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# WHETHER 'ATTEMPT' AND 'ACCESSORIAL' OFFENCES SHOULD BE INCLUDED IN THE STANDARD NON-PAROLE SENTENCING SCHEME

## A REPORT OF THE NEW SOUTH WALES SENTENCING COUNCIL*

**Pursuant to s100J(1)(d) of the *Crimes (Sentencing Procedure) Act* 1999**

**February 2004**

*The NSW Sentencing Council gratefully acknowledges the research assistance of Ms Sheridan De Kruiff.

## Index

## Index to Schedules



## Index to Tables

# 1. SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

- Absent the experience of NSW Courts (including the Court of Criminal Appeal) in dealing with the substantive offences already set forth in the standard non-parole period sentencing scheme, contained in Part 4, Division 1A of the *Crimes (Sentencing Procedure) Act* 1999 ("the *Act*") the NSW Sentencing Council ("*the Sentencing Council*") considers that it is, at present, premature to add "attempt" and "accessorial" offences to the standard non-parole sentencing scheme. No present need has been established for any such addition.

- The Sentencing Council recommends that at present, the *Act* does not require amendment to include corresponding attempt offences in the standard non-parole period sentencing scheme.

- The Sentencing Council recommends that at present, the *Act* does not require amendment to include corresponding accessorial offences in the standard non-parole period sentencing scheme.

# 2. THE NSW SENTENCING COUNCIL

Generally speaking, the Sentencing Council consults with, and advises the Attorney General in connection with sentencing matters.[1] In particular, the Council advises in relation to guideline judgments and in relation to offences suitable for standard non-parole periods and their length.[2] Section 100J (1)(d) of the *Act* provides that *at the request of the Minister,* [the sentencing council is] *to prepare research papers or reports on particular subjects in connection with sentencing*.

By way of letter dated 18 June 2003, the Attorney General requested the Sentencing Council to consider the question of whether "attempt" and "accessorial" offences should be included in the standard non-parole sentencing scheme and suggested that the research of the Sentencing Council be directed to those offences in the Table of standard non-parole periods where it is considered likely that a corresponding "attempt" or "accessorial" offence is practically capable of being charged.

[1] Section 100J *Crimes (Sentencing Procedure) Act* 1999
[2] Section 100J *Crimes (Sentencing Procedure) Act* 1999

A "standard non-parole period" is defined by the *Act* to represent "the non-parole period for an offence in the middle range of objective seriousness" [3] for offences of that category. It provides a "reference point or benchmark" [4] within the sentencing range. The standard non-parole sentencing scheme has been described as "a new concept in sentencing."[5]

The NSW Attorney General, when introducing the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill* stated:

> The standard non-parole periods set out in the Table to the bill have been set taking into account the seriousness of the offence, the maximum penalty for the offence and current sentencing trends for the offence as shown by sentencing statistics compiled by the Judicial Commission of New South Wales. The community expectation that an appropriate penalty will be imposed having regard to the objective seriousness of the offence has also been taken into account in setting standard non-parole periods. The bill provides in section 54A (2) that the standard non-parole period for an offence represents the non-parole period for an offence in the middle of the range of objective seriousness for such an offence.[6]

These comments provide some assistance as to matters relevant to a decision of what offences may be suitable for standard non-parole periods and their proposed length. The "community expectation", whilst relevant to the question of setting the length of the standard non-parole period, would also seem to be relevant to the preliminary question of whether an offence should be included in the standard non-parole sentencing scheme. The "community expectation" may be thought to be well reflected in the membership of the Sentencing Council. The Sentencing Council consists of 10 members of wide and diverse backgrounds, and includes 4 representatives of the general community, 3 of which have expertise or experience in matters associated with victims of crime.[7] In preparing this report, there has not been, for example, any survey of members of the public or any need for such. In any event, when considering the results of a community survey, "a degree of caution has to be exercised when using the

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[3] Section 54A *Crimes (Sentencing Procedure) Act* 1999

[4] The Hon Bob Debus MP Attorney General, *Hansard*, Legislative Assembly, 23 October 2002, p5813 at 5816

[5] See *Attorney General's Application no 2 of 2002* [2002] NSWCCA 515 at [16]

[6] Ibid at p 5814

[7] By section 100 I(2)(e) of the *Crimes (Sentencing Procedure) Act* 1999, two members are to have expertise or experience in matters associated with victims of crime. As the Sentencing Council is presently constituted, 3 of its members have such experience or expertise.

results of a survey of members of the public as to what sentence is appropriate."[8] Whilst this observation is made in the different context of guideline judgments it may be considered appropriate in the context of setting standard non-parole periods. In many ways, the Sentencing Council, as constituted, is well qualified to reflect public perceptions and community expectations in relation to sentencing.

The legislation which established the Sentencing Council also introduced other sentencing innovations: it states the purposes of sentencing,[9] and specifies certain aggravating and mitigating factors[10] to be considered by judicial officers in passing sentence. It may be observed that the NSW Court of Criminal Appeal is still to acquire experience in dealing with offences already included in the standard non-parole sentencing scheme, and the impact of sections 3A and 21A of the *Act*.

## 3. TERMS OF REFERENCE

In a letter to the Sentencing Council dated 18 June 2003, the Attorney General, the Hon Bob Debus MP referred the following matters for consideration: [11]

> In your letter, clarification is sought as to whether attempt offences should be considered by the Council and if so, which offences. You also raise the issue of accessorial liability.
>
> In the second reading speech to the Crimes (Sentencing procedure) Amendment (Standard Minimum Sentencing) Act 2002 I expressed an intention to refer the question of whether "attempt" offences should be included in the standard non-parole sentencing scheme, to the Council.

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[8] *R v. Keating and McInerney* [2003] All ER (D) 28 (Jan); [2002] EWCA Crim 3003; [2003] 1 All ER 1089; per Lord Woolf at [8]. In *R v. Home Secretary ex parte Venables* [1998] AC 407, Lord Goff also considered public "concern" or "perceptions" in relation to sentencing: "*I wish to draw a distinction in the present context between public concern of a general nature with regard to, for example, the prevalence of certain types of offence, and the need that those who commit such offences should be duly punished; and public clamour that a particular offender whose case is under consideration should be singled out for severe punishment. It is legitimate for a sentencing authority to take the former concern into account but not the latter.*"

[9] Section 3A *Crimes (Sentencing Procedure) Act* 1999

[10] Section 21A *Crimes (Sentencing Procedure) Act* 1999

[11] The Hon Bob Debus MP, letter to the Sentencing Council, 18 June 2003

> Accordingly I now formally request the Council to consider the question of whether "attempt" and "accessorial" offences should be included in the standard non-parole sentencing scheme.
>
> By way of further clarification as to which offences the Council should consider, I suggest that the research of the Council in relation to "attempt" and "accessorial" offences be directed to those offences in the table of standard non-parole periods where it is considered likely that a corresponding "attempt" or "accessorial" offence is practically capable of being charged.

The focus of the Sentencing Council's report has therefore been on the corresponding attempt and accessorial offences to those offences already included in the standard non-parole sentencing scheme; specifically, those corresponding attempt or accessorial offences practically capable of being charged.

## 4. METHODOLOGY AND SUBMISSIONS

Letters inviting written submissions on the topic were sent specifically to the individuals and organisations listed in *Schedule 1*. The text of this letter is set out in *Schedule 2*.

In response, the Sentencing Council received two written submissions. One from Mr Peter Zahra SC, in his capacity as Senior Public Defender, and the other from Mr Nicholas Cowdery AM QC, in his capacity as Director of Public Prosecutions.

Mr Zahra and Mr Cowdery are both members of the Sentencing Council. Their views have proved to be of considerable value, but not decisive in the formation of the Sentencing Council's independent views. They are against adding "attempt" or "accessorial" offences to the standard non-parole sentencing scheme.

The Bureau of Crime Statistics and Research ("*BOCSAR*") and the Judicial Commission of NSW ("*the Judicial Commission*") declined to make submissions.

# 5. BACKGROUND TO THE REPORT

## 5.1 The Standard Non-Parole Period Sentencing Scheme

The *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002 (NSW) was assented to on 22 November 2002. It commenced on 1 February 2003, with the exception of the provisions constituting the Sentencing Council which commenced on 17 February 2003.

