of Crime Statistics and Research, 'Drug Court Re-evaluation' (Press Release, 18 November 2008).
142. NSW Bureau of Crime Statistics and Research, 'Drug Court Re-evaluation' (Press Release, 18 November 2008).
143. Weatherburn, D. and Bartels, L., 'The Recidivism of Offenders Given Suspended Sentences in New South Wales, Australia' (2008) 48(5) *British Journal of Criminology* 667, 667, 677.

Preston, B. and Donnelly, H. '*Achieving Consistency and Transparency in Sentencing for Environmental Offences*' (Monograph 32, Judicial Commission of New South Wales, 2008)

A project between the Land and Environment Court and the Judicial Commission for New South Wales resulted in the launch of the Land and Environment Court sentencing database. This publication traces its development, outlines its function, gives a useful outline of the current law in relation to the use of statistics and notes the benefits and limitations of statistics as commented on by the Courts.[144]

OTHER JURISDICTIONS

Fisher, G., The Criminal Justice Diversion Program in Victoria (Sentencing Advisory Council, Victoria, 2008)

The report analyses the Criminal Justice Diversion Program, which is an option available to the Magistrates' Court. The scheme focuses on low level and first time offenders, and provides defendants with the opportunity to avoid a criminal conviction by undertaking certain conditions (for example, apology to victim, compensation, good behaviour, voluntary work, undertaking courses/counselling such as anger management, driving and drug related treatment).

After its initial introduction as a pilot program, the program obtained formal ongoing status in 2003. The report analyses data obtained from 2006–07.[145]

The reported findings included:

- the program was the third most common disposition for defendants in the Magistrates' Court;

144. Preston, B. and Donnelly, H. 'Achieving Consistency and Transparency in Sentencing for Environmental Offences' (Monograph 32, Judicial Commission of New South Wales, 2008) 4–16; Judicial Information Research System 'Monograph Statistics for Environmental Offences' (Recent Announcements, 18 July 2008).
145. Fisher, G., *The Criminal Justice Diversion Program in Victoria* (Sentencing Advisory Council, Victoria, 2008) 2, 7.

- although more than half of those who undertook diversion plans were aged between 17 and 29, the age groups of 17 to19 years and 65 and older were statistically more likely to be placed on the program; and
- the most common offences for defendants on the program were traffic and property offences.[146]

The Sentencing Council notes that the Victorian Sentencing Advisory Council undertook a number of other significant sentencing projects during 2008, including the release of a Discussion Paper on the offence of drive whilst disqualified or suspended; and an update to its original Research Paper 'Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing' incorporating current research on the area, as well as an accompanying Research Paper on methodological issues with respect to this area.[147]

Sentencing Guidelines Council (UK), *Causing Death by Driving: Definitive Guideline* (2008)

The Sentencing Guidelines Council issued the guideline 'Causing Death by Driving' which was effective as of 4 August 2008.

The UK media reported that drivers who cause death while sending or reading text messages at the wheel could face up to seven years imprisonment under the new guidelines. This is because the Council specified in the guideline that for the offence of 'Causing Death by Dangerous Driving' and where the driving fell into the category of creating a 'substantial risk of danger', which it determined included 'gross avoidable distraction such as reading or composing text messages over a period of time', the sentencing range was four to seven years.[148]

146. Fisher, G., *The Criminal Justice Diversion Program in Victoria* (Sentencing Advisory Council, Victoria, 2008) 19.
147. Sentencing Advisory Council (Victoria) (online), <http://www.sentencingcouncil.vic.gov.au>.
148. Independent Television News Limited, 'Text Drivers Face Tougher Penalties' (online), 4 August 2008 <http://www.itv.com>.

The Sentencing Council notes that the UK Sentencing Guidelines Council issued several other significant guidelines in 2008. These included:

- theft and burglary in a building other than a dwelling;
- breach of an anti-social behaviour order;
- Magistrates' Court sentencing guidelines; and
- Magistrates' Court sentencing guidelines—knife crime.[149]

149. Sentencing Guidelines Council (UK) (online), <http://www.sentencing-guidelines.gov.uk>.

PART FOUR: ANNEXURES

Annexure A: Sentencing Council membership

The current members of the NSW Sentencing Council are:

The Hon James Wood AO QC, Chairperson

The Hon James Wood AO QC commenced his term as Chairperson of the NSW Sentencing Council on 28 April 2006. He has been the Chairperson of the NSW Law Reform Commission since January 2006 and in December 2007 was appointed to head the Special Commission into Child Protection Services in New South Wales. Mr Wood was Chief Judge at Common Law, 1998–2005, having been appointed a Supreme Court Judge in 1984. He was also Commissioner of the Royal Commission into Police Corruption, 1994–97 and previously a full-time Commissioner with the Law Reform Commission, 1982–84.

The Hon John Dunford QC, Deputy Chairperson

The Hon John Dunford QC is a retired Judge of the Supreme Court of New South Wales with very substantial experience in criminal law and in criminal trials. He practised as a barrister in New South Wales and the Australian Capital Territory, and was appointed Queen's Counsel in 1980. He was appointed to the District Court of New South Wales in 1986, and was appointed to the Supreme Court in 1992. Mr Dunford retired from the Supreme Court in April 2005 and was an Acting Commissioner to the Corruption and Crime Commission of Western Australia, 2007-2008.

