SENTENCING TRENDS

AND PRACTICES

2010

A Report of the NSW Sentencing Council

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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Observers

The Council acknowledges the participation of Mr Luke Grant, Assistant Commissioner, Corrective Services NSW, in its meetings.

Former Members

The Hon Alan Abadee AO RFD QC, Chairperson

The Hon J P Slattery AO QC, Deputy Chairperson

The Hon John Dunford QC, Deputy Chairperson

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[1] Mr Hunt resigned from the Council in January 2011.

Mr Chris Craigie SC, former Acting Senior Public Defender

Assistant Commissioner Chris Evans APM, NSW Police Force

Mrs Jennifer Fullford, Community Representative

Mr Norman Laing, formerly NSW Aboriginal Land Council

Commander John Laycock APM, NSW Police Force

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The Hon Judge Peter Zahra SC, former Senior Public Defender

Assistant Commissioner Paul Carey APM, NSW Police Force

Officers of the Council

Executive Officer

Anna Butler (August 2009 – September 2010)

Sarah Waladan (September 2010 – present)

Research Officer

Huette Lam[2]

Viviane Mouait

Student Intern Program

Marissa Conomos (University of New South Wales)

Jack Murray (University of Wollongong)

Xinyi Lim (University of New South Wales)

Alexandra Young (University of Wollongong)

[2] Huette Lam resigned from the position of Research Officer in September 2010 and Viviane Mouait commenced in 2011.

CONTENTS

INTRODUCTION AND OVERVIEW

The NSW Sentencing Council ('the Council') is now in its eighth year of operation. This is its seventh statutory report on sentencing trends and practices,[3] and covers the period from publication of the 2008-2009 report until December 2010.

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 during the reporting period 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.

[3] 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.

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
- to educate the public about sentencing matters.

Council membership

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

On 25 May 2010 the following members were appointed to the Council:

- Ms Megan Davis, Director, Indigenous Law Centre, University of New South Wales was appointed as the member with expertise or experience in Aboriginal justice matters
- Mr Harold Hunt was appointed as a member representing the general community
- The Hon Acting Justice Roderick Howie QC was appointed as a representative with expertise in criminal law.

These appointments followed the retirement of Norman Laing in July 2009, Ms Jennifer Fullford in December 2009 and the Hon John Dunford QC in April 2010.

On 28 September 2010, Assistant Commissioner David Hudson APM was appointed as a representative with experience in law enforcement, replacing Assistant Commissioner Paul Carey APM who retired from the Council in April 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 Department of Justice and Attorney General throughout 2010. 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 Council's references examining the use of good behaviour bonds and non-conviction orders, and the proposed increase of the jurisdiction of the Local Court in criminal cases.

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.

The Council has contributed to the development and agenda of other sentencing councils and like bodies, and discussions have been held with them regarding our legislation and core activities. For example, in April 2010 the Chairperson and the Executive Officer met with representatives from the Queensland Department of Justice and Attorney General, to discuss the establishment of a sentencing council in that State.

In August 2010, Lord Justice Leveson, the Senior Presiding Judge for England and Wales and Chairman of the UK Sentencing Council, met with the Council to discuss various sentencing issues of mutual interest.

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 at least 27 times in this reporting period, on issues as diverse as sexual offences, child pornography, alcohol-related violence, public confidence in the criminal justice system and the development of community-based sentencing options.[4]

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.

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.[5] Throughout 2010 the Council has continued its active involvement 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 Tamworth, Newcastle and Dubbo with a panel of guest speakers presenting on different aspects of the criminal justice process followed by a Q&A session with the audience. The Council has been involved in all the forums to date with the Chair, the Deputy Chair, Mr Mark Ierace SC and Mr Howard Brown OAM participating as panel members.

Other guest speakers have included:

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[4] See Hansard & Papers, Parliament of NSW, available at: http://www.parliament.nsw.gov.au/prod/web/common.nsf/V3HHBHome. The Council has been cited in relation to a number of bills and criminal justice issues including; the *Crimes (Sentencing Procedure) Amendment Bill 2010*; *the Crimes (Serious Sex Offenders) Amendment Bill 2010; the Crimes (Sentencing Procedure) Amendment Bill 2010; the Crimes (Sentencing Legislation Amendment (Intensive Correction Orders) Bill 2010; the Crimes Amendment (Child Pornography and Abuse Material) Bill 2010;* and the *Crimes Amendment (Police Pursuits) Bill 2010*.

[5] 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.

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

PART TWO: PROJECTS UPDATE

Projects completed in 2010

During the period under review the Council produced a report in response to two references, for the Attorney General, a revised Sentencing Information Package and advices to the Attorney General as required.

Review of personal violence offences finalised in the Local Court and Review of the jurisdictional limit of 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.

In December 2009, the Attorney General requested that the Sentencing Council examine the relative merits of increasing the sentencing powers of the Local Court in respect of:

(a) the maximum penalty that may be imposed in respect of a single offence (from two to five years imprisonment)

(b) the maximum property value in relation to indictable 'break and enter' offences that may be dealt with summarily under Chapter 5 of the Criminal Procedure Act 1986 (from $15,000 to $60,000).

In examining these proposals, the Council is to specifically consider the following matters:

- an analysis of any cases currently heard in the Local Court in which there is an identifiable concern that the jurisdictional limit is leading to sentences that do not reflect the objective criminality of the offences
- the impact of the proposals on the workloads of affected agencies including the Local and District Courts, police prosecutors, the Office of the Director of Public Prosecutions, Legal Aid Commission, Aboriginal Legal Service, Corrective Services NSW and the State Parole Authority and their capacity to accommodate the change in jurisdiction
- whether existing avenues of appeal are adequate

- the potential impact of the proposals on the incidence of guilty pleas and jury trials
- the likely effect on rural, remote and Aboriginal communities.
- any other matter.[6]

Having regard to the potential width of the references and the need to obtain and review transcripts of proceedings in the Local Court, the Council chose to use the personal violence cases as a basis for this review of the jurisdictional limit of the Local Court. In making that decision, and in monitoring the disposition of these cases over a period of 4 years, it was influenced by the fact that serious offences of personal violence are likely to attract sentences that will approach the jurisdictional limit of the Local Court or that could well have exceeded that limit if determined in the District Court.

The Council presented its report to the Attorney General, and it was released, in January 2011. The Council's recommendations included:

- that the jurisdictional limit of the Local Court, in respect of imposing sentences of imprisonment, not be enlarged to 5 years
- that the *Criminal Procedure Act* be amended to apply a uniform 2 year maximum jurisdictional limit to all Table 1 and 2 offences
- that a narrowly confined discretion be introduced, on the part of a magistrate, to refer cases to the District Court for sentencing where, following a plea of guilty or conviction after a hearing, it is satisfied that any sentence it could impose would not be commensurate with the seriousness of the offence
- that a general review of the *Crimes Act* be undertaken to determine whether any additional offences should be included in Tables 1 and 2 and whether any offences currently included in the Tables should be re-categorised as strictly indictable.

Advices and other matters

- In March 2010, the Council advised the Attorney General in relation to the Chief Judge's proposal to reform legislation dealing with sentencing

[6] This reference followed a request from the Attorney General for the Council's advice on a proposed increase the jurisdiction of the Local Court in April 2009. The Council's advice was provided to the Attorney General in August 2009.

procedure for multiple offences, and in particular, in relation to two options for reform that were proffered, similar fact situations in non-serious offences; and streamlining the process for serious offences.

- In April 2010 the Council delivered an interim advice in relation to the jurisdictional limit of the Local Court, recommending an increase of the maximum property value for indictable break and enter offences that may be dealt with summarily, to $60,000.
- In August 2010, the Council consulted with Corrective Services NSW in relation to the Statutory Review of the Compulsory Drug Treatment Program and the Compulsory Drug Treatment Correctional Centre.
- In October 2010 the Council advised the Attorney General in relation to certain matters concerning the administration of the Cedar Cottage Pre-Trial Diversion of Offenders Program, including (amongst other matters) ways in which the program could better balance its therapeutic and rehabilitative functions with the community's expectations that the offenders receive adequate punishment.

Current projects

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. 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 has gathered relevant statistics in relation to this reference and will report to the Attorney General in 2011.

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[7] 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 particular offence in the Table, and by which the relevant SNPP is set

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

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 2011.

Standard non-parole periods and driving offences

In June 2010, the Attorney General asked the Council, as part of its consideration of SNPPs and guideline judgments in accordance with the March 2009 Reference, to also consider the question of introducing SNPPs for dangerous driving offences. Specifically, the Council was asked to consider; whether SNPPs should apply to such offences, at what level they should be set and any implications for the existing guideline judgment in respect of these offences.

The Council will also report to the Attorney General early in 2011 in relation to this part of the SNPP reference.

Examination of the use of suspended sentences

In September 2009, the Attorney General requested the Council to undertake an examination of the use of suspended sentences in accordance with the following terms of reference:

1. An analysis of whether the use of suspended sentences has had any direct effect on the use of other sentencing options, including custodial and non-custodial options
2. An examination of the extent to which the imposition of suspended sentences has exposed persons to the risk of imprisonment who would not otherwise have been sentences to imprisonment
3. An analysis of the primary reasons behind judicial decisions to impose suspended sentences in preference to other sentencing options, including:
    a) judicial attitudes to alternative sentences
    b) availability of other options
    c) increased maximum penalties.
4. The identification of current community attitudes and expectations in relation to the use of suspended sentences

5. An examination of recorded breaches; including the nature of the breach and the response
6. An examination of whether the issues identified in relation to the above matters require reform
7. An exploration of any options for reform
8. Any other relevant matter.

The Council will consult with stakeholders in 2011 and review the report of the Victorian Sentencing Advisory Council, which has reviewed the operation of suspended sentences in that jurisdiction. It will report to the Attorney General in late 2011.

Serious violent offenders

On 20 December 2010 the Attorney General requested the Council to advise on the most appropriate way of responding to the risks posed by serious violent offenders in accordance with the following terms of reference:

1. Advise on options for sentencing serious violent offenders
2. Examine and report on existing treatment options for and risk assessment of serious violent offenders
3. Examine and report on the adequacy of existing post custody management including parole and services available to address the needs of serious violent offenders and to ensure the protection of the community on their release
4. Advise on the options for and the needs for post sentence management of serious violent offenders
5. Identify the defining characteristics of the cohort of offenders to whom any proposal should apply.

The Council will consult with stakeholders in 2011 and report to the Attorney General in 2011.

PART THREE: SIGNIFICANT SENTENCING DEVELOPMENTS

The following section draws from a number of sources including the Judicial Commission of New South Wales' Judicial Information Research System (JIRS) and the LexisNexis Criminal Law News bulletins[8] to identify significant legislative developments that occurred throughout 2010. Reference is also made to the Bills' respective explanatory notes and second reading speeches, and information from the Lawlex website.

