

**Report on Sentencing Trends
and Practices
2005-2006**

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

The Council

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Hon J P Slattery AO QC, Deputy Chairperson

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Mr N R Cowdery AM QC, Director of Public Prosecutions

Assistant Commissioner Chris Evans APM, NSW Police

Mrs Jennifer Fullford, Community Representative

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¹ 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 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

² Mr Norman Laing was appointed to the Council on 18 April 2006.

³ The Hon Alan Abadee RFD QC AM served as Chairperson of the NSW Sentencing Council until 26 April 2006.

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INTRODUCTION AND OVERVIEW

The NSW Sentencing Council (“the Council”) is now in its third year of operation. This is its third statutory report on sentencing trends and practices, and covers the period July 2005-August 2006.⁵

Part 1 of this Report details changes to the membership of the Council and reports on activities the Council has engaged in.

Part 2 provides an update of the projects the Council has completed in 2005-06 and those it continues to work on.

Part 3 gives consideration to the standard non-parole period scheme (“the scheme”). In analysing the scheme the Council has relied upon statistical data available from the NSW Judicial Commission, which at present comprises data up to December 2005. As at December 2005 a total number of 652 sentences have been imposed under the scheme. A table comparing sentences imposed before the scheme with those sentenced under the scheme is attached (**Annexure A**).

Included also in the Council’s consideration of the scheme are a number of Court of Criminal Appeal judgments handed down within the year under review, where the scheme has been an issue on appeal. Summaries of these judgments are attached (**Annexure B**).

Part 4 concerns the continued monitoring of the feasibility of a guideline judgment on suspended sentences. An *Interim Report* on this issue was provided to the Attorney in September 2005 and was published on the Council’s website in July 2006. An update of this Report is provided in this part. In its update the Council has relied upon statistical data available from the Bureau of Crime Statistics and Research, with the most current data available comprising the calendar year 2005.

Included also are case summaries of appeals to the Court of Criminal Appeal involving suspended sentences for the period July 2005 to August 2006 (**Annexure C**).

⁵ Section 100J(1)(c) of the *Crimes (Sentencing Procedure) Act* 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 5 details some significant sentencing issues that have arisen over the past year:

- As was reported in the Council's 2004-05 statutory report, the provisions of section 21A of the *Crimes (Sentencing Procedure) Act 1999* continue to produce a large volume of case law. The Council considers these provisions in this Part.
- Indefinite sentencing was the subject of a recent High Court case in March 2006 and a discussion of this form of sentencing is examined in this Part.⁶
- The sentencing of Aboriginal offenders is continuing to be an area of difficulty. Since *R v Fernando* (1992) 76 A Crim R 58, a number of NSW Court of Criminal Appeal cases have referred to the principles set forth in that decision. The outcomes of those cases have sparked commentary concerning a perceived reluctance on the part of the CCA to apply the *Fernando* principles.
- On 3 April 2006 the *Crimes (Serious Sex Offenders) Act 2006* commenced. The Act provides the Attorney with the power to apply to the Supreme Court for an extended supervision order or a continuing detention order against a person serving a sentence for a serious sex offence or an offence of a sexual nature. The validity of similar Queensland legislation was upheld in the High Court case of *Fardon v Attorney General for the State of Queensland* [2004] HCA 46.
- The Australian Law Reform Commission released its report on sentencing federal offenders, *Same Crime, Same Time*.⁷ Of relevance to the Council, inter alia, was a discussion on the merits of forming a federal sentencing council.
- The NSW Legislative Council Standing Committee on Law and Justice released its Report: *Community based sentencing options for rural and remote areas and disadvantaged populations*.

Part 6 examines the first year of operation of the Victorian Sentencing Advisory Council, most notably its report on suspended sentences.⁸

Part 7 comprises Annexures to the Report.

⁶ *Buckley v The Queen* [2006] HCA 7

⁷ Australian Law Reform Commission Report 103, *Same Crime, Same Time: Sentencing Federal Offenders*, April 2006.

⁸ Victorian Sentencing Advisory Council, *Suspended Sentences Final Report Part One*, May 2006.

PART ONE: THE COUNCIL

Council Business

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

The Council has maintained its relationship with the Judicial Commission of NSW, the NSW Law Reform Commission, the Bureau of Crime Statistics and Research and the Attorney General's Department through regular meetings in 2005-06. Such meetings expand the knowledge base of the Council and also avoid any duplication of work.

In order to develop relationships and inform the Council of particular issues the Council has invited guest speakers to attend some of its monthly meetings:

- The NSW Attorney General, the Hon Bob Debus MP (July 2005);
- Mr Luke Grant, Assistant Commissioner Department of Corrective Services (February 2006); and
- Senior Officers of the Department of Corrective Services (June 2006).

Council Membership

This year has seen changes to the membership of the Council.

The founding Chairperson, the Hon Alan Abadee RFD QC AM retired in April 2006. Through his inaugural Chairmanship Justice Abadee helped shape the Council into a well functioning and cohesive body. His contribution to the Council's work over the past year is highly regarded and appreciated.

The Hon James Wood AO QC succeeded as Chairperson in April 2006.

Professor Larissa Behrendt retired as a Member of the Council in September 2005. As the member on the Council with expertise and experience in Aboriginal justice matters, her expert guidance in this area was of considerable benefit to many of the Council's reports.

Mr Norman Laing was appointed in April 2006 as the new member with expertise and experience in Aboriginal justice matters.

Profile

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

In February 2006 Mr Abadee delivered a paper on *The Role of Sentencing Advisory Councils* at the National Judicial College of Australia Conference titled 'Sentencing: Principles, Perspectives & Possibilities'.

In July 2006 the current Chairperson, James Wood, participated in a panel discussion the Victorian Sentencing Advisory Council conference *Sentencing and the Community: Politics, Public Opinion and the Development of Sentencing Policy*. The presentation was based on former Chairperson Abadee's paper on the role of the Council, which was endorsed by the Council.

Both papers are available on the Councils website, <http://www.lawlink.nsw.gov.au/sentencingcouncil>.

PART TWO: PROJECTS UPDATE

The Council produced three reports for the Attorney during 2005-06.

Seeking a Guideline Judgment on Suspended Sentences

In September 2005 the Council provided the Attorney with an *Interim Report* on seeking a guideline judgment on the use of suspended sentences. With permission from the Attorney the report was subsequently published on the Council website in July 2006.

The issue of suspended sentences was initially raised at the Council's meeting in May 2003 and has been of ongoing interest. In its *Interim Report* the Council identified two particularly compelling factors that suggest a guideline is needed:

- There has been a large number of Crown appeals against suspended sentences, many of which have been successful;
- A study by the Judicial Commission of NSW⁹, found that for 2002-2003, almost half of all suspended sentences in the higher Courts were for a period of two years. The Council suggested this might indicate that the courts are using an artificial reasoning process to arrive at a suspended sentence.

Despite this the Council advised the Attorney that an application to the Court of Criminal Appeal for a guideline judgment might be premature at that time. While the Council considered there were strong arguable points on the merits supporting a guideline judgment application, it was concerned that amendments being considered to suspended sentences legislation would mean that an application might be refused by the CCA.¹⁰ These amendments have not proceeded.

The Council has continued to monitor the above factors regarding the use of suspended sentences. An update to its *Interim Report* is provided in Part 4.

⁹ Poletti P and Vignaendra S, 'Trends in the Use of s 12 Suspended Sentences' (June 2005) 34 *Sentencing Trends and Issues*, NSW Judicial Commission.

¹⁰ NSW Sentencing Council, *Interim Report: Seeking a Guideline Judgment on Suspended Sentences*, September 2005 at 4.

NSW Sentencing Council's views on its current statutory powers contained in Part 8B of the *Crimes (Sentencing Procedure) Act 1999*

In November 2005 the Attorney General sought the Council's views on its statutory powers contained in Part 8B of the *Crimes (Sentencing Procedure) Act* ("the Act"). The Council submitted a detailed report of its views to the Attorney in November 2005, accompanied with possible legislative amendments designed to implement such views.

In expressing its views the Council acknowledged the situation, as it exists presently in NSW, where there are a number of bodies capable of advising the Attorney on sentencing issues. The Council primarily sought to clarify and solidify its position amongst these bodies. It also acknowledged that any changes to its statutory powers might have to be met within its current budget depending on the extent to which the powers are expanded.

The key areas raised in the Report included:

- *Reporting directly to Parliament* - The Council considers it may be appropriate to have its reports, at least the Council's Annual Report, placed before both houses of the NSW Parliament. The tabling of such would inform and educate the Parliament.
- *Broader statutory functions* including:
 - advising the Attorney General on sentencing matters generally and of its own motion;
 - conducting research and disseminating information to interested persons;
 - gauging public opinion on sentencing matters; and
 - fulfilling an educative role within the community.
- *Guideline judgments* – The Council expressed its concerns in ensuring that it is consulted and that its views are considered by the CCA in relation to guideline judgments. The Council submitted that its role regarding guideline judgments should be akin to that of the Victorian Sentencing Advisory Council where the Victorian Court of Appeal must consider its views before a guideline judgment is promulgated.¹¹

¹¹ See section 108C(1)(a) of the *Sentencing (Amendment) Act 2003* (VIC).

- *Membership of Council* – The Council considered it valuable to expand its membership to twelve to include two further members, reflecting the expertise found, e.g. at the Department of Corrective Services or the Legal Aid Commission.

Effectiveness of fines as a sentencing option

In November 2005 the Council was requested to examine the effectiveness of fines as a sentencing option and the consequences for those who do not pay fines, paying particular regard to increases in imprisonment for offences against sections 25 and 25A of the *Road Transport (Driver Licensing) Act 1998*.

The Council originally limited its investigations to the true sentencing issues related to court imposed fines, excluding consideration of the imposition of penalty notices or ‘on the spot fines’. In August 2006, following discussions with the Attorney General and by reason of the common issues that arise, the Council agreed to widen its terms to include the imposition and judicial review of penalty notices.

In the course of the Reference, the Council received over 50 submissions, undertook numerous consultations including in regional communities and correctional centres, met with key stakeholders and conducted a survey of judicial views regarding fines.

An *Interim Report* has been prepared and is currently being considered by the Attorney General. It is anticipated that the imposition of fines and penalties in relation to environmental and occupational health and safety issues will be the subject of a subsequent Report.

Potential Projects of Interest to the Council

Provisional Sentencing for Young Offenders

In *R v SLD* [2002] NSWSC 758 at [131] Wood CJ at CL commented,

“to sentence a person of his age [13 years] for the offence of murder, is a formidable challenge, for which there is very little, if any precedent in this country or elsewhere”.

His Honour commented further at [147]:

I will refer these reasons for sentence to the Criminal Law Review Division for consideration of a possible amendment of the law so as to cater for special cases such as the present. The cases I have in mind are those involving juveniles who are convicted of offences attracting a possible maximum

sentence of 25 years or more, who are aged less than 15 years at the time of the offence, and where the information available at the time of sentencing does not permit the Court to make a proper assessment as to the presence or likely development of a serious personality or psychiatric disorder, and/or propensity for future dangerousness.

In such a case it would be desirable, in my view, if the Court could sentence the offender initially to be detained at her Majesty's pleasure, with provision for review and resentencing at a later date, for example at the age of 21 years, or after say 5 years in custody.

The issues raised in *SLD* have not yet been addressed. CLRD has advised that initial policy consideration was paid to the issue of a provisional sentence, however it was felt that further consultation was required. This has not occurred to date although a precedent does exist in England and Wales which was applied in the case of the two young boys who were guilty of the abduction and murder of Jamie Bulger.

With the Attorney's approval, this is an issue that the NSW Sentencing Council desires to explore further.

Suspended Sentences

The results of the Council's monitoring of suspended sentences are set out below under the heading guideline judgments at page 17. Having regard to that review and to the Report of the Victorian Sentencing Advisory Council noted at page 39, the Council would be interested, with the Attorneys approval, in exploring this matter further.

Sentencing Aboriginal Offenders

The possible retreat from the *Fernando* principles by the Courts has been the cause for some criticism, particularly in the light of the high imprisonment rate for Aboriginal offenders. The possibility of a reference to the Sentencing Council or to the NSW Law Reform Commission is discussed at pages 29-30.

Limiting terms and those with a mental illness or intellectual disability

There would be merit in considering whether greater assistance could be made available to assist offenders whose intellectual disability or mental illness is such that they have been unable to appreciate or to exercise their right to seek a trial according to law, even though they have recovered, or adjusted, to the sufficient degree to be serving their "sentence" in similar conditions to those of a mainstream prisoner.

PART THREE: STANDARD NON PAROLE SENTENCING SCHEME

The Standard Non-Parole Sentencing Scheme (“the scheme”) is contained in Division 1A of Part 4 of the *Crimes (Sentencing Procedure) Act 1999*. Under its statutory functions, the Council’s statutory report on sentencing trends and practices is specifically required to include the operation of standard non-parole periods.¹²

Sentences Under the Scheme

Between 1 February 2003 and December 2005¹³ there have been 652 sentences under the scheme. A comparison between the sentences imposed before the scheme was introduced and the sentences imposed under the scheme is attached (**Annexure A**).

For some items on the table there have been few sentences imposed, indeed, there are some items where there have been no sentences passed. The Council has focused its attention on the scheme offences where there have been more than 10 sentences as shown in Table One (over page).¹⁴

Of the 14 scheme offences identified in Table One, 10 have shown an increase in the non-parole period with the remaining 4 showing no change. Eleven of the scheme offences in Table One show an increase in the percentage sent to imprisonment.

In *R v Way* (2004) 60 NSWLR 168, Wood CJ at CL noted that from the Second Reading Speech introducing the scheme, there was no specific legislative intention to increase sentences imposed for particular offences included in the scheme.¹⁵ The effect however of the legislation “may be that for some offences the sentencing pattern will move upwards, while for others it will not”.¹⁶

For two scheme offences an upward effect on the sentencing patterns would seem inevitable given the standard non-parole periods set.¹⁷ For Item 9A (s 61M(1) *Crimes Act*) the legislature has fixed 70 percent of the statutory maximum as the SNPP and for Item 10 (s 66A *Crimes Act*), 60 percent of the statutory maximum. For both of these items

¹² Section 100J(1)(c) of the Act.

¹³ This was the last available date for statistics.

¹⁴ The comments the Council makes in relation to Table One do not purport to provide a statistical analysis, but are merely observations.

¹⁵ At [141] per Wood CJ at CL.

¹⁶ At [142] per Wood CJ at CL.

¹⁷ Simpson J in *R v AJP* [2004] NSWCCA 434 at [37] commented: ‘In my opinion, the legislature having fixed 60% of the statutory maximum as the standard non-parole period for s66A offences, it is inevitable that sentences for these offences will increase.’

there has been an increase in the non-parole period and an increase in imprisonment.

Table 1: Scheme offences where there has been more than 10 sentences.

Item No. / Offence	SNPP	Percentage sent to imprisonment		Term of sentence		Non-parole period		
		Before 1/02/03	After 1/02/03	Midpoint		Midpoint		
				Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03	
1 Murder – other cases (23 matters)	20 yrs	100%	100%	18 yrs	20 + yrs	14 yrs	18 yrs	
4 Section 33 <i>Crimes Act</i> (wounding etc with intent to do bodily harm or resist arrest)	* wounding with intent (52 matters)	7 yrs	93%	92%	5 yrs	7 yrs	3 yrs	4 yrs
7 Section 61I <i>Crimes Act</i> (sexual assault)	(40 matters)	7 yrs	86%	93%	4 yrs	5 yrs	2 yrs	30 mth
8 Section 61J <i>Crimes Act</i> (aggravated sexual assault)	(28 matters)	10 yrs	95%	100%	6 yrs	6 yrs	3 yrs	3 yrs
9A Section 61M (1) <i>Crimes Act</i> (aggravated indecent assault)	(21 matters)	5 yrs	42%	52%	2 yrs	3 yrs	1 yr	30 mth
9B Section 61M (2) <i>Crimes Act</i> (aggravated indecent assault-child under 10)	(17 matters)	5 yrs	55%	71%	3 yrs	3 yrs	18 mth	18 mth
10 Section 66A <i>Crimes Act</i> (sexual intercourse-child under 10)	(14 matters)	15 yrs	82%	88%	54 mth	6 yrs	30 mth	4 yrs
11 Section 98 <i>Crimes Act</i> (robbery with arms etc and wounding)	* with arms cause wounding (11 matters)	7 yrs	98%	100%	5 yrs	7 yrs	3 yrs	3 yrs
	* in company cause wounding (18 matters)	7 yrs	94%	83%	6 yrs	6 yrs	3 yrs	3 yrs
	* assault with intent to rob and cause wounding (10 matters)	7 yrs	87%	90%	6 yrs	7 yrs	42 mth	42 mth
12 Section 112(2) <i>Crimes Act</i> (breaking etc into any house and committing serious indictable offence in circumstances of aggravation)	(269 matters)	5 yrs	73%	69%	42 mth	42 mth	18 mth	2 yrs
13 Section 112(3) <i>Crimes Act</i> (breaking into any house and committing indictable offence circumstances special aggravation)	(11 matters)	7 yrs	92%	100%	6 yrs	7 yrs	4 yrs	4 yrs
15 Section 154C (2) <i>Crimes Act</i> (car-jacking in circumstances of special aggravation)	(17 matters)	5 yrs	88%	100%	30 mth	42 mth	18 mth	18 mth
20 Section 7 <i>Firearms Act</i> 1996 (unauthorised possession or use of firearms)	Old section 7 (19 matters)	3 yrs	57%	84%	2 yrs	3 yrs	18 mth	2 yrs

Item No. / Offence	SNPP	Percentage sent to imprisonment		Term of sentence		Non-parole period		
		Midpoint		Midpoint		Midpoint		
		Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03	
<p>18 Section 25(2) <i>Drug Misuse and Trafficking Act</i> 1985 (supplying commercial quantity of prohibited drug) being an offence that:</p> <p>a) does not relate to cannabis leaf, and</p> <p>b) if a large commercial quantity specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug.</p>	<p>* supply prohibited drug – commercial quantity amphetamines (12 matters)</p>	10 yrs	92%	83%	4 yrs	6 yrs	30 mth	42 mth
		<p>* supply prohibited drug – commercial quantity ecstasy (14 matters)</p>	10 yrs	81%	86%	3 yrs	4 yrs	18 mth
<p>19 Section 25(2) <i>Drug Misuse and Trafficking Act</i> 1985 (supplying commercial quantity of prohibited drug) being an offence that:</p> <p>a) does not relate to cannabis leaf, and</p> <p>b) if a large commercial quantity specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug.</p>	<p>*supply prohibited drug – large commercial quantity ecstasy (11 matters)</p>	15 yrs	100%	100%	6 yrs	7 yrs	4 yrs	54 mths

Annexure B comprises an analysis of problems in cases within the standard non-parole period scheme, apart from those arising by reason of the application of s 21A of the Act, between July 2005 and 30 August 2006.