The *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002 introduces a new scheme of 'standard non-parole sentencing' in relation to specified serious indictable offences. A standard non-parole period is defined to represent "*the non-parole period for an offence in the middle range of objective seriousness"* [12] for offences of that category. It is a new starting point.[13] The meaning of statute law is found in the text of the legislation. The function of the Court is to give effect to the will of parliament as expressed in the law. It is no part of the function of the Courts to frustrate the clearly expressed wishes of the Parliament.[14]

The identification of where an offence lies in the sentencing spectrum is an exercise traditionally undertaken by the sentencing Judge. The Attorney General in his second reading speech stated:

> The concept of a sentencing spectrum is well known to sentencing judges and criminal law practitioners. The first important point of reference, which must be considered in the sentencing exercise, is the maximum penalty for an offence…At the other end of the sentencing spectrum lie cases which might be described as the least serious or trivial.
>
> The new sentencing scheme…introduces a further important reference point, being a point in the middle of the range of objective seriousness for the particular offence. The identification

[12] Section 54A *Crimes (Sentencing Procedure) Act* 1999

[13] In relation to "deeming" provisions applying in the different context of worker's compensation, Windeyer J noted, in *Commissioner for Railways v. Bain* (1965) 112 CLR 426: "*… a statement that a condition is to be deemed to be a disease contracted by a gradual process does not amount to a declaration that it is not in fact such a disease. The word "deemed" is of course often used to give an artificial meaning to a word, or to direct how notwithstanding the true facts some situation should be understood. But, remembering its derivation, the word "deemed" merely states how some matter is to be adjudged: and a direction that a matter is to be adjudged in a particular way is not necessarily an assertion that without such a direction it must have been adjudged differently.*" These observations may apply in relation to section 54 of the *Crimes (Sentencing Procedure) Act* 1999 and the fact that the standard non-parole periods have been "deemed" to apply to offences in the "*middle of the range of objective seriousness.*"

[14] See *Dossett v. TKJ Nominees Pty Ltd* [2003] HCA 69, 202 ALR 428 per McHugh J at [10]

> of a further reference point within the sentencing spectrum will provide further guidance and structure to the exercise of the sentencing discretion. Every sentencing exercise necessarily involves the identification by the court of where the offence lies in the spectrum of objective seriousness.[15]

The *Act* places requirements on the Courts when sentencing for an offence included in the standard non-parole scheme:

**Section 54B**

> *(2) When determining the sentence for the offence, the court is to set the standard non-parole period as the non-parole period for the offence unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period.*
>
> *(3) The reasons for which the court may set a non-parole period that is longer or shorter than the standard non-parole period are only those referred to in section 21A.*
>
> *(4) The court must make a record of its reasons for increasing or reducing the standard non-parole period. The court must identify in the record of its reasons each factor that it took into account.*

Essentially, the legislature has stipulated that in the absence of any of the aggravating or mitigating factors listed in section 21A, the standard non-parole period is the appropriate sentence for each offence listed. If a decision is made to increase or decrease the non-parole period, reasons must be recorded.

It is important to note that although section 54B(3) states the Court can consider only the matters referred to in section 21A, section 21A does not purport to provide an exhaustive list of aggravating and mitigating factors. In addition to specific factors like those shown above, section 21A(1)(c) states the Court shall also take into account

> …any other objective or subjective factor that affects the relative seriousness of the offence.

Since its introduction, the standard non-parole sentencing scheme has been the focus of some written commentary.[16]

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[15] The Hon Bob Debus MP Attorney General, *Hansard*, Legislative Assembly, 23 October 2002, pp5816-5817

[16] Marien M, "Standard Non-Parole Sentencing" (2002) 14 (11) *Judicial Officers' Bulletin* 83; Johnson P, "Reforms to NSW Sentencing Law – The *Crimes (Sentencing Procedure) Amendment*

In respect of the principal offences already included in the Table of standard non-parole periods, the new sentencing legislation may well create changes (indeed, major changes) in sentencing patterns and norms in sentencing for those offences which could or would impact upon any patterns or norms in sentencing those guilty of attempt or accessorial liability in respect of those offences.[17]

The Table of standard non-parole periods set out in Division 1A of the *Act*, to which we have added a column setting forth the maximum penalty for ease of reference, is as follows:[18]

**Table 1**

| **Item No** | | **Standard non-parole period** | **Maximum penalty** |
|---|---|---|---|
| 1A | Murder—where the victim was a police officer, emergency services worker, correctional officer, judicial officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation | 25 years | Life |
| 1 | Murder- in other cases | 20 years | Life |
| 2 | Section 26 of the *Crimes Act* 1900 (conspiracy to murder) | 10 years | 25 years |
| 3 | Sections 27- 30 of the *Crimes Act* 1900 (attempt to murder) | 10 years | 25 years |
| 4 | Section 33 of the *Crimes Act* 1900 (wounding etc with intent to do bodily harm or resist arrest) | 7 years | 25 years |
| 5 | Section 60 (2) of the *Crimes Act* 1900 (assault of police officer occasioning bodily harm) | 3 years | 7 years |
| 6 | Section 60 (3) of the *Crimes Act* 1900 (wounding or inflicting grievous bodily harm on police officer) | 5 years | 12 years |

*(Standard Minimum Sentencing) Act* 2002" (2003) 6(3) *The Judicial Review* 313; Keane J and Poletti P, (2004) "*Monograph Series 23: Sentenced Homicides in NSW, 1994 – 2001*" Sydney: Judicial Commission of NSW.

[17] Keane J and Poletti P, (2004) "*Monograph Series 23: Sentenced Homicides in NSW, 1994 – 2001"* Sydney: Judicial Commission of NSW. See in particular at pp142-143

[18] Part 4, Division 1A *Crimes (Sentencing Procedure) Act* 1999

| | | | |
|---|---|---|---|
| 7 | Section 61 I of the *Crimes Act* 1900 (sexual assault) | 7 years | 14 years |
| 8 | Section 61 J of the *Crimes Act* 1900 (aggravated sexual assault) | 10 years | 20 years |
| 9 | Section 61 JA of the *Crimes Act* 1900 (aggravated sexual assault in company) | 15 years | Life |
| 9A | Section 61 M (1) of the *Crimes Act* 1900 (aggravated indecent assault) | 5 years | 7 years |
| 9B | Section 61 M (2) of the *Crimes Act* 1900 (aggravated indecent assault – child under 10) | 5 years | 10 years |
| 10 | Section 66 A of the *Crimes Act* 1900 (sexual intercourse – child under (10) | 15 years | 25 years |
| 11 | Section 98 of the *Crimes Act* 1900 (robbery with arms etc and wounding) | 7 years | 25 years |
| 12 | Section 112 (2) of the *Crimes Act* 1900 (breaking etc into any house etc and committing serious indictable offence in circumstances of aggravation) | 5 years | 20 years |
| 13 | Section 112 (3) of the *Crimes Act* 1900 (breaking etc into any house etc and committing serious indictable offence in circumstances of special aggravation) | 7 years | 25 years |
| 14 | Section 154 C (1) of the *Crimes Act* 1900 (car-jacking) | 3 years | 10 years |
| 15 | Section 154 C (2) of the *Crimes Act* 1900 (car-jacking in circumstances of aggravation) | 5 years | 14 years |
| 15A | Section 203 E of the *Crimes Act* 1900 (bushfires) | 5 years | 14 years |
| 16 | Section 24 (2) of the *Drug Misuse and Trafficking Act* 1985 (manufacture or production of commercial quantity of prohibited drug), being an offence that:<br>(a) does not relate to cannabis leaf, and<br>(b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug. | 10 years | 20 years |
| 17 | Section 24 (2) of the *Drug Misuse and Trafficking Act* 1985 (manufacture or production of commercial quantity of prohibited drug), being an offence that:<br>(a) does not relate to cannabis leaf, and<br>(b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug | 15 years | Life |
| 18 | Section 25 (2) of the *Drug Misuse and Trafficking Act* 1985 (supplying commercial quantity of prohibited drug), being an offence that:<br>(a) does not relate to cannabis leaf, and<br>(b) if a large commercial quantity is specified for the | 10 years | 20 years |

| | | | |
|---|---|---|---|
| | prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug. | | |
| 19 | Section 25 (2) of the *Drug Misuse and Trafficking Act* 1985 (supplying commercial quantity of prohibited drug), being an offence that:<br>(a) does not relate to cannabis leaf, and<br>(b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug. | 15 years | Life |
| 20 | Section 7 of the *Firearms Act* 1996 (unauthorised possession or use of firearms) | 3 years | 14 years[19] |

It can be observed that in the table there are several offences with the same maximum penalty, but with different standard non-parole periods.