NSW Legislative Developments

Children (Criminal Proceedings) Amendment (Naming of Children) Act 2009 (NSW)[9]

In 2008, the Legislative Council's Standing Committee on Law and Justice was asked to review the laws surrounding the naming of juveniles. This Act gives effect to a number of the Committee's recommendations as set out in *Report 35: The Prohibition on the Publication of names of Children involved in Criminal Proceedings (April 2008)*, in relation to the offence of publishing or broadcasting a person's name in a way that connects that person with criminal proceedings involving children, by:

- making the offence more concise and consolidated
- limiting the offence to a publication or broadcast to the public or section of the public by means such as via a newspaper, radio, television or the internet. The offence will not cover legitimate activities of NSW Police, judicial officers and legal practitioners undertaken in the normal course of criminal proceedings
- providing a specific exemption for anything done by a member of court staff or court official such as posting court lists, or calling the name of a child into a court
- allowing a child over the age of 16 to consent to the publication or broadcast of their name if that consent is given in the presence of the legal practitioner of the child's choosing
- setting out an inclusive range of circumstances that the court must consider in determining whether to authorise the publication of the name of a person being sentenced for a serious children's indictable offence

[8] Berman, P., Howie, R. and Hulme, R. (eds), *Criminal Law News* (LexisNexis Butterworths).
[9] Assented to on 3 November 2009. Commenced on 11 December 2009.

- allowing the court to give consent to the publication or broadcast of a deceased child's name, if satisfied that the public interest so requires, in circumstances where the senior available next of kin of that deceased child cannot so consent.

Crimes Amendment (Child Pornography and Abuse Material) Act 2010 (NSW)[10]

This Act amends the *Crimes Act 1900* (NSW), the *Criminal Procedure Act 1986* (NSW) and other legislation to change the law relating to child pornography, to implement certain recommendations made by the Sentencing Council in its report, *Penalties relating to Sexual Assault Offences in New South Wales*[11], and to implement the recommendations of the Child Pornography Working Party, also established on the recommendation of the Council in order to examine issues surrounding the prosecution of child pornography offences. These amendments follow the implementation of a number of other recommendations made in the Council's Report by the *Crimes Amendment (Sexual offences) Act 2008* (NSW).

The Act replaces the term 'child pornography' with 'child abuse material', to cover a broader range of material and to align the law in NSW with that of the Commonwealth.

Also, following the Council's recommendation and the Working Party's further consideration of the issue, the artistic purposes defence formerly in s 91 H of the Crimes Act[12] has been removed.

Instead, the Act adopts the approach of the Commonwealth so that, in deciding whether reasonable persons would regard particular material as offensive, matters to be taken into account now include any literary, artistic, educational or journalistic merit of the material. It is noted that journalistic merit is not included in the Commonwealth provisions—journalistic merit is meant to capture genuine reporting and works of photo journalism that are a record or report of a matter of public interest, which was covered by the old 'public benefit' defence. A narrower public benefit defence is still available.

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[10] Assented to on 28 April 2010. Schedule 2 [4]–[6] and [10] commenced on the date of assent. The remainder has not yet been proclaimed: Crimes Amendment (Child Pornography and Abuse Material) Bill 2010 (NSW) s 2(2); New South Wales, *Government Gazette* No 61 of 7 May 2010, 2079.

[11] NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, August 2008. The full report is available on the Council's website at: http://www.lawlink.nsw.gov.au/lawlink/scouncil/ll_scouncil.nsf/pages/scouncil_publications

[12] This defence applied where 'the defendant was acting for a genuine child protection, scientific, medical, legal, artistic or other public benefit purpose and the defendant's conduct was reasonable for that purpose'.

The Act also amends the *Criminal Procedure Act* to facilitate the use of random sample evidence in child abuse material proceedings so that an authorised analyst can examine a random sample of child abuse material or alleged child abuse material that is the subject of the proceedings. In addition, the *Criminal Procedure Act* is amended to extend the same protections to witnesses in sexual offence proceedings as those afforded to complainants in the proceedings, in cases where the witness alleges that the accused has committed a sexual offence against him or her that is not the subject of the proceedings. The protections include providing for:

- a closed court
- an order, at the discretion of the court, that the identity of a sexual offence witness not be publicly disclosed
- restrictions on cross-examination regarding sexual experience
- a prohibition on the accused from personally examining or cross-examining the witness
- the witnesses to give evidence by alternative arrangements—eg, during an in camera session of court or by CCTV
- the witnesses to have a support person present while giving evidence.

Crimes Amendment (Police Pursuits) Act 2010 (NSW)[13]

This Act introduces a new indictable offence into the *Crimes Act 1900 (NSW*) (s 51B) in relation to drivers who fail to stop a vehicle and drive the vehicle recklessly, or at a speed or in a manner dangerous to others, in circumstances where the driver knows, ought reasonably to know, or has reasonable grounds to suspect that police officers are in pursuit of the vehicle and that the driver is required to stop.[14] The offence is included as a Table 2 offence,[15] to be dealt with summarily unless the prosecutor elects to proceed on indictment. The maximum penalty for the offence is three years imprisonment for a first offence, or five years imprisonment for a subsequent offence.

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[13] Assented to on 18 March 2010. Date of commencement 18 March 2010: *Crimes Amendment (Police Pursuits) Act 2010* (NSW) s 2; New South Wales, *Government Gazette* No 43 of 26 March 2010, 1342.
[14] Explanatory Notes*, Crimes Amendment (Police Pursuits) Bill 2010* (NSW).
[15] That is, an offence listed under Table 2 to Schedule 1 to the *Criminal Procedure Act 1986* (NSW).

The new offence amounts to a 'major offence'[16] under the *Road Transport (General) Act*. Accordingly, a person convicted of the new offence will be automatically disqualified from holding a drivers licence for:

- a maximum period of three years if he or she has not been convicted of any major traffic offences within a five-year period
- a maximum period of five years, if he or she has been convicted of a major traffic offence during the five-year period before the conviction.

The Crimes Amendment (Fraud, Identity and Forgery Offences) Act 2009 (NSW)[17]

This Act introduces the following key amendments into the *Crimes Act 1900*:

- The crime of fraud is updated: The Act repeals over 30 fraud offences in the Crimes Act 1900 (NSW) and replaces those offences with a new Part 4AA containing one general fraud offence (s 192E), and three ancillary offences; intention to defraud by destroying or concealing accounting records (s192F); intention to defraud by false or misleading statement (s192G) and intention to deceive members or creditors by false or misleading statement of officer of organisation (s192H). The maximum penalty for fraud has also been doubled from five years to 10 years imprisonment. The Act introduces a statutory definition of dishonesty (s 4B of the Crimes Act 1900 (NSW)), identical to the definition of dishonesty in clause 130.3 of the Criminal Code Act 1995 (Cth).
- The Act creates three new offences described as identity offences. These offences prohibit the misuse of identification information generally. Section 192I provides a non-exclusive list of identification information. Liability is based on dealing with this information (s 192J), possessing the information (s 192K) and possessing equipment capable of making identification documents (s 192L). All three offences require proof that the accused intended to facilitate or commit an indictable offence. In what appears to be an ellipsis in the drafting, there is no explicit requirement that the identification information be used in the facilitation or commission of the indictable offence. It is suggested that proof of such a link is however the clear intention of Parliament. The legislation imposes no requirement that the indictable offence should be a fraud or false identity related offence.

[16] As defined under s 3(1) of the *Road Transport (General) Act 2005* (NSW).
[17] Assented to 14 December 2009; Commenced 22 February 2010.

Nor is there any requirement that the identification information be used in any misleading or unauthorised manner. The maximum penalty for dealing with identification information is 10 years imprisonmentwith lesser penalties for the other offences.

- The Act updates the law relating to forgery (previously the false instrument offences) and also sets the maximum penalty for forgery at 10 years imprisonment.

The Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010 (NSW)[18]

In accordance with the Council's recommendations in its 2007 Report, *Review of Periodic Detention*[19], this Act introduces the Intensive Correction Order (ICO) as a new sentencing option and abolishes the sentencing option of periodic detention, It amends the *Crimes (Sentencing Procedure) Act 1999, the Crimes (Administration of Sentences) Act 1999* and other laws to allow for sentences of imprisonment to be served by way of intensive community correction.

Where a court sentences an offender to a term of imprisonment for up to two years, the court may direct that the sentence be served by way of an ICO in the community. Offenders who are deemed suitable for an ICO are required to comply with a range of stringent conditions such as reporting, submitting to surveillance or monitoring as directed, community work (a minimum of 32 hours per month) and participation in rehabilitative programs which address the particular offending, as directed.

Sentences for certain sexual offences, cannot be served this way. The Act received assent on 28 June 2010.

Courts and Crimes Legislation Further Amendment Act 2010

The *Courts and Crimes Legislation Further Amendment Act 2010* makes a number of amendments to the *Children (Criminal Proceedings) Act 1987 No 55.* A definition of "relevant offence" is inserted in s 48D. A "relevant offence" means any offence the proceedings for which the Children's Court has jurisdiction to hear and

[18] Assented to on 28 June 2010; LW 17 September 2010.
[19] New South Wales Sentencing Council, *Review of Periodic Detention*, December 2007. A copy of the Report is accessible at: http://www.lawlink.nsw.gov.au/lawlink/scouncil/ll_scouncil.nsf/pages/scouncil_publications

determine other than a prescribed sexual offence, any other serious children's indictable offence or a traffic offence. Section 48F (1) (c) allows for a final youth conduct order to be made even if an interim youth conduct order has not been made. When making a suitability order the Court must be satisfied that it is appropriate for the child to be dealt with under the scheme having regard to the seriousness of the relevant offence, the degree of violence (if any) involved in the offence, any harm caused to any victim, and the number and nature of any previous offences committed by the child (s 48 G (a1)). Pursuant to s4R (2), the Children's Court may make an order directing that the charge for a relevant offence committed (or alleged to have been committed) by a child be dismissed if the child did not plead guilty to (or had not yet been found guilty of) the relevant offence before the Children's Court made a final youth conduct order in relation to the offence, or the child pleaded guilty to the relevant offence before the Children's Court made a final youth conduct order in relation to the offence.

The *Courts and Crimes Legislation Further Amendment Act 2010* also amends the *Children (Criminal Proceedings) Regulation 2005.* It extends the definition of Local Area Command to include the Blacktown Local Area Command, the St Marys Local Area Command, the Liverpool Local Area Command and the Macquarie Fields Local Area Command (clause 4). The Eligibility criteria in clause 5 are amended to include an appropriate connection with a participating Local Area Command. An appropriate connection is established if the person concerned permanently or temporarily resides in, or is an habitual visitor to, the area of the Command or if the relevant offence was committed, or alleged to have been committed, in the area of the Command (clause 5(1A)). The new date after which persons will no longer be eligible to participate in the scheme is 25 February 2012 (clause 5(3)).

Crimes (Serious Sex Offenders) Amendment Act 2010 (NSW)[20]

This Act amends the *Crimes (Serious Sex Offenders) Act 2006* to incorporate a number of the recommendations made by the Sentencing Council in its July 2009 Report entitled "*Penalties Relating to Sexual Assault Offences in New South Wales (Volume 3)*" in relation to the treatment and management of serious sex offenders. It also implements various amendments arising from a statutory review of the Act undertaken by the Department of Justice and Attorney General.