There were 77 scheme appeals heard during this period.¹⁸ Of these 77 matters, only 47 were appealed on the basis of error in the imposition of the standard non-parole period. The remaining 30 matters were appealed on other grounds.

Of the 47 appeals concerning standard non-parole periods, 15 were brought by the Crown, of which 11 were successful.

It is noted that some judicial disagreement is apparent in at least one matter before the CCA, in relation to the application of the standard non-parole period. In *R v Yildiz* [2006] NSWCCA 97, Adams J determined that the sentence was manifestly excessive, based, at least in one respect, on the fact that the sentencing judge gave undue emphasis to the standard non-parole period. However, the majority held at [40] per Simpson J, that 'the proportion that the non-parole period actually imposed bears to the standard non-parole period lends no support at all to the proposition'.

Judicial observations on the length of sentences being increased by virtue of the SNPP scheme were made in 2 matters, *R v Des Rosiers* [2006] NSWCCA 16 and *R v Yildiz* [2006] NSWCCA 97.

In *R v Heron* [2006] NSWCCA 215 the Court commented on the anomaly between the heavy penalty for the offence charged under s33 of the *Crimes Act* (25 years imprisonment) and the penalty for an offence contrary to s35 of the *Crimes Act* (7 years imprisonment) where except for intent, the ingredients were identical (at 22).

¹⁸ The Council's analysis is based on cases identified by the Judicial Commission and the Office of the Director of Public Prosecutions.

PART FOUR: GUIDELINE JUDGMENTS

Under its statutory functions, the Council is specifically required to include the operation of guideline judgments in its report on sentencing trends and practices.¹⁹ There have been no new guideline judgments in the year under review.

Guideline Judgment for Suspended Sentences

As outlined previously, the Council submitted an *Interim Report* to the Attorney in September 2005 on the feasibility of obtaining a guideline judgment on the use of suspended sentences.

While highlighting factors that indicate a need for a guideline judgment, the Council determined that at present an application for such would be premature. The Council based this determination largely on the presence of legislative changes being considered by the Criminal Law Review Division (CLRD) of the Attorney General's Department.

The amendments being considered by CLRD were concerned with proceedings consequent upon breach of a suspended sentence. They seek to provide the court with more flexibility when dealing with a breach of a suspended sentence and to address anomalies present in the operation of sections 12, 47 and 99 of the Act.²⁰ The Council understands these amendments are still being considered, with a possibility of being introduced in the next session.

The contemplated amendments do not directly affect the aspects of suspended sentences that the Council focused on in its *Interim Report*. The Council was primarily concerned with the circumstances in which a sentence can be suspended, not so much with the issues upon breach of such a sentence. However, it was suggested, in the *Interim Report*, that the amendments could impact on the perceived seriousness of suspended sentences in the penalty hierarchy and in turn on the more practical aspects of their use. Suspended sentences have been described as having a "sting in their tail." Amendments dealing with proceedings upon breach may remove some of this "sting."²¹

¹⁹ Section 100J(1)(c) of the *Crimes (Sentencing Procedure) Act 1999*.

²⁰ In *R v Tolley* [2004] NSWCCA 165, Howie J, with whom Hodgson JA and Levine J agreed, highlighted the anomalies in the operation of these sections and provided a detailed analysis and critique of the sections.

²¹ The Council has previously commented on the tension between providing greater flexibility in dealing with a breached suspended sentence and the need to maintain public confidence in the use of suspended sentences: NSW Sentencing Council, *Interim Report: Seeking a Guideline Judgment on Suspended Sentences*, September 2005; *Abolishing Prison Sentences of Six*

The Council has continued throughout 2005/06 to monitor the use of suspended sentences and the possible need for a guideline judgment. As expressed in its *Interim Report* the Council concluded a guideline ought to re-emphasise:

1. The need for sentencers to adhere to the two step process in arriving at a suspended sentence in order to avoid:
 - a) Sentencing escalation, and
 - b) Arriving at a term of two years or less in order to permit suspension;
2. The need for sentencers, in the second step, to look again at *all* matters relevant to the circumstances of the offence, and to exercise caution against allowing subjective factors to obscure objective seriousness at this stage.²²

Statistics gained from the Bureau of Crime Statistics and Research for the calendar year 2005 indicate that the pattern of suspended sentence use in the higher courts, referred to in the Council's *Interim Report*, is continuing. The most common term for a suspended sentence was 2 years, with over a third of suspended sentences being for this length (38.6 percent).

Between July 2005 and August 2006 there were 7 appeals to the CCA concerning suspended sentences.²³ Five of these were Crown appeals and two were appeals against the severity of the sentence. Of the five Crown appeals two were successful, two were dismissed, and in one error was found but the CCA exercised its discretion not to intervene.

While the number of Crown appeals during the year under review is lower than that in previous years²⁴ the Council reiterates the comments made in its *Interim Report* that, taking into account the restraints on Crown appeals against sentence and the provision of

Months or Less, August 2004. There seems to be a disjuncture between public perceptions and legal views on the severity of suspended sentences. While the Courts view suspended sentences as one of the most serious penalties, the public seem to view the offender as "walking free". See for example, Arie Freiberg, *Pathways to justice: Sentencing Review 2001: Discussion Paper* (2001) at 59.

²² NSW Sentencing Council, *Interim Report: Seeking a Guideline Judgment on Suspended Sentences*, September 2005 at 4.

²³ *R v BCC* [2006] NSWCCA 130; *Brown v R*; *Reid v R* [2006] NSWCCA 144; *R v Gip* [2006] NSWCCA 115; *Braithwaite v R* [2005] NSWCCA 451; *R v Dutton* [2005] NSWCCA 248; *R v O'Connell* [2005] NSWCCA 265.

²⁴ Ten in 2004; six in 2003; twelve in 2002; nine in 2001; four in 2000.

prosecution guidelines, the number of such appeals to the CCA is likely to underestimate the incidence of error.²⁵

The appeals to the CCA over past and previous years provides some indication as to when a suspended sentence is appropriate and the types of factors which are commonly taken into account in whether or not to suspend a sentence. Summaries of the appeals to the CCA between July 2005 and August 2006 are attached (**Annexure C**).

Impact of the High Range PCA Guideline Judgment

On 8 September 2004, the CCA promulgated a guideline judgment for the offence of driving with a high range prescribed concentration of alcohol ("high range PCA"). The decision was in the context of a qualitative or principled guideline judgment for that offence rather than a quantitative judgment.

In September 2005 the NSW Judicial Commission completed a study on the impact the high range PCA guideline judgment was having on sentencing drink drivers in NSW.²⁶ The main conclusions reached by the study were that:

- Sentences for high range PCA offences have increased in severity;
- There has been an increased uniformity in the use of s10 non-conviction orders;
- There has been an increased uniformity in the use of disqualification periods between courts;
- Appeals to the District Court against the severity of sentences in these cases have increased slightly; and
- There have been flow on or incidental effects on sentencing patterns for similar offences such as middle or low range PCA offences.

²⁵ See Brignell and Donnelly (July 2005) "Monograph 27: Crown Appeals Against Sentence" Sydney: The Judicial Commission, at page 3

²⁶ Poletti P, 'Impact of the High Range PCA Guideline Judgment on Sentencing Drink Drivers in NSW' (2005) 35 *Sentencing Trends and Issues*, NSW Judicial Commission.

PART FIVE: SIGNIFICANT SENTENCING DEVELOPMENTS

SECTION 21A CRIMES (SENTENCING PROCEDURE) ACT 1999

In its 2005 report on sentencing trends and practices the Council commented that the large number of appeals on issues dealing with s21A of the Act raised questions as to whether a guideline judgment was warranted.

Section 21A was inserted into the Act in 2002 by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*. The section restates, in two separate lists, the aggravating and mitigating factors to be considered in the sentencing exercise. The lists are a restatement of many of the aggravating and mitigating factors that were considered under common law. The primary object of the Bill was to introduce guidance and structure to judicial discretion with the aim of promoting consistency and transparency in sentencing and also of promoting public understanding of the sentencing process.²⁷

Last year the Council noted that there had been more than 75 matters that went to the CCA complaining, often successfully, that the use of s 21A had led to error.²⁸ In the period under review, notwithstanding the benefit of guidance from the decisions of the CCA during the preceding year, there have been 78 appeals concerned with this section.

Such a large volume of appeals led to the following comment by Howie J in *R v Elyard* [2006] NSWCCA 43 at [39]:

It is unfortunate indeed that those responsible for drafting s 21A of the *Crimes (Sentencing Procedure) Act* have made the task of sentencing courts more difficult, or at least more prone to error (either real or apparent), by what was in my opinion a needless attempt to define relevant factors into categories of aggravation or mitigation and yet apparently without the intention of altering the common law as it was applied to sentencing before the advent of the section. One has only to look back over sentence appeals determined by this Court

²⁷ The Hon R J Debus MP, Attorney General, Second Reading Speech, *Crimes (Sentencing procedure) Amendment (Standard Minimum Sentencing) Bill*, NSW Parliamentary Debates, Legislative Assembly, 23 October 2002, pp5813-5819.

²⁸ Haesler SC, Sexual Assault Update – How the prudent judge can avoid error' (2005) 17 *Judicial Officers' Bulletin*.

over the last two years to see the impact that this section has had upon the work of this Court.

The editors of Criminal Law News, when commenting on recent CCA sentence decisions, made a similar observation:

These aspects...demonstrate yet again the difficulties faced by sentencing judges when attempting to sentence without error in a field where there are increasingly narrow decisions...

It is perhaps unlikely that the drafters of s 21A could have anticipated that such subtle distinctions would flow from their attempts to reproduce in statutory form what sentencing judges have been doing for many years.²⁹

Of assistance to judges in their application of section 21A is a Sentencing Bench Book, which was published by the NSW Judicial Commission on 24th October 2006. The Bench Book provides extensive guidance and commentary on all aspects of sentencing, including the provisions found in s 21A.

The Commission has compiled general rules governing the application of s 21A generally, and has also highlighted the main concerns, which primarily involve the misapplication of s 21A(2) in dealing with aggravating factors. The concerns are based around aspects of “double counting”, most notably:

- *Direct double counting*: judges will fall into error if they consider an element of an offence as an aggravating factor, contrary to the direction in s 21A(2) that additional regard is not to be had to an aggravating factor if it is an element of the offence. For example, in *R v Davis* [2004] NSWCCA 310 the sentencing judge incorrectly held that the occasioning of actual bodily harm was an aggravating factor in an offence of detaining in company with intent to obtain advantage and occasioning actual bodily harm.
- *Confusion between the bare facts of an element of an offence as opposed to the nature and extent of that element*: For the offence of robbery in company, the fact that the offence was committed in company cannot be considered as an aggravating factor under s 21A(2)(e), although the sentencing judge is entitled to consider the nature and extent of the company involved, for example the number of persons involved: *R v Hamze* [2006] NSWCCA 36.

²⁹ Butterworths Criminal Law News, April 2006

- *Double counting when the policy underlying the offence is inherent in it:* This is most evident in the consideration of s 21A(2)(i), which deals with offences committed without regard for public safety. Questions have been raised as to how a sentencing judge is correctly to assess this potentially aggravating factor when dealing with offences such as dangerous driving, drug supply or firearms offences. Inherent within those offences is a disregard for public safety. Recent decisions such as *R v Yildiz* [2006] NSWCCA 97 concerning the inherent fact of planning in a supply drug offence; and *R v Cunningham* [2006] NSWCCA 176 concerning the inherent occasioning of some degree of emotional or psychiatric harm in sexual assault cases, illustrate the problem.

Of the number of matters that have come before the CCA in the last year the following subsections of s 21A(2) seem to have been causing the most confusion:

- **Section 21A(2)(b) - the offence involved the actual or threatened use of violence.**

Error is established if actual or threatened use of violence is taken into account as an aggravating factor when it is also an element of the offence. For example in manslaughter cases the actual use of violence was held in *R v Williams* [2005] NSWCCA 99 to be an element of the offence.

In *R v Hamze* [2006] NSWCCA 36 it was held that for the offence of armed robbery threatened use of violence is an element of the offence but the actual use of violence is not. Thus, it was held that the fact that an offender uses violence could be taken into account as an aggravating factor. It was also held that while the threat of violence could not be taken into account, as an aggravating factor, the nature and quality of that threat could be regarded as heightening the seriousness of the offence.

- **Section 21A(2)(c) - the offence involved the actual or threatened use of a weapon.**

This factor was discussed in *R v Dougan* [2006] NSWCCA 34 in relation to the offence of assault with intent to rob while armed with a dangerous weapon.³⁰ While the offence is predicated on the fact that the offender is armed with a dangerous weapon, the CCA held that “armed with a dangerous weapon” refers only to being in possession of a weapon rather than its threatened or actual use.

³⁰ Section 97(2) *Crimes Act 1900*.

Accordingly the sentencing judge was entitled to take into consideration as an aggravating circumstance the nature of the actual or threatened use of a pistol, for example, being pointed at the victim's neck. In *R v Chisari* [2005] NSWCCA 19 it was noted that the sentencing judge had fallen into error in regarding the actual use of a weapon as an aggravating circumstance for an offence of maliciously inflicting grievous bodily harm.

- **Section 21A(2)(d) – the offender has a record of previous convictions.**

Recently in *R v McNaughton* [2006] NSWCCA 242 a Bench of five discussed this provision, which had been an occasion of difficulty in many cases, and settled the manner in which it is to be applied. The section had been the subject of several appeals and of much debate with the result that Spigelman CJ in *R v Hathaway* [2005] NSWCCA 368 had suggested that the relationship between s 21A(2)(d) and s 21A(4) may need to be determined by a Bench of five and that Howie J had suggested that, on its face, s 21A(2)(d) would indicate that a prior criminal record is a matter of aggravation, contrary to the manner in which that has been taken into account at common law.

Section 21(4) provides that the court is not to have regard to any aggravating or mitigating factors if to do so would be contrary to any Act or rule of law. At common law an offender's prior record does not operate to aggravate an offence. A prior record only operates to deprive an offender of leniency or to indicate that it is more appropriate to give weight to factors such as retribution, deterrence or community protection.³¹ As stated in *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 477, prior record is relevant:

to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted.

In *McNaughton* the CCA stated that the principle of proportionality requires that the upper boundary of a proportionate sentence be set by the objective circumstances of the offence, which do not include prior convictions. It also stated that the reference to prior convictions in s 21A(2)(d) of the Act should be interpreted as referring to the use of that consideration in a

³¹ *Veen v The Queen (No 2)* (1988) 164 CLR 465

manner consistent with the proportionality principle. The aggravating factors set out in s 21A(2) are intended to encompass both subjective and objective considerations, as that distinction has been developed at common law. As Spigelman CJ stated at [33-34]:

[33] If *Veen No 2* is understood to establish a principle to the effect that prior convictions can never be classified as an "aggravating factor" then, because the principle of proportionality applies to all sentences, s 21A(4) would have the effect of depriving s 21A(2)(d) of any effect. Section 21A(4) should not be interpreted in that way.

[34] This consideration reinforces my conclusion that the aggravating factors set out in s 21A(2) are intended to encompass both subjective and objective considerations, as that distinction has been developed at common law.

Examples of cases where the prior criminal record was held incapable of being treated as an aggravating circumstance include *R v Chisari* [2006] NSWCCA 19 and *R v Price* [2005] NSWCCA 285 where it was also held that a s 10 bond does not give rise to a conviction that would qualify under the section.

- **Section 21A(2)(g) - the injury, emotional harm, loss or damage caused by the offence is substantial.**

In *R v Youkhana* [2004] NSWCCA 412 it was held that it is an error to take into account as an additional factor, harm that is expected to result by the commission of the particular crime. The obvious example is taking into consideration the death of a victim where the offence is manslaughter or murder. This decision was applied in *R v Solomon* (2005) 153 A Crim R 32.

In applying the subsection a sentencing judge must identify "substantial" harm. In *R v Wickham* [2004] NSWCCA 193 the CCA pointed out that the word used in this provision is "substantial" and not "significant" as used by the sentencing judge.

