

**Report on Sentencing Trends
and Practices
2006-2007**

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

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*.

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THE COUNCIL

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The Hon John Dunford QC, Deputy Chairperson¹

Mr Howard Brown OAM, Victims of Crimes Assistance League

Mr Nicholas Cowdery AM QC, Director of Public Prosecutions

Ms Catherine Burn APM, Assistant Commissioner, NSW
Police Force²

Mrs Jennifer Fullford, Community Representative

Ms Martha Jabour, Homicide Victims Support Group

Mr Norman Laing, Barrister and Aboriginal Justice
representative

Mr Ken Marslew AM, Enough is Enough Anti-Violence
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Mr Mark Ierace SC, Senior Public Defender³

Ms Jennifer Mason, Director General, Department of
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Ms Laura Wells, Director, Criminal Law Review Division,
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Mr Ronald Woodham PSM, Commissioner, NSW Department
of Corrective Services⁵

¹ The Hon John Dunford QC was appointed as the Deputy Chairperson of the Sentencing Council on 1 May 2007

² Assistant Commissioner Catherine Burn was appointed to the Council on 23 July 2007

³ Mr Mark Ierace was appointed to the Council on 31 August 2007

⁴ Ms Laura Wells was appointed to the Council on 12 March 2007

FORMER MEMBERS

The Hon J P Slattery AO QC, Deputy Chairperson⁶

Mr Chris Craigie SC, Acting Senior Public Defender

Mr Chris Evans APM, Assistant Commissioner, NSW
Police

The Hon Judge Peter Zahra SC, (former Senior Public
Defender)

⁵ Mr Ronald Woodham was appointed to the Council on 25 June 2007

⁶ The Hon J P Slattery AO QC served as the Deputy Chairperson of the Council until March 2007

OFFICERS OF THE COUNCIL

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⁷ From October 2007

⁸ From March 2007

⁹ April 2006 to November 2006

¹⁰ From August 2007

¹¹ From August 2007

¹² To December 2006

ACKNOWLEDGEMENTS

The NSW Sentencing Council acknowledges the assistance provided by numerous agencies to the Council throughout the year. In particular, thanks are extended to the following people for their assistance on the Council's 2006-2007 annual report on sentencing trends and practices:

- Helen Cunningham, Managing Lawyer, Research Unit, Office of the Director of Public Prosecutions;
- Hugh Donnelly, Director, Research and Sentencing, Judicial Commission of New South Wales;
- Graham Hazlit, Research Unit, Office of the Director of Public Prosecutions;
- Rhonda Pietrini, Research Unit, Office of the Director of Public Prosecutions;
- Patrizia Poletti, Principal Research Officer (Statistics) Judicial Commission of New South Wales; and
- Melissa Porter, Research Unit, Office of the Director of Public Prosecutions.

INTRODUCTION AND OVERVIEW

The NSW Sentencing Council (“the Council”) is now in its fourth year of operation. This is its fourth statutory report on sentencing trends and practices, and covers the period September 2006-August 2007.¹³

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

PART 2 provides an update of the projects which the Council has completed in 2006-07 and those on which it continues to work.

PART 3 gives consideration to the standard non-parole period scheme (“the scheme”).

Reference is also made to a number of Court of Criminal Appeal judgments, where the application of the scheme has been an issue on appeal. Summaries of these judgments are attached (**Annexure B**).

PART 4 concerns the Council’s role in relation to guideline judgments.

PART 5 details some significant sentencing issues that have arisen or that have continued to cause concern.

PART 6 comprises Annexures to the Report.

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

PART ONE: THE COUNCIL

Functions

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

The Council advises and consults with the Attorney General in connection with sentencing matters, in accordance with its statutory functions. These are set forth in section 100J of the *Crimes (Sentencing Procedure) Act 1999*.

Broadly, its functions are:

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

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

Objectives

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

Membership

This year has seen significant changes to the membership and composition of the Council.

In February 2007, the amendments to the *Crimes (Sentencing Procedure) Act 1999* made by the *Crimes and Courts Legislation Amendment Act 2006* came into effect, increasing membership of the Council by 3 members, with one to have experience in corrective services, one to have experience in juvenile justice, and one to be a representative of the Attorney General's Department. During 2007, the following additional members were appointed to the Council to satisfy these requirements:

- Commissioner Ronald Woodham, PSM, Corrective Services;
- Ms Jennifer Mason, Department of Juvenile Justice; and
- Ms Laura Wells, Criminal Law Review Division, NSW Attorney General's Department.

The Deputy Chairperson, the Hon J P Slattery AO QC retired in March 2007. Assistant Commissioner Chris Evans, APM, retired from Police service and from the Council in June 2007. Mr Peter Zahra SC, Senior Public Defender, retired from the Council in February 2007 upon his appointment to the District Court.

The Hon John Dunford QC was appointed in May 2007 as the new Deputy Chairperson and Assistant Commissioner. Catherine Burn, APM, was appointed to the Council in July 2007 as the new member with expertise and experience in law enforcement. Until the formal appointment of a new Senior Public Defender, Mr Chris Craigie SC, as the Acting Senior Public Defender, was appointed to the Council from March 2007 until August 2007. Mr Mark Ierace SC, Senior Public Defender, was appointed to the Council in August 2007 as the new member with expertise and experience in criminal law particularly in the area of defence.

The contribution of former Council members to the Council's work throughout their tenure was invaluable and much appreciated.

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 New South Wales, the Bureau of Crime Statistics and Research (BOCSAR), the NSW Law Reform Commission, and the Attorney General's Department through periodic meetings in 2006-07. Such meetings expand the knowledge base of the Council and also avoid any duplication of work.

The Council's relationship with the above bodies extends to cooperation on specific projects. The Judicial Commission and BOCSAR have provided valuable assistance to the Council with data, statistics and general advice, particularly in relation to the fines reference and the periodic detention references, and also in

relation to the standard non-parole scheme. For example, the Council has recently commenced work on a joint publication with BOCSAR, examining public attitude toward sentencing, and worked with officers from the Judicial Commission of New South Wales to produce the Council's first Monograph report, *Judicial Perceptions of Fines: A survey of NSW Magistrates*.

The Research Unit of the Office of the Director of Public Prosecutions has also provided valuable assistance in relation to the Council's analysis of the cases subject to the standard non-parole period scheme, contained in this and previous annual reports on sentencing trends and practices.

The Council has assisted the NSW Law Reform Commission (NSWLRC) on the Commission's reference on mental health, specifically in the area of young offenders. As will be discussed later, the Council has been conducting a preliminary review on this topic. The Council has also greatly benefited from the research assistance provided throughout the year by the staff of the NSWLRC library.

The Council met with the Crime Prevention Division, the Criminal Law Review Division, and the Legislation and Policy Division of the Attorney General's Department to discuss issues surrounding possible Government implementation of the Council's projects and recommendations, most notably the Fines Reference.

Relationships were also developed with external bodies, through discussions with:

- The NSW Ombudsman regarding potentially overlapping projects on fines and penalty notices which are currently being undertaken by both the Council and the Ombudsman;

- The Sentencing Advisory Council (Victoria) and BOCSAR on developing a survey into public attitudes to sentencing;
- The Australian Institute of Criminology in respect of data analysis concerning juvenile offenders, as part of the Council's examination of provisional sentencing; and
- The Department of Corrective Services regarding periodic detention.

In 2007, the Council became a member of the Criminal Justice Research Network (CJRN). The CJRN comprises representatives from NSW Justice agencies and the Australian Institute of Criminology, and aims to identify general areas of research and develop key priorities in order to support a sector wide approach to criminal justice research.

The role and activities of the Council have also been of interest to a number of agencies, both within Australia and overseas, and discussions have been held with their representatives regarding these matters. For example, the Council has held discussions with representatives from the Ghanaian Law Reform Commission, and the Scottish Sentencing Commission. Meetings have also been held with members of the Parliaments of NSW and South Australia.

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

- The NSW Attorney General, the Hon John Hatzistergos MP (July 2007);
- Dr Don Weatherburn, BOCSAR (July, August 2007)

Profile

The Council's reports were cited in several cases during the year. For example, in the High Court case of *Roach v Electoral Commissioner* [2007] HCA 43, Gleeson CJ noted the Council's 2004 report on the *Abolition of Prison Sentences of Six Months or Less*.

In the matter of *DAC v Regina* [2006] NSWCCA 265, the NSW Court of Criminal Appeal referred to the Council's 2004 report *Whether 'Attempt' and 'Accessory' Offences should be included in the standard non-parole sentencing scheme*.

The Council's profile in the community has benefited through papers presented by former and current members. For example, Deputy Chairperson John Dunford QC, presented a paper *Sentencing: A Judge's reflections*, to the University of Notre Dame, Australia.

In July 2006 the Chair, the Hon James Wood AO QC, presented a paper by the former Deputy Chairperson, the Hon J Abadee AO RFD QC, titled *Sentencing in the Community: Politics, Public Opinion and the Development of Sentencing Policy*, at a national conference held in Melbourne organised by the Victorian Sentencing Advisory Council, which was attended by delegates from England, Scotland, New Zealand, South Africa and the United States of America. The paper has now been incorporated into a publication produced by the Victorian Sentencing Advisory Council. That publication, *Penal Populism: Sentencing Councils and Sentencing Policy* is to be published through Willan Press in the UK and Federation Press in Australia.

Educative Function

In February 2007, s 100J of the *Crimes (Sentencing Procedure) Act 1999* was amended to extend the Council's functions to include the education of the public on sentencing matters.

Pursuant to this new function, the Chair and the Executive Officer of the Council met with Albury City Council to provide an informal briefing in relation to sentencing practices, following the expression of public concern about crime in the area.

The Council contributed to the drafting of the Plain English *Sentencing Information Package*, produced by Victims Services of the Attorney General's Department. The booklet is designed to assist victims of crime in understanding the sentencing process, and explains the purpose of sentencing, the basic elements of sentencing procedure and the terminology used by the sentencing court.

As discussed later, the Council is currently working with BOCSAR to examine public attitudes towards sentencing. The report will identify the extent to which the public is informed about sentencing, and will also identify ways in which it might be more effectively educated about sentencing practice.

In its recently released report on *The Role of Juries in Sentencing*¹⁵ the NSWLRC noted the Council's recent activities described above, and recommended that the Council should assume a pivotal role in investigating and in improving community understanding of sentencing practices in NSW. The Commission recognised that this initiative would have resource

¹⁵ NSW Law Reform Commission Report 118 (2007) *Juries and Sentencing*, Sydney 2007 at [5.17]

implications, and may require the grant of additional power to the Council, whose functions are determined by legislation.¹⁶

¹⁶ Ibid at [5.24]

PART TWO: PROJECTS UPDATE

Reports delivered to the Attorney General

The Council delivered two reports to the Attorney General during 2006-07.

Interim Report On The Effectiveness Of Fines As A Sentencing Option: Court-Imposed Fines And Penalty Notices.

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

The Council's Report has now been published. The report includes an assessment of the fines and penalties regime in place in NSW, based on a review of national and international literature, on analysis of the submissions received and of the statistical data provided, on extensive consultations with the community and stakeholders, and on a survey of judicial officers.

The Council identified several issues of concern in current procedures regarding the imposition and collection of fines and penalties. These included:

- The lack of more meaningful alternative sanctions for several categories of disadvantaged offenders and the consequent unduly harsh consequences of fine or penalty default for such persons;

- The difficulty the existing system has in allowing the capacity of the offender to pay to be taken into account when penalties or fines are imposed;
- The administrative difficulties in enforcement, including the inability of magistrates to grant extensions to pay beyond 28 days;
- The absence of an effective review system;
- The lack of any consistency in penalty levels across the very large number of offences that potentially attract fines or penalties, and of any structure for their standardisation; and
- The existence of serious administrative difficulties which recipients of fines or penalties face in dealing with the Office of State Revenue.

The Interim Report identified a number of possible options for reform.

The Attorney General has responded to the Report¹⁷ by setting up an Interagency Working Group comprising representatives of relevant agencies including the office of the Attorney General, the Roads and Traffic Authority, the NSW Police Force, the Office of State Revenue and the Department of Transport. The Office of State Revenue has already implemented some of the recommendations, including:

- Making the payment of fines easier by allowing people to pay their penalty notices by instalments; and
- Publishing guidelines for the review of penalty notices.

¹⁷ The Hon John Hatzistergos, Attorney General of NSW, Media Release, *Improving the Effectiveness of Fines in NSW*, 25 August 2007

Other changes being considered by the Working Group include:

- Allowing the Office of State Revenue and law enforcement officers to issue and record formal cautions where issuing a ticket is not the most appropriate response;
- Expanding the role of the Hardship Review Board in reviewing State Debt Recovery Office decisions;
- Providing for the needs of vulnerable people, particularly those with a mental illness or intellectual disability, who receive fines or penalty notices; and
- Allowing alternative court orders for vulnerable people, including treatment orders under the *Mental Health (Criminal Procedure) Act 1990*, intervention programs such as the Magistrates' Early Referral Into Treatment (MERIT) for offenders with drug problems, and requirements to complete financial counselling.

The Council is continuing work on the outstanding aspects of the Reference in relation to fines and penalties issued or available under occupational health and safety and environment legislation.

Report On Sentencing Trends And Practices 2005-2006

The Council's 2005-2006 report which was delivered to the Attorney General during the year under review, was released for publication in February 2007.

CURRENT REFERENCES RECEIVED FROM THE ATTORNEY GENERAL

The Council has a number of references that are ongoing.

Effectiveness Of Fines As A Sentencing Option: OHS And Environmental Offences

The Council is continuing its review of the use of fines and penalties by examining the availability and use in relation to OHS and Environmental offences.

Fines and penalties are of added significance as a sanction in relation to these offences as they represent both an entry-level sanction for minor breaches, as well as the principal sanction for very serious breaches of the law.

The Council has undertaken a review of submissions from interested bodies as well as of the available literature. This project is ongoing and the findings will be incorporated in the Final Report on the effectiveness of fines and penalties as a sentencing option.

Periodic Detention

In June 2007 the Council was requested by the Attorney General to undertake a review of periodic detention, addressing the following issues in particular:

- The extent to which periodic detention is used as a sentencing option throughout the State, and the appropriateness and consistency of such use;

- The nature of the offences for which periodic detention orders are most commonly made;
- The method of enforcement of periodic detention orders, and the appropriateness of such enforcement;
- The advantages and disadvantages of periodic detention orders in comparison with other sentencing options;
- Whether there are better alternatives to periodic detention orders;
- Any modifications which may be made to periodic detention, including combination with other community-based orders; and
- The different arrangements for state and federal offenders under periodic detention orders.

The Council has received submissions from over 20 agencies, and has also received responses from over 70 community agencies that have received the benefit of the work performed by detainees while serving their sentence. Members of the Council and staff have visited Periodic Detention Centres, have met with Corrections staff, and have engaged in consultation with the NSW Parole Authority.

The Council report will be delivered to the Attorney General in the month of November 2007.

Public Attitudes Towards Sentencing

Under its educative function, the Council is currently undertaking research into community attitudes towards sentencing. It has initiated a public survey, which has been developed based on the British Crime Survey. The survey has been designed to ascertain the level of public confidence in the various aspects of the criminal justice system, and to identify whether those who lack confidence tend to be less well informed about crime and justice.

The purpose of the research is to ascertain the extent to which the public are uninformed about sentencing and identify ways in which they might be more effectively informed.

The survey will be analysed by BOCSAR, with results to be released as a joint publication between BOCSAR and the Council. It should provide a basis for the Council to deliver an ongoing educative program in relation to sentencing policy and practice. The Council is to report to the Attorney General by July 2008.