The key amendments include:

- A broadening of the definition of 'serious sex offence' to include:

[20] Assented 7 December 2010.

"an offence by a person that, at the time it was committed, was not a serious sex offence for the purposes of this Act but which was committed in circumstances that would make the offence a serious sex offence if it were committed at the time an application for an order against the person is made under this Act.[21]

- An amendment to the legislative test which the Supreme Court must apply when considering the point at which the community requires protection from a serious sex offender: Whereas previously, it could impose an extended supervision order or continuing detention order if it was satisfied "to a high degree of probability that the offender is likely to commit a further serious sex offence." it is now required to be satisfied that the offender "poses an unacceptable risk of committing a further serious sex offence".[22] This aligns the law in NSW with other jurisdictions which have similar legislation, including Victoria and Queensland.

- An extension of the circumstances where the State of New South Wales may apply to the Supreme Court for a continuing detention order to include circumstances where a person has breached an extended supervision order or an interim supervision order, whether or not the person is in custody.

- The ability for the State of NSW to apply for a continuing detention order against a person who is subject to an extended supervision order or an interim supervision order, if, because of altered circumstances, adequate supervision of the person cannot be provided under an extended supervision order or an interim supervision order. In order for the Court to make such an order, it must be satisfied that circumstances have changed since the making of the existing supervision order and that adequate supervision of the person cannot be provided under that order. This amendment is intended to address the Council's concerns and resulting recommendation in relation to cases where a serious sex offender has practical difficulties in the continued compliance with a condition of the order in circumstances not amounting to a breach, however it does not allow for a variation of the existing supervision order, as recommended by the Council.

- As recommended by the NSW Sentencing Council the Act provides that the views of victims should be taken into account when judges are considering making an order under the Act.

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[21] Section 5 (c1) *Crimes (Serious Sex Offenders) Amendment Act 2010* NSW.
[22] See ss 9 and 9 (2A) Crimes (Serious Sex Offenders) Amendment Act 2010 NSW.

Crimes (Sentencing Procedure) Amendment Act 2010 No 13623

The *Crimes (Sentencing Procedure) Amendment Bill 2010* gives effect to recommendations made by the Sentencing Council in its report *"Reduction in Penalties at Sentence"* and implements a system of aggregate sentencing to simplify sentencing for multiple offences.

Section 53A provides that a court *may* impose an aggregate sentence of imprisonment and, by new s 44(2A), may impose a single non-parole period in respect of that aggregate sentence. The term of an aggregate sentence must not exceed the sum of the maximum sentences for each offence (s 49(2)).

If a court elects to impose an aggregate sentence, it must indicate the sentence that would have been imposed for each offence had separate sentences been imposed instead of an aggregate sentence. For offences for which there is prescribed a standard non-parole period, the Court must indicate the non-parole period that would have been imposed (s 44(2C)).

Section 45 is amended so as to extend the power to decline to set a non-parole period to aggregate sentences.

The imposition of an aggregate sentence is optional. Section 53 is omitted and replaced with provisions that have the effect of maintaining the status quo in terms of complying with the Act in relation to individual sentences imposed (including setting individual non-parole periods) unless the court is imposing an aggregate sentence.

In addition, the *Crimes (Sentencing Procedure) Act 1999* is amended as follows:

- New s 22(1A) provides that a lesser penalty imposed because of a plea of guilty must not be unreasonably disproportionate to the nature and circumstances of the offence.
- Section 23 (powers to reduce penalties for assistance provided to authorities) is amended so as to require a court to indicate that a sentence is being reduced for assistance given in the past or undertaken to be given in the future, to state the penalty that otherwise would have been imposed, and, where the penalty is being reduced for both past and future assistance, to state the amount by which it has been reduced for each of those reasons.

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23 Assented to on 7 December 2010; to commence on a date to be proclaimed.

- Section 24B is inserted so as to provide that a court must not take into account as a mitigating factor the consequences for the offender of any confiscation of proceeds of crime or similar order.

- Section 35A provides for consultation to take place with any victim and police if there is a charge negotiation process. It provides restrictions upon a court taking into account offences listed on a Form 1 document, or any agreed facts, that was the subject of charge negotiations unless the prosecutor files a certificate verifying that consultation has taken place, or explaining why it has not. The certificate must also verify that any agreed facts constitute a fair and accurate account of the objective criminality of the offender.

Commonwealth Legislative Developments

Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010 (Cth)[24]

This Act amends the *Crimes Act 1914* (Cth), the *Criminal Code Act 1995* (Cth) and other legislation 'to ensure the comprehensive coverage of sexual offences against children within Commonwealth responsibility, including reflecting best practice approaches domestically and internationally'.[25]

The Act repeals the existing child sex tourism offence regime under Part IIIA of the *Crimes Act* and move the provisions to the *Criminal Code* (Cth). The *Criminal Code* is amended to simplify the structure of existing child sex tourism offences and to increase the maximum penalties—from 17 to 20 years imprisonment for sexual intercourse with a child under 16, and from 12 to 15 years for other sexual activity with a child under 16. It has also been amended to reinforce the child sex tourism offence regime by:

- introducing new offences for steps leading up to actual sexual activity with a child (grooming, procuring and preparatory offences)

- improving the operation of existing offences for sexual activity with a child

[24] Assented to on 14 April 2010. Sections 1–3 commenced on 14 April 2010; sch 1 commenced on 15 April 2010; sch 2 commenced on 12 May 2010: Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010 (NSW) s 2(1); Commonwealth of Australia, Government Notices Gazette No GN 16 of 28 April 2010, 859.
[25] Explanatory Memorandum, *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010* (Cth).

- introducing new aggravated offences where the offender is in a position of trust or authority and/or the child victim has a mental impairment, and a new offence of persistent sexual abuse of a child. These offences will carry a maximum penalty of 25 years imprisonment

- creating new offences of sexual intercourse or other sexual activity with a young person aged between 16 and 18 where the offender is in a position of trust or authority, which carry maximum penalties of 10 years imprisonment (sexual intercourse offence) or seven years imprisonment (sexual activity offence).

In addition, the Act amends the *Criminal Code* to insert new offences for Australians dealing in child pornography and child abuse materials overseas. Any person found to possess, control, produce, distribute or obtain such material is now liable to a maximum penalty of 15 years imprisonment, or 25 years imprisonment if it involves two or more people and conduct on three or more occasions. The Act also introduces a new aggravated offence targeted at involvement in online child pornography networks, punishable by up to 25 years imprisonment.

In relation to offences using postal or similar services, or carriage services, the Act amends the *Criminal Code* to:

- introduce new offences for using a postal or similar service for child sex-related activity that mirror existing or proposed carriage service offences and penalties

- improve the operation of offences for using a carriage service (eg, internet, mobile phone) for child pornography or child abuse material, or for grooming or procuring a child for sexual activity

- increase the maximum penalty for existing online child pornography or child abuse material offences from 10 to 15 years imprisonment

- insert two new offences—using a carriage service for indecent communications with a child, punishable by up to seven years imprisonment; and using a carriage service for sexual activity with a child, punishable by up to 15 years imprisonment.

Furthermore, the Act amends the *Crimes Act* to introduce a comprehensive scheme for forfeiture of child pornography or child abuse material, or articles containing material, derived from or used in connection with the commission of a

Commonwealth child sex offence. Forfeiture is effected through a notice scheme administered by the Australian Federal Police, or where appropriate, a state or territory police force. A court is able to deal with any disputed forfeiture matters, and to determine any forfeiture applications brought by the Commonwealth Director of Public Prosecutions in civil or criminal proceedings.

Minor consequential amendments are made to the *Australian Crime Commission Act 2002* (Cth), the *Telecommunications (Interception and Access) Act 1979* (Cth) and the *Surveillance Devices Act 2004* (Cth) to ensure existing law enforcement powers are available to combat all Commonwealth child sex-related offences, including the new offences.

Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2010 (Cth)[26]

This Bill will amend the *Criminal Code Act 1995* (Cth) by introducing offences about misrepresentation of age online, to address the fact that in some Australian jurisdictions the police cannot act unless they can prove that a sexual predator has a prurient interest in misrepresenting his or her identity.

The *Criminal Code* (Cth) will be amended to create three offences—in circumstances where an adult sender intentionally misrepresents his or her age in using a carriage service to communicate with a recipient who is, or who the sender believes to be, under 18 years of age, with the intention of:

- misrepresenting his or her age in and of itself
- making it easier to meet the recipient physically
- committing an offence.

These offences are punishable by imprisonment for three, five and eight years respectively.

It will be a defence to any of these offences that:

- the sender reasonably believed that the recipient was not under the age of 18 years at the time the communication was transmitted

[26] The Bill was introduced into the Senate and read a second time on 3 February 2010.

- the conduct is of public benefit and does not extend beyond what is of public benefit. The conduct is of public benefit if it is necessary for, or assists in: enforcing a federal, state or territory law; monitoring compliance with, or investigating a contravention of such a law; the administration of justice; or conducting scientific, medical or educational research that has been approved by the Minister in writing

- the person was a law enforcement, intelligence or security officer acting reasonably in the course of his or her duties at the time of the offence.

CASES

The Council notes the following decisions of relevance for sentencing practice and references undertaken by the Council.[27] 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.

Aggravating and mitigating factors and totality

Kenny v R [2010] NSWCCA 6

Date of judgment:	12 February 2010
Appeal details:	Appeal by the offender against sentence
Charges:	Sexual intercourse with a girl under 16 ss 61M(1) and 66C(3) *Crimes Act 1900* (NSW)
Lower court sentence:	2 years imprisonment; NPP 1 year and 3 months

Appeal dismissed.

The offender appealed on the following grounds:

1. the trial judge wrongly took into account the use of the internet to establish contact and arrange for a meeting with the complainant, as aggravating factor

2. the trial judge wrongly took into account that there was a degree of planning of the offence, as an aggravating factor

[27] The case summaries set out in this section draw from a range of sources including the Judicial Commission of New South Wales' Judicial Information Research System (JIRS) and the LexisNexis Criminal Law News bulletins.

3. the trial judge should have taken into account the fact that the defendant had suffered public opprobrium, as a mitigating factor.

The first two grounds of appeal were based on the argument that the applicant held an honest belief that the victim was not under 16 years of age. The Court dismissed these essentially on the basis that, it did not accept that the defendant had a reasonable belief that the complainant was 16.

Regarding the third ground of appeal; while the Court noted that at the time of the offence, the defendant was a public political figure and had a prior good record, the Court upheld the trial judge's consideration that the applicant had not suffered more public denigration than would have been reasonable given the nature of the offence. Howie J noted that the issue of whether public humiliation that arises from the commission of the offence alone should give rise to a mitigation of sentence appears to be unresolved in the High Court. While in exceptional cases it might reach such proportion that it has some physical or psychological effect on the person so that it could be taken into account as additional punishment, such as occurred in the cases of *R v Allpass (1993) 72 A Crim R 561* and *R v King [2009] NSWCCA 117*, that was not the case here (at [49]).