Mr Howard Brown OAM, Victims of Crimes Assistance League

Mr Brown is a community representative on the NSW Victims Advisory Board and represents the Board on the DNA Review Panel. He is the Deputy President of the Victims of Crime Assistance League and one of four members of the Council who represent the general community.

Assistant Commissioner Paul Carey APM, NSW Police

Assistant Commissioner Carey is the Acting Commander, Professional Standards, with the NSW Police Force. He joined the Force in 1973 and has held a number of senior roles including Region Commander, Central Metropolitan Region. He has a Bachelor of Arts and qualifications in management, including a Management Certificate from the University of Virginia (2005).

Mr N R Cowdery AM QC, Director of Public Prosecutions

Mr Cowdery QC is the Director of Public Prosecutions for the State of New South Wales. He has held this position since 1994. He worked as a Public Defender in Papua New Guinea until 1975 and then in private practice at the Sydney Bar until 1994. In 1987 he was appointed one of Her Majesty's Counsel. He has been an Acting Judge of the District Court of New South Wales; he was the President of the International Association of Prosecutors; and an inaugural co-chair of the International Bar Association's (IBA) Human Rights Institute. Mr Cowdery is one of three members of the Council with criminal law or sentencing expertise. He has particular experience in the area of prosecution.

Mrs Jennifer Fullford, Community Representative

Mrs Fullford is a welfare Officer at Maitland Community & Information Centre, the current registrar for Maitland RSL Youth Club and an active member of St Pauls Anglican Parish. Mrs Fullford is one of four members of the Council who represents the general community.

Mr Mark Ierace SC, Senior Public Defender

Mr Ierace SC was appointed as Senior Public Defender in 2007, and is the Council member with expertise in defence. Prior to this appointment, Mr Ierace was a consultant to the NSW Law Reform Commission, and In-house Counsel to the Commonwealth Director of Public Prosecutions. From 2000 to 2004 he was Senior Prosecuting Trial Attorney with the United Nations International Criminal Tribunal for the former Yugoslavia, The Hague, The Netherlands.

He holds a BA (Syd); Dip Law (BAB); and LLM (International Law) (Syd), and was admitted as solicitor of the NSW Supreme Court in 1979 and as a Barrister in 1981. He was appointed as Senior Counsel in 1999.

Ms Martha Jabour, Homicide Victims Support Group

Ms Jabour is the Executive Director of the Homicide Victims Support Group (HVSG) and represents the HVSG on the Victims Advisory Board, the Youth Justice Advisory Committee, and the NSW Mental Health Sentinel Events Review Committee. She is also on the Serious Offender's Review Council as a community representative. Ms Jabour is one of four members of the Council who represent the general community. She has particular experience in matters associated with victims of crime.

Mr Norman Laing, Aboriginal Justice Representative

Mr Laing is the Deputy Chief Executive Officer of the NSW Aboriginal Lands Council. Before holding this role he worked as a barrister in Sydney and as the Indigenous Research Associate for the Federal Court of Australia. Mr Laing was a full time soldier with the Australian Regular Army from 1995 to 2003 whilst completing his Bachelor of Laws and served with the Royal Australian Army Legal Corps and the Australian Military Prosecutions Office. In 2002, after completing a fulltime volunteer position with the Aboriginal Legal Service, Mr Laing was one of the first indigenous graduates of the Bachelor of Laws and Indigenous Australian Law degrees offered by the University of Technology, Sydney.

Mr Ken Marslew AM, Enough is Enough Anti-Violence Movement

Mr Marslew AM founded the Enough is Enough Anti Violence Movement Inc. in late 1994 and represents Enough is Enough on the NSW Attorney General's Victims Services Advisory Board, the Premier's Council on Crime Prevention and the Corrective Services Restorative Justice Advisory Committee. Mr Marslew is one of four members of the Council who represent the general community. He has particular experience in matters associated with victims of crime.

Ms Jennifer Mason, Department of Community Services

Ms Mason was appointed Director General of the NSW Department of Community Services in March 2008, having previously held the position of Director General of the NSW Department of Juvenile Justice from October 2005. She worked for a decade for the Attorney General of New South Wales and the former Minister of Corrective Services and previously held positions in the Office of the Ombudsman and the Legal Aid Commission. Ms Mason was appointed to the Sentencing Council in 2007, as a member with expertise in juvenile justice issues.

Ms Penny Musgrave, NSW Attorney General's Department

Ms Musgrave was admitted to practise as a solicitor in 1986. In 1989 she joined the Commonwealth Director of Public Prosecutions (CDPP). She practised across most areas prosecuted by the Commonwealth and most recently was a Senior Assistant Director managing the general prosecutions Branch of the CDPP Sydney Office. In January 2008 she took up the role of Director, Criminal Law Review Division with the NSW Attorney General's Department and represents the Council in this capacity.

Commissioner Ronald Woodham, PSM, Corrective Services

Commissioner Woodham joined the Prison Service in 1966. In 1992 he was appointed Assistant Commissioner Operations; five years later he was promoted to Senior Assistant Commissioner. In 2001 Mr Woodham was appointed Acting Commissioner of Corrective Services, and in January 2002 became Commissioner of Corrective Services, the first prison officer to hold the position in the 128-year history of the Department.

In 1980 Mr Woodham received a commendation from the Minister for Corrective Services for bravery in the line of duty following an incident at the Malabar Training Centre at Long Bay. He has received five citations for devotion to duty in hostage situations in prisons as well as the recapture of a high-profile escapee known as the Eastern Suburbs Rapist.