Sexual Assault Offences - Review Of Penalties

The Attorney General has requested that the Council examine whether the penalties currently attaching to sexual offences (and in particular sexual offences against children (including child pornography)), in New South Wales are appropriate, in accordance with the following terms of reference:

- Whether or not there are any anomalies or gaps in the current framework of sexual offences and their respective penalties;
- If so, advise how any perceived anomaly or gap might be addressed;

- Advise on the use and operation of statutory maximum penalties and standard minimum sentences when sentences are imposed for sexual offences and whether or not statutory maximum penalties and standard minimum sentences are set at appropriate levels;
- Consider the use of alternative sentence regimes incorporating community protection, such as the schemes used in Canada, the United Kingdom and New Zealand;
- Consider possible responses to address repeat offending committed by serious sexual offenders; and in particular, whether second and subsequent serious sex offences should attract higher standard minimum and maximum penalties in order to help protect the community. If so, advise what these penalties could be;
- Advise whether or not “good character” as a mitigating factor has an impact on sentences and sentence length and if so whether there needs to be a legislative response to the operation of this factor; and
- Advise on whether it is appropriate that the “special circumstance” of sex offenders serving their sentences in protective custody may form the basis of reduced sentences.

The Council is to report to the Attorney General by July 2008.

Other Council Projects

Monograph: Judicial Perceptions Of Fines As A Sentencing Option: A Survey Of NSW Magistrates

Released in August 2007, the survey is the first monograph produced by the Council and forms part of the evaluation of the reference concerning the effectiveness of fines as a sentencing option.

A primary purpose of the survey was to identify the factors taken into consideration when a magistrate is determining firstly, whether a fine ought to be imposed, and secondly, its quantum. Additionally the survey also examined judicial perceptions of the advantages and disadvantages of a fine as a sentencing option, its effectiveness and the administrative consequences applicable in response to fine default.

The study found that:

- Magistrates consider a fine to be an integral weapon in the sentencing arsenal. Essentially, fines are seen as a flexible, easy to administer and an appropriate penalty for relatively minor offences;
- Despite this, there was widespread concern at the restricted availability of alternative sentencing options, especially in rural and remote areas;
- Licence suspension issues were raised as a particular matter of concern as were the mandatory disqualification provisions. Respondents drew attention to the risk that further offences will arise when suspended drivers continue to drive in response to work or family pressures, and to the consequent risk of escalating criminality.

The Council acknowledges the valuable contribution of the Judicial Commission of New South Wales in processing the survey results and in providing advice in relation to their analysis.

Sentencing Information Package

As previously mentioned, the Criminal Law Review Division and Victims Services of the NSW Attorney General's Department and the Council have jointly produced a *Sentencing Information Package* to assist victims of crime in understanding the sentencing process. The purposes of sentencing, basic elements of sentencing procedure and the terminology used by a sentencing court are explained in language aimed at the layperson.

Topics covered include:

- The circumstances in which an offender is sentenced;
- The purposes of sentencing;
- The relevant factors taken into consideration in determining a sentence; and
- The available sentencing options.

Sentencing Aboriginal Offenders

In its 2005-2006 Annual Report, the Council identified a number of decisions of the Court of Criminal Appeal that have highlighted some continuing difficulties in sentencing Aboriginal offenders.¹⁸

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 NSWLRC 'to be accepted and applied in New South Wales'.¹⁹

The principles were intended to be indicative of some of the factors which can lead a person of Aboriginal background into offending behaviour, and which as a consequence may become relevant for sentencing, rather than a comprehensive declaration of sentencing practice.²⁰ Determining when the principles are enlivened has however been a contentious issue.

A number of subsequent 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.²¹ In some cases, it has been suggested that the principles may only be applicable to Aboriginal offenders from

¹⁸ *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.

¹⁹ NSW Law Reform Commission Report 96: *Sentencing Aboriginal Offenders*, 2000 at [2.21]

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

²¹ *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.'

rural and remote areas of NSW,²² and in several decisions the principles have held to be inapplicable.²³

Commentators have suggested that recent decisions represent a retreat from the principles created in *Fernando*.²⁴

The Council has begun a review of this issue as part of its sentence monitoring and educational functions.

Provisional Sentencing For Young Offenders

In its *2005-2006 Report on Sentencing Trends and Practices* the Council identified as an area of potential future interest the issue of sentencing of young offenders for serious offences. The Sentencing Council has initiated a review of the difficulties which arise in this context and which were identified in *R v SLD* [2002] NSWSC 758 and in *R v SLD* (2003) 58 NSWLR 589, also as part of its monitoring and educational programs. In this respect it has become aware of several recent cases in Australia involving the commission by young children of very serious crimes, including murder, and of a similar pattern of early serious criminality in other jurisdictions.

²² *R v Ceissman* (2001) 119 A Crim R 535; *R v Newman and Simpson* (2004) 145 A Crim R 361; *R v Kelly* [2005] NSWCCA 280.

²³ *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; *R v Fields* [2005] NSWCCA 37

²⁴ 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

The Review will include an examination of the existing legislative framework, case law and statistics as well as a study of the issues raised by the mental health professionals and criminologists with whom the Council had been in consultation. The Australian Institute of Criminology has assisted with data analysis.

In November 2007, the NSWLRC Report 104: *Sentencing: Young Offenders* was tabled. The report briefly examined the sentencing considerations involved in the sentencing of a young offender who has committed a serious offence, and recommended that the court be given the power to order that a young offender be re-sentenced at a determinate time before the expiration of the non-parole period.²⁵ The Government response²⁶ to the NSWLRC's report noted that this matter is the subject of consideration by the Sentencing Council.

Discounts

Several cases have come before the Court of Criminal Appeal during the year under review²⁷ involving an error in the discount that was allowed in setting the sentence. The *Crimes (Sentencing Procedure) Act 1999* permits a sentencing court to impose a lesser penalty than it would otherwise have done where:

- An offender has pleaded guilty, taking into account, additionally, the time when the offender entered such plea or indicated an intention to plead guilty;²⁸

²⁵ Recommendation 11.1 pg 271

²⁶ *NSW Government Response to the NSW Law Reform Commission Report 104: Young Offenders*, tabled 14 November 2007.

²⁷ The Council also discussed the issue of discounts in sentencing in its 20005-2006 report on sentencing trends and practices, at p31.

²⁸ s 22 *Crimes (Sentencing Procedure) Act 1999*

- The defence has made pre trial disclosure for the purposes of the trial;²⁹
- The offender has assisted or undertaken to assist law enforcement authorities in the prevention, detection or investigation of, or in proceedings relating to the offence or any other offence.³⁰

Customarily these factors, where present, have been taken into account by allowing a discount against the sentence that would have otherwise been set. Although it is not an error for a sentencing judge to omit specifying the precise level of the discount allowed, it is common for such a disclosure to be made.

Some guidance has been given in relation to the range of the discount that is applicable for a plea of guilty, of between 10 and 25%.³¹ Similar guidance has been given in relation to the discount for assistance, customarily ranging between 20 and 50%.³²

Notwithstanding the guidance provided by these authorities, error has often been detected on appeal, particularly where the accumulation of the available discounts has resulted in a sentence that is manifestly inadequate. The potential for error in this respect was identified in *SZ v R*³³ where the discount given at first instance was 62.5%. It was there pointed out that a combined discount for a plea of guilty and assistance should not normally exceed 50%; in other cases it has been suggested that the upper level of the discount should be 40% unless there is evidence that

²⁹ s 22A *Crimes (Sentencing Procedure) Act 1999*

³⁰ s 23 *Crimes (Sentencing Procedure) Act 1999*

³¹ *R v Thomson and Houlton* (2004) 49 NSWLR 383; *Markarian v The Queen* (2005) 79 ALJR 1048

³² *R v Cartwright* (1989) 17 NSWLR 243; *Gallagher v R* (1991) 23 NSWLR 220

³³ [2007] NSWCCA 19

the offender will serve the sentence in more onerous conditions.³⁴ Similar error was found in *R v JRD*³⁵ where the discount given was estimated to have been between 85% and 95%. Error was found in relation to the discount allowed in several other cases including: *R v Pham*,³⁶ *R v MAK and MSK*,³⁷ *R v Lewins*,³⁸ *Perry v R*³⁹ and *Ghazi v R*.⁴⁰

As was pointed out in *R v Wilson-Winship*,⁴¹ error will occur if a full 25% discount is given for a plea against a sentence determined by an application of the *Henry* guideline,⁴² since the guideline assumes a guilty plea and a range that is discounted for that factor.

The requirement to take into account the mitigating circumstances outlined in s 21A of the *Crimes (Sentencing Procedure) Act* 1999, including the fact of a plea, assistance, remorse and so on, has introduced a potentially complicating factor in the calculation of the appropriate discount in so far as there is now an overlap between the several sentencing considerations, with a risk of double counting. This led the court in *R v MAK and MSK*⁴³ to support the practice of confining the discount for a plea to its utilitarian value and of avoiding quantifying any discount for remorse, lest that give rise to double counting.

³⁴ *R v Sukkar* [2006] NSWCCA 92

³⁵ [2007] NSWCCA 55

³⁶ [2006] NSWCCA 288

³⁷ (2006) 167 A Crim R 159

³⁸ [2007] NSWCCA 189 where discounts of up to 82% had been given to take into account several factors including the *Ellis* discount for the disclosure of previously unknown criminality.

³⁹ [2006] NSWCCA 351

⁴⁰ [2006] NSWCCA 320

⁴¹ [2007] NSWCCA 163

⁴² *R v Henry* (1999) 46 NSWLR 346

⁴³ (2006) 167 A Crim R 159

In one decision⁴⁴ the Court of Criminal Appeal made reference to the fact that it is inappropriate for a judge to identify a discount as “falling within some undefined range”,⁴⁵ error was found in that case in relation to the Judge’s observation that the discount allowed had been “something in the vicinity of 10 to 15 percent”.

The Council intends to monitor the manner and extent to which discounts are given, as well as the incidence of error arising as detected in appeals to the Court of Criminal Appeal. This has a particular relevance by reason of the trial which is being conducted concerning criminal case conferencing.

⁴⁴ *R v Knight and Biuvanua* [2007] NSWCCA 283

⁴⁵ *R v Knight and Biuvanua* [2007] NSWCCA 283 at [38]

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*. The Council’s function in reporting on sentencing trends and practices specifically extends to an examination of the operation of that scheme.⁴⁶

The offences which attract the standard non-parole period provisions of the *Crimes (Sentencing Procedure) Act 1999* are listed in the Table which immediately follows s 54D of that Act. That Table is reproduced at **Annexure A**.⁴⁷

Sentences under the Scheme

Between 1 February 2003⁴⁸ and the 31 March 2007,⁴⁹ 1215 sentences were imposed which fell within the Scheme. The Council has focused its attention on those offences where there have been 10 or more sentences imposed after the Scheme’s commencement.⁵⁰ **Tables 1-4** show the outcomes in those cases along with relevant offender details. The analysis which follows is based on the statistical information provided by the Judicial Commission.

⁴⁶ Section 100J(1)(c) of the *Crimes (Sentencing Procedure) Act 1900*

⁴⁷ This table excludes the additional 11 criminal offences for which standard non-parole periods attach, by virtue of the *Crimes (Sentencing Procedure) Amendment Act 2007*, assented to on 1 November 07

⁴⁸ When the SNPP scheme came into effect.

⁴⁹ Based on the available cases on the JIRS database, accessed 20 November 07.

⁵⁰ This analysis is limited to matters considered after the Scheme’s commencement in 2003 but prior to 31 December 2006, as data from the subsequent period, 1 Jan to 31 March 2007, was not available at the time.

Limited utility of sentencing statistics

The comments the Council makes in relation to the Tables in this section do not purport to provide a statistical analysis, but are merely observations. Moreover, it should be noted at the outset that while statistical data may be useful in identifying sentencing trends, it has a limited application in the determination of individual sentences. The courts have consistently held that statistics of themselves are insufficient to establish an appropriate sentence in individual cases.⁵¹ Each case should turn on its own facts and circumstances.⁵²

In *Re Attorney General's Application* [No 1] (1999) 48 NSWLR 327 the court observed that attempting statistical analysis of sentences for an offence which encompasses a wide range of conduct and criminality is fraught with danger, especially if the number of examples is small. It pretends to mathematical accuracy of analysis where accuracy is not possible. The argument that sentencing statistics alone provide useful guidance to sentencers, is based on the incorrect assumption that the sentencer's task is "merely one of interpolation in a graphical representation of sentences imposed in the past" (at [66]).

⁵¹ *R v Meres* [2003] NSWCCA 193 at [36]; *R v Bloomfield* (1998) 44 NSWLR 734; *R v Montgomery* (2004) 151 A Crim R 376 per Spigelman at [5]; *Wong v The Queen*; *Leung v The Queen* (2001) 207 CLR 584

⁵² *R v Way* (2004) 60 NSWLR 168

The effect of the Standard Non-Parole Period provisions on sentencing patterns

The Court of Criminal Appeal In *R v Way* said:

Given the absence of any consistent proportion between the non-parole period and maximum penalties prescribed for the Table offences, and the absence of any consistent relativity between those non-parole periods apparent from an examination of the statistics, it may be that for some offences the sentencing pattern will move upwards, while for others it will not.⁵³

The Court in *Way* also said:

There was no mention in the Second Reading Speech of any dissatisfaction with the general level of sentencing for the Table offences, or of any intention to increase the time that persons convicted of them should remain in custody.⁵⁴

It is clear that for some offences in the Table the effect of the legislation has led to an increase in sentences. Latham J made the obvious point in *R v Des Rosiers* :

Where the legislature has fixed the standard non-parole period at a level significantly above that imposed for offences committed before 1 February 2003, it is inevitable that sentences for these offences committed after 1 February 2003 will increase, despite no apparent legislative intention to that effect; *R v AJP* [2004] NSWCCA 434 at pars 36 and 37; *R v Mills* [2005] NSWCCA 175 at par 53.⁵⁵

⁵³ (2004) 60 NSWLR 168 at [142]

⁵⁴ at [141]

⁵⁵ [2006] NSWCCA 16 at [36]

So in the case of s 66A *Crimes Act* Simpson J said in *R v AJP* :

...the legislature having fixed 60% of the statutory maximum as the standard non-parole period for s 66A offences, it is inevitable that sentences for these offences will increase.⁵⁶

Table 1 – Rate of Imprisonment

Table 1 compares the rates of imprisonment of all Scheme offences⁵⁷ before and after the introduction of the Scheme. In particular, **Table 1** focuses on the overall term of the sentence, with reference to the statistical median and the 80 per cent range.⁵⁸

As this **Table** indicates, there appears to be no obvious change in the percentage of offenders sentenced to full-time imprisonment. This differs from the Council's previous finding⁵⁹ that the Scheme had resulted in the sentencing pattern of Scheme offences moving upwards.

Only 8⁶⁰ Scheme offences (out of 15) showed an increase in the percentage of cases resulting in imprisonment, compared to 11

⁵⁶ (2004) 150 A Crim R 575 at [37]

⁵⁷ Includes both consecutive and non-consecutive sentences. It also includes all matters regardless of whether a plea of guilty or not guilty was entered.

⁵⁸ An analysis of the 80 per cent range excludes the extreme matters.

⁵⁹ The NSW Sentencing Council, *Report on Sentencing Trends and Practices, 2005-2006* at 13.

⁶⁰ These are: Item 4: s 33 *Crimes Act* 1900 (wounding etc with intent to do bodily harm or resist arrest; Item 7: s 61I (sexual assault); Item 8: s 61J aggravated sexual assault); Item 9A: s 61M(1) aggravated indecent assault); Item 9B: s 61M(2) (aggravated indecent assault – child under 10); Item 15: s 154C(2)(car-jacking in circumstances of aggravation) ; Item 18: s 25(2) *Drug Misuse and Trafficking Act* 1985 , (supply heroin); Item 18: s 25(2), (supply ecstasy).

(out of 14) in the previous reporting period.⁶¹ Further, for many of these offences, the percentage change before and after the Scheme is nominal.⁶²

A noticeable change however is observed in the case of **Item 9A**⁶³ and **9B**⁶⁴ offences, where there has been an increase in the percentage sent to imprisonment by 15 and 20 percent respectively.

