Report on Sentencing Trends and Practices 2008–2009

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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The Council

The Hon Jerrold Cripps QC, Chairperson[1]

The Hon John Dunford QC, Deputy Chairperson

The Hon James Wood AO QC, NSW Law Reform Commission[2]

Mr Howard Brown OAM, Victims of Crimes Assistance League

Assistant Commissioner Paul Carey APM, NSW Police Force

Mr Nicholas R Cowdery AM QC, NSW Director of Public Prosecutions

Mrs Jennifer Fullford, Community Representative[3]

Mr Mark Ierace SC, Senior Public Defender

Ms Martha Jabour, Homicide Victims Support Group

Mr Norman Laing, NSW Aboriginal Land Council[4]

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

Ms Jennifer Mason, NSW Department of Human Services NSW

Ms Penny Musgrave, NSW Department of Justice and Attorney General

Professor David Tait, University of Western Sydney[5]

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1. The Hon Jerrold Cripps QC was appointed Chairperson on 14 November 2009.
2. The Hon James Wood QC was Chairperson from 2006 to 14 November 2009 when he commenced his position as a member of the Council with expertise and experience in sentencing.
3. Mrs Jennifer Fullford retired from her position on the Council in December 2009 as a member of the Council representing the general community.
4. Mr Norman Laing retired from his position on the Council in August 2009 as the member of the Council with expertise or experience in Aboriginal justice matters.

Commissioner Ronald Woodham, PSM, Corrective Services NSW.

Former Members

The Hon Alan Abadee AO RFD QC, Chairperson

The Hon J P Slattery AO QC, Deputy Chairperson

Professor Larissa Behrendt, Jumbunna Indigenous House of Learning, University of Technology Sydney

Assistant Commissioner Catherine Burn APM, NSW Police

Mr Chris Craigie SC, former Acting Senior Public Defender

Assistant Commissioner Chris Evans APM, NSW Police Force

Commander John Laycock APM, NSW Police Force

Ms Laura Wells, NSW Attorney Generals' Department

The Hon Judge Peter Zahra SC, former Senior Public Defender

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5. Professor David Tait was appointed as the member with academic or research expertise or experience of relevance to the functions of the Council in December 2009.

Officers of the Council

Executive Officer

Anna Butler[6]

Research Officers

Huette Lam

Belinda Fitzpatrick

Nola Katakouzinos

Consultants & Contractors

Sophia Beckett, Forbes Chambers

Lester Fernandez, Forbes Chambers

Janet Manuell SC, NSW Public Defenders Office

Student Intern Program

Chelsea Tabart (University of Queensland, Law)

Jenna Dennison (University of New South Wales)

6. Ms Anna Butler was appointed Executive Officer in August 2009. Ms Katherine McFarlane was the Executive Officer to the Council from February 2006 to July 2009.

INTRODUCTION AND OVERVIEW

The NSW Sentencing Council ('the Council') is now in its seventh year of operation. This is its sixth statutory report on sentencing trends and practices,[7] and covers the period December 2008–December 2009.

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 review period.

Part Two provides an overview of the references and projects the Council completed in 2008–09 together with an update in relation to current and ongoing projects. Government responses to Council reports are also considered.

Part Three identifies sentencing trends and issues that have emerged during the review period, examining relevant case law and legislative amendments, together with a review of selected articles and publications.

Part Four comprises Annexures to the Report.

7. 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.[8]

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

The functions of the Council are:

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

This report does not include any statistical analysis or review of the standard non-parole period scheme for the reason that a detailed analysis formed part of the Council's report for 2006–2007 and a

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

similar analysis will be deferred for one further year to allow for the emergence of any significant trends.

The Council notes that there have been no guideline judgments delivered in the period under review.

Council membership

There have been significant changes to the membership of the Council during the review period.

In May 2009 the *Criminal Legislation Amendment Act 2009* commenced amending, inter alia, the *Crimes (Sentencing Procedure) Act* to provide for an additional two members to be appointed to the Council, one with expertise or experience in criminal law or sentencing and the other academic or research expertise or experience of relevance to the functions of the Council.

In November 2009 the Hon James Wood AO QC retired as Chairperson of the Council and has been appointed as the new member with expertise and experience in criminal law and sentencing. The members and officers of the Council acknowledge and appreciate the enormous contribution Mr Wood has made as Chair of the Council over the past three years.

The Hon Jerrold Cripps QC succeeded as Chairperson in November 2009.

In December 2009 Professor David Tait was appointed as the member with academic or research expertise or experience of relevance to the functions of the Council.

In August 2009 Mr Norman Laing retired from his position on the Council as the member with expertise in relation to Aboriginal justice

matters. The Council conveys its appreciation to Mr Laing for his contribution to the work of the Council during his three-year tenure. A suitable candidate to replace Mr Laing are currently being considered and an appointment will be made in early 2010.

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 close working 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 (now Department of Justice and Attorney General) throughout 2008–09. Such meetings expand the knowledge base of the Council and ensure work is not unnecessarily duplicated.

The Council's relationship with the above bodies extends to cooperation on specific projects. The Judicial Commission and BOCSAR have provided the Council with extensive data, statistics and general advice, particularly in relation to the Alcohol-related Violence report and in relation to the Council's current references examining the use of good behaviour bonds and non-conviction orders and the review of personal violence matters finalised in the Local Court.

The Council met regularly with the Criminal Law Review and Legislation and Policy Division of the Department of Justice and Attorney General to discuss issues surrounding the Government response and implementation of Council recommendations, such as those arising out of the Sexual Assault Offences reference, the Review

of Periodic Detention and the Alcohol-related Violence reference. Informed advice was given in relation to the appropriateness of the penalties available for arson and arson-related offences, and also in relation to the possible increase of the jurisdiction of the Local Court in criminal cases.

During 2009 the Council continued its relationship with the members of the private bar and both defence and prosecution offices. The Council Monograph *Provisional Sentencing Of Children*, was co-authored[9] by Sophia Beckett and Lester Fernandez of Forbes Chambers and the Monograph examining the sentencing of Aboriginal offenders and the application of the *Fernando* principles was authored by Janet Manuell SC of the Public Defenders Office. The expertise proffered by these parties and their contribution to the work of the Council is greatly appreciated.

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, in October 2009 the Executive Officer and Penny Musgrave met with the Tasmanian Attorney-General, the Hon Lara Giddings, to discuss the establishment of a sentencing council in that State.

Profile

During the review period a number of Council reports and projects 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 19 times in

9. Together with Ms Katherine McFarlane, former Executive Officer to the Council.

this reporting period, on issues as diverse as sexual offences, child pornography, alcohol-related violence, public confidence in the criminal justice system, arson, and the development of community-based sentencing options.[10]

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10. New South Wales, *Parliamentary Debates*, Legislative Council, Questions Without Notice: Bushfire Arsonists, 3 March 2009, 12766 (Tony Kelly, Minister for Police); New South Wales, *Parliamentary Debates*, Legislative Council, Questions Without Notice: Crime and Sentencing, 1 April 2009, 14182 (John Hatzistergos, Attorney General); New South Wales, *Parliamentary Debates*, Legislative Council, Questions Without Notice—Deferred Answers: Pornography, 5 May 2009, 14576 (Nathan Rees, Premier); New South Wales, *Parliamentary Debates*, Legislative Council, Second Reading: Criminal Legislation Amendment Bill 2009, 7 May 2009, 14861 (John Hatzistergos, Attorney General); New South Wales, *Parliamentary Debates*, Legislative Council, Second Reading: Criminal Legislation Amendment Bill 2009, 13 May 2009, 15133 (David Clarke; Lee Rhiannon); New South Wales, *Parliamentary Debates*, Legislative Assembly, Agreement in Principle: Criminal Legislation Amendment Bill 2009, 14 May 2009, 15330 (Barry Collier, Parliamentary Secretary); New South Wales, *Parliamentary Debates*, Legislative Assembly, Agreement in Principle: Criminal Legislation Amendment Bill 2009, 14 May 2009, 15331, (Greg Smith); New South Wales, *Parliamentary Debates*, Legislative Assembly, Agreement in Principle: Criminal Legislation Amendment Bill 2009, 15 May 2009, 15409 (Barry Collier, Parliamentary Secretary); New South Wales, *Parliamentary Debates*, Legislative Council, Questions Without Notice: Alcohol-related Violence Offender Sentencing, 24 June 2009, 16629 (John Hatzistergos, Attorney General); New South Wales, *Parliamentary Debates*, Legislative Assembly, Agreement in Principle: Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2009, 9 September 2009, 17615 (Greg Smith); New South Wales, *Parliamentary Debates*, Legislative Council, Questions Without Notice: Sentencing Information Forums, 24 September 2009, 18108 (John Hatzistergos, Attorney General); New South Wales, *Parliamentary Debates*, Legislative Assembly, Questions Without Notice: Bushfire Season Preparations, 24 September 2009, 18175 (Nathan Rees, Premier); New South Wales, *Parliamentary Debates*, Legislative Assembly, Agreement in Principle: Rural Fires Amendment Bill 2009, 20 October 2009, 18337 (Phil Koperberg, Parliamentary Secretary); New South Wales, *Parliamentary Debates*, Legislative Assembly, Matter of Public Importance: Crime and Sentencing, 21 October 2009, 18487 (David Harris, Parliamentary Secretary); New South Wales, *Parliamentary Debates*, Legislative Council, Questions Without Notice: Support for Victims, 10 November 2009, 19126, (John Hatzistergos, Attorney General); New South Wales, *Parliamentary Debates*, Legislative Council, Second Reading: Road Transport Legislation Amendment (Miscellaneous Provisions) Bill 2009, 12 November 2009, 19502 (Henry Tsang, Parliamentary Secretary); New South Wales, *Parliamentary Debates*, Legislative Council, Second Reading: Road Transport Legislation Amendment (Miscellaneous Provisions) Bill 2009, 25 November 2009, 19825 (Penny Sharpe, Parliamentary Secretary); New South Wales, *Parliamentary Debates*, Legislative Council, Questions Without Notice: Sentencing Discount Restrictions and Victims Rights, 1 December 2009, 20195 (John Hatzistergos,

In October 2009 the Chair and Council member Howard Brown were invited to take part in the SBS program *Insight* to discuss the issue of how the criminal justice system deals with paedophiles. Other guests included: Andrew Haesler SC, Deputy Senior Public Defender; Rhonda Booby, Executive Director of Offender Services and Programs, NSW Department of Corrective Services; the Hon Murray Kellam AO, recently retired judge of the Supreme Court of Victoria; Stephen Smallbone, criminologist; as well as victims and members of the community.

Throughout the year the Council received significant media coverage in relation to a number of references, with articles appearing in the major State papers and regional media outlets. The Council Monograph, *Public Confidence in the NSW Criminal Justice System*, generated significant media interest and saw the Chair interviewed for the Sydney Morning Herald and ABC Central West Radio. The Chair was also invited to submit an opinion piece for the Newcastle Herald on the topic of public confidence.

Educative function

The Council is committed to strengthening public awareness, understanding and confidence in the sentencing process, and throughout the year has participated in a range of activities pursuant to its educative function.[11]

Attorney General); New South Wales, *Parliamentary Debates*, Legislative Council, Questions Without Notice: Sentencing of Children Convicted of Murder, 2 December 2009, 20377 (John Hatzistergos, Attorney General).

11. In 2007 the statutory functions of the Council were expanded to incorporate an educative role to promote public awareness and understanding of sentencing related issues.

In February 2009, Mr Nicholas Cowdery QC, Director of Public Prosecutions, represented the Council at a discussion forum hosted by the Australian Human Rights Commission. The presentation examined public confidence in the courts and judiciary in New South Wales and was 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.[12]

The Council has been involved in updating the *Sentencing Information Package*, a plain English information booklet jointly produced by the Council, Department of Justice and Attorney General, Victims of Crime Bureau, and Criminal Law Review Division. The booklet was previously revised in July 2007 and has recently been amended to ensure that the information is up-to-date and accurate without becoming unnecessarily legalistic.

Throughout 2009 the Council has been actively involved in a significant and ongoing project to promote public awareness and understanding of sentencing issues through its participation in a series of public justice forums. The forums were developed as a result of the findings of the Council-BOCSAR survey which revealed that people wished to know more about the process of sentencing and that the greater understanding people have of the criminal justice process, the more likely they were to have confidence in the criminal justice system.

The forums have been conducted in Parramatta, Campbelltown, Gosford, and Wollongong with a panel of guest speakers presenting on different aspects of the criminal justice process followed by a Q&A

12. The program was conducted under the auspices of the China-Australia Human Rights Technical Cooperation Program, a bilateral program between the governments of Australia and China, which the Australian Human Rights Commission manages on behalf of the Australian Agency for International Development (AusAID).

session with the audience. The Council has been involved in all the forums to date with the Chair and Howard Brown participating as panel members.

Other guest speakers have included:

- the Hon John Hatzistergos, NSW Attorney General;
- Dr Don Weatherburn, Director, BOCSAR;
- Mr Ian Pike, former Chief Magistrate and Chair of the NSW Parole Board;
- Assistant Commissioner Luke Grant, Corrective Services NSW; and
- Mr Brendan Thomas, Assistant Director General, Crime Prevention and Community Programs, Department of Justice and Attorney General.

Additional forums are scheduled for 2010.

PART TWO: PROJECTS UPDATE

Projects completed in 2008–09

During the period under review the Council produced reports in relation to three references for the Attorney General together with three monographs.

Penalties relating to Sexual Assault Offences in New South Wales: Volume 3

In October 2007 the Attorney General requested that the Council examine penalties relating to sexual assault offences in New South Wales in accordance with the following terms of reference:

1. Whether or not there are any anomalies or gaps in the current framework of sexual offences and their respective penalties;

2. If so, advise how any perceived anomaly or gap might be addressed;

3. 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;

4. Consider the use of alternative sentence regimes incorporating community protection, such as the schemes used in Canada, the United Kingdom and New Zealand;

5. Consider possible responses to address repeat offending committed by serious sexual offenders; and in particular whether second and subsequent serious sex offences should attract higher standard minimum and maximum penalties

in order to help protect the community. If so, advise what these penalties could be;

6. 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

7. 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.

The Council's Report examining terms 1–3 and 6–7 (Volume 1), together with an analysis of sentencing statistics and trends (Volume 2), was provided to the Attorney General in August 2008 and released publicly in October 2008.

The Government responded to the Council's recommendations in Volume 1 by announcing that it would amend the legislation to create new categories of sexual offences and increase penalties for certain existing sexual offences.[13] These laws came into effect on 1 January 2009 (see Part 3, Legislative Developments).[14]

The Government 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 address issues identified in the Council's report. The working parties were convened in early 2009.

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13. 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).

14. *Crimes Amendment (Sexual Offences) Act 2008* (NSW).

In May 2009 the Council provided the Attorney General with Volume 3 which addresses the balance of the terms of reference (terms 4 and 5).

With a focus on alternative sentencing regimes, responses to and management of repeat sex offenders and the protection of the community, the Council's recommendations included:

- The retention of continuing detention and extended supervision as options to be used in respect of a very small class of offenders, tempered by appropriate safeguards.
- The retention and future expansion of restorative justice programs, together with ongoing monitoring and evaluation of such programs.
- The ongoing evaluation of sex offender treatment programs, on a long term basis, and with an extended population base.
- That consideration be given to the feasibility of extending registration requirements for sex offenders whose offences have been committed against adults and that any extension of the requirements be adopted uniformly by other jurisdictions.
- That the State ensure that relevant sex offender programs are available and accessible for offenders who may be candidates for a continuing detention order (CDO) or extended supervision order (ESO) prior to the expiry of the non-parole period.
- That the *Crimes (Serious Sex Offenders) Act 2006* be amended so as to permit the views of victims to be taken

into account by the court when determining whether or not to impose a CDO.

In response to the Council's report the Government has announced that the legislation will be amended to give effect to the Council's recommendation in relation to the views of victims being taken into account when judges are considering making a continuing detention order.[15] The legislation will also be amended to allow the court to make an additional ESO to come immediately after a CDO has expired and to substitute CDOs and ESOs where appropriate.

Several other of the Council's recommendations are being considered in the statutory review of the *Crimes (Serious Sex Offenders) Act 2006* that is currently underway.

Alcohol-related Violence

In October 2008 the then 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');

15. The Hon John Hatzistergos MLC, 'Report Backs NSW Approach to Serious Sex Offenders' (Media Release, 7 July 2009).

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's report, *Sentencing For Alcohol-related Violence*, was presented to the Attorney General in March 2009 and released publicly in June 2009.

The Council conducted an extensive review of sentencing cases in relation to alcohol-related violence, and received a wide range of submissions. The Council reported that it was satisfied that the courts have given guidance in relation to the sentencing of offenders where intoxication is an issue, and that the relevant principles are neither in doubt nor overlooked by sentencing judges. Accordingly, the Council did not make any formal recommendation for the alteration of current sentencing laws and practices, or for the creation of any new offences to deal with alcohol related violence. Nor did the Council make any recommendations for an increase in the maximum penalties available for the offences examined, on the basis that it was satisfied that the maximum sentences are appropriate for the potential objective seriousness involved.

Where an offence results in significant injury to the victim, the Council recommended that the Police and the Office of the Director of Public Prosecutions give careful consideration to the making of an

election, in accordance with the provisions of the *Criminal Procedure Act*, to have such matters dealt with in the higher courts to ensure that the jurisdictional limit of the Local Court does not result in sentences that are unduly lenient.

Reductions in Penalties at Sentence

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;
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 Council presented its report to the Attorney General in August 2009 and it was released in November 2009.

The report provides a comprehensive review of the complex and frequently interrelated factors that must be taken into consideration when determining what, if any, reduction on sentence is appropriate in a particular case.

The Council's recommendations included:

- That there should be no presumption that an offender who provides assistance to authorities will necessarily suffer harsher custodial conditions and any evidence of hardship consequent upon the provision of assistance should be addressed in a pre-sentence report.
- That assistance during a trial in its orderly and timely conduct be available, in addition to pre-trial cooperation, as a potential discounting factor.
- That the *Crimes (Administration of Sentences) Act 1999* be amended to explicitly identify post-sentence assistance to authorities as a matter to which the NSW Parole Authority may have regard when determining whether or not to grant parole.
- That, in circumstances where charge negotiation has occurred, and/or where matters have been taken into account on a Form 1, the statement of facts or Form 1 tendered to the court be accompanied by a certificate signed by an appropriate responsible officer to the effect that there has been consultation with the victim and the police officer-in-charge of the case.
- That the NSW Judicial Commission, the Department of Corrective Services, Juvenile Justice and Justice Health, develop a program to keep judicial officers informed of the current facilities, programs and procedures available or in place for the detention and management of adult and juvenile offenders.

It also suggested that consideration be given to a review, at inter-government level, concerning the appropriateness of fixing a non-parole period in the case of offenders who are likely to be deported

once they are released to parole and who will not be subject to any form of supervision in their home country.

A number of minor legislative amendments to promote transparency and to remove apparent inconsistencies, anomalies and/or redundant provisions were also recommended.

Report on Sentencing Trends and Practices 2007–2008

The 2007–08 report is the Council's fifth statutory report on sentencing trends and practices and covers the period September 2007–December 2008. The report was released in June 2009.