**5.2 Standard Non-Parole Periods: Attempt and Accessorial Offences**

In the Second Reading Speech to the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill* 2002 the Attorney General, the Hon. Bob Debus MP expressed an intention to refer to the Council the question of whether "attempt" offences should be included in the standard non-parole period sentencing scheme.[20]

On 18 June 2003, the Attorney General wrote to the Chairperson, formally requesting the Council to consider the question of whether "attempt" and "accessorial" offences should be included in the standard non-parole sentencing scheme. The relevant portion of the letter is extracted above at "3 - Terms of Reference".

## 6. ATTEMPT OR ACCESSORIAL OFFENCES PRACTICALLY CAPABLE OF BEING CHARGED

In order to ascertain those offences in the table of standard non-parole periods where it is considered likely that a corresponding "attempt" or "accessorial" offence is practically capable of being charged, consideration was given to the sentencing statistics contained in the Judicial Commission's Judicial Information Research System ("*JIRS*") database.

[19] Amended by *Crimes Legislation Further Amendment Act 2003* No 85, commenced on 14 February 2004.
[20] Supra no.4 at p 5818

It is appropriate to observe that in respect of some offences on the table, there are no (or limited) relevant sentencing statistics in existence to be compiled by the Judicial Commission and reported in the JIRS Sentencing Statistics.[21]

The JIRS database was created and is maintained by the Judicial Commission. As stated by the Judicial Commission in the preamble to the sentencing statistics:

> JIRS sentencing statistics form one component of the JIRS database. They provide a general guide to the pattern of sentences handed down by the courts for particular offences. The statistics together with the Principles and Practice, Case Summaries and Supreme Court, Court of Criminal Appeal and High Court judgments form a package of information intended to assist the courts in achieving consistency of approach. The statistics need to be approached with caution. For example**, where there are multiple offences JIRS only records the principal offence.** (Emphasis added.)

It may be that there are some attempt and accessorial offences which have been sentenced but do not appear on the JIRS statistics as the attempt or accessorial offence was not the principal offence for which the offender was sentenced. Regarding the sentencing statistics compiled by the Judicial Commission, it is also relevant to bear in mind the observations of Mr Peter Johnson SC:

> The standard non-parole period is a figure reflecting the 'middle of the range of objective seriousness' only, without taking into account any other factors relevant to sentence. It is, in effect, a starting point in the sentencing exercise relating to objective seriousness only. Further, the median non-parole period statistics relate, of course, to the particular cases which fell for sentence in the relevant period. It does not necessarily follow that the JIRS median non-parole period represents the median for that offence generally. Care needs to be taken in relying upon the JIRS median non-parole period statistics. That said, it is clear that the standard non-parole periods contained in the 2002 Act are substantial.

There are a number of offences from the standard non-parole sentencing scheme for which one or more sentences have been imposed for a corresponding "attempt" or "accessorial" offence in the last 5 years according to the sentencing statistics contained on the JIRS database.

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[21] See for example, item 15A on the Table of standard non-parole periods – "bushfires: section 203 of the *Crimes Act* 1900"

These are as follows:[22]

**Table 2**

| | |
|---|---|
| Murder | 20 accessorial offences have been sentenced and 23 attempted murders have been sentenced[23] |
| Conspiracy to murder (s26)[24] | 1 accessorial offence has been sentenced |
| Wounding etc with intent to do bodily harm or resist arrest (s33) | 3 attempts and one accessorial offence have been sentenced |
| Sexual assault (s61I) | 14 attempt offences have been sentenced |
| Aggravated sexual assault (s61J) | 10 attempts and 4 "aid and abet" offences have been sentenced |
| Aggravated indecent assault (s61M (1)) | 1 attempt has been sentenced |
| Robbery with arms etc and wounding (s98) | 8 attempts, 3 accessorial and 3 "aid and abet" offences have been sentenced |
| Breaking etc into any house etc and committing a serious indictable offence in circumstances of aggravation (s112 (2)) | 3 accessorial offences have been charged |
| Manufacture or production of a commercial quantity of prohibited drug: s24(2) of the *Drug Misuse and Trafficking Act* 1985 | 2 attempts and 3 "aid and abet" offences have been sentenced |
| Supplying commercial quantity of prohibited drug: s25(2) of the *Drug Misuse and Trafficking Act* 1985 | 2 attempt and 15 "aid and abet" offences have been sentenced |

This indicates that for the offences above, the corresponding "attempt" or "accessorial" offences are "practically capable of being charged." There are, however, many other offences contained within the *Crimes Act* 1900, but not contained in the standard non-parole sentencing scheme, for which there have been many more corresponding "attempt" or accessorial" offences sentenced. For example, for the offence of "robbery or stealing from the person" under section 94 of the *Crimes Act* 1900, there were 45 sentences imposed for accessory after the fact.

[22] These are sentences imposed in approximately the last 5 year period. For the particular time period for each offence, refer to JIRS Statistics.
[23] "Attempt to murder" is already included in the standard non-parole sentencing scheme.
[24] References in Table 2 are to the *Crimes Act* 1900 unless otherwise noted

# 7. Attempt Offences

The inchoate offence of criminal attempt is one of the most complex areas of criminal law.

> The basic rationale for criminalising an unsuccessful attempt to commit a crime is that, notwithstanding that a person may have failed to bring about the desired result, his/her conduct is sufficiently dangerous or culpable to justify criminal prosecution and punishment.[25]

The mens rea test for attempt offences is an intention to commit the completed offence.[26] The Crown must prove an intention to bring about each element of the crime alleged.[27]

The central problem in framing attempt offences is formulating the test for the requisite actus reus. An attempt involves conduct which is a step, or series of steps, immediately connected to the commission of the intended offence.[28]

Acts which are only in preparation for the intended crime are not sufficient.[29] It is a question for the jury as to whether the conduct in question is sufficient to constitute an attempt or is merely preparatory to it.[30]

All jurisdictions in Australia have statutory provisions dealing with attempts.[31] These provisions contain substantial differences. In NSW the relevant provision is as follows:

**Section 344A Attempts**

> *(1) Subject to this Act, any person who attempts to commit any offence for which a penalty is provided under this Act shall be liable to that penalty.*

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[25] Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales*, Third Edition, The Federation Press, 2001 at 11.2.1

[26] *Giorgianni v R* (1985) 156 CLR 473 per Wilson, Deane and Dawson JJ at 506

[27] *Britten v Alpogut* (1986) 23 A Crim R 254 at 258 per Murphy J (Fullagar and Gobbo JJ concurring). This decision was followed in *R v Mai & Tran* (1992) 26 NSWLR 371

[28] *R v Mai & Tran* (1992) 26 NSWLR 371 at 381-382

[29] *McMillan v. Reeves* (1945) 62 WN (NSW) 126 at 127

[30] *McMillan v. Reeves* and *DPP v. Stonehouse* [1978] AC 55 per Lord Salmon, Lord Edmund-Davies and Lord Keith (Lord Diplock and Viscount Dilhorne in dissent)

[31] Section 344A of the *Crimes Act* 1900 (NSW); sections 347 and 427 of the *Crimes Act* 1900 (ACT); sections 4, 277 – 278 of the *Criminal Code* (NT), sections 4, 535-538 and 583 of the *Criminal Code* (Qld); sections 239, 270A and 290 of the *Criminal Law Consolidation Act* 1935 (SA); sections 2, 299, and 342 of the *Criminal Code* (Tas); section 34 of the *Acts Interpretation Act* 1931 (Tas); sections 321M-321S of the *Crimes Act* 1958 (Vic); sections 4, 552, 555, 555A, 599B of the *Criminal Code* (WA).

> *(2) Where a person is convicted of an attempt to commit an offence and the offence concerned is a serious indictable offence the person shall be deemed to have been convicted of a serious indictable offence.*[32]

In addition to "general" attempt provisions such as section 344A above, certain jurisdictions have a number of "specific" statutory offences involving attempt. For example, in NSW, these include attempted murder[33], attempted incest[34], and attempt to obtain money by a willful false representation.[35] As already noted above, attempted murder[36] is included in the standard non-parole period scheme.