Einfeld v Regina [2010] NSWCCA 87

Date of judgment:	24 and 26 February 2010
Appeal details:	Appeal by the offender against sentence
Charges:	Perjury s 327 Crimes Act 1900 (NSW), perverting the course of justice s 319 Crimes Act 1900 (NSW)
Lower court sentence:	Aggregate term of imprisonment of 3 years, NPP 2 years. Count 1; term of imprisonment of 21 months, NPP of 14 months; count 2; term of imprisonment of 2 years 3 months, NPP of 15 months

Appeal dismissed.

The applicant sought leave to appeal against the severity of his sentence on a number of grounds, including the following:

i. the Court had failed to take into account his psychological conditions
ii. the Court erred in assessing the seriousness of the offence
iii. there was a failure to give adequate weight to extra-curial punishment

and public humiliation suffered

iv. an inadequate discount was given for the pleas of guilty

v. in relation to count 1, uncharged offences were taken into account

vi. in relation to count 2, numerous elements of falsity were taken into account.

In relation to (i) the Court found that the further evidence tendered on the appeal did not demonstrate that the applicant was suffering from a previously undiagnosed bipolar disorder

In relation to (ii) the trial judge did not err in taking in to account that the applicant was a barrister and had for many years been a judge of a superior Court; these were factors of great significance (at [81]). His status and experience not only rendered him capable of appreciating fully the seriousness of the offences, but also rendered the offences more serious than they would otherwise have been (at [82]-[83]).

In relation to (iii) the sentencing judge was entitled to take into account effective "punishment" of the applicant which arose beyond the confines of the sentences imposed by the Court; these factors included the revocation of his commission as Queen's Counsel and the non-renewal of his practising certificate (at [92] and [95]). These factors were taken into account and given adequate weight by the sentencing judge; it was appropriate for the public opprobrium he had suffered and the public destruction of his reputation (at [98]).

The sentencing judge did not err in his approach to these matters. He was also entitled to take into account, as a matter of aggravation, that the applicant had allowed himself to be addressed by the title "Justice" in giving evidence, at a time when he was not a judicial officer (at [109]).

In relation to (iv) the reduction in sentence in recognition of the value of pleas of guilty was not inappropriate given that the pleas were not entered at the earliest stage available in the proceedings (at [123]).

In relation to (v) and (vi); the charge of perverting the course of justice was correctly formulated in terms of a single act of making a statement to police. The sentencing judge was not in error in taking into account the fact that the statement was false in numerous respects (at [132]). It was not incorrect to take them into account as elements of aggravation in respect of a single offence (at [139]).

TG v R [2010] NSWCCA 28

Date of judgment:	2 March 2010
Appeal details:	Application by offender for leave to appeal against sentence
Charges:	4 counts dangerous driving occasioning death s 52A(1)
Lower court sentence:	4 years imprisonment, NPP 2 years; subject to an Order pursuant to s 19(1) of the *Children (Criminal Proceedings) Act* 1987 that the applicant serve his sentence as a juvenile offender until he attained the age of 21

Appeal dismissed.

Various grounds of appeal against the severity of the sentence were raised. It was submitted that regardless of the success or otherwise of any particular ground a reduction of the non-parole period to 20 months was appropriate so as to permit T's release prior to his 21st birthday, so as to avoid him serving any part of the sentence in an adult prison. It was asserted that this would aid in his rehabilitation.

The Court held that the suggestion that a sentence should, or could, be constructed with a view to bringing about a certain type of custodial arrangement should be firmly rejected. The proper approach is to determine the appropriate sentence and then consider what, if any, options exist as to how that sentence is to be served. It would be unprincipled and an error of discretion for the court to reduce a sentence solely in an attempt to avoid a juvenile offender spending a period of custody in an adult facility.

The Court noted that the sentence imposed by his Honour was probably inadequate. The 15% discount for the utilitarian value of the pleas was unjustified in light of the stage in the proceedings when the pleas were made. A minimum period of custody of two years for causing four deaths was said not to adequately reflect general deterrence and denunciation.

Additionally, the trial judge was incorrect in finding that, "other than the terrible loss of life and speed" there was no other aggravating factor. Rather, the number of persons put at risk by the driving (for example, where there are passengers in the vehicle) was an aggravating factor and should result in an increase in the overall

sentence imposed (at [28]- [32]): *R v Price at [35]; R v Janceski [2005] NSWCCA 288 at [21]-[25]*.

R v Read [2010] NSWCCA 78

Date of judgment:	3 May 2010
Appeal details:	Crown appeal against sentence
Charges:	2 counts dangerous driving occasioning grievous bodily harm s 52A(3)(c)
Lower court sentence:	2 years imprisonment, NPP 12 months; to be served by way of periodic detention

Appeal allowed.

The sentencing judge erred in determining that the sentences for the two offences pertaining to separate victims should be served concurrently: [39].

In the application of the totality principle it must be asked whether the sentence for one offence comprehends and reflects the criminality for the other offence. If it does not, the sentences should at least be partly cumulative, even where the offences are part of a single episode of criminality: [39]; *R v Cahyadi* [2007] NSWCCA 1 at [27]; *Nguyen v R* [2007] NSWCCA 14 at [12]; *R v XX* [2009] NSWCCA 115 at [52]. Therefore, the Court held that complete concurrency would not reflect the harm occasioned to each of the victims. It was not enough that their injuries were suffered during the course of one act, or that their injuries were similar (at [41]).

The sentencing judge failed to adequately address the typical case or guidance provided in the guideline judgment of *R v Whyte* (2002) 55 NSWLR 252: [50]. Despite the respondent's favourable subjective features, sentences served by periodic detention cannot be reconciled with the guidance provided by *R v Whyte*: [48]. The judge further erred in failing to first decide the appropriate term of imprisonment and then consider whether it should be served by an alternative to full-time detention: [52]; *R v Jurisic* (1998) 45 NSWLR 209 at 215, 249; *R v Zamagias* [2002] NSWCCA 17 at [24]–[30]; *R v Carruthers* [2008] NSWCCA 59 at [19]; *TG v R* [2010] NSWCCA 28 at [25].

Sentence outcome: 2 years 6 months imprisonment, NPP 1 year 6 months

R v Reynolds R v Small [2010] NSWSC 691

Date of judgment: 25 June 2010

Charges: 6 counts manslaughter s 18(1)(b) (Reynolds); 6 counts dangerous navigation causing death s 52B (Small)

Sentence: In relation to each defendant; 4 years imprisonment on each count cumulated by 1 year in the case of each count. That led to an aggregate total term of 9 years imprisonment. However taking into account the principle of totality the sentence was reduced to an overall term of 7 years 6 months with a NPP of 5 years, 7½ months and a balance term of 1 year, 10½ months. The finding of special circumstances meant that the sentence was varied to a term of imprisonment for 7½ years, NPP 5 years.

In relation to both offenders, Grove J found special circumstances, derived from the combination of age, prior good character, good prospects of rehabilitation, the availability of family support and the likely benefits to the community of supervision during a sufficiently substantial period after release from custody (at [61]-[62], [89]). The circumstance that there will be some cumulation of sentences was an additional factor contributing to the findings of special circumstances (at [89]). In relation to the defendant Small, Grove J considered promising that, whilst under the constraints of bail during a long period before conviction, he did not re-offend in any way (at [61]). Grove J regarded deterrence as an important factor in assessment (at [62]).

Grove J found guidance in *R v Whyte* [2002] NSWCCA 343*:* Where there is a plea of guilty and there is present to a marked degree any aggravating factor in the conduct of the offender, a total custodial sentence of less than three years in the case of dangerous driving causing death should be exceptional (at [96]). In the case of the defendant Small there are present aggravating factors in two suggested categories, first, the large number of people put at risk and second, the degree of alcohol and substance abuse in which he had indulged prior to the commission of the offences (at [96]). Nonetheless, in referring to the figure just mentioned in *Whyte* it should not be overlooked that it assumed a plea of guilty, which was not here present (at [96]). Pleas of guilty are themselves likely to have attracted and therefore built into the suggested figure, a significant discount for the utilitarian value of such plea.

Grove J assessed an appropriate total sentence for each offence to be imprisonment for four years. His honour considered that there should be substantial

concurrence because the offences arose out of the same acts and omissions but there should, nevertheless, be some cumulation to reflect the criminality, which is involved in the commission of multiple offences (at [100]).

Suspended sentences

R v Nicholson [2010] NSWCCA 80

Date of judgment:	5 May 2010
Appeal details:	Crown appeal against sentence
Charges:	Malicious wounding with intent to cause grievous bodily harm s 33
Lower court sentence:	NPP of 4 years 4 months 16 days, balance of term of 1 year 5 months 26 days

Appeal dismissed.

The Crown appealed on several grounds, including:

- that the sentencing judge erred by failing to properly assess the objective seriousness of the offence
- that the sentence was manifestly inadequate.

At the time of the offence, the offender was on a 12-month suspended sentence for malicious wounding, and subject to a good behaviour bond, imposed by the Local Court in June 2005. Despite the offender's guilty plea to the instant offence, no steps were taken to bring the breach of the suspended sentence before the Local Court. After the offender was sentenced for the instant offence in the District Court, the offender was brought before the Local Court and the bond was revoked. The sentence in the Local Court commenced then but had to be served concurrently with the sentence in the District Court, because the Local Court does not have the power to accumulate its sentence on a sentence imposed by the District Court (at [13]).

The Court stressed that it is the duty of the prosecution to bring an outstanding suspended sentence to the attention of the sentencing judge and considered that the sentencing judge should have declined to pass sentence until the breach of the suspended sentence had been dealt with. The Court, in referring to *DPP v Cooke*

[2007] NSWCA 2; 168 A crim R 379, noted that the failure of courts to act upon a breach of a bond associated with a suspended sentence will have the consequence of devaluing such a sentence in the eyes of both the offender and the general community (at [16]). The Court also considered the sentencing judge's application of the relevant Standard Non-Parole Period (SNPP) for the offence and held that there had been a failure to take the proper approach for determining the appropriate sentence. The sentencing judge had failed to indicate where in the range of objective seriousness the offence fell, and failed to give reasons for departing from the SNPP (at [28]).

The Court noted however that the sentencing judge was correct in its ultimate finding that the objective seriousness of the offence was significantly below the mid-range, because of:

a) the nature of the victim's injury

b) the fact that the offender suffered from a mental disorder that reduced his culpability for the offence, and that the offence was a spontaneous reaction to his loss of control due to his brain injury.

Therefore, the Court held that, notwithstanding the sentencing judge's errors, the original sentence was not manifestly inadequate, having regard to the fact that the offence was significantly below mid-range.

R v Dinh [2010] NSWCCA 74

Date of judgment:	3 May 2010
Appeal details:	Crown appeal against sentence
Charges:	Applying a corrosive fluid (acid) with intent to burn under s 47, Form 1: possess prohibited drug (heroin), possess prohibited drug (cannabis leaf), goods in custody, hinder a police officer in the execution of duty
Lower court sentence:	4 years 6 months imprisonment, NPP 2 years 6 months

Appeal allowed.

The offence was committed less than two months after the offender had been convicted of a drug supply charge (with two offences of drug possession and goods in custody on a Form 1) and received a 22-month suspended sentence subject to a good behaviour bond in the District Court.