In finding the existence of additional harm, that would meet the test of being substantial harm, Howie J in *R v Solomon* (2005) 153 A Crim R 32 at [19] stated:

Because the court assumes, without evidence, that the victim of a robbery would be affected both physically and psychologically from the commission of the offence and because that consequence of the offence is taken into account generally in determining that the offence is to be considered as a serious one requiring condign

punishment, it would be unfair for the court to take into account as an additional aggravating factor under s 21A(2)(g) the fact that the victim of an armed robbery suffered the type of harm that is assumed to be the case for any victim of that offence: there would be in effect a double counting of an aggravating feature of the offence. Therefore, in order to take into account the effect upon the victim of the offence as an aggravating feature over and above that which applies to armed robbery offences in general, something more is required than that which the court has assumed to be the case.

It was accepted that the existence of that harm could be found by reference to the victim impact statements.

- **Section 21A(2)(i) – the offence was committed without regard for public safety.**

This aggravating factor has caused much debate in respect of whether elements of particular offences, for example, dangerous driving, firearm offences and supply of prohibited drugs, already take into account a disregard for public safety. Basten JA in *R v Elyard* [2006] NSWCCA 43 stated that there has been limited consideration when determining whether this factor involves a subjective or an objective test, and if subjective, what level of conscious or reckless disregard for public safety is required?³²

Consideration was given to this provision in *R v McMillan* [2005] NSWCCA 28, *R v Ancuta* [2005] NSWCCA 275 and *R v Aslan* [2005] NSWCCA 121 with a difference in approach being evident in the decisions in *McMillan* and *Ancuta*. Howie J made reference to this inconsistency and to the difficulties which is occasioned by this aspect of s 21A(2) in *Elyard* at [40] to [45].

- **Section 21A(2)(l) – the victim was vulnerable.**

In *R v Tadrosse* [2005] NSWCCA 145 it was considered that section 21A(2)(l) is concerned with the vulnerability of a particular class of victim rather than with the threat posed by a particular class of offender. Thus error will be found if applied to generalised situations, for example in *R v Williams* [2005] NSWCCA 99 it was an error to consider a victim of manslaughter as vulnerable because he was not as powerful or aggressive as the offender.

³² *R v Elyard* [2006] NSWCCA 43 at [12]

Section 21A(2)(l) has come under much scrutiny, particularly in child sexual assault cases. It was held in *R v JDB* (2005) 153 A Crim R 164 to be an error to treat the age of a victim as an aggravating factor where that age is an element of the offence. However, in other cases the CCA has held that it was appropriate to consider a child as vulnerable due to their young age.

In *R v Pearson* [2005] NSWCCA 116 the court held the judge was entitled to consider as a matter going to the seriousness of the offence the age of the victim even though the circumstances which were relied upon as aggravating the offence of indecent assault charged was the fact that the victim was aged under 16 years, upon the basis that it was not the bare fact of the victim being under age but the extent to which she was underage that made her particularly vulnerable.

In *R v JTAC* [2005] NSWCCA 345, where the offence in question was sexual intercourse with a child under 10, the CCA similarly held the judge was entitled to consider, as a matter of aggravation, that the victims ages were 5 and 7 years, by reference to the degree of their vulnerability i.e. they were considerably younger than 10.

- **Section 21A(2)(m) – the offence involves multiple victims or a series of criminal acts**

In *R v Tadrosse* [2005] NSWCCA 145 it was also pointed out that it was an error to apply this as an aggravating factor where the offender was being sentenced for a number of separate offences although it could be applied where there was an offence involving more than one criminal act on a single criminal episode.³³

Notwithstanding the analysis by the Judicial Commission of section 21A and the recent case law, concern persists in relation to the application of section 21A in particular because of the extent to which some of the aggravating factors are elements of the offence or inherent in it, or reflect the policy behind it and because of the difficult judgment which can be required in determining whether the extent or quality of the facts giving rise to the offence justify regarding one or more of the factors as a matter going to its seriousness.

The Council will continue to monitor these provisions, especially in light of legislative amendments having been made to the section in recent months. At the moment it would seem that sufficient guidance has been given by the CCA in the year under review, but if appellate

³³ See also *R v Hamze* [2006] NSWCCA 36

error continues to occur it may be necessary to reconsider the provision or to seek a guideline judgment.

Amendments to section 21A

In 2006 the *Crimes (Sentencing Procedure) Amendment Bill* amended s 21A. Section 21A(2)(a) was amended to include victims who exercise public or community functions, where the offence arose because of their occupation. Section 21A(2)(l) was amended to expand the meaning of vulnerable victims to include bus drivers or other public transport workers.

As stated in the Second Reading Speech the amendments were primarily the result of a number of offences committed against public transport workers and life savers over a couple of months. The Hon Tony Stewart MP, on behalf of the Attorney General, stated:

During 2005 there were a number of occasions when transport workers, specifically bus drivers, were assaulted. The transport union raised the matter with the Government and called for heavier penalties for those who assaulted transport workers. Similarly, surf lifesavers give up their summer weekends to patrol our beaches. They perform a life-saving public service at no cost to beachgoers. It is simply beyond the pale that these unpaid, selfless individuals should be exposed to any threats to their person. The Bill therefore recognises the particular roles these workers play in our society and the amendment explicitly recognises the aggravating factor that applies to workers in these frontline occupations.³⁴

³⁴ The Hon Tony Stewart MP, on behalf of Attorney General, Second Reading Speech, *Crimes (Sentencing Procedure) Amendment Bill*, NSW Parliamentary Debates, Legislative Assembly, 6 April 2006.

Indefinite Sentencing

In March 2006 the High Court considered indefinite sentences in *Buckley v The Queen* (2006) 224 ALR 416.

Under particular consideration was Part 10 of the *Penalties and Sentences Act 1992* (QLD), under which a court may impose an indefinite sentence on an offender convicted of a violent offence if satisfied that the offender is a serious danger to the community. The Court acknowledged that similar legislative provisions providing for the preventive detention of habitual or dangerous offenders has a long history in jurisdictions derived from the English system.³⁵

When imposing an indefinite sentence the court must state the prison term that would otherwise have been imposed. That indefinite sentence must be reviewed within six months after the offender has served 50 percent of the nominal sentence, and subsequently at intervals of not more than two years.

The court must have regard to:

- whether the nature of the offence is exceptional;
- the offender's antecedents, age and character;
- any relevant psychiatric or other reports;
- the risk of serious physical harm to the community if an indefinite sentence is not imposed; and
- the need to protect the community from such risk.

Detailed reasons must accompany the imposition of any indefinite sentence.

The High Court unanimously allowed an appeal from a decision of the Queensland Court of Appeal refusing leave to appeal from the sentence. The High Court emphasised that indefinite sentences are exceptional sentences and are only to be used in clear cases. In the present case the sentencing judge did not examine effectively all of the issues relating to the appellant which would have been relevant in determining whether an indefinite sentence was required.

A particular error lay in the sentencing judge's failure to consider whether the nominal sentence of 22 years specified would have reasonably met the protective purpose in contemplation.

³⁵ *Buckley v The Queen* [2006] HCA 7 at [2].

The Court stated at [7]:

In the first place, where a judge, sentencing a dangerous offender, is deciding whether the protection of society requires an indefinite sentence, the protective effect of a finite sentence, fixed according to ordinary sentencing principles, including the need to protect the public, is a matter to be weighed carefully. An indefinite sentence is not merely another sentencing option. Much less is it a default option. It is exceptional, and the necessity for its application is to be considered in the light of the protective effect of a finite sentence.

Although NSW does not have a similar regime permitting indefinite sentences, the observations in the case do have some relevance for continuing detention orders under the *Crimes (Serious Sex Offenders) Act*, later mentioned, and for the declaration and sentencing of habitual criminals which was considered by the CCA in *R v Strong* (2003) A Crim R 56 from which an appeal was dismissed in *Strong v The Queen* (2005) 79 ALJR 1171.

Sentencing Aboriginal Offenders

Over the past year and previous years there have been a number of CCA decisions that have highlighted the continuing difficulties in the area of sentencing Aboriginal offenders.³⁶

The decision of *R v Fernando* (1992) 76 A Crim R 58 set forth principles that may be relevant to the sentencing of an Aboriginal offender. They are commonly referred to as the *Fernando* principles and were considered by the NSW Law Reform Commission 'to be accepted and applied in New South Wales'.³⁷

The principles were intended to be indicative of some of the factors leading a person of Aboriginal background into offending behaviour, and as a consequence relevant for sentencing, rather than a comprehensive declaration of sentencing practice.³⁸ Determining when the principles are enlivened has been the main contentious issue.

³⁶ *R v Ceissman* (2001) 119 A Crim R 535; *R v Pitt* [2001] NSWCCA 156; *R v Newman and Simpson* (2004) 145 A Crim R 361; *R v Kelly* (2005) 155 A Crim R 499.

³⁷ NSW Law Reform Commission Report 96: Sentencing Aboriginal Offenders, 2000 at [2.21]

³⁸ *R v Morgan* (2003) 57 NSWLR 533 per Wood CJ at CL at [20]-[21].

A number of cases have established that the bare fact of Aboriginality does not automatically call for the application of the *Fernando* principles and that those principles have to be considered in context: *R v Newman & Simpson* [2004] NSWCCA 102. In *R v Kelly* [2005] NSWCCA 280, Rothman J held at [55] ‘that the mere fact that a person is of Aboriginal descent and suffers disadvantage does not call for the application of the *Fernando* principles.’

In other cases, it has been suggested that the principles may only be applicable to Aboriginal offenders from rural and remote areas of NSW.³⁹ In several recent decisions the principles have held to be inapplicable, for example *R v Vincent* [2005] NSWCCA 135, *R v Walter & Thompson* [2004] NSWCCA 304, *R v Trindall* [2005] NSWCCA 446, *R v Mason* [2005] NSWCCA 403 and *R v Field* [2005] NSWCCA.

Commentators have lamented the recent decisions of the CCA asserting that they represent a retreat from the principles created in *Fernando*.⁴⁰ The suggestion has been made that the attempts to define and limit contemporary Aboriginal experience does not appreciate that “every Indigenous person [whether or not from a deprived background or from a rural/remote area] is a member of a visible racial minority in a community that is often not tolerant of racial minorities”.⁴¹

A question arises as to whether the *Fernando* principles should be re-examined, or some other approach taken in relation to sentencing Aboriginal offenders having regard to their high rate of imprisonment. In the absence of a guideline judgment the Sentencing Council would see advantage in the matter being the subject of a term of reference to the Sentencing Council or the NSW Law Reform Commission.

³⁹ *R v Ceissman* (2001) A Crim R 535; *R v Newman and Simpson* (2004) 145 A Crim R 361; *R v Kelly* (2005) 155 A Crim R 499

⁴⁰ Edney R, ‘The Retreat from Fernando’ (2006) 6(17) *Indigenous Law Bulletin* 8-11; Edney R, ‘Just Deserts in Post-Colonial Society: Problems in the Punishment of Indigenous Offenders’ (2005) 9 *Southern Cross University Law Review* 73-105; Flynn M, ‘Not Aboriginal Enough – for particular consideration when sentencing’ (2005) 6(9) *Indigenous Law Bulletin* 15-17; Omeri S, ‘Considering Aboriginality: Comparing NT and NSW’ (2006) *Law Society Journal* 4-6

⁴¹ Flynn M, ‘Not Aboriginal Enough – for particular consideration when sentencing’ (2005) 6(9) *Indigenous Law Bulletin* 15-17 at 15.

Discount for plea of guilty and/or assistance

Despite the guidance given in *R v Thomson and Houlton* (2000) 49 NSWLR 383 in relation to the discount for a guilty plea, and the guidance given in *R v Gallagher* (1991) 23 NSWLR 220 and in *R v PPB* [1999] NSWCCA 360, there have been several cases where the level of discount has been questioned, particularly where both factors are present.

In *R v Waqa* (No 2) [2005] NSWCCA 33 guidance was given as to the ways in which the courts should deal with a discount where both factors were present, including the quantification of a single combined discount, although with a separate specification.

In *R v Sukkar* [2006] NSWCCA 92 it was held that a discount in the order of 45 percent for assistance was inappropriate where there was no evidence that the offender would be at risk while in prison. This reflected the appreciation that the courts now have that informers and persons on protection do not necessarily serve their sentence under harsher conditions, and are not deprived of the amenities or services available to other prisoners.

There have been differences in opinion as to the discount to be given where the Crown does not accept the offender's indication of a plea, and where he is then convicted of the less serious offences for which the plea was offered: *R v Harmouche* [2005] NSWCCA 398.

In *R v Ahmad* [2006] NSWCCA 177 it was held that a discount at the top of the range was not appropriate where the offender did not offer a plea to the less serious offence at an early stage when it was known that the Crown would not have accepted it, but did later offer a plea which was accepted. In *R v Stamboulis* [2006] NSWCCA 56, it was held that a 25 percent discount was inappropriate in a case where the offender has refused to plead guilty until the Crown has taken one matter off the indictment and included it on a Form One.

Error was again found, for example in *R v Rahme* [2006] NSWCCA 96 in the failure of the sentencing judge to make it clear that a discount has been given for a plea, contrary to the specific observation in *Thomson and Houlton* that this should be done.

“Limiting terms” – Section 23(1) *Mental Health (Criminal Procedure) Act 1990*

A problem had existed in relation to the date from which a limiting term can be fixed to commence where, pursuant to a special hearing, a person who is unfit to be tried has been found on the limited evidence, to have committed the offence: *R v RTI* [2005] NSWCCA 337.

This was addressed during the year under review by amendment of s 23 of the *Mental Health (Criminal Procedure) Act 1990*. The position remains that the limiting term is the total term, there being no determination of what might have been a non-parole period: *R v Mailes* (2001) 150 A Crim R 365.

This can be an occasion of disadvantage for offenders whose intellectual disability or mental illness is such that they have been unable to appreciate or to exercise, their right to seek a trial according to law, even though they have recovered, or adjusted, to the sufficient degree to be serving their “sentence” in similar conditions to those of a mainstream prisoner.

The practical difficulty which people with an intellectual disability are likely to have, in obtaining a conditional early release, was specifically mentioned by Dunford J in *R v Mailes* 2004 NSWCCA 394. The Mental Health Review Tribunal has advised the Council that nothing has changed in this respect, and that such persons still have great difficulty in obtaining assistance.

Their position was also considered by the NSW Law Reform Commission in its Discussion Paper No: 35 *People With an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues* and in its Final Report No: 80, which recommended against dividing the limiting term into minimum and additional terms.

In these circumstances the Council believes that there would be merit in considering whether greater assistance could be made available to assist such persons, in being assessed for either conditional or unconditional early release, otherwise they will continue to serve out the full limiting term and be disadvantaged in comparison to other offenders, convicted and sentenced for like offences, who can normally expect a conditional release on parole before expiry of the equivalent head sentence.

The Council flags the problem for possible future consideration, since it may become the subject of consideration during the review of the Act, which is being conducted by the Hon Greg James QC as President of the Mental Health Review Tribunal.

Life Imprisonment

Offenders sentenced to imprisonment for life under ss 19A or 61JA of the *Crimes Act* and under s 33A of the *Drug Misuse and Trafficking Act*, are required to serve those sentences for the term of their natural lives, without any entitlement to have a non parole period fixed, or to have their sentence redetermined in the way that is available to those offenders sentenced to life imprisonment who come within Schedule 1 of the *Crimes (Sentencing Procedure) Act*.

Thirty-three prisoners have now been sentenced in New South Wales to imprisonment for the term of their natural lives (two of whom have died in custody).⁴² No sentences were passed under these provisions in New South Wales during the year under review, although the CCA in *R v Knight* [2006] NSWCCA 292, dismissed an appeal from a life sentence for murder, and made reference to the principles to be applied in imposing the extreme sentence of imprisonment for the term of the offenders life.

In *R v Law* [2006] NSWCCA 100 the CCA reviewed the decisions throughout Australia in relation to very serious drug offences charged under Federal law for which life sentences had been passed for all of which bar one, *R v Wei Ming Chen and R v Khong Hoi Lau* (2002) 130 A Crim R 300, non parole periods had been set.

The *Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Act 2005* amends the Act and the *Crimes (Administration of Sentences) Act 1999* in relation to redeterminations of existing life sentences where the sentencing judge recommended that the offender never be released. The Act commenced in May 2005 and was in response to the Supreme Court case of *R v B* [2005] NSWSC 340.

The object of the Act is to ensure that those offenders who are subject to life sentences and to a "non-release recommendation" cannot apply for a redetermination until they have served at least 30 years of the original sentence; and that in such a case, while the Court could set a non-parole period if satisfied of the existence of "special reasons", it could not set a specified term in place of the life term.

An appeal challenging the validity of the legislation has now been dismissed in a majority decision (Spigelman CJ & Howie J; Kirby J dissenting).

⁴²Number obtained from NSW Public Defenders website http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_murdernaturallife accessed on 21 September 2006 at 11:20am. All prisoners have been sentenced for murder under s 19A of the *Crimes Act*.

There are nine offenders currently serving sentences who fall into this category, and for whom the only possibilities for release are by exercise of the Royal Prerogative of Mercy, or by satisfaction of the Parole Board (if the Court sets a non parole period), that they were in imminent danger of death, or incapacitated to the extent that they no longer have the physical ability to do harm to any person.⁴³

At the date of this report there are 38 offenders in custody or on parole, who initially received life sentences, and who have either received sentence redeterminations, or who are entitled to apply for a redetermination, as per Table 2.