The report examines significant sentencing issues that arose during the review period, such as:

- the inclusion of 11 new offences to the standard non-parole period scheme;
- the increase of the standard non-parole period for aggravated indecent assault of a child under 10 years from five to eight years;
- the creation of a new offence of intentionally or recklessly destroying or damaging property in company, with a maximum penalty of six years imprisonment (or 11 years if by way of fire or explosives); and
- the establishment of a 12-month criminal case conferencing trial 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.

Statistical analysis of standard non-parole scheme offences was deferred for two years to allow any significant trends to emerge.

Monograph 2: Public Confidence in the New South Wales Criminal Justice System

In May 2009 the Council released its second monograph, *Public Confidence in the New South Wales Criminal Justice System*, to complement the joint Council-BOCSAR survey published in August 2008. The monograph reviews the key findings of the survey in the context of the literature and examines existing public confidence initiatives with a view to developing a co-ordinated strategy to redress the public's lack of confidence in the New South Wales criminal justice system.

In order to develop, maintain and promote public confidence in the criminal justice system a three-pronged approach is suggested:

- ongoing public consultation by way of regular surveys;
- improving and promoting public knowledge of crime and justice issues through the development of public education programs and ongoing provision of readily accessible and up-to-date information; and
- development of a dedicated media strategy to promote cooperation and open dialogue between the criminal justice system and the press.

To achieve this it is suggested:

- a commitment be made to repeating the public confidence survey at least every other year;
- a commitment be made to further developing and implementing a range of public education programs;
- a commitment be made to ensuring the existence of relevant, up-to-date, accessible information and services which are thoroughly and appropriately promoted to the general community; and
- a commitment be made to improving the relationship between the criminal justice system and the news media by developing a best practice strategy and by establishing an appropriately appointed committee to address justice system-media issues.

The report was distributed to the heads of jurisdiction and various stakeholders and has generated significant positive feedback. Copies of the report have also been made available at the Public Justice Forums.

Monograph 3: 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 application of current sentencing principles in relation to children who commit serious offences such as murder. The Council engaged two barristers from the private bar to review the issues identified by Wood CJ in *R v SLD* [2002] NSWSC 758, and specifically, to consider whether the Court should have the authority to sentence an offender initially to be detained at her Majesty's pleasure, with provision for review and re-sentencing at a later date.

The report considers 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 for serious criminal offences.

Provisional sentencing would allow for a notional sentence to be imposed, with the ability to later vary or adjust that sentence by reference to, for example, assessments as to the offender's capacity to rehabilitate, and as to future dangerousness, and ensure appropriate consideration and comprehension of any mental health conditions that may have developed or become apparent as the child matures.

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 report suggests a scheme of provisional sentencing for children aged between 10 and 14 years who have been convicted for the offence of murder, where the information available at the time of sentencing, does not permit a proper assessment to be made in relation to the presence or likely development in the offender of a serious personality or psychiatric disorder, and as a consequence an assessment as to their potential for future dangerousness or rehabilitation.

The report was presented to the Attorney General in September 2009 and released in November 2009.

Monograph 4: Sentencing Aboriginal Offenders

In *R v Fernando*[16] the NSW Court of Criminal Appeal identified the common law principles that may be relevant to the sentencing of Aboriginal offenders ('the Fernando principles'). The principles were intended to be indicative of some of the factors leading a person of Aboriginal background into offending behaviour, and as a consequence to be relevant for sentencing, rather than a comprehensive declaration of sentencing practice.[17] The principles were considered by the NSW Law Reform Commission 'to be accepted and applied in New South Wales'.[18]

The Council has previously acknowledged the ongoing difficulties with regard to sentencing Aboriginal offenders[19] and accordingly initiated an examination of the issues, engaging a barrister from the Public Defenders Office to analyse over 100 cases in which the Fernando principles have been discussed.

The report provides a comprehensive review of the development of the current common law principles in relation to sentencing Aboriginal offenders against a backdrop of increasing rates of imprisonment of Aboriginal offenders in NSW. The report identifies various reasons for the overrepresentation of Aboriginal offenders in NSW prisons and examines alternative sentencing models and criminal justice strategies from this and other jurisdictions.

The report was presented to the Attorney General in December 2009 and is expected to be released in early 2010.

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16. *R v Fernando* (1992) 76 A Crim R 58.
17. *R v Morgan* (2003) 57 NSWLR 533, [20]–[21] (Wood CJ at CL).
18. NSW Law Reform Commission, *Sentencing Aboriginal Offenders*, Report 96: (2000) [2.21].
19. NSW Sentencing Council, Reports on Sentencing Trends and Practices 2006–2007 (2008).

Current projects

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

Standard non-parole periods and sexual offences

In March 2009, in response to a number of issues identified in Volume 1 of the Council's sexual offences report, the Attorney General announced[20] that the Council had been requested to examine standard non-parole periods in the context of sexual offences in accordance with the following terms of reference:

1. Monitor the rates of offending and sentencing patterns for sexual offences not contained in the Table of Standard Non-parole Periods (SNPP), with a view to their possible inclusion in the Table at a later date;

2. Give consideration to standardising the SNPPs for sexual (and other) offences within a band of 40–60% of the available maximum penalty, subject to the possibility of individual exceptions, by reference to an assessment of the incidence of offending and special considerations relating thereto;

3. Consider potential additions to the SNPP scheme, involving the level or levels at which the SNPP might be appropriately set;

4. Give consideration to the establishment of a transparent mechanism by which a decision is made to include a

20. The Hon John Hatzistergos MLC, 'Spotlight on Standard Non-parole Periods' (Media Release, 17 March 2009).

particular offence in the Table, and by which the relevant SNPP is set; and

5. Consider the identification of sexual offences that might justify application for a guideline judgment, following its ongoing monitoring of relevant sentencing patterns.

The Council has received a number of submissions and has been monitoring relevant sentencing decisions and statistics for this reference. It will report to the Attorney General in 2010.

Review of personal violence cases finalised in the Local Court

In July 2009 the Attorney General asked the Council to conduct a review of personal violence cases finalised in the Local Court to determine whether the Court's jurisdictional limit (maximum sentence for any one offence of imprisonment for two years) has produced a significant number of sentences that are not commensurate with the objective seriousness of the offence and the subjective circumstances of the offender.

The Council has been reviewing sentencing decisions of relevance and is to report to the Attorney General in April 2010.

Examination of the use of non-conviction orders and good behaviour bonds

In July 2009 the Attorney General asked the Council to examine the use of non-conviction orders and good behaviour bonds in accordance with the following terms of reference;

1. An analysis of the primary types or categories of offences in which non-conviction orders and bonds are utilised

significantly or disproportionately when compared with other sanctions'

2. The extent to which there is consistency among NSW Local Courts in the use of non-conviction orders and bonds in respect of different offence type and categories of offenders;

3. An examination of the use across offence categories of non-conviction orders and bonds, the nature of conditions imposed and their enforcement;

4. The identification, and relative frequency, of the reasons behind sentencing decisions by Magistrates in relation to non-conviction orders and bonds;

5. What is the extent of compliance with conditions imposed on bonds and the rates of re-offending following the imposition of non-conviction orders and bonds?

6. Whether further limitations should be imposed on the ability of Magistrates to impose non-conviction orders and bonds?

7. Whether offences for which there is a high rate of non-conviction orders and bonds can be adequately addressed within the existing sentencing regime or if other sentencing alternatives are necessary or appropriate.

8. Any other relevant matter.

The Council has received a number of submissions and extensive statistical information in relation to this topic and is due to report to the Attorney General in early 2010.

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 LexisNexis Criminal Law News bulletins[21] to identify significant legislative developments that occurred throughout 2009. Reference is also made to the Bills' respective explanatory notes and second reading speeches, and information from the Lawlex website.

Crimes Amendment (Sexual Offences) Act 2008 (NSW)[22]

The Act gives effect to recommendations of the Council set out in its report, *Penalties Relating to Sexual Assault Offences in New South Wales: Volume 1*.

The Act amends 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

21. Berman, P., Howie, R. and Hulme, R. (eds), *Criminal Law News* (LexisNexis Butterworths).

22. 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).

Crimes (Serious Sex Offenders) Act 2006 (NSW) (see the new s 24A:[23] 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.[24]

The Act also amends 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 are 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, are increased.[25]

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23. 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).

24. 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).

25. 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

Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Act 2008 (NSW)[26]

This Act amends the *Crimes (Sentencing Procedure) Act 1999* (NSW) in relation to the receipt of victim impact statements, as follows:

- Amendments to s 30 make it clear that victim impact statements may include photographs, drawings and other images.[27]
- Amendments to s 30A provide that a victim 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 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.[28]
- The new ss 30A(3) and 30A(4) enable a victim who is eligible to give evidence via closed circuit television to read

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(online), *Crimes Amendment (Sexual Offences) Act 2008* (Announcements, 22 December 2008).

26. Assented to on 5 November 2008 and commenced on 1 January 2009.

27. 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).

28. 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).

the victim impact statement to the court by way of the same CCTV arrangements.[29]

- 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).[30]
- 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.[31]
- 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 is extended to 'prescribed sexual offences' as defined by the *Criminal Procedure Act 1986* (NSW) (to clarify that it is not limited to offences under s 61I). [32]

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29. 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).

30. 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).

31. 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).

32. Explanatory Notes, Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Bill 2007 (NSW) referring to Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Bill 2007 (NSW)

Fines Further Amendment Act 2008 (NSW)[33]

The Act amends the *Fines Act 1996* (NSW), in response to the NSW Sentencing Council's report, *The Effectiveness of Fines as a Sentencing Option*. The amending legislation:

- permits the giving of an official caution instead of a penalty notice in appropriate circumstances;
- introduces a scheme for the internal review of decisions to issue a penalty notice and sets out the grounds on which a penalty notice is to be withdrawn;
- provides for a review of a decision to issue a penalty notice before annulment in circumstances where no internal review of the decision had been conducted;
- creates a trial Work and Development Order scheme, which requires a person to undertake certain work, treatment, training or program to satisfy a fine or part of a fine. The scheme is available to persons who have an intellectual disability, mental illness or a cognitive

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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).

33. Assented to on 8 December 2008: New South Wales, *Government Gazette* No 157 of 8 December 2008, 11888. Commencement details as follows: (a) ss 1–5 and schs 1[2], 1[9], 1[20], 1[24]–[28], 1[30] (except to the extent that it inserts s 101B(1)(a)), 1[31] (except to the extent that it inserts s 101B(6)(a)), 1[34]–[36], sch 2.1, sch 2.2[1]–[3] and [5]–[8]: commenced on assent on 8 December 2008; (b) sch 1[1] (to the extent that it inserts the definition of 'work and development order'), 1[14] (except to the extent that it inserts s 42(1CC)(b)), 1[21], 1[22], 1[29], 1[30] (to the extent that it inserts s 101B(1)(a)), 1[31] (to the extent that it inserts s 101B(6)(a)), 1[32], 1[33] and sch 2.2[9]: commenced on 10 July 2009; (c) schs 2.3–2.4: commenced on 9 March 2009; and (d) the remainder of the Act not yet in force: *Fines Further Amendment Act 2008* (NSW) s 2(2); New South Wales, *Government Gazette* No 157 of 8 December 2008, 11888; Proclamation under the *Fines Further Amendment Act 2008* (SR 2009, No 83) (NSW); Proclamation under the *Fines Further Amendment Act 2008* (SR 2009, No 322) (NSW).

impairment, are homeless or are experiencing acute economic hardship; and

- allows certain government benefit recipients to elect to pay fines in regular instalments from those benefits.[34]

The Act provides for further review by the Hardship Review Board and permits unpaid fines to be partially written off.

The *Road Transport (Driving Licensing) Act 1998* (NSW) is amended to create new offences of driving while licence is suspended or cancelled due to a fine or penalty notice default. The penalties for the new offences include minimum disqualification periods that are lower than those which apply to offences of driving with a suspended or cancelled licence for other reasons. The new offences are not relevant offences for the purposes of the Habitual Traffic Offender scheme.

In determining any penalty or period of disqualification to be imposed on a person for the new offences, a court must take into account the effect the penalty or disqualification will have on the person's employment, as well as his or her ability to pay the outstanding fine that caused the suspension or cancellation of the drivers licence.

The Act also provides for other miscellaneous and transitional amendments.

34. Judicial Commission of New South Wales: Judicial Information Research System, 'Fines Further Amendment Act 2008' (Recent Law and Announcements, 4 August 2009); *Fines Further Amendment Act 2008* (NSW) Explanatory Notes.

Crimes (Domestic and Personal Violence) Amendment Act 2008 (NSW)[35]

The Act amends the *Firearms Act 1996* (NSW), the *Weapons Prohibition Act 1998* (NSW), the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), the *Commission for Children and Young People Act 1998* (NSW), the *Crimes (Sentencing Procedure) Act 1999* (NSW) and the *Bail Regulation 2008* (NSW).

The Act amends the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) so that the offence of stalking or intimidating a person is a personal violence offence. It also requires the police to serve a provisional order upon the protected person as soon as practicable after the order is made, in addition to a number of other amendments to the principal Act. With respect to the *Firearms Act*, the Act provides that certain licences or permits are suspended automatically on the making of a provisional order.

Crimes (Administration of Sentences) Amendment Act 2008 (NSW)[36]

The Act makes a number of amendments to the *Crimes (Administration of Sentences) Act 1999* (NSW), *the Summary Offences Act 1988* (NSW) and the *Children (Detention Centres) Act 1987* (NSW).

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35. Assented to on 10 December 2008: New South Wales, *Government Gazette* No 158 of 19 December 2008, 12297. Commenced on date of assent: *Crimes (Domestic and Personal Violence) Amendment Act 2008* (NSW) s 2.

36. Assented to on 8 December 2008: New South Wales, *Government Gazette* No 157 of 12 December 1998, 11888. Sections 1–3, 5 and sch 1[36], [38] commenced on 12 December 2008; s 4, sch 1[1]–[27], [32]–[35], [37] and sch 2 on 13 February 2009; s 3 sch 1[28]–[31] not yet proclaimed: *Crimes (Administration of Sentences) Amendment Act 2008* (NSW) s 2; Proclamation under the *Crimes (Administration of Sentences) Amendment Act 2008* (SR 2009, No 47) (NSW); Proclamation under the *Crimes (Administration of Sentences) Amendment Act 2008* (SR 2008, No 560) (NSW).

Amendments to the *Crimes (Administration of Sentences) Act* include the establishment of residential facilities to accommodate certain inmates prior to release from custody and persons subject to non-custodial orders such as good behaviour bonds, or parole orders. One such residential facility is Tabulam on the far North Coast of New South Wales which will operate a programme known as Balund-a, with its aim of reducing recidivism rates amongst Aboriginal communities.

The Act amends s 9A of the *Children (Detention Centres) Act* which provides that certain people are not to be detained in a juvenile detention centre, only applies to a person arrested in relation to an alleged escape from custody if the person was arrested pursuant to a warrant. The section is also extended to apply to persons between the age of 18 and 21 who are subject to an order or arrest warrant for escape from a detention centre, or in respect of the suspension or revocation of a parole order or a failure to appear at a parole hearing.

The Act also clarifies that if a person is transferred to a correctional centre due to revocation of his or her parole by the Children's Court, the Children's Court is to continue to exercise Parole Authority with respect to the revocation of parole.

Graffiti Control Act 2008 (NSW)[37]

The Act consolidates existing graffiti offences into one Act and extends graffiti offences to cover not only those involving the use of spray paint but also marker pens and other implements designed or modified to produce a mark that is not readily removable. The Act also provides

37. Assented to on 3 December 2008: New South Wales, *Government Gazette* No 155 of 5 December 2008, 11717. Commenced on 20 February 2009: *Graffiti Control Act 2008* (NSW) s 2; sch 2.4 not yet proclaimed.

new powers to enforce the law regulating the sale and display of spray paint.

Crimes (Appeal and Review) Amendment Act 2009 (NSW)[38]

This Act amends a number of Acts.

It amends the *Crimes (Appeal and Review) Act 2001* (NSW) to allow an appeal court to set aside a conviction for the purpose of making an order under s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) without disturbing the finding of guilt under the new section 3(3). It also provides for a person whose annulment application against sentence has been refused to appeal to the District Court against the sentence rather than the refusal to annul. Section 18(1) makes an appeal against conviction to be by way of rehearing of the evidence given in the original Local Court hearing rather than on the basis of certified transcripts. It also allows the appeal court to set aside a conviction and remit certain matters back to the Local Court for redetermination under the new s 39(1)(b). The decision of *Director of Public Prosecutions (NSW) v Emanuel* [2009] NSWCA 42 no longer applies.

The *Crimes (Appeal and Review) Act* is also amended to provide that an appeal can be lodged against both conviction and sentence and Schedule 1[15] creates s 63 (2A) and (2B) which provide that when a person lodges an appeal in relation to a serious traffic offence, the defendant who has had a license suspended or disqualified as a result of a conviction will not have a stay of this in the period leading up to

38. Assented to on 30 March 2009: New South Wales, *Government Gazette* No 61 of 9 April 2009, 1630. Schedule 1[15] commenced 1 November 2009; the remainder of the Act commenced on the date of assent: *Crimes (Appeal and Review) Amendment Act 2009* (NSW) s 2.

the appeal (unless the court considers it appropriate), if the licence was suspended by a police officer under Division 4 Part 5.4 of the *Road Transport (General) Act 2005* (NSW) when charging the licence holder with the offence to which the conviction relates.

The Act amends the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) by allowing a Local Court or Children's Court that has dismissed an application for a apprehended violence order in the absence of the applicant, to annul the dismissal of the order upon the application of the person seeking the order in certain circumstances. It requires the District Court, when allowing an appeal against the refusal to annul an apprehended violence order and remitting it back to the Local Court for hearing, to make an interim apprehended violence order providing for protection of the victim until the matter is decided.

The Act also amends the *Criminal Procedure Act 1986* (NSW) to allow an accused person, in certain circumstances, to lodge written pleas rather than attending the Local Court in person.

Crimes (Criminal Organisations Control) Act 2009 (NSW)[39]

This Act provides for the making of declarations and orders to disrupt and restrict the activities of criminal organisations and their members. The Commissioner of Police may apply to an eligible judge of the Supreme Court for a declaration, or the renewal of a declaration, that a particular organisation is a 'declared organisation' for the purposes of the Act. The declaration may be made only if the eligible judge is satisfied that members of the organisation 'associate

39. Assented to on 3 April 2009: New South Wales, *Government Gazette* No 61 of 9 April 2009, 1630. The Act commenced on the date of assent: *Crimes (Criminal Organisations Control) Act 2009* (NSW) s 2.

for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity' and that 'the organisation represents a risk to public safety and order in this State'.

The Act empowers the Supreme Court, upon application of the Commissioner of Police, to make interim control orders against members of declared organisations, which may later be confirmed, or confirmed with variations, by confirmatory control orders. Notification requirements are prescribed in relation to the application, and members referred to in the notice or other affected persons may make submissions at the hearing of the application. However, an interim control order may also be made in the absence of, and without notice to, the member concerned but does not take effect until the member is notified of the order. The Act also provides for other matters relating to a control order, including its duration, variation, revocation and appeal.