The Court considered that the sentencing judge erred in finding that the offence fell towards the lower end of the range for this type of offence, as there were a number of aggravating factors in this case—including offending in company and in a public place (witnessed by children); a significant degree of planning; possession of a weapon; and injury to the victim. The fact that the victim's injury was not more serious was not considered to be a mitigating factor. The Form 1 offences showed the offender's 'clear disregard' for the conditions of the good behaviour bond and must result in an increase in penalty.

The Court found that although the Crown had wrongly conceded that the offence was at the lower end of the range of seriousness for this type of offence, the sentencing judge was not bound by the concession.

The Court also expressed concern that the offender had not been called up for breach of the suspended sentence. In its judgment, the Court stated that, when the offender pleaded guilty to the offence, the Crown should have taken steps for the call-up for breach of the suspended sentence to be brought before the District Court, preferably before the sentencing judge, so that her Honour could take into account issues of accumulation, concurrency and totality for both the offence and breach of the suspended sentence. The Court considered that the failure of the Crown to do so 'tended to bring the system of suspended sentences into disrepute in this State.' (at [85]).

The Court noted that under s 98(1)(c) of *the Crimes (Sentencing Procedure) Act 1999* (NSW), it did not have jurisdiction to deal with the offender for breach of the suspended sentence without his consent. Nor could it remit, under s 12(2) of the *Criminal Appeal Act 1912* (NSW), the breach of suspended sentence to be dealt with by the District Court. However, it noted that any District Court judge may deal with that breach without the offender's consent under s 98(1)(b) of the *Crimes (Sentencing Procedure) Act*.

The Registrar of the Court was requested to communicate with the parties to have the breach of suspended sentence dealt with by the District Court, before the Court gave judgment. In the District Court, the bond was revoked and the offender received a 22-month sentence of imprisonment, with a NPP of 16 months and two

weeks—leaving the question of cumulation, totality and special circumstances to be finalised in the Court of Criminal Appeal. Upon return of the matter to the CCA, the Court held that there should be a 'very substantial measure of accumulation' because the offence that attracted the suspended sentence was of an entirely different nature to the offence in this case.

Sentencing outcome: 6 years imprisonment, NPP 4 years.

R v Carroll, Carroll v R [2010] NSWCCA 55

Date of judgment:	1 April 2010
Appeal details:	Crown appeal against sentence
Charges:	Manslaughter s18 (1)(b)
Lower court sentence:	3 years imprisonment, NPP 18 months; to be served by way of periodic detention

Appeal allowed.

The Crown appealed on grounds of manifest inadequacy. The Court of Criminal Appeal allowed the appeal (*R v Carroll (2008) 188 A Crim R 253*). The High Court allowed an appeal from that decision and remitted the Crown Appeal to the Court of Criminal Appeal for rehearing (*Carroll v The Queen (2009) 83 ALJR 579; 2*1).

The Court held that s 68A of the *Crimes (Appeal and Review) Act 2001* does not conflict with nor detract from the terms of the remitter made by the High Court under s 37 of the *Judiciary Act* 1903 (Cth). There is no inconsistency between s 37 of the *Judiciary Act* and s 68A in terms of s 109 of the Constitution. The retrospective operation of s 68A does not make it inconsistent with s 37 or Ch III of the Constitution: *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 applied: at [37].

The Court held that the trial judge erred by characterising the offence at the bottom of the range of objective seriousness for offences of manslaughter based on a finding that there was provocation, one spontaneous blow and no weapon involved.

The trial Judge erred in not making proper allowance for general deterrence. General deterrence has particular application for alcohol-fuelled offences of violence committed by young men of the respondent's age. The judge was diverted by the respondent's strong subjective circumstances so as to impose a sentence that did not reflect the objective seriousness of the offence.

While the respondent's relative youth and prospects of rehabilitation were significant factors on sentence, the sentencing principles that apply to juvenile offenders are not relevant in this case: at [61]. The sentencing judge erred in confining attention to the Judicial Commission statistics for manslaughter offences dealt with in the District Court and not having regard to offences of this nature dealt with in the Supreme Court: at [63].

In resentencing the respondent, the court should have regard to the objectively serious nature of the crime he had committed, the need to properly reflect general deterrence, the combined periods of periodic and full-time imprisonment he had already served, his personal circumstances and the strain of the extended legal process within which the respondent had been involved: at [67].

Sentence outcome: 18 months imprisonment, to be suspended for 18 months upon entering a bond to be of good behaviour for a period of 18 months.

Standard Non-Parole Periods (SNPPs)

Corby v R [2010] NSWCCA 146

Date of judgment:	14 July 2010
Appeal details:	Appeal by the offender against sentence
Charges:	Indecent assault on a person under 16 years s 61M(2); Commit act of indecency on a person under 16 years s 61N(1)
Lower court sentence:	3 years 6 months imprisonment, NPP 2 years

Appeal allowed.

The Applicant appealed on the following grounds:

Ground 1 - the sentencing judge failed to, or failed to adequately, assess the objective seriousness of the s.61M(2) offence

Ground 2 - the sentencing judge failed to, or failed to adequately, identify the seriousness of the s.61N(1) offences

Ground 3 - the sentencing judge failed to, or failed to adequately, assess the offences in light of the principle of proportionality as stated in *Veen v The Queen (No. 2)* (1988) 164 CLR 465

Ground 4 - the sentences for the s.61N(1) offences were manifestly excessive.

In relation to the first two grounds; the Court found that the common law duty to give reasons for imposition of sentence called for some assessment of the objective seriousness of the s.61M(2) offence and the s.61N(1) offences: *R v Hoadley (NSWCCA, 14 September 1990, BC9002004, page 3); R v Duffy [1999] NSWCCA 321 at [11],* (at [49]). The assessment of objective seriousness for the purpose of sentence for a standard non-parole period offence does not require an elaborate verbal formula (at [50]). An omission to make a finding concerning the position of an offence on the range of objective seriousness is an error of process, and it does not necessarily follow that there is an error in the imposition of the sentence imposed (at [50]). There is a need for a practical approach to be taken in assessing remarks on sentence, with an emphasis upon substance (and the resulting sentence) and not just matters of form. However, the Court found that the sentencing judge erred by not giving reasons for sentence so that it was necessary for the Court to consider whether a lesser sentence was warranted under s.6(3) *Criminal Appeal Act 1912*.

Ground 3 of the appeal was made out for the same reasons as grounds 1 and 2.

In relation to ground 4, it was argued that a sentence of imprisonment for a fixed term of nine months for each of the s.61N(1) offences was manifestly excessive, having regard to the maximum penalty of two years' imprisonment, the 25% discount allowed for the pleas of guilty, and the objective circumstances of each offence and the subjective circumstances of the Applicant. The Court did not agree with the sentencing Judge's approach of imposing identical and totally concurrent sentences for each of the three separate offences. The imposition of identical concurrent sentences, or a "one size fits all" approach, for the s 61N offences did not reflect a consideration of the principles of totality, concurrence and accumulation: [60]; *Pearce v The Queen* (1998) 194 CLR 610; *Nguyen v R [2007] NSWCCA 14* at [12].

In respect of each of the offences, it was an aggravating circumstance under s 21A(2)(l) of the *Crimes (Sentencing Procedure) Act* 1999 that the victim was vulnerable because of her limited intellectual functioning: at [73]. The age difference between the victim (14 years) and the applicant (39 years) also aggravated the offence: at [75], [77]. However, the actual conduct, and the applicant's honest but unreasonable belief that the victim was over 16, caused the Court to conclude that the offences fell "towards the bottom of the range of objective seriousness": at [81].

Sentence outcome: 2 years 6 months imprisonment, NPP of 17 months, 2 weeks

Butters v R [2010] NSWCCA 1

Date of judgment:	4 February 2010
Appeal details:	Appeal by the offender against sentence
Charges:	Recklessly inflicting grievous bodily harm s 35(2)
Lower court sentence:	Aggregate term of imprisonment of 3 years 6 months; NPP 3 years

Appeal dismissed.

The applicant advanced two grounds of appeal:

1. that the sentencing judge erred in the manner in which he dealt with evidence of remorse
2. that the sentence was manifestly excessive in circumstances where the evidence did not support a finding of objective seriousness above the mid range.

In relation to the first ground of appeal, the sentencing judge referred to remorse as a mitigating factor, however noted in his remarks that remorse 'might have been more forthcoming in my view'. Additionally, the prosecutor misstated the law by submitting that s 21A(3)(i) of the *Crimes (Sentencing Procedure) Act* requires an offender who is claiming the benefit of remorse in mitigation of sentence to give evidence in the sentence proceedings, and that in the absence of such evidence little weight should be given to out of court statements of remorse by the offender.

While the Court held that there is no statutory requirement as stated by the prosecution, it also found that, in assessing the weight of evidence of remorse based on the tendered material, the sentencing judge was entitled to take into account the fact that the applicant did not give evidence. This is an approach that is consistent with cautioning against an uncritical reliance on material contained in tendered reports (or other third party statements) for evidentiary purposes where an offender has not given evidence (see *R v Qutami* [2001] NSWCCA 353; 127 A Crim R 369 and *TS v R* [2007] NSWCCA 194 at [30]). (at [18]).

In relation to the second ground of appeal, the applicant submitted that it was necessary for the Court to find that the applicant knew he had a glass in his hand at the time he swung the punch, and that he intended to strike the victim with it, before

it was open to find under s 21A(2)(c) that the offence was aggravated in seriousness.

The Court found that, s 21A(2)(c) provides that an offence is aggravated where it *involves* the actual *use* of a weapon, and noted that in *Spooner v R* [2009] NSWCCA 247 MacFarlan JA (Howie and Hislop JJ agreeing) interpreted that provision as requiring knowledge by the offender using the glass, that he had a glass when he intentionally struck the victim (at [24]).

In this case, the Court accepted that despite the fact that the sentencing judge made no finding that the applicant knew he had the glass in his hand and intended to strike the victim with it, the plea of guilty to the charge of recklessly inflicting grievous bodily harm under s 35(2) carries with it the applicant's admission that he deliberately swung a punch with a glass in his hand with foresight of the possibility that some injury such as that which resulted, namely the loss of an eye accompanied by lacerations to the victim's face, might occur (at [25]).

In addition to these admissions, which the Court found were persuasive and potentially sufficient to dispose of this ground of appeal, the Court noted that, in any event, a concession was made in the sentence hearing by the applicant's then counsel, that the offence involved use of a weapon under s 21A(2)(c).

Ali v R [2010] NSWCCA 35

Date of judgement:	2 March 2010
Appeal details:	Appeal by the offender against sentence
Charges:	One count of having sexual intercourse without consent contrary to s 61I *Crimes Act* 1900, two counts of indecent assault contrary to s 61L
Lower court sentence:	In relation to the first count 10 years, 8 months imprisonment, NPP 8 years. On each count of indecent assault 2 years imprisonment (to be served concurrently)

Appeal dismissed.