⁶¹ The NSW Sentencing Council, *Report on Sentencing Trends and Practices, 2005-2006* at 13.

⁶² The percentage change before and after the introduction of the scheme is not greater than 3 per cent in 6 out of 15 offences. Another 4 show a percentage change of 4 to 5 per cent.

⁶³ Aggravated indecent assault, contrary to s 61M(1) of the *Crimes Act 1900*

⁶⁴ Aggravated indecent assault – child under 10 years, contrary to s 61M(2) of the *Crimes Act 1900*

Table 1- rate of imprisonment

	Item No. / Offence	SNPP	Number of matters		Percentage sent to full time imprisonment		Term of sentence (- Midpoint; - 80% Range)	
			Before 1/2/03	After 1/2/03	Before 1/2/03	After 1/2/03	Before 1/2/03	After 1/2/03
Crimes Act 1900	1 murder – other cases	20 yrs	179	53	100%	100%	18 yrs 15 yrs - 34 yrs	23yrs 18 yrs - life
	4 s 33 wounding with intent	7 yrs	165	89	93%	93%	6 yrs 3 yrs -10 yrs	6 yrs 4 mths 4 yrs – 10 yrs 8 mths
	7 s 61I sexual assault	7 yrs	124	69	86%	91%	4 yrs 2 yrs – 8 yrs	5 yrs 3 yrs –8 yrs 8 months
	8 s 61J aggravated sexual assault	10 yrs	225	50	96%	100%	6 yrs 3 yrs – 12 yrs	7 yrs 6 mths 4 yrs – 10 yrs 6 mths
	9A s 61M(1) aggravated indecent assault	5 yrs	116	33	43%	58%	2 yrs 4.5 mths 12 mths – 4 yrs 6 mths	2 yrs 10 mths 18 mths –5 yrs 2 mths
	9B s 61M(2) aggravated indecent assault-child under 10	5 yrs	59	26	53%	73%	2 yrs 6 mths 18 mths – 7 yrs	3yrs 18 mths – 4 yrs 6 mths
	10 s 66A sexual intercourse-child under 10	15 yrs	95	33	90%	79%	5 yrs 2 yrs 3 mths – 8 yrs	5 yrs 8 mths 3 yrs –16 yrs
	11 s 98 robbery with arms etc and wounding	7 yrs	77	57	95%	93%	5 yrs 3 yrs – 10 yrs	6 yrs 4 yrs 9 mths – 9yrs
Crimes Act 1900	12 s 112(2) breaking etc into any house and committing serious indictable offence in circumstances of aggravation	5 yrs	415	433	72%	70%	3 yrs 4 mths 2 yrs – 6 yrs	3 yrs 6 mths 2 yrs – 5 yrs 6 mths

	13 s 112(3) breaking into any house and committing indictable offence circumstances special aggravation	7 yrs	25	18	96%	94%	5 yrs 6.5 mths 3 yrs – 10 yrs	6 yrs 10 mths 4 yrs – 10 yrs
	15 s 154C (2) car-jacking in circumstances of special aggravation	5 yrs	10	20	90%	95%	4 yrs 2yrs –5yrs	4 yrs 2 yrs 6 mths –7 yrs 6 mths
<i>Drugs Misuse and Trafficking Act 1985</i>	18 s 25(2) supply prohibited drug – commercial quantity heroin	10 yrs	52	25	90%	100%	5 yrs 3 yrs 6 mths – 8 yrs	7 yrs 4 yrs 6 mths – 10 yrs
	18 s 25(2) supply prohibited drug – commercial quantity amphetamines	10 yrs	57	25	93%	88%	4 yrs 6 mths 2 yrs 3 mths- 6 yrs	5 yrs 8.5 mths 4 yrs – 8yrs 6 mths
	18 s 25(2) supply prohibited drug – commercial quantity ecstasy	10 yrs	16	32	81 %	84%	3 yrs 2 yrs 3 mths – 6 yrs	4 yrs 2 yrs 2 mths – 6 yrs 6 mths
	19 s 25(2) supply prohibited drug – large commercial quantity ecstasy	15 yrs	18	27	100%	96%	6 yrs 6 mths 4 yrs – 10 yrs 6 mths	7 yrs 6 mths 5 yrs 8 mths – 13 yrs 4 mths

Table 2 – non-parole period

Table 2 focuses on the non-parole period imposed for offences made under the Scheme, with reference again to the statistical median and 80 per cent range.

Table 2 excludes consecutive sentences.⁶⁵

Table 2 suggests that there has been some increase in the non-parole period for scheme offences.

On the other hand, caution must be exercised when drawing this conclusion, as the median value does not adequately convey the general trend in sentencing. A median is a mathematical device which describes the middle of the distribution but no more, the limitations of its use in sentencing were discussed in *R v AEM*.⁶⁶

In order to assess whether the standard non-parole period provisions are being properly applied by sentencing judges it is accordingly preferable to analyse individual Remarks on Sentence rather than to rely on general graphs of sentencing patterns.

Table 2 also suggests that the range of sentences imposed for Scheme offences has narrowed since the introduction of the Scheme. For example, sentences imposed before the Scheme for

⁶⁵ Consecutive sentences are not included in the Judicial Commission (JIRS) statistics. They are excluded from JIRS due to the influence of the aggregate sentence on the imposition of non-parole periods for consecutive sentences of principal offences. This does, however, have the effect of under-representing the number of offences included in the statistics. While it would be possible to calculate a notional non-parole period for the offence by reference to the statutory ratio under s 44 of the *Crimes (Sentencing Procedure) Act 1999*, this would be an arbitrary exercise as the court is free to depart from the statutory ratio where special circumstances exist and commonly does.

⁶⁶ [2002] NSWCCA 58 at [116]: There is another fallacy which sometimes creeps into discussions surrounding the use of statistics in that emphasis is often placed on the median sentence imposed. It is not the Court's function to sentence at the median range of sentences handed down over a period of time.

break, enter and commit a serious indictable offence,⁶⁷ ranged between 6 months and 16 years. After the Scheme, the sentences ranged between 6 months and 6 years.

This suggests that the Scheme has had the effect of achieving a greater consistency in sentencing, consistent with the legislative intention,⁶⁸ notwithstanding that each offence is to be determined based on its own facts and circumstances.

Another observation that can be drawn from **Table 2** is that, with the exception of murder, the 80 per cent range of the non-parole periods imposed for each of the relevant offences nearly always falls below the standard non-parole period. Bearing in mind that some of the more serious offences have been excluded as a result of the exclusion of the consecutive terms, **Table 2** suggests that nearly all of the cases included have been assessed as falling below the midrange of criminality for the Scheme offences.

There is a general expectation that sentencing statistics for offences in the Table should match the standard non-parole periods assigned in the Table in s 54D(2). However in *Way* the court emphasised that sentencing statistics take into account subjective features and are *final* sentences whereas the standard non-parole periods assigned in the Table in s 54D(2) are not:

...it is hardly surprising that the standard non-parole periods specified in the Table are generally longer than those that have been imposed in the past, since they were set as reference points before

⁶⁷ Item 12 s 112(2) *Crimes Act* 1900

⁶⁸ Second Reading Speech of The Hon. Debus MP, Attorney General, *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill* 23 October 2002 NSW Legislative Assembly, Hansard.

adjustment for the purely subjective features which almost certainly influenced the outcome of the cases included in the statistics.⁶⁹

As the court observed in *Perry v R*:

“There is, however, no necessary correlation between the statistical mid-range of sentences imposed for convictions recorded and an appropriate sentence for an offence of mid-range culpability.”⁷⁰

There is danger in assuming that a court has not correctly applied the legislation where the non-parole period differs from the standard non-parole period. However, unless more is known about the sentencing exercise, including whether there was a legitimate reason for setting a shorter or longer non-parole period for the cases included in the statistics, it is not possible to draw definitive conclusions on the question whether sentencing judges are applying the provisions correctly.

There is considerable scope for legitimate departure from the standard non-parole period in the Table. The Act provides that:

The reasons for which the court may set a non-parole period that is longer or shorter than the standard non-parole period are only those referred to in s 21A.⁷¹

⁶⁹ *R v Way* (2004) 60 NSWLR 168 at [142]

⁷⁰ (2006) 166 A Crim R 383 at [27]

⁷¹ s 54B(3) *Crimes (Sentencing Procedure) Act 1999*

The statutory context indicates that the use of the word “may” confers a discretion. The factors “referred to in s 21A” are not limited. Although various aggravating and mitigating features are listed, s 21A(1) also permits consideration of “any other objective or subjective factor that affects the relative seriousness of the offence”, and states that the matters specifically listed in the section are to be considered “in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law.”

The court in *Way* confirmed that existing common law and statutory sentencing principles continue to operate.⁷²

⁷² (2004) 60 NSWLR 168 at [104]

Table 2 – non-parole periods

	Item No. / Offence	SNPP	Number of matters		Term of sentence (- Midpoint; - 80% Range)		Non-parole period (- Midpoint; - 80% Range)		Percentage sent to full time imprisonment	
			Before 1/2/03	After 1/2/03	Before 1/2/03	After 1/2/03	Before 1/2/03	After 1/2/03	Before 1/2/03	After 1/2/03
Crimes Act 1900	1 murder – other cases	20 yrs	157	36	18 yrs; 16-20+ yrs	20+ yrs; 18 yrs-life	14 yrs; 12-20+ yrs	18 yrs; 14 yrs - life	100%	100%
	4 s 33 wounding with intent	7 yrs	126	65	6 yrs; 3-10 yrs	6 yrs; 4-12 yrs	3 yrs; 1-6 yrs	4 yrs; 2-8 yrs	92%	93%
	7 s 61I sexual assault	7 yrs	93	48	4 yrs; 2-8 yrs	5 yrs; 3-8 yrs	2.5 yrs; 1-4.5 yrs	3 yrs; 1.5-6 yrs	86%	91%
	8 s 61J aggravated sexual assault	10 yrs	138	28	6 yrs; 3-12 yrs	8 yrs; 3.5-10 yrs	3 yrs; 1.5-8 yrs	3.5 yrs; 2-7 yrs	96%	100%
	9A s 61M(1) aggravated indecent assault	5 yrs	38	13	2.5 yrs; 1-4 yrs	3 yrs; 1.5-4.5 yrs	1 yr; 0.5-2 yrs	1.5 yrs; 1-3 yrs	43%	58%
	9B s 61M(2) aggravated indecent assault-child under 10	5 yrs	27	16	2.5 yrs; 1.5-6 yrs	3 yrs; 1.5-4 yrs	1.5 yrs; 1-3.5 yrs	1.5 yrs; 1-3 yrs	53%	73%
	10 s 66A sexual intercourse-child under 10	15 yrs	56	19	5 yr; 2-8 yrs	5 yrs; 3-16 yrs	3 yrs; 1-6 yrs	3.5 yrs; 1-12 yrs	87%	79%
	11 s 98 robbery with arms etc and wounding	7 yrs	55	40	5 yrs; 2-14 yrs	6 yrs; 2-12 yrs	3 yrs; 0.5-12 yrs	3.5 yrs; 1-9 yrs	95%	93%
Crimes Act 1900	12 s 112(2) breaking etc into any house and committing serious indictable offence in circumstances of aggravation	5 yrs	263	226	3.5 yrs; 1-20 yrs	3 yrs; 1-8 yrs	2 yrs; 0.5-16 yrs	2 yrs; 0.5-6 yrs	72%	70%

	13 s 112(3) breaking into any house and committing indictable offence circumstances special aggravation	7 yrs	20	16	6 yrs; 3-9 yrs	7 yrs; 5-9 yrs	3.5 yrs; 1.5-6 yrs	4 yrs; 2.5-6 yrs	96%	94%
	15 s 154C (2) car-jacking in circumstances of special aggravation	5 yrs	6	13	4 yrs; 2-5 yrs	3.5 yrs; 2.5-5 yrs	1.5 yrs; 1-3 yrs	1.5 yrs; 1-2.5 yrs	90%	95%
Drugs Misuse and Trafficking Act 1985	18 s 25(2) supply prohibited drug – commercial quantity heroin	10 yrs	46	23	5 yrs; 3.5-8 yrs	7 yrs; 4.5-10 yrs	3 yrs; 1.5-5 yrs	4 yrs; 2-6 yrs	91%	100%
	18 s 25(2) supply prohibited drug – commercial quantity amphetamines	10 yrs	45	17	4.5 yrs; 2-6 yrs	6 yrs; 3-8 yrs	2.5 yrs; 1-4 yrs	3 yrs; 2-6 yrs	93%	88%
	18 s 25(2) supply prohibited drug – commercial quantity ecstasy	10 yrs	9	20	3 yrs; 2-6 yrs	3.5 yrs; 2-6 yrs	1.5 yrs; 1-3.5 yrs	2 yrs; 1-3.5 yrs	81%	84%
	19 s 25(2) supply prohibited drug – large commercial quantity ecstasy	15 yrs	16	20	7 yrs; 4-12 yrs	8 yrs; 5-14 yrs	4 yrs; 2-7 yrs	4.5 yrs; 3-10 yrs	100%	96%

Table 3 – Effect of guilty plea on the non-parole period

The purpose of **Table 3** is to identify the effect of guilty pleas on the Non-Parole period. Under s 22(1) of the *Crimes (Sentencing Procedure) Act 1999*, —

a court must take into account: (a) the fact that the offender has pleaded guilty, and (b) when the offender pleaded guilty or indicated an intention to plead guilty, and may accordingly impose a lesser penalty than it would otherwise have imposed.

In *R v Thomson & Houlton*⁷³, the CCA held that the discount for a plea of guilty should ordinarily fall within a range of 10-25 per cent.

The court in *Way* held that

...the periods specified in the Table [of standard non-parole periods] should be understood as having been specified for sentences imposed for midrange cases after conviction at trial⁷⁴

and that the fact that the offender pleads guilty is

...a matter which might justify a departure from the standard non-parole period⁷⁵

It acknowledged the clear

differentiation in the setting of a non-parole period, between matters resolved by plea, and at trial.⁷⁶

⁷³ (2000) 49 NSWLR 393

⁷⁴ at 71

⁷⁵ at 68

⁷⁶ at 69

The Council has given consideration to whether the discount allowed for guilty pleas has had an impact on the non-parole period imposed for Scheme offences. To do this, the Council compared the median non-parole period for all matters in each offence category with the median non-parole period imposed following a guilty plea for that offence.

Table 3 indicates that for 6 Scheme offences where there was a plea of guilty the median non-parole period was less. For example, the median non-parole period for all cases of murder⁷⁷ (36 matters) is 18 years. The median non-parole period for the same offence for guilty pleas only (13 matters), is 14 years.

The median non-parole period imposed for guilty pleas was also less for the following offences:

- Wounding with intent⁷⁸ (65 matters): 4 years (all cases) compared with 3 years (guilty pleas only) (52 matters);
- Sexual assault⁷⁹ (48 matters): 3 years (all cases) compared with 2 years (guilty pleas only) (30 matters);
- Aggravated sexual assault⁸⁰ (28 matters): 3.5 years (all cases) compared with 3 years (guilty pleas only) (22 matters);
- Sexual intercourse (of a child under 10)⁸¹ (19 matters): 3.5 years (all cases) compared with 2 years (guilty pleas only) (14 matters); and

⁷⁷ Item 1 s 19A *Crimes Act 1900*

⁷⁸ Item 4 s 33 *Crimes Act 1900*

⁷⁹ Item 7, s 61I *Crimes Act 1900*

⁸⁰ Item 8, s 61J *Crimes Act 1900*

⁸¹ Item 10, s 66A *Crimes Act 1900*

- Supply prohibited drug (large commercial – ecstasy)⁸² (20 matters): 4.5 years (all cases) compared with 4 years (guilty pleas only) (15 matters).