Table 2

• Existing life parolees	4
• Redetermined offenders whose earliest release date has passed (including 1 forensic patient and excluding 1 offender who is also subject to a non-release recommendation)	12
• Redetermined offenders whose non-parole period has not yet expired	11
• Offenders whose sentences have not yet been redetermined but who do not fall within the category of offenders for whom release recommendations have been made.	11

⁴³ **R v E & B [2006] NSWCCA 305**

Victim Impact Statements

Division 2 of Part 3 of the *Crimes (Sentencing Procedure) Act 1999* contains provisions relating to victim impact statements. Pursuant to section 27(1) of the Act, victim impact statements can be received and considered by the Supreme and District Courts, the Industrial Relations Commission and the Local Court. The statement may be received and considered at any time after a court convicts but before it sentences.⁴⁴

The amount of weight to be given to a victim impact statement is to be determined by the court. In *R v Slack* [2004] NSWCCA 128 Sperling J said at [61-62]:

[61] Whilst a sentencing hearing is not subject to the rules of evidence unless an order to that effect is made and whilst s28 also, by implication, allows the court to take a victim impact statement into account in determining the appropriate punishment by sentence, the weight to be given to such a statement is for the court to determine. In *RKB* (NSW CCA, 30 June 1992, unreported) it was acknowledged that a sentencing court is required to take into account the impact of criminal behaviour on the victim or victims of such behaviour but, it was said, what is required is an objective assessment of the crime's effect.

[62] The court is required to be satisfied of the facts in question beyond reasonable doubt. In these circumstances, substantial weight cannot be given to an account of harm in an unsworn statement, not necessarily and almost certainly not in the victim's own words, untested by cross-examination and, in the nature of things, far from being an objective and impartial account of the effect of the offence on the victim.

However, where the crime involves the death of the victim, victim impact statements are not relevant to the sentence imposed. Hunt CJ at CL considered this in *R v Bollen* (1998) 99 A Crim R 510, citing his own judgment in *R v Previtera* (1997) 94 A Crim R 76. Hunt CJ at CL argued that to hold an offender more culpable of killing someone who has a grieving family than someone who is alone is offensive to accepted notions of equality before the law.

⁴⁴ See section 28(1) of the Act.

Adams J made a similar statement in *R v Dang* [1999] NSWCCA 42 at [25]:

The reason why a victim's impact statement cannot be taken into account where a person dies may easily be demonstrated. Assume the deceased was friendless; assume the deceased had no family. It would be monstrous to suggest that that meant for some reason killing her should attract a lesser sentence than would be the case if, as is the situation here, she had a loving family and grieving relatives.

Essentially, then, the reason that victim impact statements in cases involving death are not taken into account in imposing sentence is that law holds, as it must, that in death we are all equal and the idea that it is more serious or more culpable to kill someone who has or is surrounded by a loving and grieving family than someone who is alone is offensive to our notions of equality before the law.

In *R v Berg* [2004] NSWCCA 300, Spigelman CJ noted that the decision in *Previtera* may however need to be revised in the light of the text of section 3A(g) of the Act. Section 3A(g) provides that one of the purposes for which a court may impose a sentence on an offender is to recognise the harm done to the victim of the crime and the community. Spigelman CJ stated at [44-45]:

[44] It appears to me strongly arguable that the recognition of this purpose of sentencing would encompass the kind of matters which are incorporated in a victim impact statement. It may in some cases, be appropriate to consider the contents of such statements in the sentencing exercise. This was not a purpose of sentence recognised by Hunt CJ at CL in *Previtera*, see at p86.

[45] The terminology considered by Hunt CJ at CL in *Previtera* which confers a discretion on the Court to consider the contents of the victim impact statement, which was present in the legislation then under consideration, is still contained in the reference to "if it considers it appropriate to do so" in s28 of the *Crimes (Sentencing Procedure) Act 1999*.

Whether or not *Previtera* needs to be re-visited in terms of its specific reasoning on the role of the victim impact statement, and more generally on the apparent

application of s21A(2)(g) to the injury, emotional harm, loss or damage caused by the offence to third parties, need not be determined on this occasion.

To date, the appropriate case for the CCA to reconsider this issue has not arisen. The most recent statement from the CCA on this issue was in *R v Tzanis* [2005] NSWCCA 274, where a Bench of five concluded it was not an appropriate vehicle to reconsider the authorities of *Bollen* and *Previtera*.

Unless the Act is amended to allow the effect of the death of a victim of murder or manslaughter, upon the victim's immediate family or wider community, it seems unlikely that the question raised in *Berg* will be addressed.

Relevant Legislation

Crimes (Serious Sex Offenders) Act 2006

The *Crimes (Serious Sex Offenders) Act 2006* commenced on 3 April 2006. The Act provides the Attorney with the power to apply to the Supreme Court for an “extended supervision order” or a “continuing detention order” against a person serving a sentence for a “serious sex offence” or an “offence of a sexual nature”.

The Court must have regard to a number of factors in determining whether to make either order.

The maximum time for which an order for extended supervision or continued detention can be made is 5 years, however, there is no prohibition on the making of a subsequent application for a further order.

In the Second Reading Speech, The Hon Carl Scully MP, on behalf of the Attorney General, described one of the key issues that the Act hopes to address:

One particular concern that is dealt with by this scheme relates to a handful of high-risk, hard-core offenders who have not made any attempt to rehabilitate whilst in prison. These offenders make up a very small percentage of the prison population, yet their behaviour poses a very real threat to the public. These concerns are compounded where the offender never qualifies for parole and is released at the end of their sentence totally unsupervised. The bill addresses this problem by allowing this small group of high-risk offenders to be placed on extended supervision, or, in only the very worst cases, kept in custody. The Department of Corrective Services has advised that only a small number of offenders would fall into this very high-risk category.

The validity of similar legislation in Queensland, *Dangerous Prisoners (Sexual Offenders) Act 2003*, was upheld by the High Court in *Fardon v Attorney General for the State of Queensland* [2004] HCA 46. An interim detention order was made in *Attorney General for New South Wales v Gallagher* (2006) NSWSC 340, but application for a continuing order was not pursued when the offender was deported.

Recent Reports

Victorian Sentencing Advisory Council, *Suspended Sentences Final Report – Part 1*, July 2006

The Victorian Sentencing Advisory Council released Part 1 of its Final Report in July 2006. Part 2 will be released in late 2006.

The Report recommended that suspended sentences be gradually phased out, and abolished by 2009.

Acknowledging that there are ‘widely divergent and strongly held views’ about the value of suspended sentences, the Advisory Council concluded that suspended sentences are inherently problematic. They have the potential to undermine the broader community’s confidence in sentencing through the inability to reconcile the ‘legal classification’ of a suspended sentence as a more serious penalty in the sentencing hierarchy, with its ‘practical consequence’ that allows the offender to remain in the community.

In the short term, the Advisory Council concluded that using alternative custodial or non-custodial sentences would be a more effective reform than altering the existing suspended sentences regime, to be achieved through:

- Including guidelines in the legislation about factors that might make a suspended sentence inappropriate;
- Allowing the use of suspended sentences for serious violent and sexual offences only in exceptional cases; and
- Retaining the requirement that an offender must serve the suspended term of imprisonment where the sentence has been breached, unless there are exceptional circumstances.

The Advisory Council highlighted the need to avoid the net-widening effect of suspended sentences, whereby courts increase the period of imprisonment for an offender to six months or more, so as to permit them to suspend the sentence.⁴⁵

The Advisory Council also addressed the principles of accountability and consistency in sentencing, recommending that whenever possible, hearings for breach of suspended sentences should be listed before the same judge or magistrate who imposed the original sentence.

⁴⁵ Amendment to section 27 *Sentencing Act 1991* should clarify that courts must not impose a longer period of imprisonment for this reason.

Reflecting current practice in higher courts, it anticipates that the original judge or magistrate is in a better position to judge whether 'exceptional circumstances' exist that would justify continuation of the suspension.

The Advisory Council indicated that imprisonment should remain the penalty for breach of a suspended sentence order, while recognising the need for an exception for young offenders. It strongly recommended amending the legislation so that courts are permitted to re-sentence youth offenders to a period of detention in a youth training centre or youth residential centre, instead of a period of imprisonment in an adult prison.

The Advisory Council envisages that it will have the role of monitoring the three-year reform process, if the reforms are implemented. It also recognises the 'ongoing responsibility of sentencing bodies' such as the Advisory Council to provide further information to courts and the broader community, which will form the basis of further discussions on sentencing reform.

The Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, June 2006

The Australian Law Reform Commission conducted a two-year inquiry; holding over 80 meetings with interested parties and received 98 written submissions.

The Commission:

- found a significant disparity in both the type and the severity of outcomes for Federal offenders across State and Territory lines;
- noted there is compelling evidence of inconsistent treatment of federal offenders, as well as a range of gaps, uncertainties and problems in the way the federal system meshes with that of the states and territories; and
- recommended that Australia's system for sentencing federal offenders should be significantly overhauled to provide greater consistency, fairness and clarity, through:
 - the establishment of a new *Federal Sentencing Act*;
 - development of a database of federal sentences for use by judicial officers;

- introduction of a 'Sentence Indication Scheme' to provide offenders with an
- indication of their sentence if they were to plead guilty, possibly avoiding costly court trials and distress to victims; and
- establishment of a Federal Parole Authority and an Office for the Management of Federal Offenders.

The Commission discussed but ultimately rejected the possibility of forming a sentencing advisory council at the federal level as a measure that may promote better sentencing decisions. The main argument against formation of such a body was:

That the three primary functions of sentencing councils—research, advice and rule making—are currently being performed by other bodies, or will be performed by other bodies if the proposals in this Discussion Paper are implemented.

The former Chairperson of this Council in his paper, *The Role of Sentencing Advisory Councils*, commented that this view perhaps underestimated the impact which a federal sentencing advisory body could have given the broad representative membership which could be given to it. Dr John Anderson reiterates this view in a recent article, 'Standard minimum sentencing and guideline judgments: An uneasy alliance in the way of the future'.⁴⁶

⁴⁶ Anderson J, 'Standard minimum sentencing and guideline judgments: An uneasy alliance in the Way of the future' (2006) 30 *Criminal Law Journal* 203-223 at 222.

NSW Legislative Standing Committee on Law and Justice Report, *Community based sentencing options for rural and remote areas and disadvantaged populations*, March 2006.

The Committee examined 'whether it is appropriate and in the public interest to tailor community based sentencing options for rural remote areas in NSW and for special need / disadvantaged populations.'

The Report:

- Reviewed 'primary' community based⁴⁷ and related sentencing options⁴⁸;
- Expressed concern at the lack of availability and access to community-based sentencing options for remote and rural areas, and disadvantaged groups; and
- Highlighted the complex relationship between unpaid fines and suspension/cancellation of driver's licenses.

The Committee recommended the government make it a priority to increase availability of community based sentences, noting that it received support for these sentencing options from an 'overwhelming majority of participants'.

It reported that there are still 'considerable gaps in the coverage of community based sentencing options' because they have 'restrictive' eligibility criteria, or lacked 'appropriate support'. This particularly impacts women offenders, intellectually disabled or mentally ill offenders, and offenders from Aboriginal communities and remote rural areas. A recurring concern is that these offenders are 'often' excluded from community-based sentences, though they need greater assistance in rehabilitation and re-integration into the community.

While acknowledging the initial cost of establishing these programs, the Committee noted that there would be an expected cost saving from a reduction in the prison population and rate of recidivism, and urged the Government to adopt a 'whole-of-government' approach to implementing community based sentences and related programs.

⁴⁷ Community supervision orders; bonds; suspended sentences; periodic detention, and home detention (including potential for back-end home detention);

⁴⁸ Such as Circle Sentencing, MERIT, and the Drug Court of NSW.

The Government response to the Report was due by 30 September 2006. No Government response has been provided to date.

PART SIX: SENTENCING TRENDS AND ISSUES IN OTHER JURISDICTIONS

Victorian Sentencing Advisory Council

The Sentencing Advisory Council is an independent statutory body that was established in 2004 under amendments to the *Sentencing Act 1991*. The functions of the Council are to:

- provide statistical information on sentencing, including information on current sentencing practices;
- conduct research and disseminate information on sentencing matters;
- gauge public opinion on sentencing;
- consult on sentencing matters;
- advise the Attorney-General on sentencing issues; and
- provide the Court of Appeal with the Council's written views on the giving, or review, of a guideline judgment.

Since its formation, the Victorian Council has published a number of papers including:

- An issues paper, discussion paper, interim report and Part One of a Final Report on suspended sentences;
- A report on maximum penalties for repeat drink driving offences;
- Seven “sentencing snapshots”; and
- Various fact sheets, media releases, information papers, and corporate publications including the Council’s Annual Report.

In July 2006 the Advisory Council hosted the *Sentencing and the Community Conference: Politics, Public Opinion and the Development of Sentencing Policy*.

Participants from international sentencing bodies - including the United States; Scotland; and the United Kingdom - discussed the composition, powers, limitations and projects of their respective agencies. Both the South African and New Zealand representatives indicated that their Governments propose establishing their own sentencing councils.

The NSW Sentencing Council was represented at the conference by the Chairperson the Hon James Wood AO QC, Council member Mr Nicholas Cowdery AM QC and the Executive Officer.

The Chairperson presented former Chairperson Abadee's paper (endorsed by the Council) on the role of the NSW Sentencing Council, and participated in a panel discussion comprising national and international sentencing experts. The paper has since been published on the Council's website and plans are underway to include it in a book of conference proceedings.

At the conference the Victorian Advisory Council launched its *Final Report on Suspended Sentences*, recommending the phasing-out of suspended sentences by 2009 and the phasing-in of a new range of sentencing orders. The Council was of the opinion that few issues have created such strong divisions within the community as suspended sentences; that suspended sentences are flawed and the way in which they have been used has undermined community confidence in sentencing. The Council's second part of its Final Report detailing other changes to intermediate sentences will be released later in 2006.

The Advisory Council also launched its research paper on the perceptions of the Australian public relating to sentencing. *Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing* which considers the development of a suite of methodological tools for measuring public opinion in order to address this significant gap.

In addition to these matters, the Advisory Council has produced several *Sentencing Snapshots*, the most recent focusing on burglary and aggravated burglary (August 2006). Earlier reports in the series analyse sentencing trends for murder, manslaughter, culpable driving causing death, rape, robbery and armed robbery. This aspect of its work is not dissimilar from the reports that are issued in this State by the Bureau of Crime Statistics and Research.

PART SEVEN: ANNEXURES

ANNEXURE A: Sentences under the Standard Non-Parole Period Scheme

Notes:

The “before 1/02/03” period covers sentences outside of the scheme from 1 January 1998 to 30 December 2002. The “after 1/2/03” period covers sentences under the scheme from 1 Feb 2003 to 30 December 2005.

The “number of matters” refers to the number of sentences under the scheme. The “percentage sentenced to imprisonment” were calculated on the basis of *all* matters sentenced, that is, both consecutive and non-consecutive terms.

The “term of sentence” and “non-parole period” was calculated on sentences where a non-consecutive term was imposed.