It is an offence for a member of a declared organisation who is subject to a control order (controlled member) to associate with another controlled member of that organisation for the duration of the order. The offence is punishable by a maximum of two years imprisonment for a first offence, and five years imprisonment for a subsequent offence. The Act also amends the *Bail Act 1978* (NSW) to provide for a neutral presumption against bail for the offence.

Any authorisation to carry on certain activities (such as operating certain businesses that are vulnerable to bikie and organised crime, and possessing and using a firearm) would be suspended on the making of an interim control order, and revoked on the making of a confirmatory control order.

The Act also provides for the maintenance of a register of information about declared organisations and controlled members.

In addition, the Act amends the *Criminal Asset Recovery Act 1990* (NSW) so that proceeds derived through participation in a criminal group could be recovered.

Criminal Case Conferencing Trial Amendment (Extension) Regulation 2009 (NSW)[40]

The Regulation amends the *Criminal Case Conferencing Trial Regulation 2008* (NSW) to extend the operation of the trial scheme established by the *Criminal Case Conferencing Trial Act 2008* (NSW) in respect of court proceedings for an indictable offence from 1 May 2009 to 1 July 2010.

Criminal Legislation Amendment Act 2009 (NSW)[41]

The Act amends a number of Acts, namely: the *Confiscation of Proceeds Act 1989* (NSW), the *Criminal Procedure Act 1986* (NSW), the *Crimes Act 1900* (NSW), the *Inclosed Lands Protection Act 1901* (NSW), the *Mental Health (Forensic Provisions) Act 1990* (NSW), the *Crimes (Sentencing Procedure) Act 1999* (NSW), the *Child Protection (Offenders Registration) Act 2000* (NSW), the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) *and* the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

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40. Operational on 30 April 2009: *Criminal Case Conferencing Trial Amendment (Extension) Regulation 2009* (NSW) cl 2; New South Wales, *Government Gazette* No 69 of 8 May 2009, 1971.

41. Assented to on 19 May 2009: New South Wales, *Government Gazette* No 75 of 22 May 2009, 2288. The Act commenced on the date of assent: *Criminal Legislation Amendment Act 2009* (NSW) s 2.

The amendments include an amendment to the *Crimes Act* in accordance with a recommendation of the Council made in Volume 1 of the report, *Penalties relating to Sexual Offences in New South Wales*, and provides an additional aggravating circumstance for the offence of sexual intercourse with a child under 10 under s 66A. The additional aggravating circumstance is contained in s 66A(3)(i) where the offender breaks and enters into a house with the intention of committing the offence.

The Act amends the *Crimes (Sentencing Procedure) Act* so that item 9B of the Table of Standard Non-Parole Periods is corrected to remove 'child under 10' to coincide with recent amendments to s 61M(2) of the Crimes Act making this an offence with respect to any person under 16 years of age.

It also provides for an additional two members to be appointed to the NSW Sentencing Council and specifies that one member is to have expertise or experience in criminal law or sentencing and the other is to have academic or research expertise or experience of relevance to the functions of the Sentencing Council.

The Act amends the *Child Protection (Offenders Registration) Act* providing that an initial report of relevant personal information must be made to the Commissioner of Police within seven days regardless of whether the person was required to report previously.

The Act amends the *Crimes (Domestic and Personal Violence) Act* and provides that an attempt to commit an offence under ss 13 (stalking and intimidating another person with intention to cause fear, physical or mental harm) and 14 (contravening a prohibition or restriction specified in an apprehended violence order) of the Act attracts the same penalty as the offence itself.

Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009 (NSW)[42]

The Act amends the *Children and Young Persons (Care and Protection) Act 1998* (NSW), the *Children's Court Act 1987* (NSW) and other legislation to implement certain recommendations of the Special Commission of Inquiry into Child Protection Services in NSW. Specifically, the Act:

- increases the reporting threshold to 'risk of significant harm' before a person is reported to the Department of Community Services (DoCS);
- extends the circumstances under which a child or young person is considered to be at risk of significant harm to include the situation where he or she is not receiving an education as required by the *Education Act 1990* (NSW);
- provides for alternative mandatory reporting arrangements to allow certain agencies to conduct an initial assessment within the agency rather than to report directly to DoCS;
- amends the *Children's Court Act* to provide for the appointment of a District Court judge as President of the Children's Court;

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42. Assented to on 7 April 2009. New South Wales, *Government Gazette* No 63 of 7 April 2009, 1668. Commencement details are as follows: (a) sch 2.1[4], sch 2.2[1]–[6], [8], [9] and [11]–[15], sch 2.2[16] (except to the extent that it would insert cl 8 in sch 2 to the *Children's Court Act 1987* (NSW)), schs 2.3–2.5, and sch 2.6[1]–[2] commenced on 1 June 2009: Proclamation under the *Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009* (SR 2009, No 178) (NSW); (b) sch 3.2[2]–[5] commenced on 1 July 2009: Proclamation under the *Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009* (SR 2009, No 252) (NSW); (c) sch 1.5 and sch 1.6[2] and [6] commenced on 30 October 2009: Proclamation under the *Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009* (SR 2009, No 520) (NSW). The remainder has not yet been proclaimed.

- clarifies the power of the Children's Court to make orders with respect to children and young people in care proceedings;
- modifies the legislative framework for out-of-home care arrangements;
- authorises certain agencies to exchange information concerning the safety, welfare and well-being of children and young people and to coordinate their service delivery;
- extends the child-related employment provisions under the *Commission for Children and Young People Act 1998* (NSW) to a wider class of people; and
- makes a number of other amendments.

Crimes (Sentencing Procedure) Amendment (Council Law Enforcement Officers) Act 2009 (NSW)[43]

The Act amends the *Crimes (Sentencing Procedure) Act 1999* (NSW) with respect to the sentencing of crimes committed against parking officers, council rangers, and other employees of Local Councils exercising enforcement function, such that it is an aggravating factor to be taken into account on sentence to commit an offence again a council law enforcement officer.

43. Assented to on 9 June 2009: New South Wales, *Government Gazette* No 87 of 12 June 2009, 3026. The Act commenced on the date of assent: *Crimes (Sentencing Procedure) Amendment (Council Law Enforcement Officers) Act 2009* (NSW) s 2.

Courts and Other Legislation Amendment Act 2009 (NSW)[44]

The Act amends various Acts.

The Act amends the *Crimes (Sentencing Procedure) Act 1999* (NSW) and the *Children (Criminal Proceedings) Act 1987* (NSW) to enhance flexibility in imposing non-association orders and place restriction orders. These amendments implement certain recommendations made by the NSW Ombudsman in his review of the *Justice Legislation Amendment (Non-association and Place Restriction) Act 2001* (NSW).

Section 17A of the *Crimes (Sentencing Procedure) Act* is amended to allow the court to make a limited non-association order prohibiting an offender from associating with a specified person at certain times or in certain circumstances, and/or a limited place restriction order prohibiting an offender from visiting a place or district except at specified times or in specified circumstances.

The Act is also amended to allow the court to impose a non-association order specifying a member of the offender's close family in exceptional circumstances. The definition of 'close family' is amended to include persons who are, or have been, part of the extended family or kin of an Aboriginal person or Torres Strait Islander.

The Act is amended to allow the court, in exceptional circumstances, to specify places or districts that are normally excluded from a place restriction order in such an order. The Act is further amended to exclude places at which the offender regularly receives certain health, welfare or legal services from a place restriction order.

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44. Assented to on 19 June 2009: New South Wales, *Government Gazette* No 93 of 26 June 2009, 3580. The Act commenced on the date of assent.

Amendments are made to the *Children (Criminal Proceedings) Act* to allow the court to make a limited non-association order and/or a limited place restriction order, mirroring amendments to s 17A of the *Crimes (Sentencing Procedure) Act*.

Crimes (Administration of Sentences) Amendment Act 2008 (NSW)[45]

The Act amends the *Crimes (Administration of Sentences) Act 1999* (NSW), the *Summary Offences Act 1988* (NSW) and the *Children (Detention Centres) Act 1987* (NSW).

The Act inserts a new s 78A (Separation and other variations in conditions of custody of inmates) to clarify that:

(a) current conditions of custody for inmates may vary for different inmates, including those held in the same correctional facility;

(b) inmates and groups of inmates may be held separately from other inmates at a correctional facility for the care, control or management of an inmate or group of inmates without the making of a segregated custody direction;

(c) anything previously done or omitted is taken to have been validly done or omitted; and

(d) regulations may make further provision for the designation of inmates for the management of security and other risks.

45. Assented to on 26 June 2009: New South Wales, *Government Gazette* No 99 of 3 July 2009, 3866 The Act commenced on the date of assent: *Crimes (Administration of Sentences) Amendment Act 2008* (NSW) s 2.

Children (Criminal Proceedings) Amendment (Youth Conduct Orders) Act 2008 (NSW)[46]

The Act amends the *Children (Criminal Proceedings) Act 1987* (NSW) and the *Children (Criminal Proceedings) Regulation 2005* (NSW) to provide for the establishment of a youth conduct order scheme.

The Act establishes a diversionary scheme for dealing with young people between the ages of 14 and 18 who have been charged, pleaded guilty, or found guilty of certain types of anti-social offences, such as malicious damage, graffiti which are offences that would ordinarily be covered by the *Young Offenders Act 1997* (NSW).

The Youth Conduct orders are to be piloted in the New England, Campbelltown and Mount Druitt local are commands for two years followed by an evaluation of the scheme by an independent evaluator.

The scheme will address underlying causes of anti-social behaviour in young people by the operation of the youth conduct orders which will placed restrictions on negative behaviours and will promote socially acceptable behaviours.

The Act provides that a suitability assessment is to be carried out to determine the young persons' suitability for the scheme before the Court makes either an interim or final Youth Conduct Order. If the young person is assessed as suitable for the Youth Conduct Order Scheme an interim youth conduct plan will be prepared containing recommendations on which conditions the court should impose on the young person. Orders may include restrictions including curfews,

46. Assented to on 13 November 2008: New South Wales, *Government Gazette* No 152 of 28 November 2008, 11321. The Act commenced on 1 July 2009: Proclamation under the *Children (Criminal Proceedings) Amendment (Youth Conduct Orders) Act 2008* (SR 2009, No 251) (NSW).

school attendance requirements and non-association orders. The court can take into account the young persons compliance with the Youth Conduct Order in determining a final sentence in relation to the offence which may also include dismissing the charges.

Young Offenders Amendment (Graffiti Offenders) Regulation 2009 (NSW)[47]

The Regulation provides that an outcome plan, agreed to during a youth justice conference, for a child who admits to a graffiti offence must require the child to:

- perform graffiti removal work or, if such work is not available, comparable community service work;
- pay compensation;
- participate in a personal development, educational or other program; or
- fulfil any other obligation suggested by a victim who attends the conference and is consistent with the objects of the *Young Offenders Act 1997* (NSW).

Criminal Organisations Legislation Amendment Act 2009 (NSW)[48]

This Act amends a number of Acts to clarify and support the operation of the *Crimes (Criminal Organisations Control) Act 2009* (NSW).

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47. Operational on 31 July 2009: *Young Offenders Amendment (Graffiti Offenders) Regulation 2009* (NSW) cl 2; New South Wales, *Government Gazette* No 111 of 7 August 2009, 4729.

48. Assented to on 19 May 2009: New South Wales, *Government Gazette* No 75 of 22 May 2009, 2288. Schedule 2 commenced on 7 August 2009; the remainder of the Act commenced on 19 May 2009: *Criminal Organisations Legislation Amendment Act 2009* (NSW) s 2; Proclamation under the *Criminal Organisations Legislation Amendment Act 2009* (SR 2009, No 353) (NSW).

The Act amends the *Crimes (Criminal Organisations Control) Act* to allow the Supreme Court, where satisfied that the Commissioner of Police has taken all reasonable steps to effect personal service of an interim control order and those steps have failed, to extend the period within which the order must be served, and to specify alternative means for effecting service. The Supreme Court may make an order for substituted service of an interim control order, failing which the Court may order its public notification.

The Act also creates a new offence of recruiting a person to be a member of a declared organisation, punishable by a maximum penalty of five years imprisonment.

The Act amends the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) to enable an eligible judge of the Supreme Court to issue a 'criminal organisation search warrant', on the basis of reasonable suspicion that there is, or will be within seven days, a thing connected to an 'organised crime offence' in or on the premises. An 'organised crime offence' is defined as a serious indictable offence arising from, or occurring as a result of, organised criminal activity. The search warrant must be approved by a senior police officer of the rank of superintendent or above, and is only valid for seven days.

The Act also provides for consequential and transitional matters, including inspection of records of the NSW Police Force in relation to criminal organisation search warrants by the NSW Ombudsman every two years.

Crimes (Sentencing Procedure) Amendment (Prescribed Persons) Regulation 2009 (NSW)[49]

This regulation amends the *Crimes (Sentencing Procedure) Regulation 2005* (NSW) to prescribe the Executive Officer of the WorkCover Authority of New South Wales as a person who may sign a list of additional charges on behalf of the Director of Public Prosecutions (DPP). The list of additional charges is a document filed with the court, signed by the offender and by or on behalf of the DPP, which allows the court to take into account additional offences where an offender is found guilty of an offence.

Criminal Procedure Amendment (Circle Sentencing) Regulation 2009 (NSW)[50]

The object of this amending Regulation is to add a further eligibility criterion for participation in the circle sentencing intervention program under the *Criminal Procedure Regulation 2005* (NSW).

The additional criterion requires the court to consider whether the facts in connection with the offence, together with the person's antecedents and any other information available to the court, indicate that the person is likely to be required to serve a prison sentence (including by way of periodic detention or home detention) or be subject to a suspended sentence, community service order or good behaviour bond.

Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2009 (NSW)[51]

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49. Operational on 4 September 2009: *Crimes (Sentencing Procedure) Amendment (Prescribed Persons) Regulation 2009* (NSW) cl 2; New South Wales, *Government Gazette* No 125 of 11 September 2009, 5029.

50. Operational on 11 September 2009: *Criminal Procedure Amendment (Circle Sentencing) Regulation 2009* (NSW) cl 2; New South Wales, *Government Gazette* No 131 of 18 September 2009, 5119.

The Act amends the *Crimes (Appeal and Review) Act 2001* (NSW) to implement reforms to the law of double jeopardy recommended by the Double Jeopardy Law Reform Working Group and agreed to by the Council of Australian Governments.

The principal effects of the amendments are that they: allow an acquitted person to be retried if the acquittal was tainted because of an administration of justice offence (eg, perjury, perversion of the course of justice), regardless of whether the acquittal arises out of the first or subsequent trial; and prohibit an appeal court from dismissing a prosecution appeal against sentence or from imposing a more lenient sentence than would otherwise be appropriate on the basis of any element of double jeopardy.

Crimes Legislation Amendment (Possession of Knives in Public) Act 2009[52]

The Act amends the *Summary Offences Act 1988* (NSW) to increase the maximum penalty for certain offences with respect to the possession of knives in public places and schools. Prior to the amendments, the maximum penalties for an offence under s 11C, ranged from a fine to two years imprisonment and/or a heavier fine, depending on whether the person in possession of the knife had been dealt with previously for a knife-related offence. The amendments to s 11C provide for a maximum penalty of two years and/or a fine of 20 penalty units regardless of the offender's previous knife-related offences.

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51. Assented to on 24 September 2009. The Act commenced on the date of assent: *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2009* (NSW) s 2; New South Wales, *Government Gazette* No 140 of 2 October 2009, 5285.

52. Assented to on 3 November 2009. The Act commenced on the date of assent: *Crimes Legislation Amendment (Possession of Knives in Public) Act 2009* (NSW) s 2.

The 'Agreement in Principle' speech points to the need to prevent crime as the impetus behind the amendments, citing BOCSAR research dealing with the percentage of attempted murders, murders and robberies where a knife was the most common type of weapon used in committing these offences (79 per cent, 67 per cent and 41 per cent respectively).

The Act also made amendments to the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

Courts and Crimes Legislation Amendment Act 2009[53]

The more significant amendments to various Acts include:

- Section 22A of the *Bail Act 1978* (NSW) was amended to revise the test to be applied when a Court is determining whether to hear a further bail application by an accused. Grounds for a further application are now either that: the person was not legally represented when the previous application was made and now has legal representation; information relevant to the grant of bail is to be presented that was not presented in the previous application; or circumstances relevant to the grant of bail have changed since the previous application. Section 22A now enables a lawyer to refuse to make a further bail application if the grounds for a further application are absent.
- The *Crimes (Criminal Organisations Control) Act 2009* (NSW) was amended to assist in the service of notices of

53. Assented to 3 November 2009. Date of commencement, Schs 2.6 [3] and 2.9 excepted, on date of assent, *Courts and Crimes Legislation Amendment Act 2009,* sec 2 (1); date of commencement of Schs 2.6 [3] and 2.9: not in force.

interim control orders. A police officer is permitted to request a person disclose his or her identity, and remain in a place for up to two hours to enable service if the officer believes the person is a person on whom the notice is required to be served. Failure to comply with a request to remain may result in the person being detained for up to two hours: s 16. It is now an offence for a controlled member of a declared organisation to associate with another controlled member of the declared organisation on three or more occasions within three months: s 26(1A). A police officer may request a person to disclose his or her identity where the officer has reasonable cause to suspect the person is a controlled member of a declared organisation associating with another controlled member of the declared organisation: s 28. It is an offence for a person to refuse or fail to comply with requests to disclose identities under these sections or to give false names or addresses: s 35A. A court may now make a control order against a person which is a former member of a declared organisation who has an on-going involvement with the organisation and its activities: s 19(1)(a).

Criminal Assets Recovery Amendment Act 2009[54]

The legislation was enacted in response to the decision of the High Court in *International Finance Trust Company Ltd v NSW Crime Commission* [2009] HCA 49, which determined that s 10 of the

54. Assented to 26 November 2009. Date of commencement 26 November 2009 (date of assent): *Criminal Assets Recovery Amendment Act 2009*, s 2.

Criminal Assets Recovery Act 1900 (NSW), providing for ex parte restraining orders, was invalid.

The legislation repealed ss 10 to 10B of the *Criminal Assets Recovery Act* and replaced these provisions with ss 10 to 10D. These provisions provide that, from 26 November 2009, when the New South Wales Crime Commission makes an application for an ex parte restraining order the Supreme Court may require that notice be given to a person the Court believes has sufficient interest in the application, and that person may appear and adduce evidence (within 28 days, or otherwise with the leave of the Court). Where a person makes an application to have a restraining order set aside, the Supreme Court may set aside the order if the Commission fails to satisfy the court that there are reasonable grounds for the relevant suspicion or the applicant has established that the order was obtained illegally or in good faith. Under the new s 22(1B) an assets forfeiture order can be made whether or not an application for a restraining order has been made on the relevant property. The Commission may seek an order from the Supreme Court under the new s 31D for the examination on oath of a person affected by a confiscation order.

Road Transport (General) Amendment (Consecutive Disqualification Periods) Act 2009[55]

The legislation amends the *Road Transport (General) Act 2009* (NSW) to ensure that all licence disqualification periods ordered by the courts are served before a licence can be issued, by closing the gaps between consecutive licence disqualification periods that may arise if one

55. Assented to 1 October 2009. New South Wales, *Government Gazette* No 143 of 9 October 2009, 5342. Date of commencement 27 November 2009: proclamation (SR 2009, No 546) (NSW).

period is quashed or reduced (for instance, as a consequence of an appeal or an annulment and rehearing).