The remaining Items did not however, reflect a significant difference between the median non-parole period imposed for all pleas, and that imposed for pleas of guilty. The high proportion of guilty pleas common to Scheme offences could explain this. For example, only 3 offenders (7.5%) pleaded not guilty to armed robbery.⁸³ In such cases, one might expect the distribution of non-parole periods to remain largely similar.

⁸² Item 19, s 25(2) *Drug Misuse and Trafficking Act 1985*

⁸³ Item 11, s 98 *Crimes Act 1900*

Table 3 – guilty plea

	Item No. / Offence	SNPP	Number of matters		Term of sentence (- Midpoint; - 80% Range)		Non-parole period (- Midpoint; - 80% Range)		Guilty pleas (- Non-parole period midpoint; - Percentage)	
			Before 01/02/03	After 01/02/03	Before 01/02/03	After 01/02/03	Before 01/02/03	After 01/02/03	Before 01/02/03	After 01/02/03
Crimes Act 1900	1 murder – other cases	20 yrs	157	36	18 yrs; 16-20+ yrs	20+ yrs; 18 yrs-life	14 yrs; 12-20+ yrs	18 yrs; 14 yrs - life	14 yrs; 35%	14 yrs; 36%
	4 s 33 wounding with intent	7 yrs	126	65	6 yrs; 3-10 yrs	6 yrs; 4-12 yrs	3 yrs; 1-6 yrs	4 yrs; 2-8 yrs	3 yrs; 66%	3 yrs; 80%
	7 s 61I sexual assault	7 yrs	93	48	4 yrs; 2-8 yrs	5 yrs; 3-8 yrs	2.5 yrs; 1-4.5 yrs	3 yrs; 1.5-6 yrs	2 yrs; 63%	2 yrs; 63%
	8 s 61J aggravated sexual assault	10 yrs	138	28	6 yrs; 3-12 yrs	8 yrs; 3.5-10 yrs	3 yrs; 1.5-8 yrs	3.5 yrs; 2-7 yrs	3.5 yrs; 61%	3 yrs; 76%
	9A s 61M(1) aggravated indecent assault	5 yrs	38	13	2.5 yrs; 1-4 yrs	3 yrs; 1.5-4.5 yrs	1 yr; 0.5-2 yrs	1.5 yrs; 1-3 yrs	1 yr; 79%	1.5 yrs; 77%
	9B s 61M(2) aggravated indecent assault-child under 10	5 yrs	27	16	2.5 yrs; 1.5-6 yrs	3 yrs; 1.5-4 yrs	1.5 yrs; 1-3.5 yrs	1.5 yrs; 1-3 yrs	1.5 yrs; 78%	1.5 yrs; 94%
	10 s 66A sexual intercourse-child under 10	15 yrs	56	19	5 yr; 2-8 yrs	5 yrs; 3-16 yrs	3 yrs; 1-6 yrs	3.5 yrs; 1-12 yrs	2 yrs; 61%	2 yrs; 74%
	11 s 98 robbery with arms etc and wounding (with arms cause wounding)	7 yrs	55	40	5 yrs; 2-14 yrs	6 yrs; 2-12 yrs	3 yrs; 0.5-12 yrs	3.5 yrs; 1-9 yrs	2.5 yrs; 84%	3.5 yrs; 93%

Crimes Act 1900	12 s 112(2) breaking etc into any house and committing serious indictable offence in circumstances of aggravation	5 yrs	263	226	3.5 yrs; 1-20 yrs	3 yrs; 1-8 yrs	2 yrs; 0.5-16 yrs	2 yrs; 0.5-6 yrs	1.5 yrs; 89%	2 yrs; 96%
	13 s 112(3) breaking into any house and committing indictable offence circumstances special aggravation	7 yrs	20	16	6 yrs; 3-9 yrs	7 yrs; 5-9 yrs	3.5 yrs; 1.5-6 yrs	4 yrs; 2.5-6 yrs	3.5 yrs; 100%	4 yrs; 88%
	15 s 154C (2) car-jacking in circumstances of special aggravation	5 yrs	6	13	4 yrs; 2-5 yrs	3.5 yrs; 2.5-5 yrs	1.5 yrs; 1-3 yrs	1.5 yrs; 1-2.5 yrs	1.5 yrs; 83%	1.5 yrs; 92%
Drugs Misuse and Trafficking Act 1985	18 s 25(2) supply prohibited drug – commercial quantity heroin	10 yrs	46	23	5 yrs; 3.5-8 yrs	7 yrs; 4.5-10 yrs	3 yrs; 1.5-5 yrs	4 yrs; 2-6 yrs	2.5 yrs; 83%	4 yrs; 96%
	18 s 25(2) supply prohibited drug – commercial quantity amphetamines	10 yrs	45	17	4.5 yrs; 2-6 yrs	6 yrs; 3-8 yrs	2.5 yrs; 1-4 yrs	3 yrs; 2-6 yrs	2 yrs; 84%	3 yrs; 88%
	18 s 25(2) supply prohibited drug – commercial quantity ecstasy	10 yrs	9	20	3 yrs; 2-6 yrs	3.5 yrs; 2-6 yrs	1.5 yrs; 1-3.5 yrs	2 yrs; 1-3.5 yrs	1.5 yrs; 89%	2 yrs; 100%
	19 s 25(2) supply prohibited drug – large commercial quantity ecstasy	15 yrs	16	20	7 yrs; 4-12 yrs	8 yrs; 5-14 yrs	4 yrs; 2-7 yrs	4.5 yrs; 3-10 yrs	4 yrs; 88%	4 yrs; 75%

Table 4 – Offenders under 18 years

Table 4 considers the effect of the offender's age on sentencing, in particular, where the offender was less than 18 years of age. Age is but one of the subjective features of the offender that the court may take into account when imposing a sentence, although in the case of young offenders it is an important consideration by reason of the paramount importance given to rehabilitation in their case.

Excluding murder, the overall term and the non-parole period appears to have decreased, in most cases quite significantly. However, as there have been no more than 15 matters committed by youths for each scheme offence, it is difficult to draw any satisfactory conclusions from the available statistics. More cases are necessary to draw further observations and conclusions.

Table 4 - Offenders under 18 years

	Item No. / Offence	SNPP	Number of matters		Term of sentence (- Midpoint; - 80% Range)		Non-parole period (- Midpoint; - 80% Range)		Offender under 18 years (- Non-parole period midpoint; - Percentage)	
			Before 01/02/03	After 01/02/03	Before 01/02/03	After 01/02/03	Before 01/02/03	After 01/02/03	Before 01/02/03	After 01/02/03
Crimes Act 1900	1 murder – other cases	20 yrs	157	36	18 yrs; 16-20+ yrs	20+ yrs; 18 yrs-life	14 yrs; 12-20+ yrs	18 yrs; 14 yrs - life	12 yrs; 7%	18 yrs; 8%
	4 s 33 wounding with intent	7 yrs	126	65	6 yrs; 3-10 yrs	6 yrs; 4-12 yrs	3 yrs; 1-6 yrs	4 yrs; 2-8 yrs	2.5 yrs; 8%	2 yrs; 16%
	7 s 61I sexual assault	7 yrs	93	48	4 yrs; 2-8 yrs	5 yrs; 3-8 yrs	2.5 yrs; 1-4.5 yrs	3 yrs; 1.5-6 yrs	0%	3 yrs; 4%
	8 s 61J aggravated sexual assault	10 yrs	138	28	6 yrs; 3-12 yrs	8 yrs; 3.5-10 yrs	3 yrs; 1.5-8 yrs	3.5 yrs; 2-7 yrs	3 yrs; 10%	2.5 yrs; 18%
	9B s 61M(2) aggravated indecent assault-child under 10	5 yrs	27	16	2.5 yrs; 1.5-6 yrs	3 yrs; 1.5-4 yrs	1.5 yrs; 1-3.5 yrs	1.5 yrs; 1-3 yrs	1 yr; 7%	1 yr; 13%
	10 s 66A sexual intercourse-child under 10	15 yrs	56	19	5 yr; 2-8 yrs	5 yrs; 3-16 yrs	3 yrs; 1-6 yrs	3.5 yrs; 1-12 yrs	0.5 yrs; 7%	1 yr; 16%
	11 s 98 robbery with arms etc and wounding (with arms cause wounding)	7 yrs	55	40	5 yrs; 2-14 yrs	6 yrs; 2-12 yrs	3 yrs; 0.5-12 yrs	3.5 yrs; 1-9 yrs	1.5 yrs; 16%	3 yrs; 33%

12 s 112(2) breaking etc into any house and committing serious indictable offence in circumstances of aggravation	5 yrs	263	226	3.5 yrs; 1-20 yrs	3 yrs; 1-8 yrs	2 yrs; 0.5-16 yrs	2 yrs; 0.5-6 yrs	1.5 yrs; 2%	1.5 yrs; 3%
13 s 112(3) breaking into any house and committing indictable offence circumstances special aggravation	7 yrs	20	16	6 yrs; 3-9 yrs	7 yrs; 5-9 yrs	3.5 yrs; 1.5-6 yrs	4 yrs; 2.5-6 yrs	4 yrs; 10%	4 yrs; 6%

Scheme Offence Appeals in the Court of Criminal Appeal

The Council has examined the matters that were heard by the NSW Court of Criminal Appeal during the year under review⁸⁴ where the scheme has been an issue on appeal.

There were 62⁸⁵ matters appealed to the Court of Criminal Appeal in which error in the application of the standard non-parole period scheme arose as an issue during this period. This represents a considerable increase from the 47 matters appealed on this basis reported in the Council's 2005-06 report on sentencing trends and practices.⁸⁶ During the period in question, 41 of these appeals were defence appeals, compared with 32 in the preceding year. Forty-four percent (18 matters) of these appeals were successful.⁸⁷ Twenty-one (21) appeals were brought by the Crown, of which 17 (or 81%) were successful. This compares with a success rate of 73% (11 matters) for the preceding year.

Summaries of the cases reviewed are provided at **Annexure B**.

⁸⁴ That is, between 1 September 2006 and 31 August 2007. This time frame provides some analysis to be provided over a 12 month period, and continues from the Council's previous report on sentencing trends and issues (2005-06).

⁸⁵ This figure excludes 2 matters appealed on the basis of error in the imposition of the standard non-parole period during this period. The case summaries of *Martin v R* [2007] NSWCCA 34 and *Turnell v R* [2006] NSWCCA 39 have been removed from Lawlink, the NSW Courts' website. Judgments may be removed from the website for a number of reasons, including to prevent juror research where a new trial has been ordered or to enable the decision to be amended. Accordingly, these two matters have been excluded from the Council's subsequent analysis.

⁸⁶ NSW Sentencing Council, *Report On Sentencing Trends And Practices 2005-2006*, at 16

⁸⁷ The success rate of defence appeals was not assessed in the Council's 2005-2006 report

PART FOUR: GUIDELINE JUDGMENTS

There have been no guideline judgments delivered during the year under review in NSW.

The Judicial Commission of New South Wales presented a monograph⁸⁸ that provided an exploratory study of robbery in NSW. The study looked primarily at the type and quantum of penalties imposed in the higher courts for robbery offences under s 97 of the *Crimes Act 1900* for a three-year period following the Court's guideline judgment in *R v Henry*.⁸⁹

The Council's report: *Seeking a guideline judgement on suspended sentences*, was published on the Council's website on July 2006. The Sentencing Advisory Council (Victoria), in its final report on suspended sentences⁹⁰, recommended their gradual abolition subject to the establishment of alternative sentencing options.

While suspended sentence continues to be available in NSW, they comprise a relatively small proportion of the overall sentences imposed in all NSW Courts, comprising less than 5% of the sentences imposed in the Local Court during 2006 and less than 17% of all sentences imposed in Higher Courts.⁹¹

⁸⁸ Judicial Commission of New South Wales Monograph 30-June 2007 *Sentencing Robbery Offenders Since The Henry Guideline Judgement*

⁸⁹ (1999) 46 NSWLR 346

⁹⁰ Sentencing Advisory Council (Victoria), *Part 1: Final Report into Suspended Sentences*, May 2006. Part 2 of the final report will be published in late 2007.

⁹¹ NSW Bureau of Crime Statistics and Research *New South Wales Criminal Courts Statistics 2006* at 27 and 87

The Council intends to monitor their use, and any developments in Victoria consequent upon the final report of the Sentencing Advisory Council.

PART FIVE: SIGNIFICANT SENTENCING DEVELOPMENTS

i) Section 21A *Crimes (Sentencing Procedure) Act 1999*

An analysis of several decisions dealing where error has occurred in the application of this Provision is attached at **Annexure C**. Additionally as is noted hereunder (viii) the list of aggravating factors has been extended.

ii) *Crimes (Serious Sex Offenders) Act 2006*

This Act commenced on 3 April 2006 and provides that the Attorney General may apply to the Supreme Court for an “extended supervision order” or a “continuing detention order” against an offender serving a term of imprisonment for a “serious sex offence” or an “offence of a sexual nature”. The Act reflects community concern regarding the release of serious sexual offenders on expiration of their sentences, where they are deemed to continue to pose an “unacceptable risk” of future serious sexual re-offending.

In *Fardon v Attorney-General for the State of Queensland*⁹² the High Court, by majority, upheld the validity of the Queensland counterpart of this legislation. Justices Callinan and Heydon JJ stated:

In our opinion, the Act... is intended to protect the community from predatory sexual offenders. It is a protective law authorizing involuntary detention in the

⁹² (2004) 78 ALJR 1519

interests of public safety. Its proper characterization is as a protective rather than a punitive enactment.⁹³

The NSW Act has been applied in several cases where interim or extended orders were made, including: *AG for State of NSW v Gallagher*;⁹⁴ *AG for State of NSW v Tillman*;⁹⁵ *AG for State of NSW v Quinn*;⁹⁶ *AG for State of NSW v Winters*;⁹⁷ *AG for State of NSW v Cornwall*;⁹⁸ and *AG for State of NSW v Hayter*.⁹⁹ Additionally, the NSW Court of Criminal Appeal gave detailed consideration to the proper interpretation of the Act and to the matters to be taken into account in its application in *AG for State of NSW v Tillman*.¹⁰⁰

iii) NSW Law Reform Commission Reference: People With Cognitive And Mental Health Impairments In The Criminal Justice System

As previously noted, pursuant to s 10 of the *Law Reform Commission Act 1967* the NSWLRC is undertaking a general review of the criminal law and procedure applying to people with cognitive and mental health impairments, with particular regard to:

1. s 32 and s 33 of the *Mental Health (Criminal Procedure) Act 1990*;
2. fitness to be tried;
3. the defence of "mental illness"; and
4. sentencing.

⁹³ at [217]

⁹⁴ [2006] NSWSC 340

⁹⁵ [2007] NSWSC 528

⁹⁶ [2007] NSWSC 873

⁹⁷ [2007] NSWSC 1071

⁹⁸ [2007] NSWSC 1082

⁹⁹ [2007] NSWSC 1146

¹⁰⁰ [2007] NSWCA 119

(iv) *Mental Health (Criminal Procedure) Act 1990*

The Act was amended in response to the judgment in *R v RTT*¹⁰¹, which highlighted a problem relating to the imposition of cumulative limiting terms following a special hearing of a person who had been found unfit to be tried.

The *Mental Health (Criminal Procedure) Act 1990*, s 23(5)(a) and (b) were subsequently amended as follows:

(5) A limiting term nominated in respect of a person takes effect from the time when it is nominated unless the Court:

(a) after taking into account the periods, if any, of the person's custody or detention before, during and after the special hearing (being periods related to the offence), directs that the term be taken to have commenced at an earlier time, or

(b) directs that the term commence at a later time so as to be served consecutively with (or partly concurrently and partly consecutively with) some other limiting term nominated in respect of the person or a sentence of imprisonment imposed on the person.