The applicant appealed on grounds including:

Ground 1 - that the sentencing judge erred in assessing the objective seriousness of the s 61I offence as above the mid-range

Ground 3 - that the sentencing judge erred in imposing a non-parole period in excess of the standard non-parole period for the s. 61I offences

Ground 4 - that the sentencing judge erred in imposing an overall sentence and non-parole period which were each manifestly excessive.

In relation to grounds 1 and 3, the Court found no error on the part of the sentencing judge in assessing the objective seriousness of the s 61I offence. The sentencing judge was open to have regard to the objective features of the s 61I offence of which he considered the fact that penile/vaginal intercourse was involved, ejaculation inside the victim occurred, no condom was used, the offence was premeditated since the applicant took advantage of the victim during the taxi journey, the applicant drove to a quiet location, disconnected the [taxi] camera to avoid his crime being recorded, and the victim was extremely vulnerable due to her excessive intoxication and her falling in and out of sleep during the journey. The Court considered the fact that the Applicant did not resort to non-sexual violence does not bear significantly on the objective seriousness of the offence.

In relation to ground 4, it was submitted on behalf of the Applicant that the total sentence and non-parole period were manifestly excessive for the offence of sexual intercourse without consent. In support of this submission, sentencing statistics and a schedule of cases where persons were sentenced for s.61I offences both before and after the introduction of the standard non-parole period system in 2003, were produced.

The Court stated that the function of the courts is to sentence an offender by the application of correct sentencing principles and not by reference to the statistical median range of sentences handed down over a period of time: *R v AEM* [2002] NSWCCA 58 at [116]. It considered that more than usual caution should be taken with s.61I sentencing statistics, having regard to the wide range of conduct embraced in the definition of *"sexual intercourse"* and noted that sentencing decisions and sentencing statistics for offences committed before the introduction of the standard non-parole system are of very limited use: *R v Porteous* [2005] NSWCCA 115 at [49].

MJ v R; CPD v R [2010] NSWCCA 52

Date of judgement: 23 April 2010

Appeal details: Appeal by the offenders against sentence

Charges: Robbery in company inflicting grievous bodily harm under s 98

Lower court sentence: 3 years imprisonment, NPP 2 years (to be served in a Juvenile Detention Centre)

Appeals dismissed.

The Applicants appealed on various grounds, including:

- that the sentencing judge erred in applying the SNPP because the applicants were under the age of 18 when they committed the offences
- that the sentences were manifestly excessive.

In relation to the application of the SNPP, the Court held that the sentencing judge erred in applying the 7 year SNNP for the offence under s 98; s 54D of the *Crimes (Sentencing Procedure) Act* (as amended by Act 105 of 2008) provides that Div 1A of Part 4, does not apply to an offender under the age of 18 at the time the offence was committed.

James J found that the sentencing judge did not err in considering that the principles set out in s 6 of the *Children (Criminal Proceedings) Act* had only *little relevance* because the offenders were almost 18 at the time of committing the offence and given that the applicants had conducted themselves in a way in which adults might have conducted themselves in the commission of such a crime. Rothman J, agreeing with James J, stated *"a person who is 17 and a half years of age cannot be expected to be treated significantly differently from his co-offender who has turned 18."*, however, young offenders are still entitled to an assessment of sentence that takes into account their youth and level of maturity (at [37], [70]).

In relation to the Applicant MJ, the Court considered the Applicant's diagnosis with Stage 4 Hodgkin's Lymphoma and concluded that there was no serious risk of imprisonment having a gravely adverse effect on MJ's health or that the additional burden from MJ's ill health, by reason of MJ being in a Detention Centre, was substantial (at [53]-[67]).

The Court held that the sentences imposed by the sentencing judge were lenient even placing emphasis on rehabilitation when sentencing young offenders.

AE v R [2010] NSWCCA 203

Date of judgement: 10 September 2010

Appeal details:	Appeal against sentence
Charges:	Robbery in company with wounding in contravention of s 98
Lower court sentence:	5 years imprisonment, NPP 3 years

Appeal allowed.

There were a number of grounds of appeal, including that the sentencing judge erred in that he took into account the SNPP (Ground 3).

In relation to this the third ground, the sentencing judge in his remarks referred to the SNPP as an indication of the seriousness of the offence falling within the mid-range of objective seriousness. Basten JA, pointed out that it is uncertain how the sentencing judge took the SNPP into consideration, however it can be assumed that it was used as a factor indicating Parliament's intention as to the seriousness of such an offence, which therefore justified a higher sentence (at [26]). Since the SNPP was inapplicable pursuant to s 54D(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), due to the offender being 15 years old at the time of committing the offence, the Court held that the approach of the sentencing judge was erroneous.

The majority of the court agreed that the NPP was excessive considering the age of the applicant at the time the offence was committed. It was noted that since the sentencing judge had given thought to the SNPP, this may have led to him to conclude a higher degree of severity given the age of the young offender.

Sentence outcome: 5 years imprisonment, NPP 2 years 6 months. This effectively varied the relationship of the NPP to the balance of the term. The Court considered this appropriate in the circumstances, given that an extended period of post-custody supervision was seen as beneficial.

Anastasiou v R [2010] NSWCCA 100

Date of judgment:	24 March 2010
Appeal details:	Appeal by the offender against sentence
Charges:	Larceny (x 26), attempted break and enter dwelling house with intent to commit serious indictable offence, possessing housebreaking implements
Lower court sentence:	2 years 8 months imprisonment; NPP 1 year 8 months

Appeal dismissed.

The applicant appeared before the Drug Court three times charged primarily with larceny offences. On the first two appearances, sentencing was suspended pursuant to s 7(3) of the *Drug Court Act*. On the third appearance after repeated offending, the prison sentence was imposed.

The only basis of the appeal was that the applicant's ill health and life expectancy were not taken into account by the sentencing judge because its extent was not, at that stage, know, appreciated or available.

The Court considered that the general principle is that a sentencing judge has not made an error if a medical condition arises after sentencing. Subsequent events involving medical treatment are the responsibility of the executive government as is the exercise of executive mercy and/or leniency (at [14]).

This rule does not apply, however, if circumstances existed at the time but were unknown or their seriousness was unknown. As the applicant's condition existed at the time sentence was imposed, the medical evidence is admissible as an exception to the general principle (at [15]).

Whilst the health of an offender and the effect of imprisonment on that state of health is always a factor that must be taken into account, an appropriate balance has to be maintained between the criminality in question and any damage to health or shortening of life. Here, the applicant would have received a sentence of incarceration even if the court knew of his illness; there is no complaint of the sentence imposed; there is no suggestion incarceration will aggravate his illness; and his incarceration may be providing him with health care otherwise unavailable. The applicant is entitled to apply for and be granted parole (s 160(1) of the *Crimes (Administration of Sentences) Act 1999*) and may also be subject to the prerogative of mercy available by the Executive Government [at [22]-[27]).

Giles v Director of Public Prosecutions [2009] NSWCCA 308

Date of judgment:	18 December 2009
Appeal details:	Appeal by the offender against sentence
Charges:	Aggravated act of indecency, s 61O(1); sexual intercourse with a person between the ages of 10 and 16, s 66C(2) (x7)

Lower court sentence:	Aggregate sentence of 16 years imprisonment, NPP 11 years (fixed terms of 3 years imprisonment four count one; 4 years for counts 2 and 3; 5 years for counts 4 and 5; 8 years for count 6 and taking into account matters on Form 1; and 7 years for count 7. Count 8 was imposed with NPP of 3 years with a balance of term of 5 years)

Appeal allowed.

The Applicant raised the following grounds of appeal:

1. the sentencing judge erred by imposing sentences for counts 1, 6, 7 and 8 whose notional starting points exceeded the applicable maximum penalties
2. the sentencing judge erred by partly accumulating multiple fixed terms that were not the equivalent of minimum terms
3. the overall sentence is manifestly excessive.

All three judges agreed the sentencing judge erred. However, the Court declined to set a precedent on the extent to which uncharged criminal conduct can be considered in sentencing. At present*, R v JCW [2000] 112 A Crim R 466* is authoritative in NSW although the Victorian Court of Appeal has taken a different tack: *The Queen v CJK [2009] VSCA 58*.

JCW suggested where course of conduct evidence is admitted it is appropriate to be taken into account only in rejecting a claim to mitigation and attendant reduction in sentence. Here, Basten JA suggests that *JCW* did not rule out using uncharged offences as a factor of aggravation (at [61]-[68]). Basten JA held the fact that the charges constituted part of an on-going course of action placed them in a higher range. Conversely, Hulme JA regards it as settled law in NSW that conduct similar to the charges brought, but not subject itself to charges, may not be taken into account to result in a higher sentence than would be merited by the charged conduct (at [85]). Although Johnson J found Basten JA's reasoning persuasive he did not join his analysis on representative charges because the issue had not been argued by the parties. Johnson J agreed with Basten JA's proposed sentence by applying principles in accordance with *JCW*.

Basten JA and Hulme JA also disagreed on the sentencing judge's decision to make the balance of term 5 years (at [78]-[89]). Basten JA said that the balance of term was too long as the NPP on the same count was 3 years, meaning the balance of term constituted 167% of the NPP. Basten JA noted s 44 of the

Sentencing Procedure Act requires the balance of term to be specified in terms of a sentence for a single charge, not in respect of an accumulation of sentences. Hulme JA considered that this section does not preclude taking into account that the sentence is but one of a number of sentences and, in that sentence, enlarging the balance of term at the expense of the NPP. Johnson J did not express an opinion on this issue.

Sentence outcome: 11 years 6 months imprisonment, NPP 9 years 6 months

Assessing objective seriousness

R v McEvoy [2010] NSWCCA 110

Date of judgment:	21 May 2010
Appeal details:	Crown appeal against the inadequacy of sentences
Charges:	Supply prohibited drug s 25(1) (A), Malicious wounding with intent to cause grievous bodily harm s 33 (B), Possession of a prohibited weapon without a permit s 7(1) Weapons Prohibition Act 1998 (C)
Lower court sentence:	4 years 6 months imprisonemnt, NPP 2 years 9 months

Appeal dismissed.

The Crown appealed on a number of grounds, including that Her Honour erred; in her consideration of standard non-parole principles in respect of (B); in her findings regarding the objective seriousness in respect of (B); and in imposing an effective total term and effective non-parole period which were manifestly inadequate.

The Court found that the sentencing judge erred in assessing (B) as "below the mid-range of objective seriousness" for offences of this type, for the purposes of the standard non-parole period without stating with sufficient precision where in the range of objective seriousness the offence stood. Sentencing judges must describe the extent or degree to which the offence departs from a notional offence in the mid-range of objective seriousness: [87]; *R v Knight; R v Biuvanua* (2007) 176 A Crim R 338 per Howie J at [39]. The judge's remarks erroneously gave no indication as to whether the offence fell substantially, significantly, or slightly below the notional mid-range offence: at [88].

The judge also erred in finding that the applicant's plea of guilty and his subjective circumstances reduced the objective seriousness of the offence because neither affect this assessment: at [70], [71].