Section 188A operates to automatically, and without further court order, bring forward the commencement and completion dates of consecutive driver licence disqualification periods in these circumstances. Should the particular matter be further prosecuted and a new disqualification period is imposed, this will commence at the end of the other disqualification periods applying to that person.

Section 25A of the *Road Transport (Driver Licensing) Act 1998* (NSW) is amended to confirm that an offence of drive whilst disqualified is not committed when the dates of the disqualification period have been altered by s 188A, unless the RTA has previously given written notice of the altered dates to the driver.

Graffiti Control Amendment Act 2009[56]

The legislation created two new offences in the *Graffiti Control Act 2008* (NSW). Section 8A creates an offence where a spray can is supplied to a person under 18 years of age, with a maximum penalty of $1100. A defence exists, the onus of proof being on the person who supplied the spray paint, if the person believed the paint was going to be used for a defined lawful purpose. Section 8B creates an offence where a person under 18 years of age possesses a spray pant can in a public place, with a maximum penalty of $1100 or six months imprisonment. Certain defences are available under the section, the onus of proof being on the person in possession of the spray paint can. A court may not sentence a person to imprisonment under this section

56. Date of assent 30 November 2009: Date of commencement, Schedule 1[7] and Schedule 2.1–2.3 to commence on proclamation, not yet proclaimed: *Graffiti Control Amendment Act 2009*, s 2(2). Remainder commenced on date of assent, 30 November 2009: *Graffiti Control Amendment Act 2009*, s 2(1).

unless the person has previously been convicted of graffiti offences on so many occasions that the court regards the person as a serious and persistent offender who is likely to commit the offence again.

The amending legislation also increases the penalties available for certain offences. Section 4, damaging or defacing property with a graffiti implement, has had its maximum penalty increased from six months to 12 months imprisonment. Section 5, possessing a graffiti implement with intent to damage or deface property, has had its maximum penalty increased from three months to six months.

The legislation created a scheme of community clean up work, the provisions of which are yet to commence.

Child Protection Legislation (Registrable Persons) Amendment Act 2009[57]

Sections 16A to 16H are inserted into the *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW). The Commissioner of Police may now apply for a Contact Prohibition Order where the Commissioner has reasonable grounds to suspect that a registrable person will seek to contact the victim or co-offender. A breach of this order attracts a maximum penalty of 12 months imprisonment and/or 50 penalty units. These orders cannot be issued to restrict access to the family of the registrable person, unless there are exceptional circumstances.

The legislation contains provisions to amend various aspects of the *Child Protection (Offenders Registration) Act* which at the time of writing were not yet proclaimed.

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57. Date of assent 30 November 2009. Schedule 2 commenced on date of assent, 30 November 2009: *Child Protection Legislation (Registrable Persons) Amendment Act 2009*, s 2(1). Schedule 1 [1]–[3] not yet commenced, to commence on a date to be proclaimed: *Child Protection Legislation (Registrable Persons) Amendment Act 2009*, s 2(2).

CASES

The Council notes the following decisions of relevance for sentencing practice and past and present references undertaken by the Council.[58] The cases are grouped according to key sentencing principles or offence type although it is noted that there may be an overlap of issues identified.

Discount for guilty pleas

R v Borkowski [2009] NSWCCA 102[59]

Date of judgment:	15 April 2009
Appeal details:	Crown appeal against sentence
Charges:	Manslaughter s 24 (x2)
Lower court sentence:	Aggregate term of imprisonment 9 years, non-parole period (NPP) 6 years. Partially cumulative sentences. Count 1, fixed term 4 years; count 2, term of imprisonment 7 years, NPP 4 years.

Crown appeal dismissed by the Court, in the exercise of the Court's discretion (given that the Crown did not appeal the sentence of the co-offender).

The case concerned the deaths occasioned to two people, without any fault on their part, as the result of the respondent and two other offenders who were engaged in a high speed race on the Great Western Highway.

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58. The case summaries set out in this section draw heavily from the Judicial Commission of New South Wales' Judicial Information Research System (JIRS) and the LexisNexis Criminal Law News bulletins.

59. Sources: *R v Borkowski* [2009] NSWCCA 102; JIRS (online) CCA summary *R v Borkowski* [2009] NSWCCA 102; JIRS (online) '*R v Borkowski* [2009] NSWCCA 102' (Recent Law & Announcements, 18 April 2009); (2009) 16(5) *Criminal Law News* [2547].

One of the grounds of the Crown appeal was that the sentencing judge had erred in allowing a discount of 25 per cent for the utilitarian value of the pleas of guilty entered on arraignment in the District Court (a similar discount was given to a co-offender who had entered pleas in the Local Court).

Howie J, with whom the other members of the Court agreed, observed that in the usual case a discount of more than about 15 per cent could not be justified at the arraignment stage.

Howie J set out principles of general application with respect to pleas of guilty (subject to the *Criminal Case Conferencing Trial Act 2008* and its regulations):

> 1. The discount for the utilitarian value of the pleas will be determined largely by the timing of the plea so that the earlier the plea the greater discount: *Thomson* at [154]; *Forbes* [2005] NSWCCA 377 at [116].
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> 2. Some allowance may be made in determining the discount where the trial would be particularly complicated or lengthy: *Thomson* at [154].
>
> 3. The utilitarian discount does not reflect any other consideration arising from the plea, such as saving witnesses from giving evidence but this is relevant to remorse: *Thomson* at [119] to [123]; nor is it affected by post-offending conduct: *Perry* [2006] NSWCCA 351.
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> 4. The utilitarian discount does not take into account the strength of the prosecution case: *Sutton* [2004] NSWCCA 225.
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> 5. There is to be no component in the discount for remorse nor is there to be a separate quantified discount for remorse: *MAK and MSK* [2006] NSWCCA 381; *Kite* [2009] NSWCCA 12 or for the "Ellis discount"; *Lewins* [2007] NSWCCA 189; *S* [2008] NSWCCA 186.
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> 6. Where there are multiple offences and pleas at different times, the utilitarian value of the plea should be separately considered for each offence: *SY* [2003] NSWCCA 291
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> 7. There may be offences that are so serious that no discount should be given: *Thomson* at [158]; *Kalache* [2000] NSWCCA 2; where the protection of the public requires a longer sentence: *El-Andouri* [2004] NSWCCA 178.

> 8. Generally the reason for the delay in the plea is irrelevant because, if it is not forthcoming, the utilitarian value is reduced: *Stambolis* [2006] NSWCCA 56; *Giac* [2008] NSWCCA 280.
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> 9. The utilitarian value of a delayed plea is less and consequently the discount is reduced even where there has been a plea bargain: *Dib* [2003] NSWCCA 117; *Ahmad* [2006] NSWCCA 177; or where the offender is waiting to see what charges are ultimately brought by the Crown: *Sullivan and Skillin* [2009] NSWCCA 296; or the offender has delayed the plea to obtain some forensic advantage: *Stambolis* [2006] NSWCCA 56; *Saad* [2007] NSWCCA 98, such as having matters put on a Form 1: *Chiekh and Hoete* [2004] NSWCCA 448.
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> 10. An offer of a plea that is rejected by the Crown but is consistent with a jury verdict after trial can result in a discount even though there is no utilitarian value: *Oinonen* [1999] NSWCCA 310; *Johnson* [2003] NSWCCA 129
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> 11. The discount can result in a different type of sentence but the resulting sentence should not again be reduced by reason of the discount: *Lo* [2003] NSWCCA 313.
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> 12. The amount of the discount does not depend upon the administrative arrangements or any practice in a particular court or by a particular judge for the management of trials or otherwise.

His Honour, referring to an exchange between the sentencing judge and the prosecutor, noted a number of other errors made by the sentencing judge in relation to the discount available for a plea, including the impermissibility of a court adopting a regional practice in relation to the time at which a maximum discount will be given [26]–[30].

Error was also found by Howie J in the treatment of the delay between charge and sentence as a discounting factor [42], and in the categorisation of the offence as a manslaughter by unlawful and dangerous act for sentencing purposes, where the act involved was a breach of a regulatory provision (applying *R v Pullman* (1991) 25 NSWLR 89) [57]. In this respect attention was drawn by His Honour to the structure and range of offences dealing with the occasioning of

death through driving which need to be taken into account in such cases [59].

The Court held that in sentencing the respondent the sentencing judge had 'very substantially underestimated' the criminality involved [64]–[69]. However, the Court dismissed the appeal in the exercise of its discretion, in the absence of a Crown appeal in relation to the sentence imposed on one of the co-offenders whose culpability was the same as that of the respondent, since an increase in his sentence would result in an unjustifiable disparity [72].

R v Boney [2008] NSWCCA 313[60]

Date of judgment:	17 December 2008
Appeal details:	Crown appeal against sentence
Charges:	Maliciously inflict grievous bodily harm with intent s 33; Detain for advantage s 86(1)(b); Assault occasioning actual bodily harm s 59
Lower court sentence:	Aggregate term of imprisonment 6 years, NPP 3 years. (Concurrent sentences: Maliciously inflict grievous bodily harm, term of imprisonment 6 years, NPP 3 years; detain for advantage, fixed term of imprisonment 18 months; assault occasioning actual bodily harm, fixed term of imprisonment 9 months).

Appeal allowed by the Court, on the grounds that: the sentence with respect to the maliciously inflict grievous bodily harm count, including the reduction of the statutory ratio of the NPP to the term of the sentence, was manifestly inadequate; that the 25 per cent discount given for the plea of guilty was not warranted, in circumstances of a

60. Sources: *R v Boney* [2008] NSWCCA 313; JIRS (online) CCA summary *R v Boney* [2008] NSWCCA 313; (2009) 16(2) *Criminal Law News* [2503].

late plea entered following charge negotiations and occurring after the matter had been twice listed for trial notwithstanding a concession by the Crown Prosecutor that the plea was entered at the first available opportunity; that insufficient regard was given to the need to reflect personal deterrence in the sentence; that the imposition of concurrent sentences failed to reflect the principle of totality; and that insufficient reasons were given for departing from the standard non-parole period.

Sentencing outcome:	New aggregate term of imprisonment 8 years, NPP 3 years. Re-sentenced with respect to maliciously inflict grievous bodily harm to a term of imprisonment of 7 years 6 months and NPP 4 years 6 months, partially cumulative.

Salah v R [2009] NSWCCA 2[61]

Date of judgment:	2 February 2009
Appeal details:	Appeal by the offender against sentence.
Charge:	Murder
Lower court sentence:	Term of imprisonment 8 years 9 months, NPP 5 years 9 months.

Appeal dismissed by the Court, save so far as was necessary to comply with s 44 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

One of the grounds of appeal was that the sentencing judge had not given the appellant who had been indicted on a count or murder, an adequate discount for the plea of guilty. The Crown accepted his plea of guilty to manslaughter on the basis of excessive self-defence, on the sixth day of a trial, saving approximately five weeks of hearing time. There had been no earlier indication by him of a preparedness to plead

61. Sources: *Salah v R* [2009] NSWCCA 2; (2009) 16(3) *Criminal Law News* [2518].

guilty to manslaughter. Rothman J (with whom other members of the Court agreed) held that a discount of 10 per cent for the utilitarian value of a guilty plea in the circumstances was within the range available and within the discretion available to the sentencing judge. It was open to the offender to have indicated a plea to the manslaughter, either formally or informally, either at or before committal or on indictment. An additional ground of appeal concerning the hardship to the appellant occasioned by reason of him serving his sentence on protection was dismissed in the absence of evidence as to the nature and extent of any arrangements for protection that might be imposed.

Kite v R [2009] NSWCCA 12[62]

Date of judgment:	13 February 2009
Appeal details:	Appeal by the offender against sentence
Charges:	Sexual intercourse with child under 10 years s 66A (x2)
Lower court sentence:	Aggregate term of imprisonment 8 years 10 months, NPP 5 years 6 months. Partially cumulative sentences. Count 1, term of imprisonment 8 years 4 months, NPP 5 years; count 2, term of imprisonment 8 years 4 months, NPP 5 years.

Appeal allowed by the Court.

The sentencing judge nominated a discount of 25 per cent encompassing both the utilitarian value of the plea, which it was accepted was entered at the earliest opportunity, and the applicant's remorse. The applicant argued that he was entitled to 25 per cent

62. Sources: *Kite v R* [2009] NSWCCA 12; JIRS (online) CCA summary *Kite v R* [2009] NSWCCA 12; (2009) 16(3) *Criminal Law News* [2515].

solely on the basis of its utilitarian value, and should have received an additional discount for his remorse.

Blanch J, which whom the other members of the Court agreed, accepted that there should have been some additional amelioration of the penalties to reflect his remorse and prospects of rehabilitation, and observed:

> [12] In *R v MAK and R v MSK* (2006) 167 A Crim R 159 the Court made it plain that since the introduction of s21A the preferable course is not to quantify a discount for remorse and it has been pointed that the simplest way to proceed in sentencing is to arrive at a discount for the utilitarian value of the plea of guilty whether in specific terms or not and then proceed to review what Gleeson CJ in *R v Gallagher* (supra at 228) called the "complex of inter-related considerations" which could in appropriate cases include remorse. Because s21A makes specific provision for remorse to be considered as a separate mitigating factor, to include it as a factor contributing to the percentage discount for the plea of guilty can give rise to a perception of double counting.

Sentencing outcome:	New aggregate term of imprisonment 8 years, NPP 5 years. Sentences partially cumulative. Count 1, term of imprisonment 7 years 6 months, NPP 4 years 6 months; count 2, term of imprisonment 7 years 6 months, NPP 4 years 6 months.

Other discounting factors

- *Future assistance to authorities*

R v Collett [2009] NSWCCA 236[63]

Date of judgment:	16 September 2009
Appeal details:	Crown appeal against sentence

63. Sources: *R v Collett* [2009] NSWCCA 236; JIRS (online) CCA summary, *Collett* [2009] NSWCCA 236.

Charges:	Robbery in company s 97(1) (Form 1: damage property by fire, obtain valuable thing by deception, knowingly be carried in a stolen conveyance); Entering a building with intent to steal s 114(1)(d) (x2); Larceny s 117
Lower court sentence:	Aggregate term of imprisonment 2 years 9 months, NPP 18 months. Concurrent sentences. Robbery in company (taking into account Form 1 matters), term of imprisonment 2 years 9 months, NPP 18 months; Entering a building with intent to steal s 114(1)(d) (x2), terms of imprisonment 1 year 5 months, NPP 9 months; larceny, fixed term 9 months.

Appeal based on s 5DA of the *Criminal Appeal Act 1912* (NSW) allowed by the Court.

The offender received a discount on sentence by reason of his undertaking to give evidence against his alleged co-offenders and was placed in special protection in custody. While accepting that his subsequent failure to fulfil that undertaking warranted an increase in his sentence, the offender submitted that the increase should be limited on the grounds that his placement in special protection in gaol had been difficult and that the giving of the undertaking would continue that difficulty, despite the fact that it had been withdrawn. Mcfarlan JA, with whom the other members of the Court agreed, rejected this argument, holding that there were no 'exceptional circumstances' that would justify not reversing the entire discount:

> [17] … The respondent was well aware that his sentence could be increased if he did not comply with the undertaking (indeed, he was told that it would be). The procedure whereby discounts on sentence are given in return for undertakings to give evidence would be open to abuse if, in the absence of special circumstances, the discounts were not to be removed when offenders reneged on their undertakings.

> [18] Insofar as the respondent relied upon post sentencing material, that was to the same effect as the matters taken into account by the sentencing judge. In particular, the sentencing judge took account of the respondent's fear of recriminations and his application to be accepted into the Special Management Area of protection during his incarceration. His Honour expressly noted that the respondent intended to apply to be put on "non-association", which would virtually amount to him being in solitary confinement. It cannot be expected that the respondent's position in these respects will be exacerbated by his refusal to give evidence against his co-offenders. On the contrary, there may be some lessening of his fears of retribution now that he will not be giving that evidence. However, the price of his decision must be loss of the discount he was given.

Sentence outcome:	New aggregate term of imprisonment 3 years 6 months, NPP 22 months 15 days. Re-sentenced with respect to the robbery in company (taking into account the Form 1 matters) to term of imprisonment 3 years 6 months, NPP 22 months 15 days. Sentences with respect to the remaining counts confirmed.

- *Ill health of offender*

Pfeiffer v R [2009] NSWCCA 145[64]

Date of judgment:	15 May 2009
Appeal details:	Appeal by the offender against sentence
Charges:	Supply goods and services without disclosing undischarged bankruptcy s 269(1) *Bankruptcy Act 1966* (Cth) (Form 1: Seeking credit without disclosing undischarged bankruptcy)

64. Sources: *Pfeiffer v R* [2009] NSWCCA 145; JIRS (online) CCA summary *Pfeiffer v R* [2009] NSWCCA 145; (2009) 16(7) *Criminal Law News* [2586].

Lower court sentence:	Term of imprisonment 2 years 9 months, NPP 1 year 6 months (conditional release after serving 118 months in custody pursuant to s 2 (1)(b) *Crimes Act 1914* (NSW) upon provision of security of $1000 to be of good behaviour for 3 years).

Appeal allowed by the Court.

Error was found as a consequence of the sentencing judge when taking into account the applicant's 'seriously poor health' that would cause him to suffer greater hardship whilst incarcerated as compared with a healthy person, when varying the ratio of the NPP to the head sentence but not when setting the total sentence. McClellan CJ at CL, with whom the other members of the Court agreed, observed:

> [15] The difficulties which a prisoner will face due to his health are relevant to both the total sentence and the period of full time custody which a court will impose. Where the health problems of an individual offender are such that his or her life in prison will be more burdensome than for a healthy person it may be appropriate to reflect these considerations in a reduced sentence. See *R v Miranda* [2002] NSWCCA 89; (2002) 128 A Crim R 362.
>
> [16] In the present case although his Honour indicated that he would have regard to the applicant's health when considering the period of full time custody it is not apparent that he had regard to these matters when considering the term of the total sentence. Some of the applicant's problems require constant supervision and in some cases at the time of sentencing surgical intervention was probably necessary. These problems should have been reflected not only in a reduction in his period of full time custody but also in the length of his overall sentence.

Error was also found in the finding by the sentencing judge that the offences could not be 'characterised as being out of character' in circumstances where he had found the prior offences on the offender's record were stale and of no consequence [18], and in imposing a sentence that was excessive for an offence that could not be

categorised as being in the worst case justifying a sentence close to the maximum available [20].

Sentence outcome:	Term of imprisonment 2 years, conditional release after serving 12 months in custody pursuant to s 20(1)(b) of the *Crimes Act 1914* (NSW) upon provision of security of $1000 to be of good behaviour for 3 years.

Standard non-parole periods

SAT v R [2009] NSWCCA 172[65]

Date of judgment:	30 June 2009
Appeal details:	Appeal by the offender against sentence
Charges:	Count 1: Attempt use child under 14 years for pornographic purposes; Counts 2–4: Aiding and Abetting sexual intercourse with a child under 10; Counts 5–6: Use a child under 14 for pornographic purposes; Count 7: Produce child pornography; Count 8: Disseminate child pornography. (Form 1: Possessing child pornography (x2) and Producing child pornography)
Lower court sentence:	Aggregate term of imprisonment 13 years 9 months, NPP 9 years. Sentences for counts 2–7 partially cumulative on count 1. Count 1, fixed term 2 years and 4 months; count 2, taking into account Form 1 matters, total term 12 years 9 months, NPP 8 years; counts 3 & 4, total term 12 years, NPP 8 years; counts 5 & 6, fixed term 4 years 2 months 12 days; counts 7 & 8, fixed term 3 years.