¹⁰¹ [2005] NSWCCA 337

v) Availability of appeals against revocation of a suspended sentence

Throughout 2006 there was judicial uncertainty regarding whether an appeal lay against the revocation of a bond attached to a suspended sentence. There was further uncertainty regarding whether the *Crimes (Sentencing Procedure) Act 1999* required the imposition of a non-parole period when imposing a suspended sentence, or at some later time if the good behaviour bond was breached and revoked.

The *Crimes and Courts Legislation Amendment Act 2006* provided some clarification in November 2006, by amending the definition of “sentence” in s 3 of the *Crimes (Local Courts Appeal and Review) Act 2001* and s 2 of the *Criminal Appeal Act 1912*. The effect of the amendment was to enable an appeal to be brought against the revocation of a bond, which is to be dealt with in the same manner as and applied in respect of other sentencing orders.

Amendments were also made which removed the court’s obligation to set a non-parole period when suspending a sentence.¹⁰² A court is now required to set a non-parole period if and when it revokes the good behaviour bond.

Further amendments¹⁰³ removed the court’s obligation under s 99(2) to ignore any portion of the sentence already served when it orders a revoked suspended sentence to be served by periodic detention. Other amendments to s 99 clarified that the sentencing

¹⁰² The amendments were made to ss 12(3) and 99 of the *Crimes (Sentencing Procedure) Act 1999*

¹⁰³ To the *Crimes (Sentencing Procedure) Act 1999*

procedures for imprisonment in Part 4 of the *Crimes (Sentencing Procedure) Act 1999* apply to a suspended sentence, where the good behaviour bond is revoked, as if the suspended sentence had been imposed after the revocation of the bond.

(vi) Section 10A *Crimes (Sentencing Procedure) Act 1999*

Section 10A of the *Crimes (Sentencing Procedure) Act 1999* was introduced to provide judicial officers with the sentencing option of imposing a conviction on offenders without imposing any further penalty, in circumstances where a s 10 dismissal is inappropriate because the offence is not trivial and it is inconvenient to impose any further penalty.¹⁰⁴ The NSW Parliament introduced the amendments in order to address “an anomaly in the sentencing regime”,¹⁰⁵ whereby courts were able to impose lenient and arguably tokenistic sentences on some offenders.

(vii) New sentencing option for the NSW Drug Court

The *Compulsory Drug Treatment Correctional Centre Act 2004* commenced on 21 July 2006. The Act provides for the creation of a Compulsory Drug Treatment Correctional Centre to which eligible and suitable convicted offenders may be sent by the Drug Court to serve their sentence of imprisonment.

¹⁰⁴ Judicial Commission of New South Wales, *Sentencing Bench Book*, 2006, Sydney, at [5-300], 3555-3556

¹⁰⁵ The Hon Neville Newell, Second Reading Speech, *Crimes and Courts Legislation Amendment Bill 2006*, Hansard, Legislative Assembly, 27/10/06, at 3663-3666

A convicted offender must satisfy several requirements before he or she is eligible to be sentenced under the Act, including: that there is a link between the offence committed and the offender's long term drug dependency;¹⁰⁶ that he or she has been sentenced to full-time imprisonment and that the unexpired non-parole period is of at least 18 months duration at the time of sentence, with a non-parole period of no more than 3 years;¹⁰⁷ and that the offender has at least two prior convictions in the previous five years.¹⁰⁸

There are also restrictions on the type of offender who is eligible for the program. A person is not eligible if he or she has been convicted at any time of the offence of:

- Murder;
- Attempted murder;
- Manslaughter;
- Sexual assault of an adult or child;
- A sexual offence involving a child;
- Any offence using a firearm;
- Any offence involving a commercial quantity of a prohibited plant or drug; or
- Any offence prescribed by the regulations.

¹⁰⁶ *Drug Court Act 1998*, s 5A(1)(a), (d), (e).

¹⁰⁷ *Drug Court Act 1998*, s 5A(1)(b).

¹⁰⁸ *Drug Court Act 1998*, s 5A(1)(c).

An offender will also not be eligible if he or she suffers from a mental condition, illness or disorder that is serious or leads to the person being violent and that could prevent or restrict active participation in a drug treatment program.¹⁰⁹

viii) Standard Minimum Sentencing

On 1 November 2007, the *Crimes (Sentencing Procedure) Amendment Act 2007* was assented to. It introduces standard non-parole periods (minimum sentences) for an additional 11 criminal offences:

- Murder of a child;
- Malicious (reckless) wounding;
- Malicious (reckless) wounding in company;
- Malicious (reckless) causing of grievous bodily harm;
- Malicious (reckless) causing of grievous bodily harm in company;
- Organised car or boat re-birthing activities;
- Cultivation, supply or possession of a large commercial quantity of a prohibited plant;
- Unauthorised possession or use of a prohibited weapon (where prosecuted on indictment);
- Unauthorised sale of a prohibited firearm or pistol;
- Unauthorised sale of firearms on an ongoing basis; and
- Unauthorised possession of more than 3 firearms any one of which is a prohibited firearm or pistol.

¹⁰⁹ *Drug Court Act 1998*, s 5A(2), (3)

It also introduces 8 additional aggravating factors and strengthens the requirements for an offender in relation to the demonstration of remorse, if it is to be taken into account as a factor of mitigation. The aggravating factors include:

- The offence involved the actual or threatened use of explosives, or a chemical or biological agent;
- The offence involved the offender causing the victim to take, inhale or be affected by a narcotic drug, alcohol or any other intoxicating substance;
- The offence was committed in the presence of a child;
- The offence was committed in the home of the victim or any other person;
- The actions of the offender were a risk to national security;
- The offence involved a grave risk of death to another person; or
- The offence was committed for financial gain.

The Council will report on the operation of these new provisions in its 2007-2008 report on sentencing trends and practices.

PART SIX: ANNEXURES

Annexure A: Table Of Standard Non-Parole Periods¹¹⁰

Item No	Offence	Standard non-parole period
1A	Murder —where the victim was a police officer, emergency services worker, correctional officer, judicial officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work	25 years
1	Murder —in other cases	20 years

¹¹⁰ This table excludes the additional 11 criminal offences for which standard non-parole periods attach, by virtue of the *Crimes (Sentencing Procedure) Amendment Act 2007*, assented to on 01/11/07.

2	Section 26 of the <i>Crimes Act 1900</i> (conspiracy to murder)	10 years
3	Sections 27, 28, 29 or 30 of the <i>Crimes Act 1900</i> (attempt to murder)	10 years
4	Section 33 of the <i>Crimes Act 1900</i> (wounding etc with intent to do bodily harm or resist arrest)	7 years
5	Section 60 (2) of the <i>Crimes Act 1900</i> (assault of police officer occasioning bodily harm)	3 years
6	Section 60 (3) of the <i>Crimes Act 1900</i> (wounding or inflicting grievous bodily harm on police officer)	5 years
7	Section 61I of the <i>Crimes Act 1900</i> (sexual assault)	7 years
8	Section 61J of the <i>Crimes Act 1900</i> (aggravated sexual assault)	10 years
9	Section 61JA of the <i>Crimes Act 1900</i> (aggravated sexual assault in company)	15 years
9A	Section 61M (1) of the <i>Crimes Act 1900</i> (aggravated indecent assault)	5 years
9B	Section 61M (2) of the <i>Crimes Act 1900</i> (aggravated indecent assault—child under 10)	5 years
10	Section 66A of the <i>Crimes Act 1900</i> (sexual intercourse—child under 10)	15 years

11	Section 98 of the <i>Crimes Act 1900</i> (robbery with arms etc and wounding)	7 years
12	Section 112 (2) of the <i>Crimes Act 1900</i> (breaking etc into any house etc and committing serious indictable offence in circumstances of aggravation)	5 years
13	Section 112 (3) of the <i>Crimes Act 1900</i> (breaking etc into any house etc and committing serious indictable offence in circumstances of special aggravation)	7 years
14	Section 154C (1) of the <i>Crimes Act 1900</i> (car-jacking)	3 years
15	Section 154C (2) of the <i>Crimes Act 1900</i> (car-jacking in circumstances of aggravation)	5 years
15A	Section 203E of the <i>Crimes Act 1900</i> (bushfires)	5 years
16	Section 24 (2) of the <i>Drug Misuse and Trafficking Act 1985</i> (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 is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug	10 years

17	<p>Section 24 (2) of the <i>Drug Misuse and Trafficking Act 1985</i> (manufacture or production of 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 is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug</p>	15 years
18	<p>Section 25 (2) of the <i>Drug Misuse and Trafficking Act 1985</i> (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 is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug</p>	10 years
19	<p>Section 25 (2) of the <i>Drug Misuse and Trafficking Act 1985</i> (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 is specified for the prohibited drug concerned under that</p>	15 years

	Act, involves not less than the large commercial quantity of that prohibited drug	
20	Section 7 of the <i>Firearms Act 1996</i> (unauthorised possession or use of firearms)	3 years

Annexure B: Standard Non-Parole Period Scheme: Case Summaries

Item 1 — s 19A Crimes Act 1900

Murder – general

SNPP - 20 years

***R v Adanguidi* [2006] NSWCCA 404**

Hislop J, with whom Spigelman CJ and Sully J agreed, dismissing the appeal – 15 December 2006.

Sentence appeal. Pleas of guilty to three counts of murder (counts 1, 2, 3): s 18/19A *Crimes Act*.

Orders

Leave to appeal granted; appeal dismissed.

Sentence

Imprisonment for life

Held

The sentencing judge made no error in finding that the overall criminality of the offence warranted a life sentence. The offence against one of the victims was in itself sufficiently heinous to be categorised as a worst-case murder. The absence of relevant criminal antecedents does not make the offender immune to the maximum penalty.

Further, mental illness of itself is not sufficient to reduce the term of sentence. A connection between the offender's state of mind and

the commission of the offence must be present. While the offender was mentally ill, he was still able to judge right from wrong and was aware of the “moral wrongness” of his acts.

***Apps v R* [2006] NSWCCA 290**

Simpson J, with whom Hunt AJA and Whealy J agreed, allowing the appeal - 11 September 2006.

Sentence appeal. Plea of guilty to one count of murder, ss 18(1)(a)/19A *Crimes Act*, taking into account on a Form 1 one count of break enter and steal, s 112(1) *Crimes Act*.

Orders

Appeal allowed. Applicant re-sentenced.

Sentence

Imprisonment, non-parole period 20 years 9 months, balance of term 6 years 3 months

New sentence

Imprisonment, non-parole period 13 years 6 months, balance of term 4 years 6 months

Held

The sentencing judge erred by viewing an intention to kill as the sole determinant establishing the level of objective seriousness for the offence; the objective seriousness was assessed to be well above the mid-range. Other factors relevant to the assessment of objective seriousness include circumstances specific to the offence such as the applicant’s mental disorder. The applicant’s mental disorder was relevant in the present case due to its causal connection to the commission of the offence.

Hunt AJA added —

“as an intention to kill is part of the crime charged, it was not appropriate to take that state of mind into account in determining whether the degree of objective seriousness in the particular case was above the mid-range to which the standard non-parole period applied. That complaint highlights one of the many difficulties facing sentencing judges when considering the standard non-parole period specified in that Table.” at [3]

A psychiatric condition which is causally related to an offence is relevant both to the offender’s moral culpability as well as to considerations of community protection and general and specific deterrence. By considering the applicant’s mental disorder only in relation to his future dangerousness to the community the sentencing judge erred.

An offender cannot be punished separately for the commission of a Form 1 offence. By doing this the sentencing judge contravened s 34(1) of the *Crimes (Sentencing Procedure) Act*. In accordance with *Markarian v The Queen* (2005) 215 ALR 213 the correct approach in such situations is to increase the penalty for the principal offence.

Whilst the greater objective gravity indicators were neatly balanced with the lesser objective gravity factors to place the crime at the mid-range of objective seriousness, the fact that the offence was assessed as being of mid-range objective seriousness did not dictate that the standard non-parole period ought to be imposed.

***R v Aslett* [2006] NSWCCA 360**

McClellan CJ at CL, with whom Hoeben J agreed, James J agreeing with additional reasons, allowing the appeal in part – 16 November 2006.

Sentence appeal. Pleas of guilty.

Indictment 1

One count of aggravated car-jacking (count 1): s 154C(2) *Crimes Act*; two counts of aggravated sexual assault in company (counts 2 and 3): s 61JA(1)(c)(ii) *Crimes Act*; one count of robbery whilst armed with a dangerous weapon (count 4): s 97(2) *Crimes Act*; one count of specially aggravated kidnapping (count 5): s 86(3) *Crimes Act*; one count of attempt to obtain money by deception (count 6): s 178BA/344A *Crimes Act*.

Indictment 2

Two counts of robbery whilst armed with an offensive weapon (counts 3 and 4): s 97(1) *Crimes Act*; one count of robbery whilst armed with a dangerous weapon (count 5) s 97(2) *Crimes Act*.

Indictment 3

One count of murder (count 1): s 18 *Crimes Act*.

Indictment 4

Six counts of robbery whilst armed with a dangerous weapon (counts 1, 3, 4, 5, 6, 7): s 97(2) *Crimes Act*; and three counts of take and drive conveyance (counts 2, 8, 9): s 154A/117 *Crimes Act*.

Orders

Appeal allowed in part. Applicant re-sentenced.

Sentence

Indictment 1

Count 1, Fixed term 4 years

Counts 2 and 3, Imprisonment non-parole period 12 years,
balance of term 4 years

Count 4, Fixed term 5 years

Count 5, Fixed term 3 years

Count 6, Fixed term 18 months

Indictment 2

Count 3, Imprisonment non-parole period 6 years, balance of term
of 2 years

Count 4, Fixed term 4 years

Count 5, Imprisonment non-parole period 7 years, balance of term
of 2 years

Indictment 3

Count 1, Imprisonment for life

Indictment 4

Count 1, Fixed term 5 years

Count 2, Fixed term 1 year

Counts 3 and 4, Fixed term 5 years

Count 5, Fixed term 5 years

Count 6, Fixed term 2 years

Count 7, Imprisonment non-parole period 7 years, balance of term
8 years Counts 8 and 9, Fixed term 2 years

New Sentence

Indictment 3

Count 1, 22 years non-parole period, balance of term 6 years

Other counts: sentences confirmed.

Held

The rule in *Veen v R (No 2)* (1987) 164 CLR 465 provides that an offender's criminal history cannot justify increasing the sentence imposed for the instant offence. Prior criminal history is only relevant insofar as criminal propensity, retribution, deterrence and the protection of society can be established. The sentencing judge erred by using a prior offence to increase the instant offence to life imprisonment, despite finding that the instant offence of itself did not warrant life imprisonment.

The sentencing judge was correct in his application of the principle of totality. It was noted that determining the appropriate sentence for multiple and disparate criminal acts was an unenviable task that required a balance of justice to the offender and meeting community expectations.

The CCA also noted that s 21A(2)(g) of the *Crimes (Sentencing Procedure) Act 1999*, which refers to the injury, emotional harm, loss or damage caused by the offender being substantial, could be a relevant aggravating factor in a murder case, particularly for the spouse and/or dependants of the victim.

***R v Hillsley* [2006] NSWCCA 312**

Hodgson JA, Adams and Johnson JJ, in a joint judgment, allowing the appeal in part, 28 September 2006.

*Note: This matter also features an **Item 8** offence contrary to s 61J Crimes Act.*

Crown appeal. Plea of guilty to one count of murder (count 1): ss 18(1)(a)/19A *Crimes Act 1900*; two counts of aggravated sexual assault (child under 16, threat to inflict actual bodily harm with a knife) (counts 2 and 3): s 61J(1) *Crimes Act 1900*, and two counts of aggravated sexual assault (child under 16) (counts 5 and 6): s 61J(1) *Crimes Act*.

Orders

Appeal allowed in part. Respondent re-sentenced.