With respect to general attempt offences, there exist two procedural avenues by which a defendant may be found guilty of an attempt:

- **Guilty of attempt as an alternative to the completed offence**

Section 162 of the *Criminal Procedure Act* 1986 provides that if a jury is not satisfied that the accused is guilty of the offence charged, but are satisfied that the accused is guilty of an attempt to commit the offence, they may return a verdict of guilty to the attempt offence as an alternative verdict.[37]

The jury must understand that the accused must be found not guilty of the crime charged before being found guilty of an attempt to commit it: See *R v. Crisologo.*[38]

- **Charged with, and prosecuted for, the attempt offence**

Where a person's intention is to commit the completed offence and his or her conduct goes beyond mere preparation but falls short of the required actus reus for the principal offence, he or she may be charged with the corresponding attempt offence.

There is no rule at common law that withdrawing after an attempt allows a person to escape conviction for a general "attempt".[39] Where a person does an act sufficient to constitute an attempt to commit an offence, the person does not escape conviction by evidence that the offence was voluntarily abandoned while it was still capable of success. However, such a

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[32] Section 344A *Crimes Act* 1900
[33] Sections 27-30 of the *Crimes Act* 1900
[34] Section 78B of the *Crimes Act* 1900
[35] Section 527A of the *Crimes Act* 1900
[36] Sections 27-30 of the *Crimes Act* 1900
[37] Section 162 of the *Criminal Procedure Act* 1986, previously section 427 of the *Crimes Act* 1900. See also *R v. Pureau* (1990) 19 NSWLR 372 at 374
[38] NSW CCA, 12 December 1997, at 14-15.
[39] See *Criminal Attempts Act* 1981 (UK) (Ch 47) General Note (c)

circumstance would greatly affect the culpability of the offender, and may well act as a matter of mitigation on sentence. As an example, there would be a wide variation in culpability between an offender who withdraws from committing the offence, and an offender who attempts to the end to commit an offence and is unsuccessful due to circumstances beyond the control of the offender.

An attempt may be committed even though the crime attempted could not possibly have been completed. In *R v. Taouk*[40] the Court considered the sentence appropriate for an offence predestined to fail. The Court held that the inevitability of failure might operate in mitigation of penalty; however, this does not mean that the offence is not to be regarded seriously. The fact that there was no possibility of the attempt succeeding may impact on the objective seriousness of the offence.

In the Victorian matter of *Britten v. Alpogut*[41], the defendant believed that he was importing, and intended to import, into Australia a prohibited import. However, the substance he believed to be cannabis and which he imported was a non-prohibited import. The Court held, per Murphy J with Fullager and Gobbo JJ concurring, that in order for a person to be found guilty of an "attempt", the Crown must prove that the accused at all material times intended to import something which was as a matter of law a prohibited import and known by him to be so, and that pursuant to this intention he acted, not merely preparatory but sufficiently proximate to the intended commission of the crime. It was irrelevant that the crime attempted could not have been in fact accomplished by the accused.

## 8. ATTEMPTS: CURRENT SENTENCING PRINCIPLES AND ISSUES

### 8.1 Section 344A of the *Crimes Act* 1900

Section 344A of the *Crimes Act* 1900 (extracted above on p16) sets out the general rule with respect to sentencing attempt offenders: the statutory maximum penalty is the same for attempt as for the completed offence.

The penalty should not be more than the maximum for the substantive offence.[42]

[40] NSW CCA, 4 November 1992, 65 A Crim R 387
[41] [1987] VR 929, (1986) 79 ALR 457
[42] *R v. Pearce* (1953) 1 QB 30

**8.2 Sentencing General Attempts in Practice**

In practice, attempts attract a lesser penalty than the completed offence, despite section 344A making the relevant maximum sentence for the completed offence available. This practice was noted by Mr Nicholas Cowdery AM QC in his submission to the Sentencing Council and is supported by information extracted from the Judicial Commission's JIRS database.

**Tables 3 to 5** below provide a comparative analysis between sentences for completed offences and attempt sentences for three general offences: sexual assault, aggravated sexual assault, and robbery with arms etc and wounding.

These offences were selected from **Table 2**, which demonstrates that of the standard non-parole offences *practically capable of being charged* with a corresponding attempt, the three below are the most frequently charged attempt offences.

**Table 3**

| **Offence** | **% of offenders sentenced to full time imprisonment** | **Mid point range of non-parole periods** |
|---|---|---|
| **Sexual assault – Completed offence (s61 I)** | 85 | 24 months |
| **Sexual assault – Attempt (s61 I)** | 64 | 30 months |

**Table 4**

| **Offence** | **% of offenders sentenced to full time imprisonment** | **Mid point range of non-parole periods** |
|---|---|---|
| **Aggravated sexual assault – Completed offence (s61 J)** | 96 | 36 months |
| **Aggravated sexual assault – Attempt (s61 J)** | 60 | 18 months |

**Table 5**

| **Offence** | **% of offenders sentenced to full time imprisonment** | **Mid point range of non-parole periods** |
|---|---|---|
| **Robbery with arms etc and wounding – Completed offence (s98)** | 97 | 36 months |

| | | |
|---|---|---|
| **Robbery with arms etc and wounding – Attempt (s98)** | 100 | 24 months |

It can be seen from the above tables that JIRS statistics support the submission that in practice the completed offence is sentenced more severely than a general attempt offence.

### 8.3 Sentencing the Specific Offence of Attempted Murder

As previously noted, the attempt murder offences[43] are already contained in the standard non-parole period sentencing scheme. The relevant provisions in the *Crimes Act* 1900 all provide a maximum available penalty of 25 years, whilst the standard non-parole period set by the *Act* is 10 years.

The offence of murder has life imprisonment as its maximum available penalty[44], with the standard non-parole period stipulated in the *Act* as 25 years if the victim was a police officer (or other public official, exercising public or community functions and the offence arose because of the victim's occupation) and 20 years in other cases.

It is no surprise that JIRS statistics confirm that the offence of murder is generally sentenced more severely than attempted murder.

**Table 6**

| **Offence** | **% of offenders sentenced to full time imprisonment** | **Mid point range of non-parole periods** |
|---|---|---|
| **Murder (s 19A)** | 100 | 14 years |
| **Attempt Murder Sections:** | | |
| Administer poison w/i to murder (s 27) | 100 | 5 years |
| Wound or cause g.b.h w/i to murder (s 27) | 100 | 7 years |
| Shoot at w/i to murder (s 29) | 100 | 48 months |
| Attempt to strangle/ suffocate w/i to murder (s 29) | 33 (1 out of 3 sentenced) | 30 months |
| Attempt to murder by other means (s 30) | 100 | 24 months |

[43] Sections 27- 30 of the *Crimes Act* 1900
[44] Section 19A of the *Crimes Act* 1900

In its advice to the Court of Appeal, the UK Sentencing Panel has addressed the subject of sentencing for attempted murder and stated: [45]

> Of course there are problems in comparing sentences for attempted murder and for the full offence. The first difficulty is that murder must inevitably involve the death of the victim whereas in attempted murder the extent of the harm varies. One victim may have received very grave injuries short of death while another may not have been physically injured at all. The second difficulty is that proof of either intention to kill or an intention to cause grievous bodily harm is sufficient culpability for murder, whereas for attempted murder it must be shown that the offender intended to kill. There must always remain a significant (**but probably unquantifiable**) gap between the sentence for an attempted murder and the sentence for the full offence. (Emphasis added.)

By including attempt murder in the standard non-parole period scheme, the NSW legislature has shown support for the above view, namely that there should remain a significant gap between murder and attempt murder offences.

However, the legislation departs from the notion that this gap is "probably unquantifiable" and introduces a period (10 years), which the Sentencing Council views as high for middle-range offences in light of the statistics included in Table 6.