Appeal allowed by the Court.

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65. Sources: *SAT v R* [2009] NSWCCA 172; JIRS (online) CCA summary *SAT v R* [2009] NSWCCA 172.

The offences arose out of an email relationship which the offender developed with a person known as DC who was resident in another country and who made various requests to engage the offender's niece, aged 13, and the offender's two daughters aged six and nine, in various acts of pornography and sexual intercourse to which the offender complied. The offender pleaded guilty to the charges and provided 'significant' assistance to the authorities with respect to the principal offender, DC.

The Court confirmed the overall effective 40 per cent reduction given by the sentencing judge for the plea and assistance provided by the offender but found that the starting point of approximately 23 years so as to arrive at the total effective term of 13 years 9 months was manifestly excessive, in circumstances where the offender did not personally interfere with the children, where the offences were not accompanied by any violence or by penetration of the children, where the offender participated only after a degree of persistence over a considerable period of time on the part of DC, and where there was evidence of remorse and of prior good character.

The applicant did not challenge the sentencing judge's conclusions that the standard non-parole period provisions applied to the offences of aiding and abetting sexual intercourse with a child under 10. The Court however invited supplementary submissions on this issue. Buddin J, with whom the other members of the Court agreed, observed that whilst aiders and abettors face the same maximum penalty as a principal offender the table of standard non-parole periods is silent in relation to the position of aiders and abettors and others whose liability is ancillary in nature.

It was noted that it had previously been held that the standard non-parole period provisions do not apply to attempting to commit substantive offences other than attempt murder (*DAC v R* [2006]

NSWCCA 265) and do not apply to offenders charged with conspiracy (*Diesing v R* [2007] NSWCCA 326) [51]. Reference was made to *DJB v R, R v DJB* [2007] NSWCCA 209 in which the Court had proceeded on the basis that the standard non-parole periods did apply to s 61J offences, one of which as charged in that case was an offence of aiding and abetting. Reference was also made to *R v Merrin* [2007] NSWCCA 255 where the NSWCCA had also proceeded on the basis that the standard non-parole period provisions applied to the offences of aiding and abetting aggravated break enter and steal.

Buddin J noted, however, with respect to each of these cases that the issue had not been specifically raised, and expressed the view that it remained to be 'authoritatively determined' [54]–[56]. In the circumstances of the case the Court saw no reason to depart from *DGB* and *Merrin*.

Sentencing outcome:	New aggregate term of imprisonment 10 years 6 months, NPP 7 years. Counts 2–7 partially cumulative on Count 1. Count 1, fixed term 2 years; Count 2 (and taking into account the Form 1 offences), total term 9 years 6 months, NPP 6 years); counts 3 & 4, total term 9 years, NPP 6 years; counts 5 & 6, fixed term 3 years; counts 7 & 8, fixed term 2 years 6 months.

R v Quin [2009] NSWCCA 16[66]

Date of judgment:	17 February 2009
Appeal details:	Crown appeal against sentence
Charges:	Maliciously inflict grievous bodily harm with intent s 33

66. *R v Quin* [2009] NSWCCA 16; JIRS (online) CCA summary *R v Quin* [2009] NSWCCA 16; (2009) 16(3) *Criminal Law News* [2522].

Lower court sentence: Term of imprisonment 5 years, NPP 2 years 6 months.

Crown appeal allowed by the Court.

The offence was one that attracted a SNPP. The sentencing judge found that the offence fell below the middle of the range of objective seriousness 'principally because of the absence of any weapon' having been used in the attack on the victim. Price J observed:

> [30] It is important to emphasise that the absence of a weapon (and in my opinion the use of boots to kick another may be readily characterised as the actual use of a weapon) is not a matter of mitigation: *Versluys v R* [2008] NSWCCA 76 per McClellan CJ at CL at [37]. As was said in *Versluys* it does not necessarily follow that where hands (in the present case fists) have been used by an assailant instead of a weapon that the offence is less serious than if a weapon was used. This may particularly be considered to be the case when a single victim is attacked by a number of assailants even though the method of assault was confined to the use of fists.

The Court accepted the Crown's contention that the sentencing judge had erred by engaging in double counting the subjective features of the respondent when departing from the SNPP and then making a finding of special circumstances. Price J observed:

> [36] Whilst it is true that what was said by the Chief Justice in *Fidow* at [18] cautioned against the double counting of matters already taken into account in reducing the head sentence and then in the finding of special circumstances to vary the statutory proportion of the non-parole period, sentencing Judges, in my view, should also take care to ensure against double counting when a matter is taken into account in departing from the standard non-parole period and then as a special circumstance justifying a variation in the statutory proportion between the non-parole period and balance of the term of the sentence thereby further reducing the mandatory period of imprisonment. Section 44(1) of the *Crimes (Sentencing Procedure) Act* provides that the balance of the term of the sentence should not exceed one-third of the non-parole period unless there are special circumstances, in which case reasons must be given: s 44(2).
>
> …

> [38] The Court explained in *Way* at [112] that while there are separate considerations involved for s 44(2) of the *Crimes (Sentencing Procedure) Act* and for reasons for not imposing the standard non-parole period, the relevant steps can be taken simultaneously. By avoiding a two stage process, the risk of double counting is reduced.

Error was also found in that too much weight had been given to the offender's prospects of rehabilitation. Price J observed in this respect:

> [46] Where there has been a gang attack upon a single victim, sentencing Judges, in my view, should ordinarily give more weight to considerations of personal and general deterrence, the protection of the community and denunciation than to rehabilitation. Gang attacks invariably involve multiple acts of viciousness, randomly directed at the victim's person with the high potential of serious injury being inflicted.

The case was one, however, in which the principle of double jeopardy applied resulting in the substitution of a sentence that was the minimum that could have been imposed.

Sentence outcome:	Term of imprisonment 5 years 6 months, NPP 3 years 2 months.

Hosseini v R [2009] NSWCCA 52[67]

Date of judgment:	5 March 2009
Appeal details:	Appeal by offender against conviction; Crown appeal against sentence
Charges:	Count 1: Knowingly take part manufacture large commercial quantity prohibited drug s 24(2) *Drug Misuse & Trafficking Act 1985* (Form 1: possess precursor intended to be used in manufacture; supply prohibited drug (x2); possess unauthorised firearm; fail to keep

67. Sources: *Hosseini v R* [2009] NSWCCA 52; JIRS (online) CCA summary *Hosseini v R* [2009] NSWCCA 52; JIRS (online) '*Hosseini v R* [2009] NSWCCA 52' (Recent Law & Announcements, 12 March 2009); (2009) 16(4) *Criminal Law News* [2535].

	firearm safely; custody of false instrument); Count 2: Deal with property suspected of being proceeds of crime s 193C(1)
Lower court sentence:	Aggregate term of imprisonment 7 years 6 months, NPP 4 years 6 months. Count 1, (taking into account Form 1 offences) term of imprisonment 7 years 6 months, NPP 4 years; Count 2, fixed term of imprisonment 6 months.

Appeal by offender against conviction allowed on s 193C(1) offence on the basis that the District Court had no jurisdiction to deal with that count (being a summary offence included in the indictment). Crown appeal in relation to the other count allowed by the Court.

A substantive ground of appeal on sentence was that although the respondent was sentenced following a plea of guilty the final sentence fell so far below the SNPP as to suggest that it was not used as a guidepost or benchmark. The respondent submitted that the SNPP did not apply, as the words 'knowingly take part' do not appear in the brackets to the Table alongside s 24(2) of the *Drug Misuse & Trafficking Act 1985* (NSW) which creates the offence of knowingly take part in the manufacture of a large commercial quantity of the drug concerned. Price J, with whom the other members of the Court agreed, held that the SNPP did apply to knowingly take part offences under s 24(2):

> [46] The lack of precision in the words in brackets suggests that their role is confined to providing an indication of the contents of the section rather than identifying the offence to which the standard non-parole period applies. Such a drafting technique is commonly used to give some indication for example of the contents of a Subdivision in a particular Act (such as "Bushfires" for Subdivision 5 of the *Crimes Act* or "Minors in Sex Clubs" in Part 3A of the *Summary Offences Act 1988*) or by further example the contents of a particular section. The offences within s 25 of the *Drug Misuse and Trafficking Act* appear under the heading "Supply of prohibited drugs." In those words there is no mention that the

> offences to which that section applies include knowingly take part in supply. Similarly, offences contrary to s 24 of the *Drug Misuse and Trafficking Act* appear under the heading "Manufacture and Production of prohibited drugs". No mention is made in those words to knowingly take part in the manufacture or production of a prohibited drug which is an offence within s 24.
>
> [47] It is not surprising that the words in brackets in item 17 in the Table do not include 'knowingly take part in'. An indication of the contents of s 24 is provided by the words manufacture or production in a way similar to the heading which is found in the *Drug Misuse and Trafficking Act*. Nothing turns on the word "and" in the heading and the word "or" in item 17. The word "or" merely reflects the actual wording of s 24(2).
>
> [48] In my opinion, the words within the brackets in the Table items do not identify or limit in any way the offence to which the standard non-parole period applies. The offence to which the standard non-parole provisions applies is identified by the section of the statute which is found opposite the standard non-parole period in the particular Table item.

The Court rejected an additional submission that Parliament could not have intended the same SNPP for offences of manufacture and of knowingly take part in the manufacture [49]–[50]. Error was found in allowing the respondent a 25 per cent discount for the utilitarian value of a plea entered on the first day of the trial [74], in failing to use the SNPP as a guidepost, and in giving insufficient weight to the element of deterrence [77]–[78].

Sentence outcome:	New aggregate term of imprisonment 9 years, NPP 5 years 6 months. Re-sentenced Count 1 (taking into account the matters on the Form 1) to a term of imprisonment of 9 years, NPP 5 years 6 months.

R v Hibberd [2009] NSWCCA 20[68]

Date of judgment:	11 March 2009
Appeal details:	Crown appeal against sentence
Charges:	Sexual intercourse without consent s 61I (x2); Common assault s 61 (x4); Indecent assault s 61L; related summary offence under s 166 *Criminal Procedure Act 1986* Breach apprehended domestic violence order s 562I(1)
Lower court sentence:	Aggregate term of imprisonment 9 years, NPP 6 years 9 months. Sentences were partially cumulative. s 61I offences, fixed terms of 6 months on each; s 61L offence, fixed term of 12 months imprisonment; s 61I offences, term of imprisonment 5 years, NPP 3 years 6 months, and term of imprisonment 6 years, NPP 3 years 9 months; s 562I(1) offence, fixed term of imprisonment 6 months.

Crown appeal allowed by the Court.

One ground of appeal concerned the assumption made by the sentencing judge, when assessing the objective seriousness of the offence of sexual intercourse without consent, that digital penetration is to be considered less serious than other forms of non-consensual acts of sexual intercourse. In relation to this ground Price J stated:

> [56] Relevant considerations in determining where on the scale of seriousness an offence contrary to s 61I of the *Crimes Act* lies include "the degree of violence, the physical hurt inflicted, the form of forced intercourse and the circumstances of humiliation…" See *Regina v Gebrail* (Court of Criminal Appeal, 18 November 1994, unreported) per Mahoney JA at 10–11. To those matters I would add the duration of the offence. Non-consensual sexual intercourse by digital penetration has generally been considered to be less serious

68. Sources: *R v Hibberd* [2009] NSWCCA 20; JIRS (online) CCA summary *R v Hibberd* [2009] NSWCCA 20; JIRS (online) '*R v Hibberd* [2009] NSWCCA 20' (Recent Law & Announcements, 2 April 2009); (2009) 16(4) *Criminal Law News* [2534].

> than an offence of penile penetration: see, for example, *Regina v Santos Da Silva* (Court of Criminal Appeal, 30 November 1995, unreported) per Grove J at 3, but each case will depend on its own facts. There is no canon of law which mandates a finding that digital penetration must be considered less serious than other non-consensual acts of sexual intercourse. Whilst the form of the forced intercourse is an important factor it is not to be regarded as the sole consideration.

Tobias J observed:

> [21] In my respectful view the time has come for this Court to depart from any prima facie assumption, let alone general proposition, that digital sexual intercourse is to be regarded as generally less serious than penile sexual intercourse. If one was to accept such a proposition, then it may well be appropriate to also assert that the forced vaginal penetration in some of its more gross forms is likely to be more serious than penile penetration. As the objective seriousness of the offence is wholly dependent on the facts and circumstances of the particular case as the High Court and Simpson J emphasised in *Ibbs* and *AJP* respectively, any resort to prima facie assertions that one form of penetration is likely to be or generally will be more serious than another, is to be avoided. It can, in my view, only lead a sentencing judge to erroneously attribute more weight to the general proposition or assumption than the particular facts of the case.

James J agreed that there is no rule that digital sexual intercourse without consent is necessarily less serious than penile vaginal intercourse without consent, but reserved his position as to whether the Court should depart from statements previously made to the effect that generally speaking, digital penetration is likely to be less serious than penile penetration, noting that the point was not fully or adequately argued before the Court [26]–[28].

Although in the context of the reasons given error was not found to have occurred in this respect, the Court held that there was error in the failure of the sentencing judge to give sufficient weight to the extent of violence used in the commission of the offence [66], and in the extent of the departure from the standard non-parole period in the

case of an offender with a prior record for violence, who was on bail [67]–[68], and in failing to give effect to the principle of totality [73].

Sentence outcome:	New aggregate term of imprisonment of 10 years, NPP 7 years 6 months. Re-sentenced with respect to the second s 61I offence to a term of imprisonment of 7 years, NPP 4 years 6 months, other sentences remained the same.

R v King [2009] NSWCCA 117[69]

Date of judgment:	13 April 2009
Appeal details:	Crown appeal against sentence
Charges:	Sexual intercourse with a child under 10 s 66A (Form 1: act of indecency; stealing from a dwelling; attempt to take a motor vehicle)
Lower court sentence:	Term of imprisonment 2 years, suspended by way of s 12.

The Crown appeal against sentence was allowed.

The complainant was four years old and suffered digital penetration of the vagina by the respondent, who had entered the premises as an intruder, after which he masturbated while leaning over her. The respondent then removed a set of keys from the kitchen which he used in an attempt to steal a vehicle from the premises.

Multiple errors were found in the imposition by the sentencing judge of a suspended sentence that was inadequate to 'a very substantial degree', being a sentence, even if it had not been suspended, that did not manifest the seriousness of the offender's conduct or sufficiently denounce his conduct [27].

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69. Sources: *R v King* [2009] NSWCCA 117; JIRS (online) CCA summary *King* [2009] NSWCCA 117; (2009) 16(5) *Criminal Law News* [2551].

In particular, the Court stated:

> [31] One of the difficulties in this matter is that the Judge did not approach the task of determining the relevance of the standard non-parole period in the way that decisions of this Court have required. There is a staged approach that the Judge failed to follow. That approach was set out in *MLP v R* [2006] NSWCCA 271; 164 A Crim R 93 at [33] and approved in *Mencarious v R* [2008] NSWCCA 237. The Judge was first to assess the objective seriousness of the offence, then to consider those matters in s 21A that either aggravated or mitigated the offending. The Judge next should have considered the matters on the Form 1 and the affect that they would have upon the assessment of the appropriate sentence for the offence. Then, having reached that stage and having determined the appropriate sentence with regard to the standard non-parole period, the Judge was to apply the discount for the plea of guilty. Depending upon the result, the Judge should ultimately have determined how the discounted sentence was to be served and, if necessary, what the appropriate non-parole period should be.

The Court found that it had not been open to the sentencing judge to find that the offence was 'towards the lower end of the scale' of offences falling within s 66A [34].

In considering the nature of the sexual assault (digital penetration) it noted:

> [36] … But it has been made clear that it is not a case of simply considering the nature of the penetration in isolation as being ranked in some form of hierarchy: *R v AJP* [2004] NSWCCA 434; (2004) 150 A Crim R 575. What is to be considered is the type of penetration in all the circumstances surrounding the offending. The type of penetration is simply one factor and by itself does not indicate how serious the particular offence is. The simple fact is that had the intercourse in this case been penile penetration it would have been an offence of very great seriousness if for no other reason than because of the age of the child. In such a case the seriousness of the offence may have been above mid range. But the fact that it was not penile penetration does not mean that the offence is reduced to low range.

The Court determined that there were aggravating factors present in relation to the age of the complainant (4 years), the fact that she was

in her grandmother's house, and the fact that the respondent had broken into the house as a burglar [37]–[38]. The NSWCCA considered that the fact that the intercourse had lasted a very brief period of time was not of great weight; the fact that the penetration resulted in injury and pain being the significant aspect [39]. The Court also observed that the fact that the Judge had found no evidence of prolonged damage to the child was of no mitigating value:

> [41] No one could know at the date of sentencing what emotional or psychological harm might have been occasioned to the child in the long term. The early complaint makes it obvious that the child knew that the conduct was wrong and that she found it distressing. It is significant that the act was committed by a stranger. It should not be assumed, without evidence to the contrary, that there is no significant damage by way of long-term psychological and emotional injury resulting from a sexual assault of a child who is old enough, as was the complainant, to appreciate the significance of the act committed by the offender. It should be assumed that there is a real risk of some harm of more than a transitory nature occurring. That should be a factor taken into account when sentencing for a child sexual assault offence. It is an inherent part of what makes the offence so serious. It was the appreciation of the likelihood of harm resulting that Mason P saw as changing the community attitude to sexual assaults against young children: see *R v MJR* (2002) 54 NSWLR 368 at [57].

The Court noted further that planning or pre-meditation does not have great significance in the evaluation of child sexual assault offences which are usually opportunistic [43]. The Court noted additionally that the sentencing judge had not considered or given sufficient weight to the impact of the Form 1 offences on the ultimate sentence [44] and [55]. Also, while the sentencing judge had taken into account that the respondent did not have a prior record of like offending, the Court considered that the respondent's record did not mitigate the offence [45].

The Court identified further errors including the way in which the sentencing judge treated the respondent's intoxication as a mitigating

factor [47], in his allowance of an 'Ellis discount' [53], in his assessment of the respondent's prospects of rehabilitation [60], and in the reasons given for suspending the sentence [61] and [63].

By reason of the principle of double jeopardy, the extra curial punishment which he had suffered, the fact that he had to be placed on the strict 'non-association protection', and his exposure to public outrage that risked vigilante response, the substituted sentence was significantly discounted. Following this case the *Crimes Act 1900* was amended by insertion of s 61A(3)(i) to add an additional circumstance of aggravation where an offender breaks and enters into a dwelling-house or other building with the intention of committing the offence or any other serious indictable offence, to result in the offence carrying a maximum penalty of imprisonment for life.

Sentence outcome:	Term of imprisonment 7 years, NPP 4 years 6 months (to be served by way of full time custody).