Sentence

Count 1, Imprisonment non-parole period 11 years, balance of term 5 years, consecutive on count 5

Counts 2 and 3, Imprisonment non-parole period 9 years, balance of term 3 years concurrent, partly consecutive on count 6

Count 4, Imprisonment fixed term 7 years 6 months, partly consecutive on count 6

Count 5, Imprisonment non-parole period 9 years, balance of term 3 years, partly consecutive on count 6

Count 6 Imprisonment non-parole period 25 years, balance of term 5 years

New sentence

Count 1, Life imprisonment, Counts 2 – 6 Sentences confirmed

Held

The CCA noted that while an intention to inflict grievous bodily harm is generally less culpable than an intention to kill, there are circumstances where both will have a similar level of culpability (at [15])

The sentencing judge erred by failing to take into account the offender's intention to punish the deceased as an aggravating factor to the murder. The murder of the deceased and the sexual assaults were linked as a single act of vengeance. Subsequently, a substantial overlap existed between the culpability for the sexual assaults and for the killing. This combined with other features of the crime placed the murder in the worst class of case. The facts of the case disclosed an offence so heinous as to warrant a life sentence to reflect community interests.

The sentencing judge erred by assessing the respondent as a danger to the community on account of his propensity for paedophilia and not violence. The court found that the respondent's dangerousness was not so limited. This was confirmed by the respondent's violent and disproportionate response to what he regarded as offensive treatment by the deceased.

The CCA also identified the scope for double punishment, as the sexual assaults were inextricably linked with the murder, rendering the murder more heinous than it otherwise would be. The imposition of the maximum sentence for the murder justified the lenient sentences imposed for the sexual assault and kidnapping offences at trial.

***R v Perry* [2006] NSWCCA 351**

Rothman J, with whom Spigelman CJ and Howie J agreed, allowing the appeal - 8 November 2006.

*Note: This matter also features **Item 9B** offences contrary to s 61M(2).*

Sentence appeal. Plea of guilty to one count of murder (count 1): ss 18(1)(a)/19A *Crimes Act*; and two counts of aggravated indecent assault (child under 10) (counts 2 and 3): s 61M(2) *Crimes Ac.*

Orders

Appeal allowed.

Sentence

Count 1, Imprisonment, non-parole period 18 years 9 months, balance of term 6 years and 3 months

Counts 2 and 3, Imprisonment non-parole period 4 years 3 months on each count, balance of term 1 year 9 months, partly consecutive on count 1

Total Imprisonment, non-parole period 20 years 9 months, balance of term 4 years 3 months

New Sentence

Count 1, Imprisonment non-parole period 18 years 5 months, balance of term 5 years 3 months

Counts 2 -3, Imprisonment non-parole period 18 years 5 months each count, balance of term 1 year 2 months concurrent

Total Imprisonment, non-parole period 19 years 9 months, balance of term 5 years 3 months

Held

The sentencing judge erred by failing to comply with the provisions of s 44 of the *Crimes (Sentencing Procedure) Act 1999*. Under s 44 the correct approach when sentencing is to first set a non-parole period and then the balance of term. An error of this type does not give rise to an automatic right to a lesser sentence: *Itaoui v R* (2005) 158 A Crim R 233; *R v Brown* [2006] NSWCCA 249.

The court affirmed the holding in *R v Way* (2004) 60 NSWLR 168 and *R v Moffitt* (1990) 20 and stated that s 44 of the *Crimes (Sentencing Procedure) Act 1999* does not control the reasoning of the sentencing act.

The sentencing judge was found to have erred by adopting an arithmetic application of the discount, thereby using the standard non-parole period as more than a mere reference point: *R v AJP* (2004) 150 A Crim R 575; *R v Way* (2004) 60 NSWLR 168. Nevertheless, the court observed that even where the standard non-parole period has been misused, if no lesser sentence is warranted, the misapplication of the standard non-parole period may not result in a different sentence (at [19]).

There was no error in the sentencing judge's assessment of the objective gravity of the offences. The court reiterated that there were a number of features aggravating the sexual assault, including the complainant's vulnerability and the fact that the applicant was in a position of trust in relation to her. The court observed that although the complainant will suffer psychological harm, such harm does not determine the relative objective gravity of the conduct constituting the offences under s 61M of the *Crimes Act* at [24]

The sentencing judge erred in reducing the discount for the applicant's early plea on account of the applicant's lying about the extent of the indecent assaults. By reducing the discount on this basis, His Honour confused the utilitarian value of the plea with a consideration of remorse, another factor in the sentencing process.

***R v Wallace* [2007] NSWCCA 63**

Sully J, with whom Bell and Hoeben JJ agreed, dismissing the appeal – 14 March 2007.

Crown appeal. Convicted of one count of murder: s 18 *Crimes Act*.

Orders

Appeal dismissed.

Sentence

Imprisonment non-parole period 8 years, balance of term 6 years

Held

The fact that the murder was committed whilst the respondent was on conditional liberty was an aggravating feature of the offence. This was so notwithstanding the fact that the antecedent offences were different in kind from the murder. Subsequently the sentencing judge erred when he concluded, in his reasons for departing from the standard non-parole period, that the fact that the respondent was on parole was not an aggravating feature. The court observed that it is a condition of parole that the parolee be of good behaviour, simply and comprehensively. The court found, however, that the sentence ultimately imposed was within range for the offence committed.

A reduction of six years in the standard non-parole period was justified by the pervasively harsh conditions that the respondent would face in prison. The court noted that the offence was one of high objective culpability, but found that the conditions in gaol that the respondent faced, including the threat of serious physical violence, justified the reduction in the standard non-parole period.

Item 4 — s 33 Crimes Act

Wounding with intent to do bodily harm or resist arrest

SNPP - 7 years

***R v Ghazi* [2006] NSWCCA 320**

Rothman J, with whom Tobias JA and Howie J agreed, allowing the appeal – 10 October 2006.

Sentence appeal. Plea of guilty to one count of malicious wounding with intent to do grievous bodily harm, s 33 *Crimes Act*.

Orders

Appeal allowed. Applicant re-sentenced.

Sentence

Imprisonment non-parole period 6 years, balance of term 4 years 6 months

New sentence

Imprisonment non-parole period 5 years, balance of term 4 years 7 months

Held

The court found no error in the application of s 44 of the *Crimes (Sentencing Procedure) Act*. The court held that the reasoning of the judge is not governed by s 44. Instead, s 44 sets out the form of the sentence which is to be imposed. The court observed that there is subsequently nothing to prevent a sentencing judge from fixing the length of a non-parole period and then calculating the additional term, after having taken into account all the relevant circumstances. A sentencing judge may then alter the length of

the non-parole period within the total sentence in order to accommodate a finding of special circumstances.

The court found that the sentencing judge erred in taking into account the applicant's prior criminal record. The applicant's record was not for matters of significant violence; the sentencing judge therefore erred by finding that these prior convictions should be considered as they were of a similar nature to the offence.

Although the offence was serious, it was not a worst category case. Relevant considerations include that the offence was not premeditated but rather was an impulsive act. The finding of special circumstances as well as the desirability of rehabilitation supported the assessment that the offence was not in the worst category class and that the sentence imposed was excessive. The applicant was justifiably aggrieved at not being sentenced in the mid-range. at [48]

Howie J expressed concern regarding placing too much weight on statistical information. However His Honour agreed with the orders proposed. His Honour commented that the sentencing judge fell into error by taking prior summary convictions (custody of a knife in a public place and common assault) as evidence of a dangerous propensity as an aggravating circumstance going to sentencing. His Honour stated "the statistics tend to suggest that insufficient regard is being given to the seriousness of the offence and the statutory maximum penalty." at [2]. His Honour held, however, that in light of the evidence before the court the new sentence proposed was appropriate.

***Pillay v R* [2006] NSWCCA 402**

Hislop J, with whom James and Hidden JJ agreed, allowing the appeal – 15 December 2006.

Sentence appeal. Convicted of one count of malicious wounding with intent to inflict grievous bodily harm, s 33 *Crimes Act*.

Orders

Appeal allowed, sentence quashed. Applicant re-sentenced.

Sentence

Imprisonment non-parole period 7 years, balance of term 2 years 4 months

New Sentence

Imprisonment non-parole period 5 years 6 months, balance of term, 2 years 6 months

Held

The CCA found that the sentencing judge had made a finding inconsistent with the principle espoused in *The Queen v De Simoni* (1981) 147 CLR 383. When sentencing His Honour took into account a circumstance of aggravation that would warrant a conviction for a more serious offence, namely an attempted murder. In this regard the sentencing judge had considered as aggravating features the pre-meditation and planning of the offence, including the fact that the applicant had made the victim write a suicide note. It was wrong to consider these features as aggravating as implicit in them is an intention to murder; this more serious charge had been rejected by the judge and jury.

The sentencing judge was entitled to find that a discount for a plea of guilty was not warranted in the circumstances.

The sentencing judge erred by failing to have regard to the applicant's special circumstances. These included his youth, the special hardship that he would endure on account of his being a foreign national with few friends or family in Australia, and his good prospects of rehabilitation. These factors, properly considered, warranted a departure from the standard non-parole period.

The CCA also found that statistical information from the Judicial Commission of itself is insufficient to establish that a sentence is manifestly excessive.

***R v Jenkins* [2006] NSWCCA 412**

Hoeben J, with whom Simpson and Barr JJ agreed, dismissing the appeal – 19 December 2006.

Crown appeal. Convicted of one count of maliciously inflict grievous bodily harm with intent to do grievous bodily harm, s 33 *Crimes Act*.

Orders

Appeal dismissed.

Sentence

Imprisonment, non-parole period 2 years 6 months, balance of term 2 years 6 months

Held

The sentencing judge erred by disregarding the standard non-parole period after deciding that it should not be imposed. The standard non-parole period remains relevant as a guide in the sentencing process even where a sentencing judge decides that it

should not be applied: *R v Way* (2004) 60 NSWLR 168. Nevertheless, the court found that this error was not of such a nature that required its intervention.

Although the sentence imposed was very lenient, it was still within the range of sentences open for such an offence. The court held that it was not appropriate to intervene in light of the judicial restraint required to be exercised in Crown appeals.

***R v Vragovic* [2007] NSWCCA 46**

Adams J, with whom Howie and Price JJ agreed, dismissing the appeal – 27 February 2007.

Sentence appeal. Convicted of one count of maliciously inflict grievous bodily harm with intent, s 33 *Crimes Act*.

Orders

Leave to appeal granted, appeal dismissed.

Sentence

Imprisonment, non-parole period 8 years, balance of term 4 years

Held

The court rejected the contention that the sentencing judge erred by categorising the offence as “near the top of the range of seriousness”. at [32]. The court observed that this characterisation was based not simply on the victim’s physical injuries and long term trauma suffered by the victim, but on the circumstances in which those injuries were inflicted. at [34]. The court noted that in considering the objective seriousness of the offence, the sentencing judge had had regard to the maximum penalty for the offence, the fact that the appellant was on

conditional liberty at the time it was committed and the fact that the offence was a deliberate attack and a calculated act of revenge.

R v XY [2007] NSWCCA 72

McClellan CJ at CL, with whom Sully and Howie JJ agreed, allowing the appeal – 23 March 2007.

*Note: This matter also features an **Item 10** offence contrary to s 66A Crimes Act.*

Sentence appeal. Plea of guilty to one count of sexual intercourse with a child under the age of ten (count 1): s 66 *Crimes Act 1900*; one count of maliciously inflict grievous bodily harm with intent to do grievous bodily harm (count 2): s 33 *Crimes Act 1900*; and two counts of assault occasioning actual bodily harm (counts 3 and 4): s 59(1) *Crimes Act*.

Orders

Appeal allowed, applicant re-sentenced.

Sentence

Count 1, Imprisonment fixed term 8 years concurrent with count 2

Count 2, Imprisonment non-parole period 10 years, balance of term 5 years consecutive on count 3

Count 3, Imprisonment fixed term 9 months consecutive on count 4

Count 4, Imprisonment fixed term 9 months

Total Imprisonment 11 years 6 months, balance of term 5 years

New sentence

Count 1, Imprisonment fixed term 4 years, concurrent with count 2

Count 2, Imprisonment non-parole period 4 years 6 months, balance of term 3 years, consecutive on count 3

Count 3, Imprisonment fixed term 6 months

Count 4, Imprisonment fixed term 6 months partly consecutive on count 3

Total Imprisonment non-parole period 5 years, balance of term 3 years

Held

The sentencing judge erred by ignoring the effect of intoxication on the commission of the offence. Intoxication was relevant insofar as it demonstrated that the offence committed was out of character. Moreover there was nothing to suggest that the applicant had previously behaved in the manner he did when he committed the offences. at [28] – [29].

The court found that the sentencing judge erred in finding that because the offence was one of sexual intercourse the applicant's previous good character was of little assistance to him.

Additionally, the sentencing judge erred in finding that the applicant was not contrite. On the evidence available, there were indications that the offender was remorseful, despite his early plea of not guilty. These indications included the applicant's expression of contrition to the writer of the pre-sentence report and his desire to undertake the CUBIT programme for sex offenders. A discounted sentence was warranted in these circumstances.

Further, the offence was not of a character that could be categorised as an offence in the mid range of objective seriousness. This was on account of the nature of the injuries inflicted as well as the lack of premeditation, and the fact that the offences were committed in a “drunken rage”. at [43]

The sentencing judge also failed to apply the principle of totality in imposing the sentence. The overall sentence did not reflect the overall criminality of the offending.

Howie J, while agreeing with McClellan CJ at CL, noted that there was an element of double punishment, in that two offences arose out of one injury. This was remedied by the concurrent sentences imposed on the sexual assault and malicious wounding.

***Frigiani v R* [2007] NSWCCA 81**

Howie J, with whom Simpson and Barr JJ agreed, dismissing the appeal – 30 March 2007.

Plea of guilty to one count of malicious wounding with intent to cause grievous bodily harm: s 33 *Crimes Act*.

Orders

Leave to appeal allowed, appeal dismissed.

Sentence

Imprisonment, non-parole period 5 years 6 months, balance of term 3 years 6 months

Held

The sentencing judge properly applied s 54B of the *Crimes (Sentencing Procedure) Act* and *R v Way* (2004) 60 NSWLR 168

by providing reasons for his departure from the standard non-parole period.

The breach of a good behaviour bond pursuant to s 10 of the *Crimes (Sentencing Procedure) Act 1999* is relevant in two ways: as an aggravating factor insofar as it relates to s 21A(2)(j) of the *Crimes (Sentencing Procedure) Act* and to show that the offence was not an aberration.

Howie J said in relation to past criminal behaviour: “It is generally considered to be more aggravating when the conduct is similar to that for which the offender is being sentenced.” at [24]

Howie J also said that —

“... care should be taken when referring to *Veen v R (No 2)* (1988) 164 CLR 465 and the principles for which it stands when discussing the relevance of criminal record. It was never intended to refer to a situation where there was only one prior offence recorded against the offender even if the conduct of that offence was similar to that for which sentence was being passed.” at [26]

***Matzick v R* [2007] NSWCCA 92**

Simpson J, with whom Howie and Hislop JJ agreed, dismissing the appeal – 2 April 2007.

Sentence appeal. Plea of guilty to one count of malicious wounding with intent to inflict grievous bodily harm: s 33 *Crimes Act*.

Orders

Leave to appeal allowed, appeal dismissed.

Sentence

Imprisonment non-parole period 2 years, 10 months, balance of term 2 years 6 months

Held

The sentencing judge's observation that the applicant was "suffering from no obvious mental or physical disability" was not "easily reconciled" with extracts from the relevant psychiatric report. Despite this, the remark had no impact on the outcome of the sentencing process. The diagnoses made did not entitle the applicant to a reduction in the sentence that would otherwise have been imposed.

***Chung v Regina* [2007] NSWCCA 146**

Smart AJ, with whom McClellan CJ at CL (with additional remarks) and Hislop J agreed, dismissing the appeal – 22 May 2007.