### 8.4 'Attempt' Sentencing Issue: Moral culpability

In his article *The Sentence for Attempt*[46] Alec Samuels puts forward an argument as to why an "attempt" should be sentenced the same as the completed offence, but then notes that in practice, the sentence for an "attempt" tends to be less than for the completed offence:

> It may be strongly argued that the sentence for attempt should be the same as for the completed offence. Parliament has decreed that the maximum in both cases shall be the same. The necessary criminal intent is identical. If he (sic) did not succeed this time, will he try again and perhaps succeed next time. The suffering of the victim may be as great, and fear can be a very potent injury indeed…But for circumstances beyond the control of the criminal, the completed offence, as intended, would have taken place. Therefore, as

[45] UK Sentencing Advisory Panel, *Annual Report 2001-2002*, Appendix E: Advice to the Court of Appeal on Minimum Terms in Murder Cases at para 27

[46] Samuels A, "The Sentence for Attempt" 148 (41) *Justice of the Peace* 643-644

> punishment relates to and reflects moral culpability and not consequential injury or damage, the sentence for attempt should be the same.
>
> In practice the sentence for attempt is less than for the completed offence…Steering by the maximum, an attempt is unlikely to be seen to be the worst imaginable offence, meriting the maximum. The harm inflicted is *ex hypothesi* less. The victim may well have suffered less. In a property crime *ex hypothesi* the offender gained nothing. If he failed to complete because of incompetence, then it may be said that he represents less of a social threat than the more sophisticated criminal. Although he committed the attempt, it is possible that he might have changed his mind and drawn back at the eleventh hour. The public might feel that it would be unjust or too severe entirely to disregard the lack of consequences in the attempt. The public instinctively feels that the completed offence is worse than the attempt.

Samuels outlines a major reason as to why attempt sentences are generally less severe than that for the completed offence; the public feels that the completed offence is 'worse' because less harm has been caused by the offender's actions. This approach is adopted in the standard non-parole period of 10 years for attempt murder, contrasted with 25 or 20 years for the completed offence.[47]

### 8.5 Attempt Sentencing Issue: Wide Variation in Circumstances of Offence

In addition to the issue of moral culpability as discussed in 8.4, attempt offences also display a wide variation in circumstances. This matter alone should not be a decisive reason for exclusion from the standard non-parole scheme, as the same observation could be made in respect of many of the offences already included in the Table. However, such factors should be considered when addressing the question of whether an offence should/should not be included in the Table.[48] Further, where an offence covers a wide range of offending behaviour, such may also militate against a guideline judgment being obtained for that offence.[49]

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[47] The Sentencing Council notes that *if* standard non-parole periods were introduced for attempt offences already included in the Table, our recommendation may be to set these at a lower standard than for the completed offence. This acknowledges that an attempt, whilst still morally reprehensible, may often cause less harm or damage, and remains consistent with the view already taken by the legislature for attempt murder.

[48] See for example, The Hon. Mervyn Finlay QC (2003) "*Review of the Law of Manslaughter in NSW*" Sydney: Attorney General's Department at pp 6.1 – 6.3

[49] See for example, Attorney General's Application no 2 of 2002 [2002] NSWCCA 515 – "Assault Police".

In NSW, there has been varied judicial comment on the culpability for an "attempt" with much of the case law concerning drug matters. What can be ascertained is that culpability depends to a large extent on the particular offence attempted, and the circumstances of the attempt. It may be argued, therefore, that a quantitative measure is not suitable in light of the fact that vast differences arise in the circumstances of attempt offences. Both submissions received by the Sentencing Council support this argument:

- A quantitative measure is not always appropriate if wide variations occur in the circumstances of an offence. It seems to me that non-specific attempts (i.e. where the attempt is not constituted as an offence) ought not be included on the Table on the basis that they encompass a wide range of offending behaviour, the gravity of which can vary greatly.[50]

- Attempts may be constituted by, at the one end of the spectrum, acts that go a very short way beyond mere preparation and, at the other end, acts that fall just short, through sheer good luck, of the completed offence. It would be productive of injustice to seek to apply one standard non-parole period to all of the degrees of culpability that can be expressed by way of a conviction for attempting to commit a particular offence.[51]

In relation to this issue, the NSW Court of Criminal Appeal has held:

> It is important to appreciate that where an attempt to commit a substantive offence is involved, it is relevant to consider, in evaluating the seriousness of the offence, inter alia, that the offence was not completed; the chances of its success; the seriousness of the attempt; whether the attempt was sophisticated or naïve, the competence of the attempt, and all the other surrounding circumstances.[52]

In the attempted armed robbery matter of *R v Doorey*[53], the NSW Court of Criminal Appeal considered that:

> Every case has to be treated and assessed upon its merits. In some cases an attempt may constitute an offence of lesser seriousness, if there was a withdrawal or a failure to carry the matter through from a very early stage. In the present case, however, it was only the inability of the applicant to open the till, which meant that the substantive

[50] Mr Nicholas Cowdery AM QC, Submission to the Sentencing Council, 3 September 2003
[51] Mr Peter Zahra SC, Submission to the Sentencing Council, 12 September 2003
[52] *R v. Schofield* [2003] NSWCCA 3 at 139 citing *R v Taouk* (1992) 65 A Crim R 387 at 390
[53] [2000] NSWCCA 456

> offence was not implemented. In the circumstances of this case I would regard the attempt as still constituting a matter of particular seriousness.[54]

In *Barter*,[55] the NSW Court of Criminal Appeal held that an attempt of break, enter and steal involves significantly less culpability than the substantive offence.

In *Irusta*[56] the Court of Criminal Appeal noted that when sentencing for an attempt, the actual offence in question and the particular circumstances are important in ascertaining culpability:

> Where an attempt to commit an offence is not an ancillary offence (eg attempting to pervert the course of justice) common sense dictates that some instances of the conduct proscribed are more serious than others. Thus, a person convicted of the importation of drugs is generally regarded as more culpable than a person who attempts to commit the same offence. (at paras 45-48). Actual importation of a drug also weighs more heavily and attracts a greater sentence than an attempt to obtain possession of the same quantity of the drug once imported.

As noted in *Sentencing Practice and Principles*,[57] the view expressed in *Irusta* appears to be in direct opposition to another view that holds that generally there is no warrant for distinguishing between the penalties for obtaining possession and attempting to obtain possession in relation to some drug offences:[58] see *Harvey*.[59] See also *Shafiei*[60]. In this matter, Fitzgerald JA held that section 233B(1)(c) is concerned with what an accused person actually possessed, not with what he or she intended to possess. Hence controlled delivery samples will need to contain trafficable quantities in order to found an offence of attempt to possess a trafficable quantity. The majority did not consider it necessary to decide this point.

In *Mai & Tran*,[61] the issue of an attempt to possess a drug was considered. Hunt CJ at CL held that:

> The intention of the possessor of a prohibited drug, that is, whether the possessor intended it for his or her own use, or for sale, is

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[54] [2000] NSWCCA 456 per Wood J at 29
[55] NSW CCA, 22 November 1996
[56] *Irusta* [2000] NSWCCA 391
[57] "*Sentencing Practice and Principles*" JIRS database, Judicial Commission of NSW.
[58] For example, under section 233B(1)(c)
[59] [2000] NSWCCA 253
[60] [2000] NSWCCA 254
[61] NSW CCA, 6 April 1992, 60 A Crim R 49, 26 NSWLR 49

> relevant to the degree of criminality and therefore the appropriate sentence. Thus, where a person in fact obtained a smaller quantity of the drug (the major part having already been removed by the authorities) he or she may be sentenced on the basis of an intention to obtain the greater amount that he or she believed he or she was obtaining.

The culpability for an "attempt" may depend on the particular offence in question. In *Jordan*[62] the Court considered a particular "attempt" offence of attempting to pervert the course of justice. Hidden J held that a "full time custodial sentence should not be regarded as rare or exceptional in cases involving attempt to pervert the course of justice."

In *R v. Duong*[63] the Court again considered a specific offence: attempting to bribe a police officer. Wood CJ at CL held, with the Court agreeing, that:

> The offence of bribery or of offering a bribe to police in the course of the execution of their duties is a most serious offence. It is an offence that strikes at the heart of the criminal justice system as Lee CJ at CL observed in Pangallo (1991) 56 A Crim R 441 at 443.
>
> …
>
> Save in the most exceptional circumstances it will call for a significant term of imprisonment to be imposed cumulatively or at least substantially cumulatively upon the sentence for the primary offence in respect of the detection or prosecution of which the bribe was offered. In this case no such exceptional circumstance was shown to exist. It was the clear duty of the learned sentencing Judge to impose a sentence, after taking into account the principle of totality that reflected the seriousness of the offence. For this criminality his Honour clearly failed to take into account the principle I have enunciated, leaving the respondent totally unpunished for the offence for which he stood for sentence.

As noted above, culpability for a particular "attempt" may depend on issues such as whether the offender withdraws from committing an offence at the eleventh hour.