SKA v R: R v SKA [2009] NSWCCA 186[70]

Date of judgment:	14 July 2009
Appeal details:	Appeal by the offender against conviction and sentence
Charges:	Count 1: Sexual intercourse with child under 10 s 66A; Counts 2–3: Aggravated indecent assault of child under 10—under authority s 61M(2); Count 4: Aggravated sexual intercourse with child between 10 and 14—under authority s 66C(2); Count 5: Aggravated indecent assault of child under 16—under authority s 61M(1)

70. Source(s): *SKA v R: R v SKA* [2009] NSWCCA 186; JIRS (online) CCA summary, *SKA* [2009] NSWCCA 186.

Lower court sentence:	Aggregate term of imprisonment 8 years 9 months and 15 days, NPP 4 years 9 months and 15 days. Partially cumulative sentences. Count 1, term of imprisonment 8 years, NPP 4 years; counts 2 & 3, terms of imprisonment 4 years, NPP 2 years; count 4, term of imprisonment 8 years, NPP 4 years; count 5, term of imprisonment 4 years, NPP 2 years.

The appeal against conviction was dismissed; the appeal against sentence by the offender was dismissed; the Crown's appeal against sentence (on the s 66A count) was granted, along with consequential variations of the starting dates for the other sentences.

The sentencing judge had determined that each offence was less than mid-range, an assessment with which Simpson J (with whom the other members of the Court agreed), held to have been open to him [190]. However in dealing with this ground Simpson J observed that it was not an adequate discharge of the requirements in ss 54A and 54B of the *Crimes (Sentencing Procedure) Act* by the sentencing judge to have made a global finding of the objective gravity in relation to all offences. *Way* determined that what was required was an evaluation of the gravity of each offence against the notional mid-range offence [183].

Simpson J also noted that although the absence of force or violence, threats or importuning the complainant to silence were not irrelevant to the assessment of objective gravity, their relevance was limited, principally going to the determination of what constitutes a notional offence in the mid-range of objective gravity [185].

Error was found in the failure of the sentencing judge to have regard to the SNPP for the s 66A offence as a reference point or guide. The 4-

year NPP was a fraction of the SNPP of 15 years, and the sentence for the offence was so far below the SNPP as to denote error: [192]–[193].

Error was also found in the failure of the sentencing judge to make reference to the need for deterrence in sentencing for offences committed against a child [203], and in taking evidence on the offender's prior good character into account when considering the objective seriousness of his conduct [184].

Simpson J noted that in being explicit in his view that the convictions were unsafe (by reason of concerns that he entertained as to the credibility of the complainant's evidence) the sentencing judge had given the offender false hope and made the re-sentencing task more complicated, especially when the sentence must be significantly extended [210]. First instance judges should be circumspect in expressing views of this kind [211]. Although the double jeopardy principle applied, the Court of Criminal Appeal was required to impose a sentence, on appeal, that paid due regard to the SNPP and to the principle of totality.

Sentence outcome:	New aggregate sentence 12 years imprisonment, NPP 8 years. Re-sentenced with respect to count 1 to 12 years imprisonment, NPP 8 years. Sentences with respect to the remaining counts varied in terms of their commencement dates.

Eedens v R [2009] NSWCCA 254[71]

Date of judgment:	2 October 2009
Appeal details:	Appeal by the offender against sentence
Charges:	Sexual intercourse with child under 10 s 66A (Form 1: Sexual intercourse with child under 10; sexual intercourse with child between 10 and 14)
Lower court sentence:	Term of imprisonment 12 years, NPP 9 years.

Appeal allowed by the Court.

Error was found in relation to the failure of the sentencing judge to determine the level of objective criminality involved in the offence in the manner required by the authorities, including *Way*, that is with 'some specificity' [24]–[25]; and in imposing a sentence that was out of kilter with earlier sentencing decisions for like offences [26] and [44].

Howie J also made the following obiter observations in relation to the Form 1 matters:

> [17] …I should express my view that the course adopted by the Crown, apparently as a result of negotiations in the Local Court, to place two of the offences on a Form 1 appears on the information before this Court to have been inappropriate. These were distinct offences against three vulnerable complainants and each was a separate act of criminality of great seriousness. In fact one of the offences on the Form 1 was objectively more serious than the offence for which the applicant was being sentenced because the child was aged 8 years. The younger the child, the more serious the offence: *Shannon v R* [2006] NSWCCA 39. Had the applicant been sentenced for each of the offences, there would clearly have been a measure of accumulation as the offence against any one child could not have embraced the criminality involved in the offence against another child.
>
> [18] I appreciate that in some cases of child sexual assault there may be concerns about proving a particular charge were

71. Source(s): *Eedens v R* [2009] NSWCCA 254.

it not placed on a Form 1, but in light of the very recent complaints made in this case and the admission allegedly made to the two mothers, a conviction would have been highly likely. The use of the Form 1 reduced considerably the punishment that could be imposed upon the applicant because of the limited use that could be made of the matters being taken into account upon proper sentencing principles in accordance with the guideline judgment on s 33 of the *Crimes (Sentencing Procedure) Act* 1999, *Attorney General's Application No 1 of 2002* [2002] NSWCCA 518; 56 NSWLR 146. This is notwithstanding that taking offences into account can result in a substantial increase to the sentence otherwise appropriate for the offence for which sentence is passed: *R v Grube* [2005] NSWCCA 140 and that in a general way the sentence imposed represents the whole of the criminality before the court.

[19] But the sentence imposed for one offence even taking the other two offences into account, could not replicate the sentence that would have been imposed had the applicant been sentenced on all three charges. The use of the Form 1 meant that the sentence imposed could not, in my opinion, sufficiently reflect the seriousness of the totality of the applicant's conduct nor could it properly denounce the fact that three children had been abused in the way that they were. This is particularly so having regard to the fact that one of the offences also carried a standard non-parole period. The significance of the standard non-parole provisions loses its impact when the offence is placed on a Form 1. I am of the opinion that generally it is inappropriate to have a matter taken into account that carries a standard non-parole period. Of course, there may be situations where that procedure can be justified, for example where the offender is being sentenced for a number of offences similar to those placed on the Form 1.

Sentence outcome: Term of imprisonment 8 years 3 months, NPP 6 years 2 months.

Totality

R v Burnard [2009] NSWCCA 5[72]

Date of judgment:	10 February 2009
Appeal details:	Crown appeal against sentence; Appeal by the offender against conviction
Charges:	Obtain money by false or misleading statement s 178BB (x9)
Lower court sentence:	With respect to 4 counts, concurrent terms of imprisonment of 12 months suspended by way of s 12; for the remaining 5 counts, $10,000 fine for each offence

The Crown appeal was dismissed.

The Crown submitted that error arose in that, firstly, a decision was made improperly to suspend each of the sentences before a determination was made of appropriate terms of imprisonment for each count and secondly, in that such decision was made before consideration was given to questions of totality and concurrence and accumulation of sentences. James J, with whom the other members of the Court agreed, rejected the first of these grounds but held:

> [111] As to the second of the two submissions, I am, however, of the opinion that the sentencing judge, as a judge sentencing an offender for multiple offences, was required to give consideration to questions of totality and to what extent the sentences for different offences should be made concurrent or cumulative, before making any decision to suspend the execution of any of the sentences. Such a consideration would necessarily involve a determination of what would be appropriate sentences for all of the offences, before determining whether any of the sentences should be suspended.
>
> [112] Such a consideration would be required, in order to determine whether, having regard to the restrictions in s 12 of

72. Sources: *R v Burnard* [2009] NSWCCA 5; JIRS (online) CCA summary *R v Burnard* [2009] NSWCCA 5; (2009) 16(3) *Criminal Law News*.

> the *Crimes (Sentencing Procedure) Act* on the making of orders suspending the execution of sentences of imprisonment, it would even be open to suspend the execution of a particular sentence and in order to ensure that the sentences for the individual offences would be consistent with each other. Very importantly, such a consideration would be necessary in order to give effect to the sentencing principle of totality, "that the aggregate sentence should fairly and justly reflect the total criminality of the offender's conduct" (see *R v Weldon* [2002] 136 A Crim R 55 per Ipp JA at 62 (46)).

The Court rejected an additional submission by the Crown that error occurred in the finding that the conviction of the respondent would prevent his being a Director of companies for a considerable period or subject to a possible application banning him from occupying positions within the financial industry. Notwithstanding the error in sentencing approach found resulting in manifestly inadequate sentences the Crown appeal was dismissed in the exercise of the Court's discretion applying the principle of double jeopardy, and by reference to the time which had passed between sentencing and disposition of the appeal.

Suleman v R [2009] NSWCCA 70[73]

Date of judgment:	20 March 2009
Appeal details:	Appeal by the offender against sentence
Charges:	Making a false statement, s 178BB *Crimes Act* (x15); Using a false instrument, s 300(2) *Crimes Act* (x11)
Lower court sentence:	Aggregate term of imprisonment 7 years 4 months, NPP 5 years 6 months. Partially cumulative sentences. s 178BB offences (x14), fixed terms 1 year 6 months on each offence; s 178BB offence (x1), term of imprisonment 2 years, 2 months, 14 days,

73. Sources: *Suleman v R* [2009] NSWCCA 70; (2009) 16(4) *Criminal Law News* [2533], JIRS (online) *Suleman v R* [2009] NSWCCA 70 (Recent Law and Announcements, 26 March 2009).

> NPP 4 months, 14 days; s 300(2) offences (x11), fixed term 9 months for each offence.

Appeal allowed by the Court.

One of the grounds of appeal was that the sentencing judge had erred in holding that the offences were committed in breach of trust that investors, particularly those within the Assyrian community, had in the applicant pursuant to s 21A(2)(k) of the *Crimes (Sentencing Procedure) Act*. In upholding this ground Howie J, with whom the other members of the Court agreed, stated:

> [22] This aggravating factor is not made out simply because the victim trusted the offender for some reason or other, such as because of the offender's standing in the community or he appeared to be a successful businessman. Nor is it made out because the persons with whom the offender dealt were "commercially naïve people". The relevant factor is that there was at the time of the offending a particular relationship between the offender and the victim that amounted to "a position of trust". It is a special relationship existing between them and transcends the usual duty of care arising between persons in the community in their everyday contact or their business and social dealings. The position of trust may reside in only one of the persons, such as between parent and child. But there may be situations where each stands in a position of trust to the other. The relationship is one recognised by the common law as imposing upon one of the participants a particular responsibility not to act to the detriment of the other because of their peculiar relationship.

Howie J went on to observe that whilst the common law recognised particular trust relationships such as doctors, priest or teachers, the holder having a particular duty of care towards the member of community, it did not, for the purposes of sentencing, recognise the position of trust that arises from the simple fact that two persons are involved in a commercial relationship [24]–[25]. There must be some 'some peculiar aspect of the relationship that imposed a position of trust on one or both of the participants'. Section 21A(2) was not

intended to extend the categories of aggravating factors recognised by the common law [26].

Howie J found that the sentencing judge had also erred in the application of the principles of totality of criminality, because he had not determined the appropriate sentence for each offence individually [38].

Sentence outcome:	New aggregate term of imprisonment 6 years 4 months, NPP 4 years 9 months. Partially cumulative sentences, restructured. s 178BB offences (x14), fixed terms 1 year 6 months on each offence; s 178BB offence (x1), term of imprisonment 1 year 11 months 14 days, NPP 4 months 14 days; s 300(2) offences (x11), sentences confirmed.

Child pornography

Saddler v R [2009] NSWCCA 83[74]

Date of judgment:	31 March 2009
Appeal details:	Appeal by the offender against sentence.
Charges:	Possessing child pornography s 91H(3) (x3) (Form 1 offences taken into account: Possessing child pornography (x2), possessing a prohibited drug and custody of an offensive weapon)
Lower court sentence:	Aggregate sentence 6 years imprisonment, NPP 4 years 6 months. Partially cumulative sentences. Count 1 (taking into account Form 1 offences) term of imprisonment 5 years, NPP 3 years 6 months; Counts 2 & 3, terms of imprisonment 3 years 9 months, NPP 2 years.

74. Sources: *Saddler v R* [2009] NSWCCA 83; (2009) 16(5) *Criminal Law News* [2544].

Appeal allowed by the Court.

The offender pleaded guilty to three offences of possessing child pornography with four further charges taken into account on a Form 1. The offender was in possession of over 45,000 pornographic images, with about 700 child pornography movies, involving 'thousands of children' ranging from less than 12 months of age to early teens, comprising images ranging from level 1 to level 10 on the COPINE scale.

One of the grounds of appeal was that the sentencing judge erred in finding the offence was aggravated pursuant to s 21A(2)(n) of the *Crimes (Sentencing Procedure) Act* (planned or organised criminal activity). Buddin J, with whom other members of the Court agreed, in allowing this ground held that there was no planning beyond that which was inherent in the offence [36]. Reference was made to *Fahs v R* [2007] NSWCCA 26, in which Howie J observed that being part of a 'planned or organised criminal activity' involves more than that the offence was planned, and to *R v Yildiz* (2006) 160 A Crim R 218 where Simpson J observed that the degree of planning would need to exceed that which would ordinarily be expected of or inherent in the offence.

Buddin J further held that there was error in the finding that the offences were aggravated by the fact that they involved gratuitous cruelty, pursuant to s 21A(2)(f). In this regard it was noted that the definition of child pornography includes the depiction of torture, cruelty or physical abuse as a possible element of the offence and as such the sentencing judge had already taken this factor into account in determining the objective gravity of the offence resulting in double counting [41]. Buddin J left undecided the question of whether an offence of possession of images depicting gratuitous cruelty, after they had been created, 'involved' gratuitous cruelty, although he was inclined to find that it would not [43].

Grove J questioned the rationale for the counterpoise between s 21A(2)(n) which makes it an aggravating factor that an offence is part of an organised or planned criminal activity, and s 21A(3)(b) which makes the absence of that circumstance a mitigating circumstance [3]–[4].

Sentence outcome:	New aggregate sentence 5 years imprisonment, NPP 3 years 9 months. Partially cumulative sentences. Count 1 (taking into account the matters on the Form 1) term of imprisonment 4 years, NPP 2 years 9 months.

DPP (NSW) v Annetts [2009] NSWCCA 86[75]

Date of judgment:	31 March 2009
Charges:	Possess child pornography s 91H(3) (now repealed and included in s 91H(2))
Proceeding details:	Stated case brought by the DPP on the issue of whether the District Court judge 'err[ed] in law in concluding that the manner and circumstances in which the images in question were recorded, including the secretive nature of the filming and the concentration of the camera, in part, on the genitalia of the young persons filmed, was not relevant to whether the images depict a person, under the age of 16 "in a sexual context", pursuant to the definition of child pornography contained in s 91H(1) of the *Crimes Act* (NSW) 1900'
Result:	Stated case answered in the affirmative.

A DVD containing clips of young boys getting un/dressed in a swimming pool change room was filmed secretively by the respondent. The NSWDC had upheld the offender's appeal against his conviction

75. Source(s): *DPP (NSW) v Annetts* [2009] NSWCCA 86.

in the Local Court on the basis that the manner and circumstances in which the images were recorded (ie, secretively and partly focussing on the genitalia of the young persons) was not relevant to whether the images depict a person, under the age of 16 'in a sexual context', pursuant to the definition of child pornography in s 91H(1).

McClellan CJ at CL, with whom the other members of the Court agreed, held:

> [10] In my opinion his Honour was correct to determine that the question which the definition in s 91H raises is objective and is to be answered by considering the content of the material about which complaint has been made. The fact that the images were secretly recorded is not relevant to whether or not the material is child pornography. Furthermore, the reasons which motivated the photographer are not relevant. These matters may inform an understanding of the context in which the film was made but are not relevant to an understanding of whether or not the video depicts boys in a "sexual context." That question must be answered after considering the content of the film itself.
>
> [11] For that reason the content of the images contained in the video is relevant to the issue raised by the statute. The fact that all the images were of young boys and the camera has concentrated on their genitalia are both relevant to the question of whether or not the images depicted are of a person or persons in a "sexual context." Of course it may be that after consideration of the content of a video, including a video containing a sequence of images of the genitalia of young boys, it could not be concluded that the video depicts boys in a sexual context. The images may have been made for a medical or artistic purpose and are depicted in that context. However, a conclusion that the images depict persons under 16 in "sexual context" may be informed by the number of images, the gestures of those photographed and the portion or portions of the body, including the genitalia, depicted.
>
> [12] It follows that the primary judge's approach was only partly correct. Although the motivation of the photographer and the method he used to film the boys was not relevant all of the content of the images, including that all the images were of young boys, concentrated on their genitalia and were taken over a period of time, and, if this is apparent from the video, were taken in a men's change room were relevant to the question of whether or not the material depicted a person "in a sexual context". Whether, when these matters are

> considered, an offence is proved in the present case is not a matter for this Court.[76]

R v Booth [2009] NSWCCA 89[77]

Date of judgment:	6 April 2009
Appeal details:	Crown appeal against sentence
Charges:	Possess child pornography s 91H(3)
Lower court sentence:	4-year good behaviour bond pursuant to s 9

Appeal allowed by the Court.

The Crown appealed on the grounds of manifest inadequacy of sentence. Error was found in the fact that the sentencing judge appeared to have discarded general deterrence as an irrelevant or scarcely relevant consideration.

Simpson J, with whom the other members of the Court agreed, referred to the authorities of *R v Gent; Assheton v R* (2002) 132 A Crim R 237, and *Mouscas v R* [2008] NSWCCA 181 where general deterrence was said to have been at least a significant element of the sentencing process in child pornography offences, and observed:

> [41] In sentencing for such a crime, it is well to bear firmly in mind that the material in question cannot come into existence without exploitation and abuse of children somewhere in the

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76. Appeal against conviction was upheld and the conviction was set aside in *Annetts (No 2)* [2009] NSWDC 129. The District Court held that the films were for sexual gratification but could not be considered to be in a 'sexual context' or offensive (as required under s91H(1)), even though the conduct leading to the filming (ie, loitering in change rooms for prurient purpose) could be so considered: [12], [17]–[19]. Noted that a separate offence regime has been created for voyeurism, which reinforced the view that such material might not necessarily fall within the definition of child pornography: [20].

77. Sources: *R v Booth* [2009] NSWCCA 89; JIRS (online) '*R v Booth* [2009] NSWCCA 89' (Recent Law & Announcements, 7 April 2009); (2009) 16(6) *Criminal Law News* [2565].

> world. Often this is in underdeveloped or disadvantaged countries that lack the resources to provide adequate child protection mechanisms. The damage done to the children may be, and undoubtedly often is, profound. Those who make use of the product feed upon that exploitation and abuse, and upon the poverty of the children the subject of the material.
>
> [42] What makes the crime callous is not just that it exploits and abuses children; it is callous because, each time the material is viewed, the offender is reminded of and confronted with obvious pictorial evidence of that exploitation and abuse, and the degradation it causes.
>
> [43] And every occasion on which an internet child pornography site is accessed (or when such material is accessed by any means at all) provides further encouragement to expand their activities to those who create and purvey the material.
>
> [44] It is for that reason that this is a crime in respect of which general deterrence is of particular significance. In my opinion the sentencing judge too readily dismissed from consideration the need to convey the very serious manner in which courts view possession of child pornography.

Error was also found in that the sentencing judge inappropriately took into account as a mitigating factor, on a charge of possession, that the respondent had not further distributed the material in his possession [46]. No penalty other than one requiring a term of full time custody was sufficient to meet the sentencing requirements [48].