Sentence appeal. Pleas of guilty to one count of maliciously inflict grievous bodily harm with intent (s 33 *Crimes Act*) (count 1) and one count of break, enter and inflict grievous bodily harm (s 100 *Crimes Act*) (count 2).

Orders

Leave to appeal granted, appeal dismissed.

Sentence

Count 1, Imprisonment non-parole period 10 years, balance of term 4 years Count 2, Imprisonment fixed term 4 years partly concurrent on count 1

Held

The applicant argued unsuccessfully that the sentencing judge had placed insufficient weight on his prior good character.

A judge is obliged to consider the “otherwise good character” of a person found guilty of serious offences. The term “otherwise good character” refers not merely to the absence of prior convictions “but the person’s general morally good character as distinct from that of a ‘morally neutral or bad’ person.” *Ryan v The Queen* (1999) 198 CLR 267 at [23] and [25].

While the sentencing judge made no finding as to the weight to be placed on the applicant’s prior good character, prior good character was taken into account. The applicant’s absence of prior criminal offending and “the effect of the references and the evidence” before the judge were remarked upon. at [29]. Her Honour also stated that she considered “the objective seriousness of the offences and the offender’s subjective features.”

“Questions of weight are primarily for the sentencing judge and the circumstances in which matters of ‘weight’ will justify intervention by an appellate court are confined: per Spigelman CJ in *R v Baker* [2000] NSWCCA 185 at [11]” at [36] in *Chung*.

The applicant’s conduct was “little short of barbarous”. When the seriousness of the criminality was considered, it could not be said that insufficient weight had been accorded to the applicant’s prior good character.

The sentences imposed were “stern” but not manifestly excessive. They were warranted by the grave nature of the offending. The applicant was not entitled to rely on sentencing statistics that showed the penalty imposed on him was more than twice the

mean of sentences imposed for the offence of manslaughter. The comparison was not a valid one.

***Regina v Jione* [2007] NSWCCA 170**

Grove J, with whom Hodgson JA and Simpson J agreed, allowing the appeal – 21 June 2007.

Crown appeal. Plea of guilty to one count of maliciously inflicting grievous bodily harm with intent so to do: s 33 *Crimes Act*.

Orders

Appeal allowed. Sentence quashed and new sentence ordered.

Sentence

Imprisonment non-parole period 5 years, balance of term of 3 years

New Sentence

Imprisonment non-parole period 8 years, balance of term 4 years

Held

The sentence imposed was manifestly inadequate. The sentencing judge erred in placing the offence in the mid-range of objective seriousness, notwithstanding a finding that the injuries suffered were “catastrophic.” In determining where an offence lies in the spectrum of seriousness, a sentencing judge is obliged to consider

“the *actus reus*, the consequences of the conduct and any factors which might properly be said to have impinged on the mens rea of an offender.” *R v Way* (2004) 60 NSWLR 168 at p 186. (Cited at [13] in *Jione*).

In this matter “the actus reus emerged from more than one attack on the victim despite attempts by bystanders to restrain the respondent.” Further, insufficient attention was given to the victim’s injuries; the attack left him in a vegetative state and he was expected to remain in that state indefinitely.

The sentencing judge erred in omitting reference to the prescribed maximum penalty.

There was error in applying a 25 per cent discount for the guilty plea and in describing it as having been offered at the “earliest opportunity”. The plea was entered when the matter was listed to confirm a trial date “when the respondent asked to be arraigned and offered the plea of guilty.” at [18]

In re-sentencing the respondent, a discount of 25 per cent was re-applied despite this discount being affected by error at first instance. The ratio between the non-parole period and term of sentence was adjusted to reflect the respondent’s need for ongoing rehabilitation.

***R v Deng* [2007] NSWCCA 216**

James J, with whom Mason P and Hislop J agreed, dismissing the appeal - 2 August 2007.

Crown appeal. Plea of guilty to one count of malicious wounding with intent to do grievous bodily harm: s 33 *Crimes Act*.

Orders

Appeal dismissed.

Sentence

Imprisonment, non-parole period 2 years, balance of term 1 year to be served by way of periodic detention

Held

Absent allegations of incompetence or impropriety by the respondent's counsel at sentence, the respondent was bound by the manner in which the sentence proceedings were conducted and was precluded from adducing on appeal, evidence about facts of the offence that conflicted with the agreed statement of facts on which the respondent was sentenced. (at [48]). The categories of fresh evidence were outlined by Howie AJ (as he then was) in *R v Fordham* (1997) 98 A Crim R at 377-378, The "new evidence" which the respondent's counsel sought to have admitted was not evidence of matters which occurred after the original sentence proceedings and was not admissible as "fresh evidence."

It was open to the sentencing judge to make a finding under s 21A(2)(g) of the *Crimes (Sentencing Procedure) Act 1999* that the offence was not aggravated by the emotional and financial harm suffered by the victim. The assertion that the victim suffered financial harm pursuant to s 21A(2)(g) had not been proved beyond reasonable doubt as required.

The sentencing judge correctly held that the use of a knife was an aggravating factor under s 21A(2)(c) of the *Crimes (Sentencing Procedure) Act*.

The CCA held that the sentence was manifestly inadequate but declined to intervene based in part on the offender's good prospects of rehabilitation.

***Wilmot v R* [2007] NSWCCA 30**

Bell J, with whom Sully and Buddin JJ agreed, dismissing the appeal - 1 March 2007.

Sentence appeal. Plea of guilty to one count of kidnapping: s 90A *Crimes Act* (as it then was) and three counts of sexual intercourse without consent: s 61I *Crimes Act*. Two offences of indecent assault (s 61L *Crimes Act*) were taken into account on a Form 1 in sentencing the applicant for the s 90A offence.

Orders

Leave to appeal granted, appeal dismissed.

Sentence

Section 90A offence Imprisonment, non-parole period 9 years, balance of term 3 years; s 61I offences, Imprisonment fixed term 6 years, each count concurrent and concurrent with sentence for s 90A offence (accumulated on the non-parole period imposed in the District Court in June 2000).

Total sentence, Imprisonment non-parole period 9 years, balance of term 3 years.

Effective aggregate sentence, Imprisonment non-parole period 16 years, balance of term 3 years.

Held

Where an offence under s 90A *Crimes Act* is subject to the higher maximum penalty because the defence has failed to establish the absence of substantial injury to the victim, it is an error to find the offence aggravated by the fact that the victim suffered substantial injury or substantial harm.

In the circumstances, the NSWCCA determined that it should not intervene as no lesser sentence was warranted in law. This was based on the objective seriousness of the offence, the fact that the sentence was less than two-thirds of the maximum penalty, the factual findings of the sentencing judge and the purposes of punishment to which weight was given.

A judge is required to make any assessment of an offender's prospects of rehabilitation on the whole of the material before him or her." at [43]. The sentencing judge's approach to the applicant's prospects of rehabilitation did not reveal error. It was open to the judge to assess these prospects as he did. This assessment was based on the applicant's previous offending, his failure to comply with bail and parole conditions, his underlying personality disorder and his difficulty in coping outside a custodial environment.

On appeal, the aggregate sentence of 19 years was not manifestly excessive. Further, the sentencing judge did not err in fixing a non-parole period that exceeded 75 per cent of the aggregate sentence in light of the aims of punishment.

***JPW* [2006] NSWCCA 294**

Sully J, with whom Spigelman CJ and McClellan CJ agreed, dismissing the appeal. McClellan CJ at CL agreed with additional observations by Spigelman CJ – 1 September 2006

Crown appeal. Conviction following trial of one count of maliciously inflict grievous bodily harm with intent to prevent lawful apprehension of another person, s 33 *Crimes Act*.

Orders

Crown appeal dismissed.

Sentence

Section 9 good behaviour bond for 3 years with supervision.

Held

The imposition of a s 9 bond seriously undervalued the element of general deterrence. at [16]. The bond was “inappropriately lenient”. at [31]

The sentencing judge concluded that the offence fell below the mid-range of objective seriousness and that the imposition of the standard non-parole period of seven years was unjustified. The respondent was 15½ years of age at the time of the offence and had no prior convictions. The judge described him as “a person of unblemished character.” The judge found only one aggravating factor under s 21A of the *Crimes (Sentencing Procedure) Act*; but identified eight mitigating factors from those listed under s 21A(3).

A fair reading of the remarks on sentence indicates that the subjective considerations were allowed to overwhelm the serious objective criminality of the offence and prima facie the Crown appeal was entitled to succeed. at [22]-[23]. However, the Department of Juvenile Justice report before the Court of Criminal Appeal vouched for the respondent’s compliance with the conditions of his bond and that his ongoing rehabilitation would be undone by imposing a sentence of full time custody.

The CCA exercised its discretion not to intervene. A periodic detention order could not be made with respect to a person less than 18 years of age. A wholly suspended sentence of two years would be wholly spent at the end of the two years, rather than the

burden continuing for the three years of the current bond. A “realistic improvement in supervision” would not be achieved by extending the length of the current bond by two years.

***Singh v DPP* [2006] NSWCCA 333**

Basten JA, with whom Whealy and Latham JJ agreed, dismissing the appeal – 18 October 2006

Conviction and sentence appeal. Conviction following trial of one count of malicious wounding with intent to inflict grievous bodily harm (count 5), s 33 *Crimes Act*; one count of assault with intent to rob (count 7), s 98 *Crimes Act*; one count of maliciously inflict grievous bodily harm in company (count 2), s 35(2) *Crimes Act*; one count of steal from the person (count 4), s 94 *Crimes Act*; and one count of maliciously damage property (count 9), s 195(a) *Crimes Act*.

Orders

Appeal dismissed

Sentence

Counts 5 and 7, Imprisonment non-parole period 7 years, balance of term 2 years 4 months on each count to be served concurrently

Count 2, Imprisonment non-parole period 2 years 3 months, balance of term 3 months, partly consecutive on counts 5 and 7

Count 4, Imprisonment fixed term 2 years, concurrent with counts 5 and 7

Count 9, Imprisonment fixed term 1 year, concurrent with counts 5 and 7

Total, Imprisonment non-parole period 7 years 6 months, balance of term 1 year 10 months

Held

There was no error in the sentencing judge declining to find special circumstances for the purposes of s 44(2) of the *Crimes (Sentencing Procedure) Act 1999*, so as to warrant variation of the statutory ratio between the balance of the term of the sentence and the non-parole period.

The judge made no reference to the appellant's "lack of support from family and family and friends in Australia", but did take into account relevant matters that had the potential to constitute special circumstances. His Honour's conclusion in declining to find special circumstances did not demonstrate error of the type in *House v The King* (1936) 55 CLR 499. There was no basis for interfering with the sentence. at [74]

Item 5 - s 60(2) Crimes Act

Assault of police officer occasioning actual bodily harm

SNPP - 3 years

Kafovalu v R [2007] NSWCCA 141

Harrison J, with whom James and Rothman JJ agreed, dismissing the appeal – 24 May 2007

Sentence appeal. Pleas of guilty to a number of charges listed on two indictments.

Indictment 1

One count of robbery in company (s 97(1) *Crimes Act*) (count 1) with robbery in company listed on a Form 1.

Indictment 2

One count of affray (s 93C(1) *Crimes Act*) (count 1); one count of assault occasioning actual bodily harm (s 59(1) *Crimes Act*) (count 2); one count of assault occasioning actual bodily harm to a police officer in the execution of duty (s 60(2) *Crimes Act*) (count 3); two counts of resist a police officer in the execution of duty (s 58 *Crimes Act*) (counts 4 and 5).

Orders

Leave to appeal granted; appeal dismissed.

Sentence

Indictment

1

Taking into account the Form 1, imprisonment, non-parole period 2 years, balance of term 2 years

Indictment 2

Counts 1 & 2, Imprisonment non-parole period 12 months, balance of term, 4 months

Count 3, Imprisonment non-parole period 2 years, 3 months, balance of term, 9 months

Counts 4 & 5, Imprisonment fixed term, 3 months

Total Imprisonment 6 years, non-parole period 4 years

Held

The sentencing judge erred in assessing the objective seriousness of the offence of assault occasioning actual bodily harm to a police officer. His Honour did this by taking into account the fact that the applicant was on parole at the time the offence was committed. In assessing the objective seriousness of an offence to which a standard non-parole period applies, Spigelman CJ in *R v Way* (2004) 60 NSWLR 168 emphasised the need to consider only matters directly or causally related to the commission of the offence.

In *R v McNaughton* [2006] NSWCCA 242 the court held at [24] that —

“... the principle of proportionality required the upper boundary of a proportionate sentence should be set by the objective circumstances of the offence which do not encompass prior convictions.” Cited at [25] in *Kafovalu*.

To determine whether the sentence imposed for count 2 was manifestly excessive, and whether the overall sentence was also excessive, the court considered in detail the approach taken by the sentencing judge at first instance. In relation to count 2, the

sentencing judge took into account that the probable spontaneity of the offending was a mitigating feature relating to the objective seriousness of the offence, albeit the only mitigating feature.

In approaching the sentence generally, His Honour “patently and transparently” considered in painstaking detail, factors relevant to the objective gravity of the offending and the offender’s mitigating features. The applicant’s youth, his pleas of guilty, which whilst not entered early still attracted a discount pursuant to *R v Thompson and Houlton* (2000) 49 NSWLR 38,3 and the minimal level of planing involved in the commission of the offence were considered. There was no evidence available on which a finding of remorse could have been based, and there was insufficient material on which a finding of good prospects of rehabilitation could have been made.

The error made by the sentencing judge in assessing the objective seriousness of the offence did not “relevantly infect the sentencing process.” at [74]. The judge properly considered as an aggravating factor relevant to determining the appropriate sentence, the fact that the applicant was on parole when he committed the earlier offences. For the court to interfere, the applicant had to demonstrate that His Honour’s —

“... erroneous application of this fact to an assessment of the objective seriousness of the offence amounted to an error in the process of reasoning necessarily requiring that some other sentence was warranted in law.” at [74]

Such error was not demonstrated. The court was unable to conclude that another sentence was warranted in law or should have been passed.

Item 6 – s 60(3) Crimes Act

Wounding or inflicting grievous bodily harm on police officer

SNPP - 5 years

***Winn v R* [2007] NSWCCA 44**

Adams J, with whom Howie and Price JJ agreed, allowing the appeal – 27 February 2007.

*Note this matter also involves an offence under **Item 5: s 60(2) Crimes Act.***

Sentence appeal. Plea of guilty to one count of maliciously inflict grievous bodily under s 60(3)(b) *Crimes Act* (count 1) and one count of assault occasioning actual bodily harm on a police officer under s 60(2) *Crimes Act* (count 2).

Orders

Leave to appeal granted. Appeal allowed. Applicant re-sentenced.

Sentence

Count 1, Imprisonment non-parole period 3 years, balance of term 12 months
Count 2, Imprisonment 18 months, balance of term 6 months. Sentences concurrent.

New sentence

Count 1, Imprisonment, non-parole period 1 year, 6 months,
balance of term 2 years

Count 2, Imprisonment fixed term 12 months, concurrent with
count 1

Held

The sentences imposed were manifestly excessive. The sentencing judge failed to apply the principles set down in *R v Way* (2004) 60 NSWLR 168 at [117]-[124]. Further, His Honour omitted to focus on —

“the seriousness of the offences in the context of the range of factual circumstances which might place an offence in the middle of the range of objective seriousness.” at [37]

The offences were below the mid range in objective seriousness.

The sentencing judge erred in failing to consider the applicant’s complete abstinence from alcohol since the time of offending, as evidence of contrition. “For a long-term alcoholic to abstain completely from alcohol in the way achieved by the applicant is very significant indeed.” at [31]

The finding that the applicant’s sentence required a greater element of continued personal deterrence, on the basis that he was unlikely to continue his rehabilitation or that he may relapse into violence, was not justified. The applicant had made considerable progress toward behavioural change including the complete abstinence from alcohol. The evidence of his contrition was “overwhelming.”