The Council notes that attempt offenders may have:

- Voluntarily withdrawn from the exercise before the full offence was committed, or
- Attempted to commit the offence, but their efforts were unsuccessful to satisfy the requisite actus reus, or

[62] NSW CCA, 3 November 1997
[63] [1999] NSWCCA 353, 109 A Crim R 60

- Attempted to commit the offence, but circumstances beyond their control made it impossible – often due to law enforcement intervention.

Within each of these varying situations there exists even further room for variation in circumstances.

Overall, in some instances the attempt may be viewed as serious as the completed offence and the relevant sentencing principles applied. However, discretion is crucial in this sphere of offences due to the diverse range of conduct which may amount to an attempt, and the circumstances which prevented completion of the intended offence.

## 9. ATTEMPTS: POSSIBLE INCLUSION IN THE STANDARD NON-PAROLE PERIOD SENTENCING SCHEME?

"Attempt murder" offences have been included in the Table of Standard Non-Parole periods perhaps because the attempt murder offences are specific statutory offences under sections 27- 30 of the *Crimes Act* 1900. The Sentencing Council notes that the standard non-parole period for such attempt murder offences is 10 years, whilst for murder the period is 20 years. This difference in the standard period reflects the general sentencing practice discussed above. The Sentencing Council acknowledges that the above issues regarding variation in circumstances may also be applied to the attempt murder offences. However, their inclusion in the standard non-parole sentence scheme reflects the seriousness of the offence and, at this stage, the Sentencing Council has not been requested by the Attorney General to formally review that decision.

Section 66A of the *Crimes Act* 1900 ("Sexual intercourse – Child under 10") is included in the Table of Standard Non-Parole periods, whilst the corresponding specific statutory attempt provision (section 66B of the *Crimes Act* 1900: "Attempting, or assaulting with intent, to have sexual intercourse with a child under 10") has not been included in the table.

Section 33 of the *Crimes Act* 1900 ("Wounding etc with intent to do bodily harm or resist arrest") is listed in the Table of Standard Non-Parole periods. That section contains the words "or in any manner attempts to discharge any kind of loaded arms at any person."

Offences already included in the Table, which are 'practically capable of being charged'[64] as attempts, include sexual assault[65], aggravated sexual

[64] See above, Table 2
[65] Section 61 I *Crimes Act* 1900

assault[66], robbery with arms[67], manufacture prohibited drug[68], and supply prohibited drug[69].

The issues canvassed above - the nature of attempt offences and current sentencing principles- has led the Sentencing Council to agree with the submissions received and not recommend inclusion in the standard non-parole period scheme. Specifically, the Sentencing Council notes the injustice which would eventuate if one standard period was applied to all attempt defendants within a particular offence.

Whilst recognising the aim of the relevant amendments to the *Act* is to provide a further reference point for courts when sentencing, the Sentencing Council feels that attempt offences are inappropriate for inclusion. Locating the "middle range of objective seriousness"[70] for attempt offences, and proceeding to quantify an appropriate non-parole period, would be a near-impossible task considering the vast array of behaviour involved, the lack of available sentencing data and the fact "that there is very little history of Crown appeals to the Court of Criminal Appeal with respect to attempt and accessorial offences".[71]

There exists an issue with respect to the 'newness' of the legislative changes. As pointed out by Mr Peter Zahra SC:

> …the new system is experimental and is only now commencing to operate in the Courts, as a result of it only applying to offences committed on or after 1 February 2003. It has not been the subject of consideration by the Court of Criminal Appeal, the pre-eminent Court in New South Wales with regard to questions of sentencing. To my mind, it is **far too early to consider extending the system.**[72] (Emphasis added.)

In addition to Mr Zahra's submission regarding the experimental nature of the standard non-parole scheme, the Sentencing Council wishes to raise a further issue arising from the newness of the legislation. To add new offences to the scheme now would rely on examination of past case law, much of which has been outlined above. We must not place too much emphasis on these past cases as the scheme's implementation may create a vastly different sentencing environment.

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[66] Section 61 J *Crimes Act* 1900
[67] Section 98 *Crimes Act* 1900
[68] Section 24 *Drug Misuse and Trafficking Act* 1985
[69] Section 25 *Drug Misuse and Trafficking Act* 1985
[70] Section 54A *Crimes (Sentencing Procedure) Act* 1999
[71] Mr Nicholas Cowdery AM QC, Submission to the Sentencing Council, 3 September 2003
[72] Mr Peter Zahra SC, Submission to the Sentencing Council, 12 September 2003

A similar approach is reflected in the judgment of the NSW Court of Criminal Appeal in declining to promulgate a guideline judgment for the offence of "assault police"[73], and considering when it is appropriate for the Court to promulgate a guideline. In that case, the NSW Court of Criminal Appeal inter alia declined to give a guideline judgment not merely because of the Court's lack of experience with respect to a particular offence, but also because of the need to consider the impact of new sections 3A ("purposes of sentencing") and 21A ("aggravating and mitigating factors") of the *Act*:

> [55] Many of the listed aggravating and mitigating factors reflect the common law. Nevertheless, some are expressed in ways which differ from that contained in any judgment. Furthermore, they differ from the list of considerations identified in the former s21A which was based in large measure on s16A of the Commonwealth Crimes Act. That section included matters covered in the new s3A as well as many of the matters referred to in s21A.
>
> [56] The list of aggravating factors is stated in a form which has not hitherto been required to be taken into account by sentencing judges. The guideline proposed is basically derived from this list of aggravating factors plus three specific additional ones, based on circumstances that often arise with respect to offences under s60(1).
>
> [57] Further, this Court did not receive submissions about the impact of s3A of the 1999 Act which also takes effect from 1 January 2003. It is arguable that some of the "purposes of sentencing" which must now guide sentencing decisions constitute a change of pre-existing sentencing principle.

The data available to the Sentencing Council in February 2004 shows that of the thirteen known sentences handed down under the new scheme, nine are currently awaiting appeal. This confirms Mr Zahra's concerns and highlights the need to wait for further judicial consideration, clearly forthcoming, before the Sentencing Council is in a position to advise expanding the scheme.

[73] [2002] NSWCCA 515

# 10. ACCESSORIAL LIABILITY

A person who commits an actual offence is liable as a principal in the first degree. Accessorial liability is concerned with secondary parties.

There are three kinds of secondary parties

1. Principal in the second degree is a person actually present at the commission of the offence;
2. Accessory before the fact is a person not present at the crime that has encouraged or assisted another to commit that offence;
3. Accessory after the fact is a person who assists the principal in the first degree to avoid detection apprehension or conviction after the offence has been committed.

## 10.1 Accessories Before the Fact and Principals in the Second Degree – 'Aid and Abet'

These two types of secondary parties will be discussed together because the distinction bears no legal significance - both parties may be held liable for the principal offence.[74] The distinction is merely one of presence at the scene of the crime.

Both may be charged and prosecuted as principle offenders; they are 'true' accessories in that they are accessories to the substantive offence. In all Australian jurisdictions, an accessory before the fact is liable to the same punishment as the principal offender.[75] In NSW, the relevant legislation is the *Crimes Act* 1900, sections 346, 351, 351B and section 24 of the *Criminal Procedure Act* 1986.

To be liable, offenders must "aid, abet, counsel or procure"[76] ('encourage or assist')[77] another to commit the offence. In *Giorgianni v. R*[78] it was held that the relevant provisions in the *Crimes Act* 1900 are declaratory of the common law, and therefore common law principles should still be applied.[79]

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[74] *Johns v. R* (1980) 143 CLR 108 at 117
[75] *Crimes Act* 1914 (CTH) s 5(1); *Criminal Code* (CTH) s 11.2(1), *Crimes Act* 1900 (ACT) s 345, *Criminal Code* (NT) s 12, *Crimes Act* 1900 (NSW) ss 345, 346, *Criminal Procedure Act* 1986 s 24, *Criminal Code* (QLD) s 7, *Criminal Law Consolidation Act* 1935 (SA) s 267, *Criminal Code* (TAS) s 3(1), *Crimes Act* 1958 (VIC) ss 323, 324, and *Criminal Code* (WA) s 7
[76] Section 351 *Crimes Act* 1900 and see also section 27 *Drug Misuse and Trafficking Act* 1985
[77] Button R and Scouler C, "Guide to accessorial liability in New South Wales", 8(7) *Criminal Law News* 62 (2001); a very helpful and practical article to accessorial liability in NSW.
[78] (1985) 58 ALR 641; 156 CLR 473
[79] (1985) 58 ALR 641 per Wilson, Deane & Dawson JJ at 660

In terms of required conduct, the secondary offender's actions must go beyond mere acquiescence,[80] and there must be a causal link between the procuring and the commission of the offence.[81]

Secondary offenders must also possess a guilty mind; there exists a requirement of intention.[82] In *Giorgianni* the High Court confirmed that a person cannot aid, abet, counsel or procure the commission of an offence without intent based on knowledge of the essential facts which constitute the offence.[83] *Actual* knowledge must be proved, not knowledge imputed or presumed. Also, neither recklessness nor negligence would be sufficient to satisfy this mental element.[84]

The offender (that is, the secondary participant to the crime) must have possessed knowledge of the essential matters which constitute the offence in question, and proceeded to intentionally assist or encourage the commission of the offence. Their intention is aid, abet, counsel or procure.