Sentence outcome: Term of imprisonment 2 years, NPP 6 months.

Alcohol-related violence/'glassing' offences

SK v R [2009] NSWCCA 21[78]

Date of judgment:	13 February 2009
Appeal details:	Appeal by the offender against sentence
Charges:	Maliciously inflicting grievous bodily harm with intent to do grievous bodily harm, s 33 *Crimes Act 1900* (NSW)
Lower court sentence:	Term of imprisonment 12 years, NPP 8 years.

Appeal dismissed by the Court.

The principal ground of appeal was that the sentencing judge had failed to take into account the offender's intoxication when she pushed the victim off a railway platform into the path of an oncoming train, as a mitigating factor. The offender had a history of alcohol abuse and referred to drinking as being part of her work culture, with one prior conviction for a mid range PCA (prescribed concentration of alcohol). The sentencing judge did not find that the offence was materially mitigated by the offender's intoxication.

Blanch J, with whom the other members of the Court agreed, observed:

> [7] Intoxication may sometimes assist in assessing the degree of deliberation involved in the offence: see *R v Coleman* (1990) 47 A Crim R 306 at 327. It may also be something which is treated as an equivocal factor which simply explains the context of the crime: see *R v Fletcher-Jones* (1994) 75 A Crim R 381. It is also something which can be taken into account in assessing the objective seriousness of a standard non-parole period and *R v Fryar* [2008] NSWCCA 171 is a case where it was suggested the intoxication had been given too much emphasis in

78. Sources: *SK v Regina* [2009] NSWCCA 21; (2009) 16(3) *Criminal Law News* [2519].

> assessing the criminality at a lower level: see also *R v Mitchell* [2007] NSWCCA 296. It should also be noted the applicant knew she had a problem with self-control when intoxicated and she had previously taken steps to correct this.

In dismissing the appeal the Court confirmed the sentencing judge's analysis of the offender's actions as having been quite deliberate and noted that the relevance of intoxication was a question of fact and degree in each case. It was held that the seriousness of the offence warranted no lesser sentence, and that the evidence provided in relation to the applicant's placement in the special management area did not justify any mitigation of the sentence [9]–[10].

R v Miria [2009] NSWCCA 68[79]

Date of judgment:	13 February 2009
Appeal details:	Crown appeal against sentence
Charges:	Maliciously inflict grievous bodily harm with intent s 33
Lower court sentence:	2 years suspended sentence by way of s 12

Crown appeal against sentence was allowed by the Court.

The offence, which occurred just outside hotel premises in the early hours of the morning, arose as a result of the respondent swinging his hand, which was holding a schooner glass, towards the victim resulting in it smashing against the victim's head and neck [2]. The respondent had three prior assaults on his record, two of them occurring in hotels in similar circumstances [3].

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79. Sources: *R v Miria* [2009] NSWCCA 68; JIRS (online) CCA summary *R v Miria* [2009] NSWCCA 68; JIRS (online) '*R v Miria* [2009] NSWCCA 68' (Recent Law & Announcements, 24 March 2009); (2009) 16(4) *Criminal Law News* [2530].

The sentencing judge had stated in his remarks: 'The general deterrent effect of any sentence is debatable, given that it will at best be published as a statistic and thus unlikely to cause anyone else to act differently'.

Grove J, with whom the other members of the Court agreed, observed in upholding the Crown submission that error occurred in this respect:

> [8] The implication of that statement is that his Honour did not incorporate any reflection of general deterrence among the elements constituting his sentence assessment. Such omission was erroneous.
>
> …
>
> [11] It is true that the remark by Williams DCJ concerning debatability has precedent but there is no authority permitting a judge to dismiss general deterrence as a factor for sentence assessment. Of course, in circumstances which are found to be appropriate a particular offender may not be a suitable vehicle for manifesting general deterrence, for example if a mental condition disables the offender from appreciating the level of his wrongdoing: cf *R v Scognamiglio* [1991] 56 A Crim R 81. Nothing attracting that kind of consideration was suggested to be the case in this instance.

Grove J noted that actions of the kind involved in this case fell within a category which had attracted comment by the CCA and that the case was one where the need to include an element of general deterrence looms large, citing Howie J's comments about 'glassing' offences in licensed premises in *Sayin v R* [2008] NSWCCA 307 [17].

Grove J also observed that error arose from the fact the applicant was given credit for offering a plea of guilty in circumstances where there was no attempt by him to seek to have the prosecution accept a plea to a lesser s 35 offence [21].

Sentencing outcome: Re-sentenced to term of imprisonment 4 years, NPP 2 years, to be served by way of full time custody.

Spooner v R [2009] NSWCCA 247[80]

Date of judgment:	28 September 2009
Appeal details:	Appeal by the offender against sentence.
Charges:	Recklessly cause grievous bodily harm s 35(2)
Lower court sentence:	Term of imprisonment of 4 years, NPP 1 year 10 months

Leave to appeal granted, but appeal dismissed by the Court.

The case involved the loss of an eye and facial scarring by the victim occasioned when the offender struck him in the face with a glass after leaving licensed premises.

The Court rejected the submission that the sentencing judge erred in assessing the offence as above mid range. Matters of relevance included:

- the finding that the offender had intended to use the glass as a weapon and was aware that he had it in his hand when he struck the victim;
- the seriousness of the injury to the victim;
- the vulnerability of the victim, who was unarmed and had an arm in a plaster cast; and
- the fact that the group of which the offender was a part were the aggressors in the confrontation [15].

Mcfarlan JA, with whom the other members of the Court agreed, held that the case was distinguishable from the less serious 'glassing' cases

80. Sources: *Spooner v R* [2009] NSWCCA 247; JIRS (online) CCA summary, *Spooner* [2009] NSWCCA 247.

of *R v Willet* (Unreported, NSW Court of Criminal Appeal, 21 August 1998) and *R v Davies* [2007] NSWCCA 178, and was more comparable with the more serious case of *Sayin v R* [2008] NSWCCA 307 [16]–[19].

The Court adopted Howie J's comments in *Sayin* in relation to the prevalence of 'glassing' offences in licensed premises, the need to impose very severe penalties for such offenders, and his Honour's observations that the increased maximum penalty for s 35(2) offences (recklessly inflict grievous bodily harm) to 10 years should result in a marked increase in the penalty for offences of this nature [20].

Miscellaneous

- *Summary offences in the District Court*

McCullough v R [2009] NSWCCA 94[81]

Date of judgment:	8 April 2009
Appeal details:	Appeal by the offender against sentence
Charges:	Count 1: Malicious damage s 195(1)(a) (Form 1 Resist arrest); Count 2: Assault s 61; Count 3: Malicious wounding s 35(1)(a)
Lower court sentence:	Aggregate term of imprisonment 5 years 2 months, NPP 3 years 6 months. Sentences partially cumulative. Count 1 (taking into account the Form 1 offence), fixed term 1 year 7 months; Count 2, fixed term 9 months; Count 3, term of imprisonment 4 years 2 months, NPP 2 years 6 months.

81. Sources: *McCullough v R* [2009] NSWCCA 94; JIRS (online) CCA summary *McCullough v R* [2009] NSWCCA 94; JIRS (online) '*McCullough v R* [2009] NSWCCA 94' (Recent Law & Announcements, 15 April 2009); (2009) 16(5) *Criminal Law News* [2545].

Appeal allowed by the Court.

Error was found in the failure of the sentencing judge to reflect, appropriately, that counts 1 and 2 could have been dealt with in the Local Court, and that the reduced maximum sentences applicable in that court fell below its jurisdictional limit, whereas the sentences imposed exceeded those reduced maximum sentences. In relation to the malicious wounding offence error was found in relation to the finding that the wounding by the applicant of his mother involved gratuitous cruelty under s 21A(2)(f) of the *Crimes (Sentencing Procedure) Act.* Howie J, with whom the other members of the Court agreed, categorised the concept of gratuitous cruelty as follows:

> [30] Gratuitous cruelty seems to me to suggest that the infliction of pain is an end in itself. It is needless yet intentional violence committed simply to make the victim suffer. It might be found, for example, where a robber inflicts pain upon an already compliant victim who was willing to part with the property demanded or in a case of a sexual offence where the victim is assaulted even though he or she is not resisting the offender. But in offences which are of their nature violent, such as wounding or the infliction of grievous bodily harm, where the purpose of the offence is to cause pain and suffering to the victim there needs to be something more for the factor to be present than merely that the offender had no justification for causing the victim pain.
>
> [31] There may be cases of malicious wounding where the factor is present because of the nature or purpose of the wounding, for example where it involved a type of torture. In *TMTW v R* [2008] NSWCCA 50 the applicant inflicted pain on the victim by the use of a pair of pliers applied to the victim's penis and scrotum. It was held that the judge was correct to find that offence was committed with gratuitous violence. In *R v Olsen* [2005] NSWCCA 243 gratuitous cruelty was found by reason of the infliction of a very large number of injuries to a very young child. But there was nothing in the present case that gave rise to this factor of aggravation in the nature of the attack upon the victim.

Howie J also observed that count 3 charged an offence of malicious wounding, not one of maliciously inflict grievous bodily harm. Although both offences are captured by the same section of the *Crimes*

Act, His Honour pointed out that they are two distinct offences and noted:

> [37] Malicious wounding is principally a result offence. Generally speaking the seriousness of the offence will significantly depend upon the seriousness of the wounding. That is not to say that the manner in which the wound was inflicted, the reason for the infliction of the wound and the circumstances surrounding the wounding are irrelevant. The same can be said for an offence involving the infliction of grievous bodily harm: the more serious the harm inflicted the more serious the offence: see *R v Mitchell and Gallagher* [2007] NSWCCA 296; 177 A Crim R 94 at [27].

In the context of the offence charged, it was held to be an error for the sentencing judge to take into account other injuries inflicted upon the victim that were not 'wounds' within the meaning given to that element, or the consequence to her of those other injuries [38]–[39].

Substantial criticism was made by the Court in relation to the manner in which the prosecution was conducted, including the selection of inappropriate charges, the failure to assist the Court in relation to the matters included in the indictment that could have been dealt with in the Local Court, and the provision of submissions on sentence that were erroneous, unduly inflammatory and irresponsible.

Sentence outcome: New aggregate sentence 3 years 4 months, NPP 2 years 4 months. Sentences partially cumulative. Count 1 (taking into account the Form 1 matter) fixed term 9 months; count 2, fixed term 3 months; count 3, 2 years 8 months, NPP 1 year 8 months.

- *Summary jurisdictional limit*

Lapa v R [2008] NSWCCA 331[82]

Date of judgment:	19 December 2008
Appeal details:	Appeal by the offender against sentence
Charges:	Break, enter and steal s 112 (summary jurisdiction), deemed supply heroin s 25(1)/s 29 *Drug. Misuse and Trafficking Act 1985*
Lower court sentence:	Aggregate term of imprisonment 5 years 2 months, NPP 3 years 8 months. Partially cumulative sentences: Break, enter and steal total term of imprisonment 23 months, NPP 17 months; deemed supply heroin total term of imprisonment 5 years, NPP 3 years 6 months.

Appeal dismissed by the Court, which confirmed, applying *R v Doan* (2000) 50 NSWLR 115, that, in relation to a break enter and steal offence that was dealt with summarily in the Drug Court, the two-year jurisdictional limit did not preclude the sentencing court determining a starting point for the sentence in excess of that limit, so long as the sentences actually passed, after a deduction for the plea of guilty, fell below that limit.

- *s 21A(2)(g) 'Substantial emotional harm'*

Clarke v R [2009] NSWCCA 13[83]

Date of judgment:	13 February 2009
Appeal details:	Appeal by the offender against sentence

82. Sources: *Lapa v R* [2008] NSWCCA 331; (2009) 16(1) *Criminal Law News* [2482].

83. Sources: *Clarke v R* [2009] NSWCCA 13; JIRS (online) CCA summary *Clarke v R* [2009] NSWCCA 13; (2009) 16(3) *Criminal Law News* [2517].

Charges:	Aggravated indecent assault (person under 16) s 61M(1)
Lower court sentence:	Term of imprisonment 2 years, NPP 1 year.

Appeal dismissed by the Court.

In sentencing the applicant two circumstances of aggravation were found, namely that the assault was a breach of trust, and that the complainant had suffered substantial emotional harm arising from the rupture of family relationships after the victim went to the police, within the meaning of s 21A(2)(g) of the *Crimes (Sentencing Procedure) Act*. In rejecting a ground of appeal that there was error in taking this second matter into account Kirby J, with whom the other members of the Court agreed, held:

> [14] Dealing first with the question of causation, the harm to the victim must be limited to those consequences which were intended or reasonably foreseeable (*R v Wickham* [2004] NSWCCA 193, per Howie J at [25], although see limitation in *Siganto v The Queen* (1998) 194 CLR 656 at 667, [35].). It was predictable that, where a person such as a father or step father, or a person in the position of Mr Clarke in relation to his partner's sister, indecently assaulted or sexually molested another person, the victim may complain. If there were a complaint, emotional harm and the potential for rupture to family relationships may occur. In my view, the harm occasioned by the offence is not limited to the physical or emotional reaction by the complainant to the assault itself.

Kirby J determined that it was open to the sentencing judge to characterise this emotional harm as substantial [15]–[16].

- *Lengthy determinate sentence and age of offender at expiration of sentence*

Barton v R [2009] NSWCCA 164[84]

Date of judgment:	25 June 2009
Appeal details:	Appeal by the offender against sentence
Charges:	Manslaughter s 24; attempted murder s 30; murder s 19A
Lower court sentence:	Aggregate term of imprisonment 42 years, NPP 35 years. Partially cumulative sentences. Manslaughter, fixed term of 5 years; attempted murder, fixed term of 13 years; murder, term of imprisonment 37 years, NPP 30 years.

Appeal dismissed by the Court.

The applicant was convicted of the manslaughter by shooting of M; and of the murder of one child of M and attempted murder of a second child of M by setting fire to a house in which they were asleep having been given methadone by him. The applicant submitted, having regard to the fact that he would be 82 years of age when eligible for parole, that the sentencing judge had erred in imposing a life sentence 'in disguise', notwithstanding having declined to impose a life sentence pursuant to s 16(1) of the *Crimes (Sentencing Procedure) Act*.

Giles JA, with whom the other members of the Court agreed, observed:

> [17] The submission is contrary to principle, and involves flawed reasoning. If a life sentence is imposed, there is imprisonment for however long the period may be until the offender's death: as the judge observed, the imposition of a life sentence upon an offender "means that he or she has no prospect of release, save for the prerogative of mercy". There

84. Sources: *Barton v R* [2009] NSWCCA 164; JIRS (online) CCA summary *Barton v R* [2009] NSWCCA 164; (2009) 16(7) *Criminal Law News* [2582].

> is a fundamental difference between a determinate sentence expiring when the offender is of advanced age and a sentence enduring until the offender dies, since the offender may live well beyond the expiry of the determinate sentence. It is not correct to regard the former sentence as a surrogate for the latter, or to reason that declining to impose a life sentence pursuant to s 61(1) means that a term of imprisonment expiring in old age can not or should not be imposed. Declining to impose a life sentence means that the qualified obligation in s 61(1) does not apply. It leaves all other sentencing considerations to be applied.

Giles JA observed that a fundamental sentencing principle is that a sentence must reflect the objective seriousness of the offence [22], and reviewed several earlier decisions in which a similar question had arisen and in which divergent views had been expressed. In the result his Honour concluded that the sentence was within the range of discretion and did not overlook the fact that the sentence would not expire until the applicant was well into old age [27].

PUBLICATIONS

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

NSW

Bradford, D. and Smith, N., *An Evaluation of the NSW Court Liaison Services* (NSW Bureau of Crime Statistics and Research, 2009)

This study evaluates the Statewide Community and Court Liaison Service (SCCLS) for adults and the court diversion services provided by the Justice Health Adolescent Court and Community Team. The SCCLS was piloted in 1999 and has since expanded to 21 Local Courts. In the adolescent jurisdiction diversion services operate in five Children's Courts. These services report to the court on mental health issues and deals with referrals to psychiatric health.

The evaluation was twofold:

- Focusing on adult client's experience of the SCCLS, BOCSAR quantitatively examined the effect of the service. Overall, the study found that SCCLS clients had greater contact with the criminal justice system. However, there was a significant decreasing trend in mean offending in the 18-month period following SCCLS intervention (when comparing to the preceding 18-month period) for individuals in the sample group receiving dismissals under the *Mental Health (Forensic Provisions) Act* (a result which did not appear in the control group). With respect to the sample group of remaining individuals with a finalised court appearance, there was a significant drop in mean

offending in the month immediately following contact with the service, with only a slight decrease in the control group. When offenders who received custodial penalties were excluded from analysis, a significant decline in offending frequency was shown.

- BOCSAR canvassed the opinions of stakeholders, including Legal Aid solicitors, Local Court Magistrates, NSW Health, NSW Police and the Department of Corrective Services. The majority felt the impact of the services was positive. Overwhelmingly, the identified strength of the service was its ability to discern the existence of mental health problems and communicate this information to the court. Stakeholders recommended further expansion of the service, with a view to concentrating resources in areas of high need.

Dyer, A. and Donnelly, H., 'Sentencing in Complicity Cases—Part 1: Joint Criminal Enterprise' (Sentencing Trends & Issues No 38, Judicial Commission of New South Wales, 2009)

This paper discusses the sentencing principles that are applicable when an offender is involved in a joint criminal enterprise or is criminally liable by extended common purpose doctrine with respect to offences of homicide, assault and wounding, robbery, kidnapping, and break and enter.

Fitzgerald, J., 'Why are Indigenous Imprisonment Rates Increasing?' (Crime and Justice Statistics Issue Paper No 41., NSW Bureau of Crime Statistics and Research, 2009)

Between 2001 and 2008 the Indigenous imprisonment rate increased by 48 per cent in NSW while non-indigenous rate only rose seven per cent. The article suggests that the reason for the rate rise is the increased severity of the treatment of Indigenous offenders by the criminal justice system. Three quarters of the increase has come from sentenced prisoners (as a result of more Indigenous offenders receiving sentences of imprisonment and for longer periods) while one quarter of the increase has come from remandees (as a result of an increased rate of bail refusal and an increase in time spent on remand for Indigenous offenders). The increase in imprisonment rates does not appear to be a result of increase offending (aside from possibly offences against justice procedures).

The report suggests that the substantial increase in the number of Indigenous people in prison is due mainly to changes in the criminal justice system's response to offending rather than changes in offending itself. The authors consider why this response has had a greater impact on the Indigenous prison population than the non-Indigenous population.

Jones, C., 'Does Forum Sentencing Reduce Re-offending?' (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 129, NSW Bureau of Crime Statistics and Research, 2009)

Forum Sentencing is an adult-focused restorative justice program operating in select parts of NSW. The scheme brings together the offender, the victim(s) of the offender's crime and other people affected by the crime whereby the matter can be dealt with by way of a

community conference rather than a court setting. Participants at the Forum discuss what happened, how the crime has affected the victim(s) and the community and how things can be made better, and a Plan is developed with respect to repairing harm and reducing the likelihood of re-offending.