The judge gave inadequate weight to the standard non-parole period for (B) and imposed a sentence for (B) that did not reflect the objective seriousness of the offence. Even accepting the judge's finding that (B) was "below" the mid-range of objective seriousness, on no view of the evidence could it be said that it was so far below the mid-range as to warrant a non-parole period so substantially below the standard non-parole period: [95]. Nor did the respondent's personal circumstances (or anything else) justify a departure of this magnitude: [94].

It was also erroneous to subsume the sentences for (C) within the sentence for (B): [103]. (C) was entirely separate and distinct from (B) and ought to have resulted in a separate and distinct period of imprisonment: [105].

The Court concluded that, while the sentencing process miscarried in respect of the malicious wounding offence, and resulted in a sentence that was manifestly inadequate, and that failure to accumulate in respect of the firearms offence exacerbated the inadequacy; exceptional evidence was tendered by Corrective Services which showed that the process of rehabilitation was well under way, and that therefore, there should be no interference with that process being carried to its conclusion: [114].

Whiley v R [2010] NSWCCA 53

Date of judgment:	23 April 2010
Appeal details:	Appeal by offender against sentence
Charges:	2 counts producing child pornography, s 91H(2)
Lower court sentence:	4 years imprisonment, NPP 3 years

Appeal allowed.

The sentencing judge erred in finding that the objective gravity of the offences fell "somewhere below the middle range": [71]. Rather, the judge should have found that the offences fell near the bottom of the range: [71]. This error led to the sentences imposed being manifestly excessive: [72].

In this case, the production of the child pornography did not involve the exploitation or victimisation of any actual child: [63]. Nor was the pornography used to facilitate

future contact offending against children: [69]. Hence the Court decided that the offences fell near the bottom of the range despite the applicant's extensive criminal history and past child pornography offences.

The objective circumstances of the offence do not include an offender's previous convictions: [70], *R v McNaughton* (2006) 66 NSWLR 556 applied. Previous convictions are only relevant to the question of where, within the boundary set by the objective circumstances, the sentence should lie: [70].

Sentence outcome: 1 year imprisonment, NPP 9 months

Collins v R [2010] NSWCCA 13

Date of judgment:	22 February 2010
Appeal details:	Appeal by offender against sentence
Charges:	Intimidate with intent to cause fear of physical s 545AB(1) (rep) (A), related summary offences under s 166 of the *Criminal Procedure Act* 1986, 3 counts of Common assault s 61 (B) and 2 counts of maliciously damage property s 195(1)(a) (C)
Lower court sentence:	4 years, 10 months, 14 days imprisonment; NPP 3 years 7 months

Appeal allowed.

The sentencing judge erred in failing to calculate the sentences for the related summary offences by reference to the maximum penalty that could have been imposed had the offences been dealt with in the Local Court: [24]; [33]. Section 168(3) of the *Criminal Procedure Act* 1986 restricts the maximum penalties that could be imposed by the sentencing judge to those applying in the Local Court. Further, s 168(3) restricts the sentencing judge's power to accumulate these sentences beyond a period of three years: [23].

The sentencing judge also failed to assess the objective seriousness of the related offences: [25]. The sentences for the malicious damage offences were manifestly excessive having regard to the nature of the offences and to the maximum sentence that the Local Court could have imposed: [33]. The sentences for the assault offences were also disproportionate to the maximum sentence that could have been imposed in the Local Court: [34].

The sentence for (A) was manifestly excessive: [38]. The sentencing judge should have taken into account the facts that the victim was not alone, but supported by others: [47]. The victim and those with her were able to contact the police either directly or indirectly by phone. The police attended the premises on two occasions during the incident: [48]. During the first police visit, the victim did not seek protection by leaving the scene and the applicant was not arrested.

Sentence outcome: 3 years imprisonment, NPP 2 years 8 months

Principles applying to co-offenders

R v JW [2010] NSWCCA 49

Date of judgment:	22 March 2010
Appeal details:	Crown appeal against sentence
Charges:	Armed robbery causing wounding s 98, Assault with intent to rob whilst armed with an offensive weapon [knife] causing wounding s 98 & s 344A
Lower court sentence:	2 years imprisonment (to be served by way of a suspended sentence (Count 1)), 80 hours community service (Count 2)

Appeal allowed.

Section 68A of the *Crimes (Appeal and Review) Act* 2001 removes from consideration, on the part of the Court of Criminal Appeal, the element of distress and anxiety to which all respondents to a Crown appeal are presumed to be subject. It prevents the appellate court exercising its discretion not to intervene on a crown appeal, or to reduce a sentence, which it otherwise believes to be appropriate on the basis of such distress and anxiety.

Spigelman CJ and Allsop P agreed that whilst it is appropriate to differentiate the relative culpability amongst co-offenders by reference to their particular conduct, there are limits to which this can occur with respect to the objective seriousness of the offence because of the existence of the common purpose to commit the offence: *R v Wright* [2009] NSWCCA 3 applied. Subjective features of individual offenders will result in differences — sometimes significant — in the sentences imposed between offenders: at [166]. In this case, the judge's findings were open on the evidence and the Crown had not established that the judge misapplied sentencing

principles. McClellan CJ at CL, Howie and Johnson JJ added that, in assigning roles to the specific participants, the sentencing judge should not lose sight of the fact that they were all participants in the crime.

The Court held that the sentence for the second offence was manifestly inadequate because it failed to reflect the objective criminality of the offence and the respondent's responsibility for the acts of his co-offenders in a joint criminal enterprise.

McClellan CJ at CL, Howie and Johnson JJ held that the sentence for the first offence was manifestly inadequate because the objective criminality of the offences warranted severe punishment. The subjective factors relied on did not justify the imposition of a suspended sentence. However, given what had transpired since the sentence was imposed (the respondent's compliance with supervision and attempts to address life issues), the court should exercise its discretion to impose a lesser sentence than was warranted at first instance: at [209]–[210].

Sentence outcome: In relation to Count 2, 2 years imprisonment, suspended under s 12 of the *Crimes (Sentencing Procedure) Act*.

Jimmy v R [2010] NSWCCA 60

Date of judgment:	9 April 2010
Appeal details:	Appeal by the offender against sentence
Charges:	Money laundering s 400.4(1) of the *Criminal Code* 1995 (Cth)
Lower court sentence:	3 years 3 months imprisonment, NPP 2 years 2 months

Appeal dismissed.

The judge erred in setting a non-parole period that was two-thirds of the head sentence, because this conflicted with her Honour's earlier assessment that a 60% non-parole period was appropriate: [228]. Further, the judge used an incorrect methodology in calculating the non-parole period and did not give the applicant credit for all of the time that he had already spent in gaol: [229] – [230]. However, the non-parole period actually imposed was 68.58% of the head sentence, which was only very marginally outside the usual range within which non-parole periods are imposed (60-66.67%). Given that tinkering with sentences is generally

impermissible, and that the non-parole period that was imposed was not excessive, it cannot be said that a different sentence should have been passed: [242].

There was no marked disparity between the sentence imposed on the applicant, on one hand, and those imposed on the co-offenders, on the other, giving rise to a justifiable sense of grievance in the applicant: [223].

The High Court authorities on parity do not confine the parity principle to sentences imposed upon co-offenders who have committed the same crime. Campbell JA sets out some of the limits of the application of the parity principle where co-offenders are charged with different offences:

- The parity principle cannot overcome those differences in sentence that arise from a prosecutorial decision about whether to charge a person at all, or with what crime to charge them (in this regard, *R v Kerr* [2003] NSWCCA 234 should no longer be followed: [117], [130], [247],[267].
- If it is used to compare the sentences of participants in the same criminal enterprise who have been charged with different crimes, there can be significant practical difficulties. Those practical difficulties become greater the greater the difference between the crimes charged becomes, and can become so great that in the circumstances of a particular case a judge cannot apply it, or cannot see that there is any justifiable sense of grievance arising from the discrepancy.
- The parity principle cannot overcome differences in sentence that arise from one of the co-offenders having been given a sentence that is unjustifiably low.
- There are particular difficulties in an applicant succeeding in a disparity argument where the disparity is said to arise by comparison with the sentence imposed on a co-offender who has been charged with an offence that is less serious than that of the applicant.
- An applicant should not be able to seek parity with a sentence imposed upon a co-offender after a successful Crown appeal simply on the basis that the sentence imposed upon the co-offender was reduced because of double jeopardy or for some other discretionary reason that does not apply to the applicant: [249]; *Osman v R* [2008] NSWCCA 157.

Breach of Community Service Order

Bonsu v R [2009] NSWCCA 316

Date of judgment: 19 November 2009

Appeal details: Appeal by the offender against sentence

Charges: Breach of community service order *Crimes (Administration of Sentences) Act* 1999, s 115(3)

Lower court sentence: 3 months imprisonment

Appeal allowed.

Once the application for revocation has been established under s 115(3) of the *Crimes (Administration of Sentences) Act* 1999, the court in its discretion "… may revoke the offender's community service order and (if it considers it appropriate to do so) deal with the offender in any manner in which it could have dealt with the offender had the order not been made". The offender is dealt with for the original offence, not for failing to carry out the order: at [9].

The judge failed to appreciate that he was re-sentencing the applicant for the original offence: [12]. He erred in believing that his only function was to convert the unperformed hours of community service into a period of full-time custody by applying some mathematical formula. There is no presumption of imprisonment for breach of a community service order. The judge also paid no attention to the facts of the offence or the subjective features of the applicant: at [12].

Sentence outcome: 12-month s 9 Good behaviour bond.

PUBLICATIONS

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

NSW

Trimboli, L. and Smith, N. 'Drink-driving and Recidivism in NSW' (NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin No 135, 2009)

This bulletin analysed data on people who were convicted of a drink driving offence in 2002 in the NSW Local Courts, in order to identify the characteristics of these offenders, the penalties they received, and their risk factors for subsequent drink driving or other driving offences.

The study found that within five years, 15.5% of drink drivers were charged with another drink driving offence, and 14.3% of drink drivers were charged with a non-alcohol related driving offence (eg, driving licence, registration or roadworthiness offence). It was noted that reconviction rates were likely to significantly underestimate actual drink-driving offences, because most of these offences are unlikely to be detected.

Certain sub-groups were found to be most likely to be reconvicted of drink-driving and other driving offences, namely—men, Indigenous offenders, offenders aged 24 years or less, offenders who resided in areas with the highest level of socio-economic disadvantage, offenders who has been disqualified from driving for one to six months, and offenders with at least two prior convictions within the last five years. It was estimated that within five years of the offence, more than one-third (35.5%) of drink drivers with all of these characteristics will be reconvicted of another drink driving offence, and nearly half of them (49%) will be reconvicted of a driving licence, vehicle registration or roadworthiness offence.

A licence disqualification for 13 months or more was found to reduce the risk of subsequent drink-driving offences, but at the same time, to greatly increase the risk of further non-alcohol related driving offences—offenders who received disqualification periods of 13 months or more were more than four times as likely as those whose licence was not disqualified to be charged with a subsequent non-alcohol related driving offence within five years.

Anthony, T., 'Sentencing Indigenous Offenders' (Indigenous Justice Clearinghouse, Brief No 7, 2010)

This brief provides an overview of the key issues in the sentencing of Indigenous offenders, including the statutory framework in Australia and New Zealand, relevant common law principles and statistical studies.