Button and Scouler note that in some ways this requirement is strict, but may also be viewed as broad, because the offender in the second degree need have no mental element at all with regard to the *consequences* of the principal crime.[85]

During proceedings against second degree parties, the prosecution must prove the commission of the offence by the principal in the first degree.[86] This need not be established by way of actual conviction of the principal.

If the necessary elements are present, the offender may be indicted, convicted and sentenced as a principal offender.[87]

### 10.2 Accessories After the Fact

The fundamental distinction between accessories after the fact and the two categories discussed above is that accessories after the fact are not liable as principal offenders. As Button and Scouler note, they are not 'true' accessories because they commit an additional, separate offence *after* the completion of the principal offence.[88]

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[80] *R v Webbe* [1926] SASR 108
[81] *A-G's Reference No 1 of 1975* [1975] QB 773
[82] *R v Maxwell* [1978] 1 WLR
[83] (1985) 58 ALR 641 per Wilson, Deane & Dawson JJ at 663
[84] Ibid per Gibbs CJ at 651
[85] Button R and Scouler C, supra no. 77, at [50]-[51]
[86] *Osland v R* (1998) 197 CLR 316
[87] Sections 346 and 351 *Crimes Act* 1900
[88] Button R and Scouler C, supra no. 77, at [21]

In NSW, a person who has provided assistance after a serious indictable offence[89] has been committed may be liable for the separate offence of "accessory after the fact".[90] Similar provisions exist in the other Australian jurisdictions.[91] Further in NSW, a related offence of "concealing a serious indictable offence" exists.[92] There is no offence of being an accessory after the fact to a summary offence.

To be liable, the accessory must provide assistance designed to assist the principal to avoid justice.[93] There must be a positive act.

Conduct such as concealing or destroying evidence[94] and harbouring the principal[95] are well-recognised acts which may make the offender liable as an accessory after the fact. However, there naturally exists a vast range of possible conduct.

The necessary mental state is that the assisting acts must be committed with knowledge of the committed crime.[96] and with the intention of aiding the principal to avoid detection.[97]

## 11. ACCESSORIAL LIABILITY: CURRENT SENTENCING PRINCIPLES AND ISSUES

### 11.1 Sentencing Accessories Before the Fact and Principals in the Second Degree

In all Australian jurisdictions, an accessory before the fact is liable to the same punishment as the principal offender.[98] In NSW, the relevant legislation is the *Crimes Act* 1900, sections 346, 351, 351B and section 24 of the *Criminal Procedure Act* 1986. The *Drug Misuse and Trafficking Act* 1985 also contains a provision stipulating that those who aid or abet shall

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[89] By section 4 of the *Crimes Act* 1900, a "serious indictable offence" is defined as one "*that is punishable by imprisonment for life or for a term of 5 years or more*".
[90] Sections 347-50 *Crimes Act* 1900
[91] *Crimes Act* 1914 (CTH) s6; *Crimes Act* 1900 (ACT) s 346; *Criminal Code* (NT) s 13; *Criminal Code* (QLD) s 10; *Criminal Law Consolidation Act* 1935 (SA) s 241(1)(b); *Criminal Code* (TAS) s 6; *Crimes Act* 1958 (VIC) s 325; *Criminal Code* (WA) s 10.
[92] Section 316 *Crimes Act* 1900
[93] See for example, *R v. Barlow* (1962) 79 WN (NSW) 756 at 757 and *R v Stone* [1981] VR 737
[94] *R v Williamson* [1972] 2 NSWLR 281; *R v Levy* [1912] 1 KB 158
[95] *R v Hurley* [1967 VR 526
[96] *R v Stone* [1981] VR 737
[97] *R v Young and Phipps* (CCANSW, 31 October 1995, unreported)
[98] *Crimes Act* 1914 (CTH) s 5(1); *Criminal Code* (CTH) s 11.2(1), *Crimes Act* 1900(ACT) s 345, *Criminal Code* (NT) s 12, *Crimes Act* 1900(NSW) ss 345, 346, *Criminal Procedure Act* 1986 (NSW) section 24, *Criminal Code* (QLD) s 7, *Criminal Law Consolidation Act* 1935 (SA) s 267, *Criminal Code* (TAS) s 3(1), *Crimes Act* 1958 (VIC) ss 323, 324, and Criminal Code (WA) s 7

be liable to the same punishment as if the person had committed the full offence.[99]

The actual role played by the offender will naturally influence the sentence imposed.[100] Culpability may often be very close to that for the full offence, but the distinction between the principal and secondary offenders must be noted when sentencing.

Authority confirms that despite this distinction, an accessory may be deemed by the court as more culpable than the principal. In *Houvardas*[101] the NSW Court of Criminal Appeal considered an appeal by an offender sentenced as an accessory to principle offences committed by his wife. The applicant submitted that it is contrary to sound sentencing practice to impose a more severe sentence on an accessory than on a principle. However, Heydon JA held, with Mason P and Smart AJ concurring, that this is not necessarily so, and that a great deal depends upon the circumstances of the case:

> Sentencing an accessory more severely than a principal offender does not necessarily create a justifiable sense of grievance. Whether it does will depend on the circumstances of the particular case. The circumstances of this case could not fairly create that sense of grievance because of the role of the applicant as instigator. As the sentencing judge said: 'he not only committed these offences but he got his wife embroiled in them too'.[102]

In considering a Crown appeal against a sentence imposed for an accessory before the fact to an armed assault in company with intent to rob, the Court of Criminal Appeal held in *Vougdis and Rossides*[103] that culpability as an accessory before the fact can often be the same as if the offender were actually present and participating in the actual offence. Allowing the Crown appeal, the Court held:

> The fact that the applicant Vougdis preferred the safety of absence from the scene while others took the greater risk of carrying out the plans to which he was a party, did not make his culpability any the less.[104]

McInerney J added comment in relation to the culpability of Vougdis, stating:

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[99] Section 27 *Drug Misuse and Trafficking Act* 1985
[100] *Johns v. R* (1980) 143 CLR 108 at 117; *Osland v R* (1998) 197 CLR 316.
[101] [2000] NSWCCA 203
[102] Ibid at 17
[103] NSW CCA, 19 April 1989, 41 A Crim R 125
[104] Ibid at 126

> As far as the prisoner Vougdis is concerned, I agree with the learned trial judge's conclusion that he was as blameworthy as Rossides. The word "contemptible" used by his Honour to describe his part in the offences is, in my view, a very mild way of describing it. I believe a cowardly and despicable involvement is the more appropriate description of his involvement using his business contacts to plan these crimes and then leave the execution of those plans to others.[105]

In *R v. Tuira and Niukapu*[106] T was convicted for robbery with striking, while N was convicted for accessory before the fact to robbery with striking, and receiving the proceeds of the robbery. The Court of Criminal Appeal held that there was no error on the part of the sentencing judge in sentencing N to a longer sentence than T, bearing in mind that N provided no assistance to the authorities, and pleaded guilty at a later stage than T. In considering the culpability of each of the defenders, the Court of Criminal Appeal held that the two offenders were equally culpable:

> It seems to be that in reality the judge was unable on the evidence to determine who was the instigator. No more are we. In that sense Niukapu and Tuira are equally culpable but not as instigators. Neither is proved to be the instigator. In that sense each is equally culpable with the other.

The appeals against sentence by both offenders were successful, however, in re-sentencing, N again received the longer of the two sentences.