The study compared Forum Sentencing participants with others who were sentenced in a conventional court setting, by analysing the proportion of participants who were reconvicted, and the time periods between sentencing and re-offending, in each group. There was no evidence that Forum Sentencing participants performed any better on any of these outcomes. The author questioned whether Forum Sentencing has sufficient intensity to act as a rehabilitation program, referring to the literature which contends that programs need to address characteristics of the offenders that can be changed and that are associated with the offender's criminal activities, in order to be effective.

Lulham, R., The Magistrate Early Referral into Treatment Program (MERIT)' (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 131, NSW Bureau of Crime Statistics and Research 2009)

This study investigated the impact of program participation on re-offending by defendants with a drug use problem. MERIT provides defendants with the opportunity of undertaking formal drug treatment while on bail. The research demonstrated that acceptance into the MERIT program, regardless of completion, significantly reduced the number of defendants committing any theft re-offence. In addition, acceptance and completion of the MERIT program significantly reduced the number of defendants committing any type of offence.

Judge S Norrish QC, 'Addressing the Special Needs of Particular Offenders in Sentencing' (2009) 9(3) *Journal of the Judicial Commission of NSW* 267

This article discusses the challenges inherent in meeting the 'special needs' of an offender in the sentencing exercise. 'Special needs' are the inherent or environmental characteristics of the offender arising from the objective circumstances of the offence.

The author highlights the contribution to community safety and protection that is made by the successful rehabilitation of offenders. However, he notes the increasing involvement of legislation and guideline judgements in guiding the sentencing process, which often inhibits the ability of courts to address the causes of offending behaviour or provide a foundation for rehabilitation. He also argues that the capacity of judicial officers to meet the needs of offenders is often constrained by circumstances beyond their control. The author makes suggestions to address these issues, including wider options for sentencing and greater flexibility in the execution of penalties; special prisons (or places within prisons) for the drug addicted, mentally ill, Indigenous, domestic violence offenders and repeat serious driving offenders; judicial education and publications for judicial officers, such as specialist sentencing checklists highlighting available programs and options; and wider use of restorative justice models.

Lulham, R., Weatherburn, D. and Bartels, L., 'The Recidivism of Offenders Given Suspended Sentences: A Comparison with Full-time Imprisonment' (Crime and Justice Bulletin No 136, NSW Bureau of Crime Statistics and Research, 2009)

The number of suspended sentences imposed by the Local Court increased by 300% between 2000 and 2007. This BOCSAR study aimed to determine whether suspended sentences have the same deterrent effect as a prison sentence. For offenders who have never been incarcerated, there was no difference in the re-offending rate

between offenders who received a suspended sentence and those who received a prison sentence. However, for offenders who have been in custody previously, those who received a prison sentence re-offended substantially sooner than those who received a suspended sentence. The study concluded that, contrary to popular opinion, full-time custody is no more effective as a specific deterrent than suspended sentences.

NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2008* (2009)

BOCSAR's New South Wales Criminal Courts Statistics Report 2008 presents data on criminal cases finalised in the NSW Local Courts, Children's Courts, District Court, Supreme Court and Licensing Court. The report reveals certain trends with respect to sentencing, including:

- the proportion of people given a prison sentence by a Local Court increased from 6.9 per cent to 7.2 per cent of those found guilty;
- the proportion of people given a prison sentence by a higher court decreased from 69.9 per cent to 67.8 per cent;
- the proportion of people given a control order by the Children's Court increased by 17.6 per cent; and
- the proportion of Aboriginal and Torres Strait Islander people given sentences of imprisonment in the Local Courts increased from 18.1 per cent to 19.5 per cent of all Aboriginal and Torres Strait Islander people found guilty in those Courts.

Vignaendra, S., Moffatt, S., Weatherburn, D., and Heller, E. 'Recent Trends in Legal Proceedings for Breach of Bail, Juvenile Remand and Crime' (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 128, NSW Bureau of Crime Statistics and Research, 2009)

This paper evaluates the upward trend between 2007 and 2008 in the juvenile remand population in NSW which grew by 32 per cent during this period. The study found that police enforcement of bail laws by way of proceedings for breach of bail, and changes to the *Bail Act 1978* (NSW) which restricted the number of applications for bail that can be made, both contributed to the growth in the number of juveniles on remand. The former increased the number of juveniles placed on remand, and the introduction of s 22A increased the average length of stay on remand. The report notes that it should not be assumed that these were the only factors contributing to the growth in the juvenile remand population.

The study found that most breach of bail proceedings for juveniles were not as a result of the commission of further offences, but were as a result of non-compliance with conditions of bail, and of this group, the most common condition breached was failure to adhere to curfew conditions and not being in the company of a parent.

The study did not find that there was a significant association between the growth in the juvenile remand population and the fall in property crime.

Other jurisdictions

Bartels, L., 'Suspended Sentences in Tasmania: Key Research Findings' (Sentencing Trends & Issues No 377, Australian Institute of Criminology, 2009)

This study examined the use of suspended sentences in the Supreme Court of Tasmania, including reconviction and breach rates.

The study found that offenders serving wholly suspended sentences had the lowest reconviction rates, followed by those serving partly suspended sentences, when compared with offenders who received non-custodial and unsuspended sentences. The author argued that this demonstrates the effectiveness of suspended sentences for some offenders. However, the analysis showed that first time offenders were less likely to be reconvicted following a sentence involving time in custody, as compared with those receiving a non-custodial order or wholly suspended sentences. The study also found that there was a lack of action by prosecuting authorities for breach proceedings, with only five to six per cent of offenders who were in breach of a suspended sentences being returned to court for breach action. The need to improve the management of breaches was therefore highlighted.

Hough, M. et al, 'Public Attitudes to the Principles of Sentencing' (Sentencing Advisory Panel Research Report No 6, Sentencing Advisory Panel (UK), 2009)

In this research report commissioned by the UK's Sentencing Advisory Panel, a representative sample of 1023 adults in England and Wales and eight focus groups were surveyed to gauge their views on the sentencing of adult offenders.

The results of the survey indicated that the UK public do not simply react with punitiveness when dealing with sentencing questions. The findings of the research included that a majority of the participants:

- placed high value on four out of the five sentencing purposes set out in the *Criminal Justice Act 2003* (UK)—namely, public protection, crime prevention, punishment, rehabilitation—with reparation securing the least support;
- saw the use of a weapon, the vulnerability of the victim and previous convictions as aggravating factors;
- did not reach a consensus on particular mitigating factors, but considered that at least some factors were potential sources of mitigation; and
- considered that the decision to impose a prison sentence should be influenced by various aggravating and mitigating factors, rather than the nature of the offence alone. However, they tended not to take into account the interaction between the aggravating and mitigating factors.

The report concluded that, rather than that the sentencing principles were entirely out of step with public opinion, there were public misperceptions about how often prison sentences were imposed and how lenient courts were. Accordingly, such public misperceptions need to be addressed before any fine-tuning of sentencing principles are attempted.

Marshall, J., 'Port Lincoln Aboriginal Conference Pilot: Review Report' (Office of Crime Statistics and Research Sentencing, South Australian Department of Justice, 2008)

The Port Lincoln Aboriginal Adult Conference Pilot is a model combining the elements of the sentencing circle and restorative justice conferencing with the Nunga Court method, with emphasis on victim and Aboriginal Elder participation. Under this model, Aboriginal defendants who reside in Port Lincoln, have familial connections with the local community and plead guilty are eligible to attend a conference prior to the sentencing hearing. Between September 2007 and June 2008 nine referrals to the program were made with seven resulting in a conference. The Office of Crime Statistics and Research conducted a review of the pilot for the period May to June 2008.

Overall, there was a positive response from all stakeholders about the conferencing process and a number of benefits were identified. Nine recommendations were made as a result of the review, dealing with matters including the need for appropriate time and resourcing for conferences, dissemination of information within the community, appropriate training for Aboriginal Elders, and a consideration that follow up procedures be developed, as well as a recommendation that the viability of extending the conferencing to other areas be considered.

The overall finding was that five of the pilot's six aims had been achieved. It was concluded that due to the limited scale of the pilot, the sixth aim 'to give the community more confidence in the sentencing process' had not yet been realised, however, most stakeholders were optimistic in the program's future aim to increase confidence in the sentencing process.

Roberts, L., & Indermaur, D., 'What Australians Think about Crime and Justice: Results from the 2007 Survey of Social Attitudes' (Research and Public Policy Series No 101, Australian Institute of Criminology, 2009)

The results of the 2007 Australian Survey of Social Attitudes (AuSSA) demonstrate that Australians consider crime-related issues to be of importance and would be encouraged if there was more expenditure on police and law enforcement. Newspapers, television and radio were the primary mediums through which Australians were informed of such issues.

Australians believe that crime is increasing, violence is thought to be widespread and offenders are seen as be being treated lightly by the court system. New concerns have developed around identity theft and credit card fraud as well as terrorism. However the majority of Australians view the threat of crime as not imminent in their local communities, and they did not expect to become a victim of crime.

There appears to be confidence in police ability to respond to crime quickly and fairly however there appears to be less confidence in the court system with respect to victims' rights and little confidence in the prison system as a mechanism of deterring offending or rehabilitating prisoners. Support for harsher penalties, including the death penalty, has declined over time.

The article reports that the disparity between the public view and the reality of how much crime is recorded and what happens to offenders after they are charged appears to be a widespread phenomenon and that the continued assessment of public attitudes towards crime and punishment is of pivotal policy importance.

Sentencing Advisory Council (Victoria), Driving While Disqualified or Suspended: Report (2009)

The Council's report considers issues related to the offence of driving while disqualified or suspended and the use of suspended sentences, including a consideration of the mandatory minimum penalty of one month's imprisonment for second and subsequent offences of driving while disqualified or suspended. The Council noted that Victoria's road toll has decreased dramatically since the 1970s to the extent that it is among the lowest in the developed world. There has been an increase in the number of Victorians who continued to drive with their license suspended, however: in 2007–08 it was the second most common offence found proven by the Magistrates Court.

The Council found that the mandatory minimum penalty for driving whilst disqualified or suspended was one of the major factors that has lead to the high use of suspended sentences of imprisonment in the Magistrates Court. The Council recommended that the mandatory minimum penalty be abolished: it considered that the mandatory minimum penalty is no longer an effective means to protect the community against future offences, it does not facilitate the offender's rehabilitation, it has limited capacity to prevent re-offending and it can result in penalties that are disproportionately high as compared with other related offences, as well as cause a strain on the criminal justice system. The Council recommended a number of what it considered to be more effective alternative approaches to address deterrence, incapacitation and rehabilitation. These recommended alternatives involved measures providing for increased detection, the use of impoundment, immobilisation and forfeiture of vehicles as a form of punishment, earlier intervention for drink drivers, and the establishment of a specialist list in the Magistrate's Court for repeat offenders.

Sentencing Advisory Council (Victoria), Maximum Penalties for Sexual Penetration with a Child under 16 (2009)

The adequacy of the maximum penalty for the offence of sexual penetration with a child under 16 years came to media attention through a County Court case where the offence occurred two weeks after the victim had turned 10 years of age. As the child was 10 years old at the time the available maximum penalty was 10 years imprisonment. However if the event had occurred two weeks prior, when the child was under 10 years of age, the maximum penalty of 25 years imprisonment would have been available. This matter drew attention to the 15-year discrepancy between the maximum penalties applying to offences committed against a child under 10 years of age and those where the victim is between 10 and 16.

The report reveals that between 2006–07 and 2007–08 the average term of imprisonment for an individual charge of sexual penetration (child under 10) was 3.3 years (maximum penalty 25 years); for an individual charge of sexual penetration (care, supervision or authority) was 3.6 years (maximum penalty 15 years); and for an individual charge of sexual penetration (aged between 10 and 16) was 2.3 years (maximum penalty 10 years). The average total effective imprisonment sentence was higher, at 6.7, 8.8 and 4.2 years respectively. Victims of crime, victim support organisations and police argued that the terms of sentence for the individual charges and for the total imprisonment sentences were too low when considered in the context of the seriousness of child sex offences and the relevant maximum penalties.

The Council's view was that increasing the statutory maximum penalty would not significantly increase the current sentencing practices for such offences. The current maximum penalties were not

considered to be inadequate. The development of a guideline judgment was considered to be a more effective method of addressing the low sentencing practices in relation to these offences.

The Council did recommend however that the lower age for this offence be increase from 'under 10' to 'under 12' to reflect the vulnerability of pre-teen children.

Sentencing Guidelines Council (UK), *Attempted Murder: Definitive Guideline* (2009)

The UK Sentencing Guidelines Council's guideline, 'Attempted Murder' applies to adult offenders sentenced on or after 27 July 2009.

The guideline notes that an assessment of the seriousness of an offence of attempted murder is to be made by considering the culpability of the offender, which includes consideration of the harm caused, intended to be caused or that might foreseeably have been caused, and the degree of planning involved (including whether a weapon was used). It divides offences of attempted murder into three levels: exceptionally or particularly high level of seriousness, other planned attempts to kill, and other spontaneous attempts to kill. For each level, the degree of harm dictates the starting point of a sentence and the sentencing range for the offence.

Sentencing Guidelines Council (UK), Sentencing for Fraud—Statutory Offences: Definitive Guideline (2009)

This guideline applies to adult offenders sentenced for statutory offences of fraud on or after 26 October 2009.[85]

Since some fraudulent activity can result in conviction for multiple offences, the guideline groups such activities into different types of fraud (eg, confidence fraud, benefit fraud, banking and insurance fraud) instead of specific offences, to encourage a consistent approach. The guideline sets out starting points and ranges for these types of fraud. The guideline notes that, in sentencing for fraud offences, the main consideration is the seriousness of the offending, which is assessed by reference to: the offender's culpability; the harm caused, intended to be caused or that might foreseeably have been caused; the level of planning; the determination with which the offender committed the offence; and the value of the money or property obtained by fraud. It also sets out the aggravating and mitigating factors which would have an impact on the culpability of the offender or the degree of harm to the victim.

The guideline provides that a fine normally should not be imposed in addition to a sentence of imprisonment for statutory fraud offences, given the extensive powers relating to compensation, forfeiture, confiscation, and seizure of assets or the proceeds of crime (unless certain circumstances apply). It also provides guidance on the types of ancillary and other orders relating to property that must, or are most likely to, be considered for such offences (eg, compensation orders,

85. It does not apply to the common law offence of cheating the public revenue or conspiracy to defraud.

deprivation orders, disqualification from acting as a company director).

Taylor, N., 'Juveniles in Detention in Australia, 1981–2007' (AIC Reports: Monitoring Reports 05, Australian Institute of Criminology, 2009)

The paper provides an overview of juveniles in detention in Australia. Since 1981 the detention rates of young people aged 10 to 17 years has decreased by 51 per cent. The decreases apply to both males and females, though young males are nine times more likely than young females to be in detention. The study shows that Indigenous youth are incarcerated at a much higher rate than non-Indigenous youth. Although the rate of detention of Indigenous young people decreased and then stabilised up until 2006, there has been a sharp increase in numbers recorded after this date.

Other key findings of the report are that; only a small proportion of young people found guilty in the children's courts in Australia were sentenced to detention during 2006 to 2007 (about five per cent); the rates of detention for all young people has decreased by 51 per cent since 1981, and the majority of detainees are between the ages of 15 to 17. The over representation in detention of Indigenous young people relative to non-Indigenous young people remains very high, with Indigenous young people 28 times more likely than non-Indigenous young people to be detained at 30 June 2007. The proportion of juveniles remanded in detention (as opposed to sentenced) at 2002 was 50 per cent, but there has been an upward trend in this percentage since 2002, with 58 per cent of detained juveniles on remand at 30 June 2007.

Warner, K., Davis, J., Walter, M., Bradfield, R., and Vermey, R., 'Gauging Public Opinion on Sentencing: Can Asking Jurors Help?' (Trends and Issues in Crime and Criminal Justice No 371, Australian Institute of Criminology, 2009)

The study, examined whether jurors could be used to gauge public opinion on sentencing, and also as a means of better informing the public about crime and sentencing issues. The study involved examining jurors from trials in the Tasmanian Supreme Court at several stages during and after the sentencing process.

The paper suggests that, despite problems in attaining a truly representative public sample, using members of the public who have been involved in a jury trial has potential as a new methodology, as jurors have a detailed knowledge of the offence and a sense of the offender, and their opinions are based on informed judgements rather than uninformed or intuitive responses. The results indicated that jurors, with specific knowledge of the case, tended to be less punitive than public opinion polls would suggest. Jurors appeared least satisfied about the severity of sentences for sex offenders.

The authors suggested that jury surveys might be considered as a complementary approach to measuring public opinion, and noted the possibility that they might provide insights into the nature of public opinion and its relationship with knowledge of criminal law and sentencing matters.

Weatherburn, D., Vignaendra, S. and McGrath, A., 'The Specific Deterrent Effect of Custodial Penalties on Juvenile Reoffending' (AIC Reports: Technical and Background Paper No 33, Australian Institute of Criminology, 2009)

The aim of this study was to determine whether juvenile offenders who received a custodial penalty were more likely to re-offend than

juveniles who received a non-custodial penalty. The study compared a group of juveniles who had been given detention sentences with a group of juveniles given non-custodial sentences. The study found no significant difference between the two groups in the likelihood of reconviction. This result differs from the two other Australian studies that had been conducted on the issue, which found evidence that juveniles given custodial sentences were more likely to be reconvicted. The study noted the adverse effects of imprisonment on employment outcomes and noted that this factor, coupled with the lack of strong evidence that custodial penalties had a deterrent effect on juvenile offending, suggested that custodial penalties should be used very sparingly on juvenile offenders.

PART FOUR: ANNEXURES

Annexure A: Sentencing Council membership

The current members of the NSW Sentencing Council are:

The Hon Jerrold Cripps QC, Chairperson

The Hon Jerrold Cripps QC commenced his term as Chairperson of the Council on 14 November 2009 having recently completed a five-year term as Commissioner of the Independent Commission Against Corruption (ICAC). He practised as a barrister in New South Wales and was appointed Queen's Counsel in 1974. He was appointed to the District Court of New South Wales in 1977, was Chief Judge of the Land and Environment Court from 1985 to 1992, and was appointed to the Supreme Court in 1992.

Mr Cripps has also served as chairman of the NSW Legal Aid Commission, president of the NSW Anti-Discrimination Board and a part-time commissioner of the NSW Law Reform Commission

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.

The Hon James Wood AO QC, NSW Law Reform Commission

The Hon James Wood AO QC was Chairperson of the Council from April 2006 to November 2009. 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.

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 Force

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 Nicholas 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 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 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 Human Services NSW

Ms Mason was appointed as the Director-General of the Department of Human Services NSW in July 2009, having previously held the position of Director General of the NSW Department of Community Services and 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, Department of Justice and Attorney General

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 Department of Justice and Attorney General and represents the Council in this capacity.

Professor David Tait, University of Western Sydney

David Tait is Professor of Justice Research at the University of Western Sydney, with a special interest in how court processes and spaces are experienced by justice participants. He leads four national Australian Research Council-funded research projects about jury decision-making, use of video communications with remote witnesses, court safety and security and the democratic aspects of the jury experience. In the area of sentencing he has done research on the use of imprisonment by magistrates, suspended sentences in Victoria, the impact of penal severity of magistrates on recidivism in NSW local courts, the use of sentencing information systems, and the role of juries in sentencing in France.

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.