Item No. / Offence	SNPP	Percentage Sent to Imprisonment		Term of Sentence		Non-Parole Period		
		Before 1/02/03	After 1/02/03	Midpoint		Midpoint		
				Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03	
1A Murder- where the victim was a police officer, emergency services worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation (0 matters)	25 yrs	N/A		N/A		N/A		
1 Murder – other cases (23 matters)	20 yrs	100%	100%	18 yrs	20+ yrs	14 yrs	18 yrs	
2 Section 26 <i>Crimes Act</i> (conspiracy to murder)	* conspiracy to murder (0 matters)	10 yrs	100%	N/A	10 yrs	N/A	6 yrs	N/A
	* solicit to murder (4 matters)	10 yrs	92%	100%	5 yrs	5 yrs	42 mth	2 yrs
3 Section 27 <i>Crimes Act</i> (acts done to the person with intent to murder)	* administer poison with intent to murder (0 matters)	10 yrs	100%	N/A	9 yrs	N/A	5 yrs	N/A
	* wound or cause GBH with intent to murder (4 matters)	10 yrs	100%	100%	12 yrs	7 yrs	7 yrs	6 yrs
3 Section 29 <i>Crimes Act</i> (certain other attempts to murder)	* attempt to strangle/suffocate with intent to murder (0 matters)	10 yrs	50%	N/A	4 yrs	N/A	30 mth	N/A
	* shoot at with intent to murder (0 matters)	10 yrs	100%	N/A	5 yrs	N/A	4 yrs	N/A
3 Section 30 <i>Crimes Act</i> (attempt to murder by other means) (0 matters)		10 yrs	100%	N/A	5 yrs	N/A	2 yrs	N/A
4 Section 33 <i>Crimes Act</i> (wounding etc with intent to do bodily harm or resist arrest)	* wounding with intent (52 matters)	7 yrs	93%	92%	5 yrs	7 yrs	3 yrs	4 yrs
	* shoot at/attempt to shoot with intent (3 matters)	7 yrs	85%	100%	7 yrs	3 yrs	5 yrs	18 mth
5 Section 60 (2) <i>Crimes Act</i> (assault of police officer occasioning bodily harm)(4 matters)		3 yrs	56%	75%	2 yrs	3 yrs	1 yr	1 yr
6 Section 60(3) <i>Crimes Act</i> (wounding or inflicting GBH on police officer) (1 matters)		5 yrs	33%	100%	2 yrs	4 yrs	1 yr	3 yrs

Item No. / Offence	SNPP	Percentage sent to imprisonment		Term of sentence		Non-parole period	
		Before 1/02/03	After 1/02/03	Midpoint		Midpoint	
				Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03
7 Section 61I <i>Crimes Act</i> (sexual assault) (40 matters)	7 yrs	86%	93%	4 yrs	5 yrs	2 yrs	30 mth
8 Section 61J <i>Crimes Act</i> (aggravated sexual assault) (28 matters)	10 yrs	95%	100%	6 yrs	6 yrs	3 yrs	3 yrs
9 Section 61JA <i>Crimes Act</i> (aggravated sexual assault in company)	* inflict abh (1matter)	15 yrs	N/A	100%	N/A	N/A	N/A
	* threaten abh by weapon (5 matters)	15 yrs	100%	100%	7 yrs	7 yrs	4 yrs
	* deprive liberty (2 matters)	15 yrs	100%	N/A	16 yrs	N/A	10 yrs
9A Section 61M (1) <i>Crimes Act</i> (aggravated indecent assault) (21 matters)	5 yrs	42%	52%	2 yrs	3 yrs	1 yr	18 mth
9B Section 61M (2) <i>Crimes Act</i> (aggravated indecent assault-child under 10) (17 matters)	5 yrs	55%	71%	3 yrs	3 yrs	18 mth	18 mth
10 Section 66A <i>Crimes Act</i> (sexual intercourse-child under 10)(14 matters)	15 yrs	82%	88%	54 mth	6 yrs	30 mth	4 yrs
11 Section 98 <i>Crimes Act</i> (robbery with arms etc and wounding)	* with arms cause wounding (11 matters)	7 yrs	98%	100%	5 yrs	7 yrs	3 yrs
	* in company cause wounding(18 matters)	7 yrs	94%	83%	6 yrs	6 yrs	3 yrs
	* assault with intent to rob and cause wounding (10matters)	7 yrs	87%	90%	6 yrs	7 yrs	42 mth

Item No. / Offence	SNPP	Percentage sent to imprisonment		Term of sentence		Non-parole period		
		Before 1/02/03	After 1/02/03	Midpoint		Midpoint		
				Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03	
12 Section 112(2) <i>Crimes Act</i> (breaking etc into any house and committing serious indictable offence in circumstances of aggravation) (269 matters)	5 yrs	73%	69%	42 mth	42 mth	18 mth	2 yrs	
13 Section 112(3) <i>Crimes Act</i> (breaking into any house and committing indictable offence circumstances special aggravation) (11 matters)	7 yrs	92%	100%	6 yrs	7 yrs	4 yrs	4 yrs	
14 Section 154C (1) <i>Crimes Act</i> (car-jacking) (3 matters)	3 yrs	100%	100%	3 yrs	5 yrs	18 mth	3 yrs	
15 Section 154C (2) <i>Crimes Act</i> (car-jacking in circumstances of special aggravation) (17 matters)	5 yrs	88%	100%	30 mth	42 mth	18 mth	18 mth	
15A Section 203E <i>Crimes Act</i> (bushfires) (1 matter)	5 yrs	67%	100%	54 mth	N/A	30 mth	N/A	
20 Section 7 <i>Firearms Act 1996</i> ** (unauthorised possession or use of firearms)	Old section 7 (19 matters)	3 yrs	57%	84%	2 yrs	3 yrs	18 mth	2 yrs
	New section 7 – firearms (6 matters)	3 yrs	N/A	67%	N/A	18 mth	N/A	1 yr
	New section 7 – pistols (1 matter)	3 yrs	N/A	100%	N/A	3 yrs	N/A	2 yrs
16 Section 24(2) <i>Drug Misuse and Trafficking Act 1985</i> (manufacture or production of commercial quantity of prohibited drug) being an offence that: a) does not	* manufacture prohibited drug - commercial quantity amphetamines (0 matter)	10 yrs	100%	N/A	6 yrs	N/A	4 yrs	N/A

** “Old” Section 7(1) prior to amendment by *Crimes Legislation Further Amendment Act 2003*. Assented to 5/12/2003, commenced 14/02/2004.

relate to cannabis leaf, and b) if a large commercial quantity specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug)	*manufacture prohibited drug – commercial quantity cocaine (1 matter)	10 yrs	N/A	100%	N/A	3 yrs	N/A	18 mth
	*knowingly take part in manufacture of prohibited drug – commercial quantity amphetamines (0 matters)	10 yrs	95%	N/A	5 yrs	N/A	3 yrs	N/A
	* knowingly take part in manufacture of prohibited drug – commercial quantity cocaine(0 matter)	10 yrs	67%	N/A	3 yrs	N/A	1 yr	N/A
	* knowingly take part in manufacture of prohibited drug – commercial quantity ecstasy(0 matters)	10 yrs	100%	N/A	18 mth	N/A	1 yr	N/A
17 Section 24(2) <i>Drug Misuse and Trafficking Act</i> 1985 (manufacture or production of commercial quantity of prohibited drug) being an offence that: a) does not relate to cannabis leaf, and b) if a large commercial quantity specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that	* manufacture prohibited drug – large commercial quantity amphetamines (1 matter)	15 yrs	100%	100%	18 mth	4yrs	6 mth	18 mth
	* knowingly take part in manufacture of prohibited drug – large commercial quantity amphetamines (0 matters)	15 yrs	86%	N/A	5 yrs	N/A	3 yrs	N/A

prohibited drug)	* knowingly take part in manufacture of prohibited drug – large commercial quantity ecstasy (0 matters)	15 yrs	100%	N/A	6 yrs	N/A	4 yrs	N/A
18 Section 25(2) <i>Drug Misuse and Trafficking Act</i> 1985 (supplying commercial quantity of prohibited drug) being an offence that: a) does not relate to cannabis leaf, and b) if a large commercial quantity specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug)	* supply prohibited drug – commercial quantity heroin (7 matters)	10 yrs	94%	100%	5 yrs	8 yrs	3 yrs	5 yrs
	* supply prohibited drug – commercial quantity amphetamines (12 matters)	10 yrs	92%	83%	4 yrs	6 yrs	30 mth	42 mth
	* supply prohibited drug – commercial quantity cocaine (4 matters)	10 yrs	87%	100%	5 yrs	6 yrs	3 yrs	3 yrs
	* supply prohibited drug – commercial quantity ecstasy (14 matters)	10 yrs	81%	86%	3 yrs	4 yrs	18 mth	2 yrs
	* supply prohibited drug – commercial quantity ketamine (1 matter)	10 yrs	N/A	100%	N/A	8 yrs	N/A	54 mth

	* knowingly take part in supply of prohibited drug – commercial quantity heroin (3 matters)	10 yrs	100%	100%	4 yrs	54 mth	30 mth	30 mth
	* knowingly take part in supply of prohibited drug – commercial quantity amphetamines (2 matter)	10 yrs	79%	100%	3 yrs	4 yrs	18 mth	2 yrs
	* knowingly take part in supply of prohibited drug – commercial quantity cocaine (0 matters)	10 yrs	100%	N/A	4 yrs	N/A	2 yrs	N/A
	* knowingly take part in supply of prohibited drug – commercial quantity ecstasy (1 matter)	10 yrs	75%	100%	3 yrs	3 yrs	18 mth	18 mth
19 Section 25(2) <i>Drug Misuse and Trafficking Act</i> 1985 (supplying commercial quantity of prohibited drug) being an offence that: a) does not relate to cannabis leaf, and b) if a large commercial quantity specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that	* supply prohibited drug – large commercial quantity heroin (6 matters)	15 yrs	100%	100%	8 yrs	8 yrs	6 yrs	5 yrs
	* supply prohibited drug – large commercial quantity amphetamines (4 matters)	15 yrs	95%	100%	7 yrs	6 yrs	4 yrs	54 mth

prohibited drug)	* supply prohibited drug – large commercial quantity cocaine (0 matters)	15 yrs	75%	N/A	7 yrs	N/A	5 yrs	N/A
	supply prohibited drug – large commercial quantity ecstasy (11 matters)	15 yrs	100%	100%	6 yrs	7 yrs	4 yrs	54 mth
	* knowingly take part in supply of prohibited drug – large commercial quantity heroin (1 matter)	15 yrs	100%	100%	7 yrs	8 yrs	54 mth	5 yrs
	* knowingly take part in supply of prohibited drug – large commercial quantity amphetamines (0 matters)	15 yrs	100%	N/A	54 mth	N/A	30 mth	N/A
	* knowingly take part in supply of prohibited drug – large commercial quantity cocaine (0 matters)	15 yrs	100%	N/A	5 yrs	N/A	4 yrs	N/A
	* knowingly take part in supply of prohibited drug – large commercial quantity ecstasy (0 matters)	15 yrs	100%	N/A	30 mth	N/A	1 yr	N/A

ANNEXURE B: Case summaries of SNPP appeals to CCA, July 2005 – August 2006

Item 1 – *Crimes Act*, s 19A (murder-general). SNPP is 20 years.

***R v Imnetu* [2006] NSWCCA 203 – 30 June 2006**

Conviction after trial or guilty plea: Conviction after trial.

Judgment of: McClellan CJ at CL; Johnson J; Latham J

Decision: Conviction and sentence appeal dismissed.

Held: The sentencing judge correctly assessed the offence as being above the mid-range of seriousness. The sentence of a non-parole period of 20 years with a balance of term of 6 years 8 months was appropriate.

***R v F.D; R v J.D* [2006] NSWCCA 31 - 21 February 2006**

Note that this matter also featured an Item 4 section 33 offence.

Conviction after trial or guilty plea: Conviction after trial.

Judgment of: Sully J; Hulme J; Hall J

Decision: Each Crown appeal against sentence was dismissed.

Held: The minor departure from the standard non-parole period (18 years non-parole Period, balance of tem of 6 years in relation to FD), did not constitute a fundamental sentencing error and could not be objected to. Even if error had been identified however, the CCA would have exercised its residual discretion to refuse the Crown appeal. (Sully J at 131).

***R v O'Connell* [2006] NSWCCA 82 – 18 May 2006**

Conviction after trial or guilty plea: Guilty plea

Judgment of: Grove J; Simpson J; Rothman J

Decision: Appeal against severity of sentence dismissed. Non-parole period of 25 years and a balance term of 10 years confirmed.

Held: The sentencing judge erred by failing to take into account the finding of special circumstances when determining the non-parole period. The judge first set a non-parole period, then did a hypothetical calculation of what the balance of term would be in accordance with s 44(2). Despite the error no lesser sentence was warranted.

Item 2 - *Crimes Act*, s 26 (conspiracy to murder). SNPP is 10 years.

R v Benitez [2006] NSWCCA 21 – 23 February 2006

Conviction after trial or guilty plea: Guilty plea.

Judgment of: Hunt AJA; Simpson J; Rothman J

Decision: Appeal upheld - applicant sentenced to imprisonment with a non-parole period of 5 ½ years, balance of term of 4 ½ years for each count concurrent (reduced from an aggregate non-parole period of 7 years, with balance of term of 5 years).

Held: There was no error in finding that the offences were above the “mid range of objective seriousness”. The fact that the offences would never have been committed, and that the victims were not, in reality, in any danger, was not relevant to the objective gravity of the offences: at [45].

The sentencing judge found that special circumstances, pursuant to s 44 of the *Crimes (Sentencing Procedure) Act 1999*, existed, justifying a departure from the ratio between the non-parole period and the head sentence otherwise specified.

The CCA held that “... in respect of each offence, no sentence involving a non-parole period of less than five and a half years would be adequate to meet the applicant’s criminality. That leaves no room for accumulation.” (Simpson J at [49]).

Item 3 – *Crimes Act* sections 27, 28, 29 or 30 (attempt to murder). SNPP is 10 years

***R v Zegura* [2006] NSWCCA 230 – 3 August 2006**

Conviction after trial or guilty plea: Guilty plea

Judgment of: McClellan CJ at CL; Kirby J; Hoeben J.

Decision: Appeal related to two offences:

- i) intent to murder
- ii) maliciously destroy property with fire

Crown appeal allowed with respect to the offence of maliciously destroy property by fire (which is an offence not subject to the SNPP scheme). Sentence of non-parole period of 6 years and 6 months and a balance term of 2 years 6 months increased to non-parole period 7 years and 6 months and a balance term of 2 years 6 months.

Item 4 - *Crimes Act*, s 33 (wounding etc with intent to do bodily harm or resist arrest) SNPP is 7 years.

Note that the following matters also featured an offence under this section, but have been noted elsewhere in this Annexure:

- *R v Chaaban [2006] CCA 107 listed under Item 13*
- *R v FD; R v JD [2006] CCA 31 listed under Item 1*

R v LNT [2005] NSWCCA 307 - 8 September 2005
Conviction after trial or guilty plea: Guilty plea.

Judgment of: Simpson J; Johnson J; Rothman J

Decision: Appeal upheld. Sentenced to imprisonment with non-parole of 4 years, balance of term of 3 years (reduced from a non-parole period of 5 years, balance of term of 2 ½ years). Entire sentence to be served in a juvenile detention facility.

Held: The applicant was a juvenile offender and this fact necessitated increasing the importance of rehabilitation. The plea of guilty and the other subjective factors present were not appropriately taken into account. The applicant's circumstances warranted a greater emphasis on rehabilitation than was given and the sentence, as a consequence, was excessive.

R v Reid [2005] NSWCCA 309 - 8 September 2005

Conviction after trial or guilty plea: Guilty plea.

Judgment of: Sully J; Hidden J; Hall J

Decision: Appeal against sentence dismissed. Sentence of imprisonment with a non-parole period of 4 years 8 months, balance of term of 2 years 1 month confirmed.

Held: The CCA held that "... her Honour did not correctly implement the approach explained in paragraphs 117 and 118 of *Way*" (Sully J at [21]). This constituted an error of principle and opened "... precisely the risk of double counting to which *Way* draws clear and exact attention in its paragraph 120" (Sully J at [22]). Nonetheless, the sentence was appropriate and ought not be altered.

***R v Mackey* [2006] NSWCCA 254 – 25 August 2006**

Conviction after trial or guilty plea: Conviction after trial

Judgment of: Beazley JA; Hulme J; Hislop J

Decision: Appeal against severity of sentence dismissed.

Held: The applicant submitted that the judge erroneously took into consideration certain circumstances when assessing whether the mid range of seriousness was constituted in the offence. The CCA rejected this submission.

***R v Chisari* [2006] NSWCCA 19 - 23 February 2006**

Conviction after trial or guilty plea: Conviction after trial.

Judgment of: Beazley JA; Simpson J; Rothman J

Decision: Crown appeal upheld. Sentence increased to a non-parole period of 2 ½ years, balance of term of 2 ½ years (from a non-parole period of 14 months, balance of term of 1 year 6 months).

Held: The sentencing judge found that the offence fell below the mid-range of objective seriousness, and found special circumstances which justified departure from the ratio between the head sentence and the non-parole period otherwise specified.

The CCA held that latent error, as well as patent error, was been demonstrated, and that given the circumstances of the case, the sentence imposed was "... well below what was permissible in the exercise of a sound sentencing discretion" (Simpson J at [37]).

***R v Heron* [2006] NSWCCA 215 – 26 July 2006**

Conviction after trial or guilty plea: Conviction after trial.

Judgment of: Mason; Kirby J; Hoeben J

Decision: Appeal granted. Sentence reduced to non-parole period of 4 years with a balance of term of 3 years (from a non-parole period of 5 years 6 months with a balance of term of 2 years).

Held: The sentencing judge found special circumstances to alter the ratio between the non-parole period and balance of term but failed to apply the correct method of reasoning as to whether the offence was in the mid-range of objective seriousness for offences of this kind. Errors were also made applying s 21A(2)(d) and (g) of the *Act* in determining that the previous criminal record was an aggravating factor; and in focusing on the potential of the injury, rather than what actually occurred.

The CCA found that the objective seriousness of the offence was not in the mid-range of objective seriousness for offences of this kind. While the standard non-parole period does not apply it nonetheless remains relevant as an important guidepost for sentencing purposes.

Item 7 - *Crimes Act*, s 61I (sexual assault). SNPP is 7 years.

***R v Perrin* [2006] NSWCCA 64 – 15 March 2006**

Judgment of: McClellan CJ at CL; Rothman J; Smart AJ

Conviction after trial or guilty plea: Guilty plea.

Decision: Appeal upheld. Sentence reduced to a non-parole period of 2 years with a balance of term of 2 years (from a non-parole period of 4 years with a balance of term of 2 years).

Held: The sentencing judge erred by elevating the criminality of the offender by sentencing on the basis of material not in evidence against that offender (contents of three records of interview). As the factual basis for sentencing was inaccurate "... the sentence imposed was manifestly excessive as to the full term and the non-parole period" (Smart AJ at [41]). Special circumstances existed, "... principally to ensure a longer period on parole so as to provide adequate supervision and assistance in the applicant's rehabilitation and re-integration back into the community." (Smart AJ at [24]).

Item 8: *Crimes Act* sec 61J (aggravated sexual assault). SNPP is 10 years

***R v Brooks* [2006] NSWCCA 169 – 9 August 2006**

Conviction after trial or guilty plea: Guilty plea

Judgment of: Hulme J; Hidden J; Hall J

Decision: Appeal against sentence allowed. Non-parole period of 13 years with balance of term 4 years reduced to non parole period of 10 years and 6 months with balance of term 3 years and 6 months.

Held: Three counts of sexual assault on elderly woman. Sentencing judge erred by determining them as the worst category of offence for offences of that kind.