### 11.2 Sentencing Accessories After the Fact

Sections 348 - 350 of the *Crimes Act* 1900 address the punishment of accessories after the fact:

- Section 348- accessories after the fact to treason-related offences (section 12 *Crimes Act* 1900) are liable to 2 years imprisonment;
- Section 349(1)- accessories after the fact to murder are liable to 25 years imprisonment;
- Section 349(2)- accessories after the fact to the crime of robbery with arms or in company with one or more persons, or the crime of kidnapping in section 86, liable to 14 years imprisonment;
- Section 350- accessories after the fact to any other serious indictable offence are liable to 5 years imprisonment.[107]

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[105] NSW CCA, 19 April 1989, 41 A Crim R 125 at 132
[106] NSW CCA, 6 August 1992
[107] By section 4 of the *Crimes Act* 1900, a "serious indictable offence" is defined as one "*that is punishable by imprisonment for life or for a term of 5 years or more*".

In *R v. Maloney*[108] the applicant appealed the sentence imposed for being an accessory after the fact to an offence of breaking, entering and stealing. In considering the question of culpability, Grove J held, with Newman J concurring, that there is a distinction in culpability between principal and accessorial offences. His honour held:

> His Honour Judge Saunders concluded that he could see no reason why the two offenders – Baxter and the applicant – should not be treated as being of equal culpability. That conclusion – which ignores the considerable distinction in principle charges – must therefore be erroneous and I would so hold. That error attracts the intervention of the Court and we must consider re-sentence.

In considering an offence of accessory after the fact of robbery in company, the NSW Court of Criminal Appeal has again accepted that accessorial involvement carries in general a somewhat lesser penalty than for the substantive offence.[109]

In considering the specific accessorial offence of "accessory after the fact to murder"[110] the Court of Criminal Appeal has also noted the wide range of offending behaviour and culpability that the offence may encompass: see *R v. Farroukh*[111] and *R v. Do (Tan)*[112] As previously observed in relation to attempt offences, such matters should not of themselves be decisive as to whether to include accessorial liability offences in the Table.

In *Farroukh* Gleeson CJ held, allowing a Crown appeal against sentence, that:

> The maximum penalty is penal servitude for twenty-five years. There is, however, a wide variation in the possible degrees of moral culpability of persons convicted of this offence. The present was not a case, as sometimes occurs, where an accessory after the fact has been personally involved in a criminal enterprise, although the involvement falls short of participation as a principal, or where an accessory is associated with criminal elements and has become an accessory by reason of that association (cf R v Hawken (1986) 27 A Crim R 32, R v Winsten (1994) 74 A Crim R 312.)

*Farroukh* has been cited with approval in subsequent judgments of the NSW Court of Criminal Appeal, including *R v. Dileski*[113], where the

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[108] Unreported NSWCCA, Friday 14 October 1994
[109] *R v. Qarta* [2000] NSWCCA 406
[110] See section 349 of the *Crimes Act* 1900
[111] Unreported NSWCCA, 29 March 1996
[112] Unreported NSWCCA, 7 May 1997
[113] [2002] NSWCCA 345

applicant successfully appealed a sentence of accessory after the fact to murder.

In *Do (Tan)* Gleeson CJ held:

> Although the maximum penalty is penal servitude for 25 years, there is a wide variation in the possible degrees of moral culpability of persons involved in offences of this kind.

**11.3 Statistics on the Sentencing of Accessories**

The sentencing statistics from the Judicial Commission's JIRS database indicate that generally, accessories before the fact tend to be sentenced more severely than accessories after the fact, and often receive a sentence close to the midpoint of sentences imposed for the completed offence.

For the offence of *accessory before the fact to murder*, one offender received a sentence of 9 years with a non-parole period of 5 years, compared to the mid point non-parole period of 14 years for the completed offence. In stark contrast, for *accessory after the fact to murder*, only 47% of offenders were sentenced to imprisonment, with the mid point non-parole period being only 2 years.

For the offence of *accessory before the fact to solicit murder*, one offender received a sentence of 10 years with a non-parole period of 7 years, compared to 15 people sentenced for *the full offence*, with 93% sentenced to imprisonment, with a *lower* midpoint sentence and non-parole period of 5 years and 3 years respectively.

For the offence of *accessory before the fact to maliciously inflicting grievous bodily harm*, 6 offenders were sentenced, with 67% sentenced to imprisonment. The midpoint sentence was 36 months, with a 12-month non-parole period. This is quite similar to the sentences imposed for the *completed offence*: 283 offenders sentenced, with 68% sentenced to gaol. The midpoint sentence was 36 months with a non-parole period of 18 months. Again, in stark contrast, only 38% of the 8 offenders sentenced as *accessories after the fact* were sent to gaol, with the midpoint sentence being 42 months with a non-parole period of 24 months.

Section 25(2) of the *Drug Misuse and Trafficking Act* 1985 – supplying a commercial quantity of a prohibited drug - has been included in the standard non-parole period scheme as Items No. 18 and 19. A total of 15 offenders[114] have been sentenced as *accessories before the fact to supply*, with 6 (i.e. 40%) receiving a prison sentence. In contrast: of the 528

[114] The statistics in this paragraph are referring to all three categories of supply: less than commercial quantity, commercial quantity and large commercial quantity.

defendants sentenced for the *completed offence* supply of heroin, 400 (i.e. 76%) received prison terms. This indicates two things to the Sentencing Council. Firstly, aid and abet supply of a prohibited drug is a relatively common accessorial offence, and secondly, offenders are sentenced more leniently than those guilty of the complete offence.

From the above, the sentencing statistics from the JIRS database indicate that generally, sentences for completed offences tend to be the most severe, followed by sentences for accessories before the fact. In contrast, accessories after the fact tend to be sentenced much more leniently than the principal offenders, with a much greater range in the types of sentences imposed.

## 12. ACCESSORIAL OFFENCES: POSSIBLE INCLUSION IN THE STANDARD NON-PAROLE PERIOD SENTENCING SCHEME?

Appellate judgments certainly suggest that culpability for an accessory before the fact is often very close to the culpability for the full offence, whereas culpability as an accessory after the fact is often far less than for the full offence, with great variances in culpability from case to case.

In the submission of the of the Director of Public Prosecutions[115], offences involving accessories after the fact should not be included in the Table of standard non-parole periods as they encompass an extremely wide range of offending behaviour. Mr Cowdery stated that offences involving accessories before the fact "could be added to the Table if that is thought necessary", but in summary preferred not to recommend their inclusion. The Sentencing Council has independently concluded that it is not necessary at this point of time.

In the submission of the Senior Public Defender[116]:

> …to seek to apply the one standard non-parole period to all of the different circumstances whereby a person may be convicted of being an accessory to an offence would be productive of injustice.

Both judicial comments and statistics support these submissions. The Sentencing Council concludes that the sentencing of secondary parties should remain at the discretion of the Court in question. Whilst recognising that standard non-parole periods provide a further reference point that may be useful in some instances, the Sentencing Council advises that the area of accessorial liability is presently inappropriate for this scheme.

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[115] Submission of the Office of the Director of Public Prosecutions, 3 September 2003
[116] Submission of the Senior Public Defender, 12 September 2003

**Schedule 1**

Individuals and organisations invited by the Sentencing Council to make submissions

| | | |
|---|---|---|
| Dr Don Weatherburn | Director | Bureau of Crime Statistics and Research |
| Mr E Schmatt PSM | Chief Executive | Judicial Commission of NSW |
| Mr N Cowdery AM QC | Director | Office of the Director of Public Prosecutions |
| Mr Peter Zahra SC | Senior Public Defender | NSW Public Defenders Office |

## Schedule 2

Copy of letter inviting submissions

Dear «Adressee»

The NSW Attorney General has asked the NSW Sentencing Council to consider the question of whether "attempt" and "accessorial" offences should be included in the standard non-parole sentencing scheme in Part 4, Division 1A of the *Crimes (Sentencing Procedure) Act* 1999.

In particular, the research of the Council will be directed to those offences in the Table of standard non-parole periods where it is considered likely that a corresponding "attempt" or "accessorial" offence is practically capable of being charged.

In order to assist the Council in its task, I invite the «Organisation» to make a written submission addressing one or more of the issues set out above.

Submissions should be sent to:

The Executive Officer
NSW Sentencing Council,
GPO Box 6,
Sydney NSW 2001

The closing date for submissions is September 2003.

I look forward to receiving the submission of the «Organisation».

Yours faithfully

The Hon A. R. Abadee RFD QC
Chairperson