It was noted that sentencing legislation in three Australian jurisdictions (Queensland, ACT and the Northern Territory) and New Zealand refer specifically to the offender's cultural background. At common law, three factors are considered relevant in the sentencing of Indigenous offenders: social and economic disadvantages, together with widespread alcohol abuse, found in some Indigenous communities; Indigenous laws and cultural practices that have motivated the offending behaviour; and traditional punishment under Indigenous laws. However, during the last decade courts in several jurisdictions have limited the application of some of the relevant sentencing principles.

While the extremely high rate of Indigenous imprisonment persists in both Australia and New Zealand, several statistical studies have yielded mixed results as to whether an offender's Indigenous status affects the likelihood of imprisonment. It was suggested that further research is necessary to reconcile these results.

The brief also highlighted the need for further long-term studies to explain the different sentencing outcomes for Indigenous and non-Indigenous young offenders, and for sentencing statistics on the imposition of non-custodial options on Indigenous and non-Indigenous offenders.

Poletti, P. and Donnelly, H., 'The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales' (Judicial Commission of NSW, Monograph No 33, 2010)

The stated aim of the NSW standard non-parole period (SNPP) scheme was to promote consistency and transparency in sentencing. Before its introduction, the scheme was opposed mainly on the basis that it was intended to increase, and would have the effect of increasing, sentences for SNPP offences. This monograph compared sentencing data between the pre-SNPP period (April 2000–January 2003) and the post-SNPP period (February 2003–December 2007) to determine the impact of the scheme on sentence severity and consistency.

Key findings of the study included:

- The guilty plea rate for what are now SNPP offences increased from 78.2% to 86.1% after the commencement of the scheme, while the guilty plea rate for non-SNPP offences remained relatively stable

- While most SNPP offences already had a high rate of imprisonment before the introduction of the scheme, there was a substantial increase in the use of full-time imprisonment for aggravated indecent assault—from 37.3% to 59.3% for aggravated indecent assault, and from 57.1% to 81.3% for aggravated indecent assault (child under 10)

- For the four SNPP offences that had sufficient data to allow meaningful comparisons—namely, wounding etc with intent to do bodily harm or resist arrest, sexual assault, murder (in other cases), and aggravated sexual assault—the median lengths of the non-parole period (NPP) and the head sentence both increased in cases where the offender pleaded not guilty

- Except for the offence of aggravated indecent assault (child under 10), the severity of both the NPP and the head sentence increased—with the largest increases for the offences of sexual intercourse (child under 10), aggravated indecent assault, supplying a commercial quantity of heroin, supplying a commercial quantity of amphetamines, and aggravated sexual assault

- Offences with the highest increases in sentences had the greatest SNPP to maximum penalty ratio

- Although the median length of the head sentence for the offence of aggravated indecent assault (child under 10) has decreased, the use of full-time imprisonment for these offences has increased. This may have lowered the average sentence length because the use of shorter sentences may have replaced the use of non-custodial penalties.

The study also found that where the SNPP scheme did not result in a significant change in sentence lengths, consistency in sentencing has generally increased. It was noted that where the SNPP and the maximum penalty were relatively high, there was more scope for variation in sentence lengths and therefore less uniform sentences. However, the study was unable to conclude whether greater consistency in sentencing was being applied to like cases or dissimilar cases.

Further, the study revealed that Crown appeals have increased while severity appeals have decreased. Although Crown appeals have always had, and continue to have, a higher success rate than severity appeals, the success rate of severity

appeals have increased from 37.6% to 47.4%. An increase in overall appeals was found for aggravated indecent assault, robbery with arms etc and wounding, supplying a commercial quantity of prohibited drug, and unauthorised possession or use of firearms.

Other jurisdictions

Roberts, L. & Indermaur, D., 'Confidence in the Criminal Justice System' (Trends & Issues in Crime and Criminal Justice No 387, Australian Institute of Criminology, 2009)

The confidence level in the criminal justice system was determined by data collected from the Australia Survey on Social Attitudes in 2007. The study highlighted that on an international level, Australia ranked 27 out of 36 countries for levels of confidence in the criminal justice system. It was noted that "confidence" included both the accuracy of the individual's perception of crime and the reliance on news media for information.

The overall trend from the survey showed that the public has the greatest confidence in the police, followed by the courts system and prisons. Participants who perceived that there was corruption in the police force were more likely to have a lower level of confidence in the criminal justice system.

The public perception of the court system showed that people tended to believe the courts has more regards for defendant's rights than victim's rights. Less than a quarter of participants had a high level of confidence in the courts to deal with matters quickly. Those who had less confidence in the courts were more likely to be in favour of tougher sentences.

The confidence levels in the prison system were the lowers, with the majority of respondents having very little or no confidence in the prison system's ability to rehabilitate prisoners, deter future offending, teach prisoners skills and the system's overall role as a punishment.

Participants who had more confidence in one criminal justice institution tended to have more confidence in the other criminal justice institutions and vice versa.

The report highlights the fact that the police visibility in the early stages of the criminal justice proceedings affect the higher levels of public confidence (Roberts 2007; Smith 2007). The media's representation of the 'entertainment' aspect of the criminal justice system overshadows the psychologically ambiguous process of

sentencing, which can result in the public perceiving that the courts are too lenient on criminals.

The study highlighted three main areas of focus to develop greater confidence in the criminal justice system. Firstly, the criminal justice system should not be the subject of investigations as it is a "highly contaminated construct representing a crass amalgam of distinctly different social institutions." Secondly, the need for greater understanding about the process of the criminal justice system was highlighted. Thirdly, the report showed the need to present the criminal justice system as a system that is acting on behalf of the interests of the citizens.

Sentencing Advisory Council (Victoria), Suspended Sentences in Victoria (2010)

In its 2006 report on suspended sentences, the Sentencing Advisory Council recommended that such sentences be gradually phased out, subject to the establishment of viable alternative sentencing options. As an interim measure, the Advisory Council recommended that the use of wholly suspended sentences for serious offences be restricted. This recommendation was implemented through amendments to the *Sentencing Act 1991* (Vic) in 2006,[28] with the aims to:

a) limit the use of wholly suspended sentences for serious offences unless there are exceptional circumstances and it is in the interests of justice

b) require the sentencing court to give and record its reasons for imposing a wholly suspended sentence.[29]

In its latest report on suspended sentences, the Advisory Council examined the use of wholly suspended sentences for serious offences between 1 November 2006 and 30 June 2009, to ascertain whether the 2006 amendments have achieved their stated purposes. During this period, sufficient data for three offences—namely, armed robbery, intentionally causing serious injury and sexual penetration with a child aged 10–16—were available for analysis. The Advisory Council found no statistically significant change in the use of wholly suspended sentences for these offences. It also noted that the Director of Public Prosecutions has not appealed any of these sentences, despite having the power to do so.

A review of the sentencing remarks for serious offences committed after the legislative amendments showed that not every case involving a serious offence

[28] *Sentencing (Suspended Sentences) Act* 2006 (Vic).
[29] *Sentencing Act* 1991 (Vic) s 27(2B), (2C).

mentioned the legislative requirement for, or the existence of, exceptional circumstances when a wholly suspended sentence was imposed. However, the percentage of sentencing judges who did make such references increased from 40% for January–June 2008 to 72% for January–June 2009. The Advisory Council noted that sentencing judges appeared to have interpreted 'exceptional circumstances' more widely in imposing a suspended sentence (commonly included factors such as youth, lack of prior convictions and good rehabilitation prospects) than in dealing with breach of such a sentence.

The Advisory Council concluded that the 2006 amendments had been unsuccessful due to the lack of viable alternatives to suspended sentences, and that without such alternatives, sentencing practices are unlikely to change.

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 and the Court of Appeal 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 James Wood AO QC, Deputy Chairperson

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 Harold Hunt, Community Representative[30]

Mr Hunt is on of four members of the Council who represents the general community. Mr Hunt has previously held a number of positions including as a community representative on the NSW Offenders Review Board and as a member of the Aboriginal Advisory Council.

[30] Mr Hunt resigned as a member of the Council in January 2011

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 David Hudson APM, NSW Police Force

Assistant Commissioner David Hudson APM is the Commander of the State Crime Command. He has held this position since February 2008 when he was appointed as the head of the largest investigative arm of the NSW Police. His portfolio covers the investigation of all facets of serious and organised crime, Confiscation of Proceeds of Crime, Asian Crime. Drug Related Crime (Clandestine Laboratory Response). Firearms (Operational), Fraud (Computer Crime, identity crime), Gangs (Organised Criminal Networks), Homicide (Victims of Crime, Coronial Investigations), Intelligence, Middle Eastern Organised Crime, Property Crime (Arson, motor vehicle rebirthing, bush fires), Regulated Industries (Gaming and Racing, Casino). Robbery (Extortion, kidnap for ransom, product contamination), Sexual Assault, Child Protection (Child Protection Register, Child Internet Exploitation) and Security Licensing Enforcement. Having previously performed the roles of Acting Deputy Commissioner, Director of Operations in Professional Standards and as a Local Area Commander and Crime Manager, Assistant Commissioner brings an extensive knowledge of policing and criminal investigation to his role on the Sentencing Council.

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.

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.

The Hon Acting Justice Roderick Howie QC, Supreme Court NSW

Justice Howie was appointed to the Council in May 2010. He was a Judge of the Supreme Court from 2000 - 2010, retiring in May 2010. Since September 2010 he has held an Acting Justice position. Previously he held the following positions: Director of the Criminal Law Review Division of the Attorney General's Department, 1984-1987; Deputy Director of Public Prosecutions 1987-1993; Crown Advocate, 1993-1996 and District Court Judge 1996-2000. He has co-authored Butterworth's Criminal Practice and Procedure in New South Wales and has been a major contributor to the section of Halsbury's Laws of Australia on Sentencing and Criminal Procedure.

Ms Martha Jabour, Homicide Victims Support Group

Ms Martha Jabour, Executive Director of the Homicide Victims Support Group (HVSG), represents the HVSG on the Victims Advisory Board, the Victims Interagency Committee, the Homicide Squad Advisory Committee. She is also on the State Parole Authority of NSW as a community member, the Judicial Commission on the Conduct Division as a community member, on the Domestic Violence Death Review Team (DVDRT). 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 in particular homicide.

Ms Megan Davis, Director, Indigenous Law Centre, University of New South Wales

Megan Davis *BA (UQ), LLB (UQ), Grad Dip Leg Pract (ANU), LLM (ANU)* is an Associate Professor of Law and Director, Indigenous Law Centre, Faculty of Law, University of New South Wales. Megan is also an Acting Commissioner of the NSW

Land and Environment Court. Megan is a United Nations Expert member of the UN Permanent Forum on Indigenous Peoples at UNNY. Megan is also an Australian member of the International Law Association's Indigenous Rights Committee and is a member of the Expert Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples. Megan is an admitted Lawyer of the Supreme Court of the Australian Capital Territory although currently not practicing. Megan also completed a PhD in Law from the Australian National University in 2010.

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.