Item 9: *Crimes Act* sec 61JA (aggravated sexual assault in company). SNPP is 15 years

R v Stephen Aslett [2006] NSWCCA 48 - 24 March 2006

Note that this matter also featured an Item 13 *Crimes Act* section 112(3) offence.

Conviction after trial or guilty plea: Guilty plea.

Judgment of: Spigelman CJ; Barr J; Howie J

Decision: Appeal upheld. Sentence comprising a non-parole period of 13 years and a balance of term of 7 years imposed (reduced from a non-parole period of 17 years and a balance of term of 7 years).

Held: The CCA determined that “[t]he reason for departing from the prima facie ratio of 3:1 between non-parole period and balance of term is to recognise the applicant’s youth and to foster his prospects of rehabilitation ...” (Barr J at [19]).

R v Dudley Aslett [2006] NSWCCA 49 - 24 March 2006

Note that this matter also featured an Item 13 *Crimes Act* section 112(3) offence

Conviction after trial or guilty plea: Conviction after trial.

Judgment of: Spigelman CJ; Barr J; Howie J

Decision: Appeal against conviction dismissed. Appeal against sentence upheld.

Sentence of imprisonment with a total non-parole period of 22 ½ years imposed with a balance of term of 7 ½ years (reduced from a total non-parole period of 30 years with a balance of term of 10 years).

Held: The sentencing judge was entitled to find that the offences under s 61JA *Crimes Act* were more serious than those in the mid range of objective seriousness and that a non-parole period exceeding the standard was justified. His Honour was also entitled to conclude the

offence the subject of the first count merited a non-parole period exceeding the standard non-parole period.

The CCA departed from the standard non-parole period due to "... the seriousness, ... of the appellant's criminality in the first and second counts and the need, in imposing sentence on counts 5, 6 and 7, to provide a proper opportunity for parole" (Barr J at [145]).

Item: 9A *Crimes Act*, s 61M(1) (aggravated indecent assault). SNPP is 5 years.

***R v Tidona* [2005] NSWCCA 410 - 2 December 2005.**

Conviction after trial or guilty plea: Guilty plea.

Judgment of: Simpson J; Adams J; Hoeben J

Decision: Appeal upheld - applicant re-sentenced to a non-parole period of 3 years and a balance term of 2 years and 2 months (reduced from a non-parole period of 3 years and 11 months, and a balance of term of 1 year and 3 months).

Held: The total sentence of 5 years and 2 months was not excessive, given the aggravating features identified by the sentencing judge, the objective seriousness of the offence and issues of general and specific deterrence.

However, by beginning with the standard non-parole period and then crafting the structure of the sentence around it, Her Honour failed to stand back and look at the appropriate balance between the term of sentence and non-parole period.

There were a number of factors which amounted to special circumstances and which required that the statutory ratio between the term of sentence and non-parole period be adjusted so as to increase the period of supervision on parole for the applicant. These matters included his age; poor state of mental and physical health, the fact that he had commenced his first period of imprisonment at an advanced age and the need for some psychiatric intervention.

***R v Sharwood* [2006] NSWCCA 157 - 24 May 2006**

Conviction after trial or guilty plea: Conviction after trial.

Judgment of: McClellan CJ at CL; Hoeben J; Johnson J

Decision: Sentence appeal allowed. Applicant re-sentenced to a total non-parole period of 1 year and 3 weeks with a balance of term of 11 months and 1 week (reduced from a non-parole period of imprisonment of 5 years and 4 months, with a balance of sentence of 2 years and 2 months).

Held: The 7 years 6 months imposed for count 5 exceeded the maximum penalty (which the sentencing judge incorrectly believed to be ten years). Errors were made in characterising the offences as being “in the middle of the range of objective seriousness” (at [64]); applying the principles of totality and proportionality; and the findings on accumulation.

The five year standard non-parole period should serve as a reference point or guidepost “... however, the comparatively low level of objective criminality, together with the very significant subjective matters, should be given greater weight” (Hoeben J at [73]).

***R v Dagwell* [2006] NSWCCA 98 - 5 April 2006**

Conviction after trial or guilty plea: Guilty plea

Judgment of: Beazley JA; Adams J; Howie J

Decision: Crown appeal allowed. Non-parole period of 9 months with balance of term 12 months increased to non-parole period of 2 yrs 11 months with balance of term 1 year and 5 months

Held: The sentences were manifestly inadequate to a very significant degree. The sentences did not reflect the judge’s findings that the offences were very serious. Given the considerable age gap between the victim and the defendant there was little mitigation in the victim having consented and encouraged the defendant.

***R v LJG* [2006] NSWCCA 216 – 20 July 2006**

Conviction after trial or guilty plea: Guilty plea

Judgment of: McClellan AJA; Hulme J; Hall J

Decision: Appeal against severity of sentence dismissed.

Held: The sentencing judge erred in respect of the application of the standard non-parole period in that his Honour commenced with the standard five-year non-parole period, then reduced it by 25% for the plea and then considered a further reduction for the subjective features. This approach was incorrect as expressed in *Way*. Despite error there was no lesser sentence warranted.

Item 9B: *Crimes Act* s 61M(2) (aggravated indecent assault – child under 10).
SNPP is 5 years

***R v Blinco* [2006] NSWCCA 105 – 5 April 2006**

Conviction after trial or guilty plea: Guilty plea.

Judgment of: Grove J; Simpson J; Howie J

Decision: Appeal upheld. Applicant re-sentenced to a non-parole period of 1 year 6 months with a balance of term of 1 year 6 months (reduced from a non-parole period of 2 years and 9 months with a balance of term of 2 years).

Held: The offence carries a prescribed maximum penalty of ten years imprisonment; the standard non-parole period is five years. “Somewhat surprisingly, a consequence of this prescription is, if it is applicable, the total term for an offence in the middle of the range of objective seriousness (an expression in s 54A(2) of that Act) would necessarily be more than half the available maximum term.” (Grove J at [5]).

Error occurred when the non-parole period was set independently of a consideration of the total sentence. The CCA accepted that the offence fell below the mid range of objective seriousness. However, the sentencing judge’s finding was reached, at least in part, by impermissible reasoning – mainly, the emphasis placed on the applicant’s plea of guilty. (Grove J at [13]). Special circumstances (relating to the need for alcohol counselling and rehabilitation prospects) warranted a departure from the statutory ratio.

Item 10: *Crimes Act*, s66A (sexual intercourse - child under 10). SNPP is 15 years.

No Item 10 matters were appealed on the basis of the standard non-parole period (SNPP) in the period under review.

One Item 10 matter, *R v JTAC* [2005] NSWCCA 345 - 5 October 2005 did fall within the period under review, but was not appealed on the basis of the non-parole period imposed.

Item 11: *Crimes Act* s 98 (robbery with arms etc and wounding). SNPP is 7 years

***R v LLM* [2005] NSWCCA 302 - 2 September 2005**

Conviction after trial or guilty plea: Guilty plea

Judgment of: Grove J; Hulme J; Simpson J

Decision: Appeal allowed and sentence quashed. Applicant re-sentenced; Imprisonment, non-parole 5 years; balance of term 1 year, 8 months (reduced from 8 years, 4 months).

Held: The CCA did not regard the non-parole portions of the sentences imposed on the applicant as manifestly excessive. (at [61]). However, it is clearly apparent that the balance of the term of each sentence does not accord with what was intended, viz. that it should be one-third of the non-parole periods, i.e. 1 year and 8 months.” Subject to the reduction in the length of the balance of term, no lesser sentences were warranted.” (at [84]).

***R v Misiepo* [2005] NSWCCA 405 - 24 November 2005**

Conviction after trial or guilty plea: Guilty plea

Judgment of: Simpson J; Adams J; Hoeben J

Decision: Crown appeal dismissed. Sentence 4 years, 9 months, non-parole period 3 years, balance of term 1 year, 9 months confirmed.

Held: The Crown’s assertion that the sentencing judge applied an earlier version of s 44 of the *Crimes (Sentencing Procedure) Act 1999*⁴⁹ by setting the head sentence first could not be sustained. In any event there is nothing in the current version of s 44 that demands that the reasoning process follow a particular sequence. Provided a judge complies with the requirements of the section, it

⁴⁹ Section 44 of the *Crimes (Sentencing Procedure) Act 1999* requires a court sentencing an offender to imprisonment to first set a non-parole period and secondly to specify the balance of the term of sentence. This is to be contrasted with s 44 in its previous incarnation, which required a sentencing court to first, fix the term of the sentence, that is the head sentence, and only secondly to set a non-parole period. See *R v Misiepo* [2005] NSWCCA 405 at [41].

is not necessary that his or her thought processes commence with the non-parole period. (at [42]).

However, there were other problems in the manner in which Part 3, Division 1A was applied. While special circumstances existed to justify a departure from the statutory ratio between the non-parole period and the term of sentence, error lies in the failure to explain the basis on which the judge took this course. “However, s 54B(5) makes it perfectly plain that an error of that kind does not invalidate a sentence.” (at [45]).

***R v Rick Barry Swan* [2006] NSWCCA 47 – 6 March 2006**

Conviction after trial or guilty plea: Guilty plea

Judgment of: Spigelman CJ; Barr J; Howie J

Decision: Sentence appeal allowed. Original sentence 7 ½ years, non-parole period 2 ½ years, reduced to 5 years, non-parole period 2 years, balance of term, 3 years

Held: While two years is a “very short sentence for an offence of this objective gravity”, (at [11]) it reflects the special circumstances of the offender having an intellectual disability. The court was not however satisfied that “his Honour took the applicant’s intellectual disability into account when determining the head sentence, as distinct from the non-parole period.” This was indicated by the imposition of a head sentence of more than double the non-parole period. (at [19]).

Item 12: *Crimes Act s 112(2)* (Aggravated break, enter and commit serious indictable offence). SNPP is 5 years.

***R v Lewis* [2005] NSWCCA 300 - 2 September 2005**

Conviction after trial or guilty plea: Guilty plea

Judgment of: Grove J; Hidden J; Bell J

Decision: Sentence appeal dismissed. Imprisonment 4 ½ years, non-parole period 2 years, 3 months, balance of term of the same length confirmed.

Held: The sentence was imposed prior to *R v Way (2004) 60 NSWLR 168*. It was therefore understandable that the sentencing judge approached the matter as he did. "The whole sentencing exercise, including his Honour's assessment of the objective gravity of the offence and the impact of the applicant's subjective case, revolved around the standard non-parole period and was impermissibly influenced by it." Hidden J at [14]. Nonetheless, given the facts and the offences involved, which included two matters on a Form 1, a lengthy criminal record, and commission of the offences by the offender whilst subject to conditional liberty, no lesser sentence was appropriate.

***R v RE* [2005] NSWCCA 429 - 16 December 2005**

Conviction after trial or guilty plea: Guilty plea

Judgment of: McClellan CJ at CL; Studdert J; James J

Decision: Appeal allowed in relation to sentence for first offence of aggravated breaking, entering and stealing. Applicant re-sentenced.
Original sentence: non-parole period 2 years, 9 months.

New sentence: non-parole period 2 years, 3 months, balance of term, 2 years, 3 months.

Held: The sentence for the first offence was manifestly excessive. The applicant should have received a combined discount of not less than 50 per cent on the basis of his pleas of guilty and for his past and future assistance to authorities. The sentencing judge acknowledged the appropriateness of applying a discount for assistance to authorities although His Honour omitted to quantify it. A notional starting point

was not nominated for the sentence for the first offence. When sentencing an offender who has pleaded guilty, and who has provided assistance to authorities, it is desirable, though not obligatory in the absence of a statutory provision to the contrary, to specify the discount to be applied in addition to the notional starting point of the sentence. *R v Waqa (No 2)* [2005] NSWCCA 33 at [13] per Dunford J; *R v Thomson*; *R v Houlton* (2000) 49 NSWLR 383 at 419.

***R v Diamantis* [2005] NSWCCA 433 – 14 December 2005**

Conviction after trial or guilty plea: Guilty plea

Judgment of: Windeyer J; Hislop J; Smart AJ

Decision: Appeal dismissed. Sentence non parole period 4 years, balance of term, 2 years confirmed.

Held: (1) The sentencing judge erred in applying the standard non-parole period in the applicant's case. The sentencing judge was not referred to *R v Way* (2004) 60 NSW LR 168, which clarified that standard non-parole periods were "intended to apply to sentences imposed after conviction following trial, and not to sentences imposed where a plea of guilty has been entered". Notwithstanding this error, a less severe sentence was not warranted in law.

(2) The judge paid sufficient regard to the applicant's subjective circumstances. These matters were disclosed by the applicant to the psychologist. "Whilst his Honour did not individually refer to each of those matters he did specifically state he had considered the material in the pre-sentence report, a report from an alcohol and drug counsellor, a letter from St Vincent de Paul, the psychologist's report and the letter which purported to be written by the applicant." (at[14]).

"The weight assigned to the various factors is a matter for the assessment of the trial Judge in the exercise of his sentencing discretion. Error in this regard has not been demonstrated." [17] Judges should exercise caution in relying on an offender's statements to experts, in the absence of that offender giving evidence. at sentence : *R v Qutami* [2001] NSWCCA 353.

(3) The sentencing judge considered the finding of special circumstances in determining the non parole period. It was not established that His Honour extended the balance of term of sentence instead of varying the ratio between the non-parole period and the balance of term: *R v P* [2004] NSWCCA 218 cited.

***R v Bushara*[2006] NSWCCA 8 – 6 February 2006**

Conviction after trial or guilty plea: Guilty plea

Judgment of: Basten JA; Howie J; Hall J

Decision: Appeal upheld. Total sentence 5 years 3 months, non-parole period 3 years 9 months.

Held: In accordance with s 12 of the *Drug Court Act 1998*, when assessing the “final sentence” of the offender, regard was had to the applicant’s pre-sentence custody.

Howie J noted that when an initial sentence is not backed dated to take into account pre-trial custody, “[i]t is very easy for the second sentencer to overlook that fact when deciding in accordance with the principle of totality, what the sentence for the second offence should be”(at [23]): *R v Newman and Simpson* (2004) 145 A Crim R 361.

While the determination of the ratio between the non-parole and parole period lies within the discretionary powers of the sentencing judge, the ratio will be affected if the actual sentence fails to reflect the actual period of custody. The court found that the additional period of custody served by the applicant was not reflected in the term of sentence and accordingly amended the sentence to account for it.

The total sentence was not manifestly excessive. It was within the sentencing judge’s discretion to make the sentences cumulative, particularly as the offences were unrelated and committed whilst on conditional liberty. Leniency was unwarranted considering the limited subjective material presented.

Howie J stated that “[n]one of the material suggests to me that any lesser sentence should be imposed other than to correct the Judge’s failure to take into account the period of custody the applicant had served prior to being sentenced.”(at [45]).

R v Stambolis [2006] NSWCCA 56 – 10 March 2006

Conviction after trial or guilty plea: Guilty plea

Judgment of: Giles JA; Howie J; Hoeben J

Decision: Crown appeal allowed in relation to sentences imposed for two of the offences. Original sentence for break, enter and steal, fixed term of 18 months, suspended. Increased to non-parole period 12 months, balance of term 12 months.

Original sentence for aggravated break, enter and steal in company, a fixed term 2 years, suspended. Increased to non-parole period 2 years, balance of term 2 years, 6 months.

Held: (1) The sentencing judge did not properly assess the objective criminality of the offences before referring to the subjective circumstances of the respondent. The offences demonstrated a substantial level of preparation and planning. The respondent was on a bond when he committed the first two offences and subject to a bond and on bail when he committed the remaining offences. These were significant aggravating factors demonstrating a level of contempt for the criminal justice system. There was no material on which the judge could be confident about the prospects of rehabilitation of the respondent.

(2) It is necessary to first determine the appropriate sentence before deciding to suspend it. In *R v Zamagias* [2002] NSWCCA 17 the Court of Criminal Appeal provided guidance on the appropriate reasoning process to be followed when imposing a sentence of imprisonment under the *Crimes (Sentencing Procedure) Act*.

In considering whether a term of imprisonment is called for, the preliminary question is whether there are any alternatives to the imposition of term of imprisonment: s 5. A suspended sentence is not an alternative to which

s 5 relates. A sentence cannot be suspended before it is imposed. It is the execution of a sentence that is suspended, not its imposition. The court next fixes the term of imprisonment. It cannot be increased because it is to be served by way of periodic detention or home detention, nor can it be reduced because an otherwise appropriate alternative is unavailable. Only then does the court consider whether any available alternative to full-time custody should be utilised and whether it reflects the objective seriousness of the offences and fulfils all the purposes of punishment: *Zamagias* at [22]-[28].

(3) The imposition of concurrent sentences did not adequately reflect the criminality of the discrete offences. The proper application of the principles in *Pearce v The Queen* (1998) 194 CLR 610 would have resulted in the judge taking into account the appropriate sentence to be imposed for each offence, before considering how they might be served. The break and enter offences were discrete offences with no basis for concurrency between them.

(4) Howie J in considering matters not the subject of the grounds of appeal observed that even though the respondent pleaded guilty, the standard non-parole period was relevant as a guidepost to the appropriate sentence. The judge was required to consider where the particular offence stood in relation to the mid-range of objective seriousness for an offence of its type and to give reasons for departing from the standard non-parole period: *R v Way* (2004) 60 NSWLR 168.

***R v Joel Tory; R v Luke Tory* [2006] NSWCCA 18 – 16 February 2006**

Conviction after trial or guilty plea: Guilty pleas

Judgment of: Hunt AJA; Adams J; Latham J

Decision: Crown appeal allowed.

Joel Tory: Original sentence 2 year good behaviour bond increased to non-parole period 4 months, balance of term, 6 months suspended under s 12 *Crimes (Sentencing Procedure) Act* 1999.

Luke Tory: 2 year good behaviour bond increased to non-parole period 7 months, balance of term, 7 months, suspended under s 12 *Crimes (Sentencing Procedure) Act 1999*.

Held: (1) The sentence imposed on both respondents were manifestly inadequate. In spite of the fact that the respondents were of good character, had little or no criminal record and were not motivated revenge, the imposition of good behaviour bonds reflected a disregard for the objective seriousness of the offences in such a way as to manifest error.

(2) The sentencing judge erred in his omission to identify sufficiently reasons for the case being significantly less objectively serious than one falling in the mid range of objective seriousness. "This requirement applied even though the respondents pleaded guilty and even though the standard non-parole period was but a signpost (to use one of the metaphors proposed in *R v Way* (2004) 60 NSWLR 168)." ([at 36]).

***R v Dominey & Lovell* [2006] NSWCCA 222 – 28 July 2006**

Conviction after trial or guilty plea: Guilty pleas

Judgment of: McClellan CJ at CL; Johnson J; Latham J

Decision: Appeals upheld. Applicants re-sentenced.

Original sentences: **Lovell** count 1: non-parole period 3 years, balance of term 2 years; count 2, non-parole period 2 years, balance of term 2 years concurrent with count 1.

Dominey count 1: non-parole period 4 years, balance of term 3 years; count 2, non-parole period 2 years, balance of term 2 years, concurrent with count 1.

New sentences: Lovell count 1, non-parole period 1 year, 9 months, balance of term 12 months; count 2, fixed term 15 months, concurrent with count 1. Dominey count 1, non-parole period 2 years, 3 months, balance 18 months. Count 2, fixed term 18 months, concurrent with count 1.

Held: (1) The sentences were manifestly excessive, given the specific error of the sentencing judge in assessing the objective seriousness of the s 112(2) *Crimes Act* offences,

and notwithstanding that the elements of general and specific deterrence were significant sentencing considerations.

The sentences for the s 195(a) offence were similarly manifestly excessive. The sentencing judge erred by taking as a starting point a term at, or exceeding, the maximum statutory penalty. The offence was far from the worst case category for which the maximum penalty is reserved.

Dominey's criminality was aggravated by the fact that the offence was committed while he was on conditional liberty. However, there were significant subjective features in his favour, including the devastating impact on him of the death of his grandmother.

(2) Notwithstanding that the standard non-parole period refers to an offence in the mid-range of objective seriousness where an offender is convicted after trial, it remains relevant as a benchmark or sounding board where an offender pleads guilty. It has a role along with the use of authorities, sentencing statistics, guideline judgments and the statutory maximum penalty, in determining an appropriate sentence: *R v Way* (2004) 60 NSWLR 168; *R v Davies* [2004] NSWCCA 319; *R v AJP* (2004) 150 A Crim R 575; *R v Stambolis* [2006] NSWCCA 56.

Where an offender pleads guilty, it is appropriate for a sentencing judge to consider the place of the offence in the range of objective seriousness: *R v Porteous* [2005] NSWCCA 115; *R v Tory* [2006] NSWCCA 18.

The sentencing judge failed to undertake the assessment of the objective seriousness of the offences, given that a guilty plea had been entered, in line with *Way* and consistent with the approach summarised by Simpson J in *AJP* at [13].

The sentencing judge erred in concluding that the pleas of guilty and the circumstances of their entry reduced the level of objective seriousness "somewhat below mid range." A plea of guilty and its timing, while relevant to the determination of sentence, has no bearing upon determining the place of an offence in the range of

objective seriousness: *R v Rice* (2004) 150 A Crim R 37 at 56.

Considering the motivation of the applicants, the element of provocation, the evidence that they were affected by alcohol and that they made no attempt to disguise themselves in the presence of a person who knew them, the s 112(2) offences lay below the mid range of objective seriousness. While the use of the fire extinguisher was an aggravating feature, it was used to damage property rather than threaten physical harm.

Item 13: *Crimes Act s 112(3)* (specially aggravated break, enter and commit serious indictable offence). SNPP is 7 years.

Note that the following matters also featured an offence under this section, but have been listed in the table at Item 9: *R v Steven Aslett* [2006] NSWCCA 48 – 29 March 2006; and *R v Dudley Aslett* [2006] NSWCCA 49 – 24 March 2006.

***R v Chaaban* [2006] NSWCCA 107 – 7 April 2006**

Note that this matter also featured an Item 13 Crimes Act section 112(3) offence.

Conviction after trial or guilty plea: Guilty plea

Judgment of: Hunt AJA; Simpson J; Rothman J

Decision: Crown appeal allowed. Respondent re-sentenced.

Original sentences: Specially aggravated break enter and steal (maliciously inflict grievous bodily harm), imprisonment, non-parole period 2 years, balance of term, 1 year, 6 months; maliciously inflict grievous bodily harm with intent, imprisonment fixed term 2 years.

New sentences: aggravated break, enter and steal, sentence increased to imprisonment non-parole period 2 years, 6 months, balance of term, 2 years, 6 months. Sentence for maliciously inflict grievous bodily harm, increased to imprisonment, fixed term, 3 years.

Held: (1) Individually and overall the combined sentences were manifestly inadequate, and disproportionate to the objective gravity of the offences. The respondent's strong subjective case should not be permitted to overshadow the objective seriousness of the offences.

(2) Insufficient regard was paid to the standard non-parole period for each offence which is seven years. The total effective non parole period after accumulation was less than 43 percent of the standard non-parole period.

“Even if I were not of the view that it was an error to regard the offences as below the middle of the range of objective seriousness, so great a departure would, other than in an exceptional case, be questionable.” Simpson J at [19].

Were it not for “the respondent’s very unfortunate history, ... the absence of any previous criminal behaviour of any substance, and to the principles which govern Crown appeals, and most particularly to the 50 percent discount... I would have considered that even those proposed sentences fail to meet the needs of justice in this case.” Simpson J at [20].

Hunt AJA stated that he did not understand why the Crown did not object to the 50 percent discount allowed by the sentencing judge, which “ignored both s 23(3) of the *Crimes (Sentencing Procedure) Act* and community standards.” (at [4]).

Item: *15 Crimes Act*, s 154C(2) (car-jacking in circumstances of aggravation).
SNPP is 5 years.

***R v Pritchard* [2006] NSWCCA 2 – 19 January 2006**

Conviction after trial or guilty plea: Conviction after trial

Judgment of: Basten JA; Howie J; Hall J

Decision: Appeal dismissed.

Held: Basten JA said at [13]-[14]:“The question is whether it is appropriate to reduce the non-parole period. The reduction would not be in accordance with what his Honour intended. There is no challenge to the length of the period proposed by his Honour, taking into account the various circumstances that were relevant in this case. The reduction would be required purely in order to give effect to a statutory expectation that a non-parole period will normally be 75 percent of the length of the full term.

...It is inappropriate to intervene in that way in the present case. The statute does not require that the balance of the term be less than 25% of the sentence (or 33% of the non-parole period) but rather that it not exceed that amount. Accordingly there is no breach of the statutory period. There is otherwise no justification for reducing the non-parole period.”

***R v Barker; R v Gibson* [2006] NSWCCA 20 – 15 February 2006**

Conviction after trial or guilty plea: Guilty plea.

Judgment of: Basten JA; Howie J; Hall J

Decision: Crown appeal allowed in relation to both respondents and sentences for each respondent of non-parole period of 18 months, balance of term of 2 years quashed so far as the commencement date is concerned.

Held: Noted there is no acknowledgment of the principles to be applied as stated in *R v Way* (2004) 60 NSWLR 168, and particularly, no reference to the fact that, where the court is justified in departing from the standard non-parole period, it remains as an important guidepost to the appropriate sentence to be imposed. However, the

Crown did not argue that her Honour was not entitled to depart from the standard non-parole period (the fact that the respondents pleaded guilty was sufficient to make it inappropriate) nor did the Crown dispute that her Honour was entitled to determine that the offence objectively was not within the mid-range of seriousness.

The Crown submitted that in light of the respondents' criminal records and the aggravating factors present, a sentence with a non-parole period of 18 months did not pay due regard to the significance of the standard non-parole period of 5 years. However during argument the Crown conceded that, based upon *Drew* the sentence was within range although at the bottom of it. Howie J said at [59] that " I confess to being troubled by this result but... this Court should act upon the Crown's concession in a Crown appeal. However, it should not be taken that I am persuaded that the sentence was not manifestly inadequate."

Item : 18 *Drug Misuse and Trafficking Act* 1985, s 25(2) (supply commercial quantity of prohibited drug other than cannabis leaf). SNPP is 10 years.

Note that the following matters also featured an offence under this section, but have been listed in the table at Item 19: *R v Lo* [2005] NSWCCA 436 – 16 December 2005; *R v Vu* [2006] NSWCCA 188 22 June 2006; and *R v Lam* [2006] NSWCCA 2 February 2006.

***R v Mendez* [2005] NSWCCA 246 – 22 July 2005**

Conviction after trial or guilty plea: Conviction after trial

Judgment of: Studdert J; Kirby J; Howie J

Decision: Crown appeal upheld. Non-parole period of 5 years 6 months, balance of term 2 years 6 months (increased from non-parole period of 3 years, balance of term 12 months).

Held: The sentencing judge's approach does not conform with the principles set out in *R v Way*: having determined that the offence was "in the middle range of seriousness", his Honour then balanced aggravating features under s 21A with mitigating features, determining that the latter outweighed the former "to a considerable degree." (at [35]).

Given that his Honour determined that the offence was in the middle of the range of objective seriousness, and given that the standard non-parole period is 10 years, it is at once apparent that a 3 year non-parole period is extremely low. Unfortunately, as the Crown complains, his Honour did not provide reasons, as required by s54B (4), for reducing the non-parole period.

The fact of double jeopardy is recognised and the sentence substituted should be conservative, that is, at the lower end of the range (*Dinsdale v The Queen* (2000) 202 CLR 321 at 341).

***R v Ancuta* [2005] NSWCCA 275 – 17 August 2005**

Conviction after trial or guilty plea: Guilty plea

Judgment of: Brownie AJA; Buddin J; Latham J

Decision: Appeal upheld. Non-parole period 5 years, balance of term 3 years imposed (reduced from non-parole period 6 years 6 months, balance of term 2 years 6 months).

Held: The sentencing judge erred in his approach to *Regina v Way* [2004] NSWCCA 13, that is, he started with the standard non-parole period of 10 years, said that he proposed to reduce that by approximately 20 per cent to allow for the utilitarian value of a relatively early plea of guilty, and then considered whether the resultant figure of 8 years imprisonment should be increased or decreased by reference to the aggravating and mitigating factors that existed – however, in doing so he commenced with the standard non-parole period and oscillated around it by reference to the factors mentioned: (at [9]).

***R v Dang* [2005] NSWCCA 430 - 14 December 2005**

Conviction after trial or guilty plea: Guilty plea

Judgment of: Studdert J; Whealy J; Howie J

Decision: Crown appeal upheld – respondent sentenced to a non-parole period of imprisonment for 5 years with a balance of the term of 4 years (increased from a non-parole period of 4 years and a balance of the term of 2 years 6 months).

Held: The sentencing judge appears to have thought, contrary to *Way*, that the

SNPP applied regardless of whether the offender was convicted after a plea of guilty or after trial and not simply as a reference point where there was a plea of guilty. Secondly the Judge appears to have thought that it was unnecessary to have any further regard to the standard non-parole once he had determined that the

offence fell outside the mid range of seriousness, and failed to give reasons for the conclusion as to where the offence lay in terms of seriousness.

A non-parole period of 4 years as against the standard non-parole period of 10 years was manifestly inadequate, even after taking into account the discount for the plea of guilty. As against a maximum penalty of 20 years for the offence, a term of imprisonment totalling 6½ years was also manifestly inadequate, suggesting that the Judge had either given insufficient weight to the seriousness of the offence or too much weight to the subjective factors.

The CCA departed from the standard non-parole period for the following reasons:

- (i) notwithstanding the amount and purity of the drug and that the Respondent was involved in planned criminal activity, he was not a principal and had only been involved in a single supply as a result of his addiction to cocaine with the result that, the offence fell below the mid range of seriousness;
- (ii) he was on conditional liberty at the time;
- (iii) he pleaded guilty at the first reasonable opportunity;
- (iv) he was remorseful;
- (v) he does not have any significant record of other offences;
- (vi) he has good prospects of rehabilitation;
- (vii) the respondent is serving his first sentence in custody;
- (viii) his current prison classification.

Item: 19 *Drug Misuse and Trafficking Act* 1985, s 25(2) (supply large commercial quantity of prohibited drug other than cannabis leaf). SNPP is 15 years.

***R v Thompson* [2005] NSWCCA 340 – 29 September 2005**

Judgment of: Mason P; Barr J; Johnson J

Decision: Appeal against severity of sentence upheld. Sentence reduced to 13 years 4 months with a non-parole period of 10 years from 16 years with a non-parole period of 12 years).

Held: It was common ground that the sentencing exercise did not conform to the principles in *Way*. The applicant's family circumstances, the consequences of a motor vehicle accident that caused injury and led to long-term unemployment, and his early plea of guilty justified a lesser sentence

***R v Lo* [2005] NSWCCA 436 - 16 December 2005**

This matters also featured an Item 18 offence.

Judgment of: Hulme J; Hidden J; Latham J

Decision: Appeal against severity of sentence upheld in part - sentence of an overall non-parole period of 7 years with a balance of term of 11 years imposed (reduced from a total of 11 years, with non-parole periods totalling 9 years).

Held: The sentence was manifestly excessive. The sentencing judge erred:

- in adopting the standard non-parole periods as starting points in his determination of the final sentences; and in
- failing to regard the partial accumulation of sentences as “special circumstances”.

***R v Lam* [2006] NSWCCA 11 - 2 February 2006**

This matters also featured an Item 18 offence in the decision of Liu v R [2006] NSWCCA 450 re application of SNPP to knowingly take part offences as noted.

Judgment of: Grove J and Rothman J

Decision: Appeal against severity of sentence upheld – sentence of a non parole period of ten years with a total term of fourteen years imposed (reduced from an overall twelve and a half years non parole period and total term of seventeen and a half years).

Held: Error was found in that his Honour made a finding of special circumstances, the ultimate overall effect was to depart from the s 44 statutory proportion by only a little over 3 percent.

***R v Des Rosiers* [2006] NSWCCA 16 – 10 February 2006**

Judgment of: McClellan CJ at CL; Howie J; Latham J

Decision: Appeal upheld. Four counts:

- (A) Supply large commercial quantity of prohibited drug (term of sentence 18 yrs, npp 12 yrs)
- (B) Supply prohibited drug (term of sentence 12 yrs, npp 8 yrs, concurrent with (A))
- (C) Supply trafficable quantity of prohibited drug (term of sentence 12 yrs, npp 8 yrs, concurrent with (A))
- (D) Supply prohibited drug [LSD] (fixed term 2 yrs, concurrent with (A))

Held: While not a matter raised on the appeal, the sentencing Judge made a technical error by not setting a non-parole period first, then determining the balance of the term in respect of each offence. This of itself did not justify interference by this Court, but it was considered relevant to the question of re-sentencing.

The Judge also erred:

- in believing that the maximum penalty in respect of the second, third and fourth charges was 18

years' imprisonment (the applicable maximum penalties being 15 years' imprisonment in respect of charge (2), 10 years' imprisonment in respect of charge (3), and 15 years in respect of charge (4) when prosecuted on indictment);

- in not identifying the basis for departing from the standard non-parole period. Nowhere in the remarks on sentence did his Honour assess the objective gravity of the offence in terms of the spectrum of offences of this type, nor was there any attempt to meet the requirements of s 54B(4) of the *Crimes (Sentencing Procedure) Act*.
- in failing to comply with the principles in *Pearce v The Queen* (1998) 194 CLR 610.

***R v Yildiz* [2006] NSWCCA 97 – 5 April 2006**

Judgment of: Simpson J; Adams J; Hoeben J

Decision: Sentence appeal dismissed (by majority)

Held: Although the sentencing judge did not err in finding that this offence did not come within the middle of the range of objective seriousness and in having regard to the standard non-parole period as a guidepost or benchmark, the imposition of a non-parole period of seven years with a balance of term of three years represented a significant reduction on the prescribed standard non-parole period to just 46%.

Simpson J observed at [41]:

I agree that the sentence is a lengthy one, and probably longer than might have been imposed prior to the introduction of Division 1A of Part 4 of the *Sentencing Procedure Act*. But that is the effect of the amendments to the law, and to the sentencing process, made by Division 1A. It is the obligation of sentencing judges to apply the law as it is made and expressed by the legislature. In the light of the standard non-parole period I am unable to conclude that the sentence was manifestly excessive.

***R v Vu* [2006] NSWCCA 188 – 22 June 2006**

This matter also featured an Item 18 offence.

Judgment of: James J; Buddin J; Hall J

Decision: Appeal upheld in relation to the total non-parole period.

For Count 2, sentence of a fixed term of imprisonment of six years and nine months imposed reduced from a term of nine years with a NPP of 6 years and 9 months.

For Count 1, sentence of a non-parole period of seven years and a balance of term of five years imposed with a partial cumulation of the sentence to reflect the total criminality resulting in an overall term of 14 years with a NPP of 9 years (reduced from a total effective sentence of imprisonment for 14 years with a non-parole period of 11 years).

Held: The sentences were not manifestly excessive. It was open to the judge to determine that the offences were in the middle of the range of objective seriousness. Although the judge did not give precise reasons for that determination, his Honour specifically had regard to the serious nature of the offences.

***R v Stankovic* [2006] NSWCCA 229 – 1 August 2006**

Conviction after trial or guilty plea: Guilty plea

Judgment of: Giles JA; Grove J; Hidden J

Decision: Crown appeal allowed. Non-parole period of 5 years 2 months with a balance of term of 2 years 7 months increased to non-parole period of 8 years 9 months with a balance of term 2 years and 11 months.

Held: The judge erred in the approach taken to the standard non-parole period. The applicant pleaded guilty and the judge recognised that the SNPP acts a guiding post in that circumstance. The sentencing judge however used the SNPP as a guide for an assessment of the total sentence as opposed to the minimum term.

Item: 20 *Firearms Act* 1996, s7 (unauthorised possession or use of firearms). SNPP is 3 years.

***R v Dusan Krstic* [2005] NSWCCA 391 – 21 November 2005**

Judgment of: Sully J; Hulme J; Latham J

Decision: Sentence appeal dismissed.

Held: Noted that as to the fact that this was the applicant's first experience of custody, the question is whether that circumstance justified a lower proportionate relationship between the non-parole period and the head sentence. That question was one for the Judge to answer in the exercise of his discretion. This Court should be slow to interfere unless the non-parole period can be said to be manifestly excessive.

Held that a non-parole period of 2 years was well within the Judge's sentencing discretion. Moreover, a period of 8 months potential release on parole provided adequate scope for the applicant's supervision on release, given his stated intention of returning to live with his family.

The following matters were not appealed on the basis of the non-parole period imposed.

R v AB & Clifford [2005] NSWCCA 360 - 27 October 2005

Judgment of: McClellan CJ at CL; Grove J; Hislop J

Conviction after trial or guilty plea: Guilty plea

Decision: Crown appeal against sentence for murder and maliciously inflict grievous bodily harm upheld. Sentences confirmed but restructured. New aggregate: Non-parole period 10 years 6 months, balance of term 4 years 6 months.

R v Douglas [2005] NSWCCA 419 - 23 December 2005

Judgment of: Simpson J; Adams J; Hoeben J

Conviction after trial or guilty plea: Conviction after trial

Decision: Appeal against convictions and sentence dismissed. Effective total sentence of non-parole period 6 years, balance of term 4 years confirmed.

R v Walker [2006] NSWCCA 228 - 1 August 2006

Judgment of: McClellan CJ at CL; Kirby J; Hoeben J

Conviction after trial or guilty plea: Conviction after trial

Decision: Appeal against conviction dismissed and leave to appeal against sentence refused.

R v Doolan [2006] NSWCCA 29 - 17 February 2006

Judgment of: McClellan CJ at CL; James J; Buddin J

Conviction after trial or guilty plea: Conviction after trial

Decision: Appeal dismissed. Non-parole period 7 years, balance of term 3 years confirmed.

Held: The sentencing judge erred in finding some aggravating factors pursuant to s 21A. These included the applicant's prior criminal record, the substantial nature of the injury, emotional harm, loss or damage caused by the offence and the victim's vulnerability. Other factors however aggravated the offence and these included a lack of remorse, a failure to plead guilty, the fact the offender was on conditional liberty, the making of threats and actual violence and the commission of the offences over a "not inconsiderable" period of time.

It was not open to conclude that a lesser sentence ought to have been imposed. Therefore, notwithstanding the sentencing judge's conclusion that the standard non-parole period did not apply, it was clear that standard non-parole periods provide a "guidepost, or benchmark, against which the case [under consideration can] be compared."

***R v Doherty* [2006] NSWCCA 133 - 28 April 2006**

Judgment of: Grove J; Simpson J; Bell J

Conviction after trial or guilty plea: Guilty plea

Decision: Appeal upheld. Sentence of non-parole period 10 years, balance of term 5 years imposed (reduced from effective overall sentence of non-parole period 12 years, balance of term 5 years).

Held: The facts of the offences demonstrate beyond doubt that heavy sentences were called for (at [8]). The CCA found that the extent of the accumulation of the sentences was excessive, and resulted in a manifestly excessive effective head sentence and non-parole period.

***R v TV* [2006] NSWCCA 174 - 5 June 2006**

Judgment of: Hodgson JA; Grove J; Adams J

Conviction after trial or guilty plea: Conviction after trial

Decision: Appeal against conviction dismissed. Leave to appeal against sentence refused.

***R v JTAC* [2005] NSWCCA 345 - 5 October 2005**

Judgment of: McClellan CJ at CL; Grove J; Hislop J

Conviction after trial or guilty plea: Guilty plea

Decision: Appeal against sentence dismissed.

***R v Mason* [2005] NSWCCA 403 - 17 October 2005**

Judgment of: McClellan CJ at CL; Adams J; Johnson J

Conviction after trial or guilty plea: Guilty plea

Decision: Sentence appeal dismissed. Sentence of non-parole period 6 years, balance of term 2 years 6 months confirmed.

***R v Truong* [2006] NSWCCA 71 - 30 March 2006**

Judgment of: Beazley JA; Adams J; Howie J

Conviction after trial or guilty plea: Guilty plea

Decision: Appeal on sentence for the third count allowed. Sentence for this count reduced to non-parole period 3 years and 6 months, balance of term 3 years (from an effective total sentence of non-parole period 5 years 9 months, balance of term 3 years.)

New total sentence: Non-parole period 5 years 3 months, balance of term 3 years.

***R v Sternbeck* [2006] NSWCCA 132 - 18 May 2006**

Judgment of: Hodgson JA at 1; James J at 2; Hoeben J

Conviction after trial or guilty plea: Guilty plea

Decision: Sentence appeal dismissed. Total effective sentence of non-parole period 7 years 6 months, balance of term 3 years 6 months confirmed.

R v McArthur [2006] NSWCCA 200 – 23 June 2006

Judgment of: Giles JA; Grove J; Hidden J

Conviction after trial or guilty plea: Guilty plea

Decision: Appeal dismissed. Sentence of non-parole period 9 years, balance of term 3 years confirmed.

R v Bellamy [2005] NSWCCA 329 – 14 September 2005

Judgment of: Grove J; Simpson J; Buddin J

Conviction after trial or guilty plea: Guilty plea

Decision: Appeal dismissed. Sentence of non-parole period 3 years, balance of term 11 months confirmed.

R v Connor [2005] NSWCCA 431 – 14 December 2005

Judgment of: McClellan CJ at CL; Studdert J; James J

Conviction after trial or guilty plea: Guilty plea

Decision: Appeal allowed. Sentence of non-parole period 3 years, balance of term 1 year imposed (reduced from aggregate term of non-parole period 3 years 6 months, balance of term 1 year 2 months.)

R v Price [2005] NSWCCA 285 – 15 August 2005

Judgment of: Simpson J; Johnson J; Rothman J

Conviction after trial or guilty plea: Guilty plea

Decision: Appeal upheld. Sentence of non-parole period 9 months, balance of term 7 months imposed (reduced from non-parole period 1 year 6 months, balance of term of 1 year 2 months.) Direction made that the applicant be released on parole forthwith.

Held: Two distinct matters were erroneously taken into account in aggravation of the offence. There was a material misdirection as to the availability of the means by which the sentence might be served and inadequate attention was given to the applicant's powerful subjective case.

“...Another, less severe, sentence should have been passed” (at [56]) – namely periodic detention or alternatively, a significantly shorter sentence with a non-parole period of no more than nine months. As the applicant had served almost ten months of the non-parole period in full-time custody, it was too late for periodic detention and a shorter sentence was accordingly warranted.

***R v McAndrew* [2006] NSWCCA 12 – 2 February 2006**

Judgment of: Grove J; Rothman J

Conviction after trial or guilty plea: Guilty plea

Decision: Appeal dismissed.

Held: The standard non-parole period applicable to this offence on conviction after trial is ten years. Although the non-parole period imposed was less than half that the court held that the sentence was appropriate.

***R v Smith* [2006] NSWCCA 129 – 27 April 2006**

Judgment of: James J; Simpson J; Hall J

Conviction after trial or guilty plea: Guilty plea

Decision: Crown appeal dismissed

***R v BCC* [2006] NSWCCA 130 - 27 April 2006**

Judgment of: James J; Simpson J; Hall J

Conviction after trial or guilty plea: Guilty plea

Decision: Crown appeal dismissed

***R v Hockey* [2006] NSWCCA 146 – 8 May 2006**

Judgment of: McClellan CJ at CL; Adams J; Johnson J

Conviction after trial or guilty plea: Guilty plea

Decision: Appeal dismissed

***R v Sorbello* [2006] NSWCCA 225 - 28 July 2006**

Judgment of: Tobias JA; McClellan CJ at CL; Hoeben J

Conviction after trial or guilty plea: Guilty plea

Decision: Appeal upheld. Non-parole period 4 years, balance of 2 years imposed (reduced from non-parole period 5 years, balance of term 3 years.)

***R v AA* [2006] NSWCCA 55 – 10 March 2006**

Judgment of: McClellan CJ at CL; Hulme J; Rothman J

Conviction after trial or guilty plea: Guilty plea

Decision: Crown appeal dismissed.

***R v Disano* [2006] NSWCCA 125 – 18 May 2006**

Conviction after trial or guilty plea: Conviction after trial

Judgment of: McClellan CJ at CL; Hoeben J; Johnson J

Decision: Appeal against conviction dismissed.

***R v Banting* [2006] NSWCCA 53 – 10 March 2006**

Conviction after trial or guilty plea: Guilty plea

Judgment of: Grove J; Rothman J

Decision: Appeal against sentence allowed.

Held: The judge failed to take into account the features of the case which warranted a finding of special circumstances and the need for extended supervision upon release.

***R v BP; R v SW* [2006] NSWCCA 172 – 1 June 2006**

Conviction after trial or guilty plea: Conviction after trial

Judgment of: Hodgson JA; Adams J; Johnson J

Decision: Appeal against conviction dismissed

***R v MJD* [2006] NSWCCA 151 – 10 May 2006**

Conviction after trial or guilty plea: Conviction after trial

Judgment of: Hodgson JA; James J; Hoeben J

Decision: Appeal against sentence dismissed.

Held: The applicant's son's very short life expectancy amounted to sufficient evidence to represent extreme hardship to a family member, which may go towards ameliorating the sentence imposed. However to ameliorate the hardship would require the quashing of the sentences imposed and the imposition of a non-parole period expiring immediately. Such an option would be out of proportion to the criminality involved.

***R v Fina'i* [2006] NSWCCA 134 – 27 April 2006**

Conviction after trial or guilty plea: Guilty plea

Judgment of: McClellan CJ at CL; Rothman J; Smart AJ

Decision: Appeal against sentence allowed. Non-parole period of 7 yrs with balance of term 2 yrs reduced to non-parole period of 6 yrs 9 months with balance of term 2 yrs 3 months.

Held: Sentencing judge failed to take into account his findings of special circumstances.

***R v Cunningham* [2006] NSWCCA 176 – 5 June 2006**

Conviction after trial or guilty plea: Guilty plea

Judgment of: Grove J; Simpson J; Bell J

Decision: Appeal against sentence allowed.

Held: Sentencing judge erred by taking into account an element of the offence as an aggravating factor.

***R v Huynh* [2006] NSWCCA 77 – 28 July 2006**

Conviction after trial or guilty plea: Conviction after trial

Judgment of: Hidden J; Kirby J; Hislop J

Decision: Appeal against severity of sentence dismissed

***R v Hawkins* [2006] NSWCCA 91 – 3 May 2006**

Conviction after trial or guilty plea: Guilty plea

Judgment of: Sully J; Hidden J; Hall J

Decision: Appeal against sentence dismissed (by majority)

Held: Sentencing judge did not err in his assessment of special circumstances

ANNEXURE C: Case summaries of appeals to CCA concerning suspended sentences, July 2005 – August 2006

***R v BCC* [2006] NSWCCA 130 – 22 May 2006**

Judgment of: Spigelman CJ, Simpson and Johnson JJ

Decision: Crown appeal dismissed.

Held: The Crown argued the sentence was manifestly inadequate given that the maximum penalty for such an offence is twenty years imprisonment and the objective seriousness of the offence was high. The Crown submitted that the need for general deterrence was high in this particular case and that a suspended sentence, which has a “strong element of leniency”, is not appropriate in a drug supply case. It was submitted that, where the maximum penalty was 20 years and where the standard non-parole period was 10 years and the sentencing judge used four years as a starting point and then discounted it by 50% for the plea and assistance and then imposed a suspended sentence, the sentencing judge had demonstrably fallen into error.

The sentence was held to be manifestly inadequate given the objective seriousness and because it was suspended, but the Court exercised its discretion not to intervene. The respondent had been released from custody and there would be undue hardship resulting from the respondent being returned to custody.

***R v Brown; R v Reid* [2006] NSWCCA 144 – 21 April 2006**

Judgment of: Hodgson JA, James and Hoeben JJ

Decision: Severity of sentence appeal allowed against both offenders.

Held: Appeal concerning suspended sentence was for the second offender Reid. The applicant submitted that the sentencing judge erred in not giving consideration to whether the execution of the sentence of imprisonment should be suspended pursuant to s 12.

Reliance was placed on the reasoning that a judge should follow when imposing a sentence of imprisonment as set out in *R v Zamagias*. It was

submitted that the sentencing judge erred in the final step of that process in, that after determining that a period of imprisonment was warranted and then determining the term, the judge did not then consider appropriately the manner in which sentence should be served.

It was held that the judge did err by not appropriately assessing the manner in which the period of imprisonment should be served. A suspended sentence was open to the judge to consider given the term of sentence and the subjective aspects of the case, in particular the offender's participation in the MERIT program. By not assessing this judge's sentencing discretion miscarried. It did not matter that no application was made for a suspended sentence by the applicant at sentence proceedings.

***R v Gip; R v Ly* [2006] NSWCCA 115 – 11 April 2006**

Judgment of: McClellan CJ at CL, Rothman J and Smart AJ

Decision: Crown appeal against sentence imposed on wife (Gip) dismissed

Held: In relation to Gip, the Crown submitted that the objective seriousness of the offence warranted a higher sentence – supply of heroin. The Crown also submitted that Ly was on a 3-year bond at the time of the offence and a previous 2-year bond for a similar drug offence had only expired 4 months before the commission of the present offence

It was held that the sentence imposed was not inadequate. The sentencing judge took into consideration the hardship a custodial sentence imposed on the first respondent would have on her children. This was relevant within the sentencing judge's discretion.

***R v Stambolis* [2006] NSWCCA 56 – 10 March 2006**

Judgment of: Giles JA, Howie J, and Hoeben J

Decision: Crown appeal allowed.

Held: The sentence imposed was manifestly inadequate. The judge underestimated the seriousness of the offences. The judge determined first that the sentences should be suspended. That approach did not accord with *R v Zamagias* [2002] NSWCCA 17 where it was held that a judge is to set the term of imprisonment without reference to the manner in which it will be served.

***R v Braithwaite* [2005] NSWCCA 451 – 16 December 2005**

Judgment of: Hodgson JA, McClellan CJ at CL and Hall J

Decision: Severity of sentence appeal allowed

Held: The applicant submitted that the sentencing judge did not properly consider whether to suspend the sentence under section 12. The applicant argued that the judge erroneously considered the application of s.12 before determining that a sentence of imprisonment was appropriate, and that it was not the case that the offences had to fall towards the lower end of the scale for like offences, or that exceptional circumstances needed to be established, before the sentence could be suspended.

The judge did err in the approach taken to section 12. In this case, consideration of whether imprisonment was appropriate appeared to have been combined with consideration of whether s.12 could be applied, whereas the two questions should be considered separately. The judge was also in error in stating that it is a pre-condition to suspending the sentence that the offence falls towards the lower end of the scale, or that there be exceptional circumstances.

***R v O'Connell* [2005] NSWCCA 265 – 3 August 2005**

Judgment of: Brownie AJA, Buddin and Latham J

Decision: Crown appeal dismissed

Held: The Crown appealed on the grounds that the sentencing Judge erred by tailoring the sentences so they could be suspended and good behaviour bonds imposed. In its submissions it relied upon a particular comment by the sentencing judge, 'What you do ultimately depends on your assessment of the overall criminality, it seems to me.'

The CCA held that there was no apparent error on the part of the sentencing judge in the remarks on sentence. It noted that the sentencing Judge began with a term of 3 years and then applied the discounts which reduced the sentence to the term of 23 and a half months.

***R v Dutton* [2005] NSWCCA 248 – 20 July 2005**

Judgment of: Studdert, Kirby and Howie JJ

Decision: Crown appeal allowed

Held: The suspended sentence was "manifestly inadequate". There was an issue as to the timing of the blood alcohol testing. It was open for the sentencing judge to determine that he would sentence the respondent on the lowest level estimation of the blood alcohol level range provided in expert evidence. However, his Honour erred in the way he dealt with the relevance of the blood alcohol level and its significance to an assessment of the seriousness of the respondent's criminality.

In sentencing for an offence where general deterrence is of considerable importance in protecting the public, for example where the offence is frequently committed and the consequences of the offending are particularly serious, there will be less opportunity to suspend a sentence and yet sufficiently reflect general deterrence: *R v Taylor* [2000] NSWCCA 442. This was not a case where either the seriousness of the offending or the need for general deterrence could be reflected in a sentence that was suspended.