Item 7 - s 61I Crimes Act

Sexual assault

SNPP - 7 years

***LM v R* [2006] NSWCCA 322**

Rothman J, with whom Tobias and Howie JJ agreed, dismissing the appeal – 10 October 2006.

Sentence appeal. Pleas of guilty to three counts of sexual intercourse without consent: s 61I *Crimes Act*.

Orders

Appeal dismissed.

Sentence

Imprisonment, non-parole period 3 years, balance of term 2 years on each count to be served concurrently in a juvenile detention centre.

Held

The trial judge was entitled to exercise his discretion to treat the applicant as a child under the *Children (Criminal Proceedings) Act* 1987. In considering whether to treat the applicant as a child under the *Children (Criminal Proceedings) Act* 1987 or in accordance with the law the sentencing judge's discretion did not miscarry. at [14]

“His Honour did not take into account any irrelevant matter, he took into account all relevant matters, there was no error of law or principle, nor is the exercise of discretion manifestly wrong.” at [14]

The sentencing judge's exercise of his discretion pursuant to s18 of the *Children (Criminal Proceedings) Act 1987* demonstrated that His Honour carefully considered the applicant's youth and the need to determine whether he should be treated as a child or an adult.

The sentence imposed was within the sentencing range available. It ensured "the applicant will complete his sentence in a juvenile facility," undergo counselling whilst in detention and continue counselling thereafter. at [19]. It was not necessary for the NSWCCA to find that it would have imposed the same sentence. It was sufficient for the court to find that the sentencing judge's discretion did not miscarry.

***Dean v R* [2006] NSWCCA 341**

Tobias JA with whom Grove and Bell JJ agreed, allowing the appeal – 26 October 2006

Conviction and sentence appeal. Conviction following trial of one count of sexual intercourse without consent: s 61I *Crimes Act*.

Orders

Appeal allowed. Applicant re-sentenced.

Sentence

Imprisonment non-parole period 7 years, balance of term 3 years

New sentence

Imprisonment non-parole period 7 years, balance of term 2 years 4 months

Held

The sentencing judge's reference to the applicant's plea of not

guilty as an aggravating factor did not cause the sentence discretion to miscarry. Although His Honour's comments conflict with the holding in *Siganto v The Queen* (1998) 194 CLR 656, the error was irrelevant. The standard non-parole period was imposed and it was accepted that the offence lay in the mid-range of objective seriousness. at [54] – [56]

Consideration of the applicant's plea of not guilty as an aggravating factor would have become relevant had His Honour used it to find that the offence lay beyond the mid-range of objective seriousness, and on that basis, provided a justification for a longer than standard non-parole period. at [54] – [55]

To impose a non-parole period less than the standard non-parole period applicable to the offence, it is necessary for a sentencing judge to find one or more mitigating factors set out in s 21A(3) of the *Crimes (Sentencing Procedure) Act* or some other objective or subjective factor relevant to the seriousness of the offence pursuant to *R v Way* (2004) 60 NSWLR 168. at [66]

There were no special circumstances justifying the setting of a balance of term which exceeded the statutory ratio. at [71]

***Gallant v R* [2006] NSWCCA 339**

Howie J with whom McClellan CJ at CL and Adams J agreed, dismissing the appeal – 26 October 2006

Conviction and sentence appeal. Conviction following trial of two counts of sexual assault: s 61I *Crimes Act*.

Orders

Appeal dismissed

Sentence

Imprisonment non-parole period 3 years 9 months, balance of term 1 year 3 months on each count. Sentences to be served concurrently.

Held

Defence counsel's failure to submit the full array of witness testimonials as to the appellant's good character, or to call witnesses to give evidence on this matter, did not cause the sentence proceedings to miscarry. Defence counsel could not be criticised for "not over-egging the pudding". at [62]

The sentence proceedings did not miscarry on account of defence counsel's failure to refer to special circumstances as a basis for adjusting the statutory ratio between the non-parole period and the parole period. There was very little on which to base a submission, and those factors that could be put forth had already been adumbrated. at [67]

The judge's remarks on sentence were brief and did not adequately deal with the issue of the standard non-parole period. Notably, the remarks did not set out an assessment of the objective seriousness of the offence. at [69]

The sentencing judge erred by reducing the standard non-parole period by almost half on the apparent basis of the applicant's subjective circumstances. The resultant sentence was unduly lenient. at [71]

***R v JRB* [2006] NSWCCA 371**

James J with whom Hidden and Hislop JJ agreed, allowing the appeal – 29 November 2006

Crown appeal. Conviction following trial of one count of sexual intercourse without consent: s 61I *Crimes Act*.

Orders

Appeal allowed. Respondent re-sentenced.

Sentence

Imprisonment non-parole period 3 months, balance of term 2 years 9 months

New Sentence

Imprisonment non-parole period 1 year 3 months, balance of term 1 year 9 months

Held

The sentencing judge did not err by failing to have regard to the maximum sentence applicable to s 61I *Crimes Act* offences or the standard non-parole period for that offence. at [32]

There was no error in the sentencing judge's consideration of his own experience of the care received by diabetic prisoners in gaol. His Honour had put his intention to consider this on notice, and had used his experience in the area as a basis for finding that there was a risk of the respondent's health being endangered if imprisoned. at [40] – [45]

Whilst, pursuant to s 44(2) of the *Crimes (Sentencing Procedure) Act*, the sentencing judge was entitled to find special circumstances and set a proportionally less than usual non-parole period, the period of three months which was set was

manifestly inadequate in light of the offence; sexual intercourse without consent. at [47] This inadequacy was so despite His Honour's findings regarding the threat a term of imprisonment could pose to the respondent's health. at [48]

***R v Smith* [2006] NSWCCA 353**

Bell J with whom Hidden and Johnson JJ agreed, allowing the appeal – 10 November 2006

Crown appeal. Plea of guilty to one count of aggravated indecent assault upon a person under 10 years (count 1): s 61M(2) *Crimes Act*; three counts of aggravated sexual intercourse without consent with a child under 16 years (counts 2, 3 and 4): s 61J *Crimes Act*; one count of aggravated indecent assault, victim under 16 (count 5); s 61M(1) *Crimes Act*; and one count of sexual intercourse without consent (count 6): s 61I *Crimes Act*. A form 1 was attached to count 2. This contained one charge of aggravated indecent assault; s 61M(1) *Crimes Act*; one charge of act of indecency: s 61N(2) *Crimes Act*; and one charge of indecent assault: s 61L *Crimes Act*.

Orders

Appeal allowed. Respondent re-sentenced.

Sentence

Count 1, fixed term 18 months, concurrent with count 2

Count 2, Imprisonment non-parole period 3 years 3 months, balance of term 2 years 9 months

Count 3, fixed term 2 years 9 months, concurrent on count 2

Count 4, fixed term 2 years 9 months, concurrent on count 2

Count 5, fixed term 18 months, concurrent on count 2

Count 6, fixed term 2 years concurrent on count 2

Total, Imprisonment non-parole period 3 years 3 months, balance of term 2 years 9 months

New sentence

Count 1, Confirmed

Count 2, Confirmed, but made partially consecutive on count 6

Count 3, Confirmed, but made partially consecutive on count 2

Count 4, Confirmed, but made partially consecutive on count 3

Count 5, Confirmed, but made partially consecutive with count 4

Count 6, Imprisonment non-parole period 3 years, balance of term 2 years partially consecutive on count 2

Total, Imprisonment, non-parole period 5 years, balance of term 2 years 9 months

Held

The sentencing judge erred in finding that the sentences should be served concurrently. The offences were each discrete incidents and the principle of totality did not require this. at [23] – [24]

Section 45(1) of the *Crimes (Sentencing Procedure) Act* does not authorise a sentencing judge to decline to set a non-parole period for an offence which is subject to a standard non-parole period. at [27]

The overall sentence did not reflect the criminality of the six offences and was manifestly inadequate. at [24]. Whilst the respondent's subjective case was favourable, he was not entitled

to a degree of mitigation that might be afforded to an offender for whom the offence was an isolated incident. at [27]

Item 8 – s 61J Crimes Act

Aggravated sexual assault

SNPP - 10 years

***R v BWS* [2007] NSWCCA 59**

Sully J, with whom Bell and Hoeben JJ agreed, allowing the appeal – 9 March 2007.

Crown appeal. Convicted of two counts of aggravated sexual assault (under authority) (counts 1 and 2): s 61J(1) *Crimes Act* and one count of assault occasioning actual bodily harm (count 3): s 59 *Crimes Act*.

Orders

Appeal allowed. Respondent re-sentenced.

Sentence

Count 1, Imprisonment non-parole period 6 years, balance of term 4 years

Count 2, Imprisonment non-parole period 6 years, balance of term 4 years, concurrent with count 1

Count 3, Imprisonment fixed term 4 months

Total Imprisonment non-parole period 6 years, balance of term 4 years

New Sentence

Count 1, Imprisonment non-parole period 6 years 6 months, balance of term 3 years

Count 2, Imprisonment non-parole period 6 years 6 months, balance of term 3 years, partly consecutive on count 1

Count 3, Imprisonment 4 months fixed term

Total Imprisonment non-parole period 7 years 6 months, balance of term 3 years

Held

The sentencing judge failed to give proper effect to the principle of totality as set out in *Pearce v The Queen* (1998) 194 CLR 610. Since the offences arose out of separate criminal enterprises on separate dates, wholly concurrent sentences were inappropriate, and did not reflect the overall criminality of the offences.

The sentencing judge also misapplied *R v Way* (2004) 60 NSWLR 168 in failing to balance the objective and subjective circumstances of the offence to make a determination as to its objective seriousness. Further, no reference was made to the reasons for departing from the standard non-parole period despite a finding that the offence was in the mid range of objective seriousness. A departure of 40 per cent from the standard non-parole period for an offence in the mid range of objective seriousness is unreasonable.

***Reaburn v R* [2007] NSWCCA 60**

Hoeben J, with whom Sully and Bell JJ agreed, allowing the appeal – 16 March 2007.

*Note this matter also features an **Item 7** under s 61I Crimes Act.*

Sentence appeal. Plea of guilty to one count of aggravated sexual assault (threaten actual bodily harm with an offensive weapon, namely a knife) (count 1): s 61J(1) *Crimes Act*; and one count of sexual assault (count 2): s 61I *Crimes Act*. One count of assault

occasioning actual bodily harm was taken into account of a Form 1.

Orders

Leave to appeal granted. Applicant re-sentenced.

Sentence

Count 1, Imprisonment non-parole period 9 years, balance of term 3 years (taking into account the Form 1)

Count 2, Imprisonment non-parole period 4 years 4 months, balance of term 3 years 8 months, partially cumulative on count 1

Total Imprisonment non-parole period 11 years, balance of term 3 years 8 months

New sentence

Count 1, Imprisonment non-parole period 6 years 9 months, balance of term 2 years 3 months (taking into account the Form 1)

Count 2, Imprisonment non-parole period 4 years 4 months, balance of term 2 years 8 months, partially cumulative on count 1

Total Imprisonment non-parole period 7 years 6 months, balance of term 2 years 8 months

Held

The sentencing judge erred by placing undue weight on the standard non-parole period, using it as the “starting point” rather than as a reference point, thereby misapplying *R v Way* (2004) 60 NSWLR 168. Additionally, the sentencing judge failed to apply the 25 per cent discount to the sentence for an early plea of guilty.

The sentencing judge also fell into error by failing to give proper consideration to the applicant’s mental state, as a result of his sad and traumatic upbringing.

Further, His Honour misinterpreted the aggravating factor under s 21A(2)(n) of the *Crimes (Sentencing Procedure) Act 1999*, that “the offence was part of a planned or organised criminal activity”. While some level of planning was involved, the court commented that the period in which the applicant formed the intention to commit the offences was “likely to have been relatively short”. at [42]. Noting this, the court held that pursuant to *Fahs v R* [2007] NSWCCA 26 the low level of planning involved in the commission of the offences did not activate the s 21A(2)(n) aggravating feature. at [44]

***Musgrove v R* [2007] NSWCCA 21**

Simpson J, with whom McClellan CJ at CL and Price J agreed, dismissing the appeal – 12 February 2007.

Sentence appeal. Plea of guilty to one count of aggravated sexual assault (threaten actual bodily harm with an offensive weapon, namely a knife): s 61J *Crimes Act*.

Orders

Leave to appeal granted. Appeal dismissed.

Sentence

Imprisonment non-parole period 8 years, balance of term 2 years 6 months

Held

The sentencing judge was entitled to make a finding that no special circumstances existed to justify reducing the sentence. The determination of whether or not special circumstances exist is a discretionary finding of the sentencing judge and error will only

be found where it can be shown that such a finding was not open.
at [24]

Section 44(1) of the *Crimes (Sentencing Procedure) Act 1999* as it currently stands first requires the court to set the non-parole period and then to set the balance of term. This requirement however does not mean that the non-parole period must first be determined. at [44]. See *R v Moffitt* (1990) 20 NSWLR 114 at 122; *R v P* [2004] NSWCCA 218; and *R v Tobar* [2004] NSWCCA 391; 150 A Crim R 104.

Simpson J commented that –

“...To determine, initially, the non-parole period, before determining the total sentence, would, in my opinion, (where special circumstances are then found) be conducive to error of the kind exposed in *Huynh*. A finding of special circumstances, after the determination of the non-parole period, would provoke an extension, beyond proper limits, of the balance of term. Sentencing judges need to be wary of taking a course that might lead to that error. Yet, on too literal an application of the section, that kind of error is rendered likely...

The course of legislative amendment has, in my opinion, been apt to create confusion in the sentencing process.” at [44] –[45]

Whilst a parole period must not exceed one-third of the non-parole period in the absence of special circumstances (s 44(2) of the *Crimes (Sentencing Procedure) Act 1999*), the converse is not true. That is, it is not an error for a parole period of less than one third of the non-parole period to be imposed. at [27]

***NT v R* [2007] NSWCCA 143**

Harrison J, with whom James and Rothman JJ agreed, dismissing the appeal — 24 May 2007.

*Note this matter also features an **Item 9A** s 61M(1) Crimes Act offence.*

Sentence appeal. Pleas of guilty to five counts of aggravated indecent assault (child under the age of 16 years) (counts 1, 2, 3, 7 and 8): s 61M(1) of the *Crimes Act*; two counts of aggravated sexual assault (child under the age of 16 years) (counts 5 and 6): s 61J(1) *Crimes Act*; and one count of attempted aggravated sexual assault (child under the age of 16 years) (count 4): ss 61J(1)/61P *Crimes Act*.

Orders

Leave to appeal granted. Appeal dismissed.

Sentence

Count 1, Imprisonment 12 months fixed term

Count 2, Imprisonment 9 months fixed term, partially cumulative on count 1
Count 3, Imprisonment 1 year 6 months fixed term, partly cumulative on count 2

Count 4, Imprisonment 3 years fixed term, concurrent with count 3

Count 5, Imprisonment 3 years fixed term, party cumulative on count 8

Count 6, Imprisonment non-parole period 2 years, balance of term 4 years, partly cumulative on count 5

Count 7, Imprisonment 9 months fixed term, concurrent with count 4

Count 8, Imprisonment 12 months fixed term, concurrent with count 7

Total Imprisonment non-parole period 5 years 9 months, balance of term 4 years

Held

Despite the “exceptional features” of the case, the applicant failed to establish that there had been an error that warranted the court’s intervention.

The CCA referred to *R v Sangalang* [2005] NSWCCA 171 where it was held that offences committed before 1 February 2003 are of limited assistance in determining the appropriate sentence for an offence committed after the date. at [34]. Caution must also be exercised when comparing cases under the same offence, due to the different facts and circumstances of the case. at [30]

***R v Oloitoa* [2007] NSWCCA 177**

McClellan CJ at CL, with whom Hoeben and Hall JJ agreed, allowing the appeal – 4 April 2007.

Crown appeal. Plea of guilty to one count of aggravated entry with intent to commit serious indictable offence (count 1): s 111(2) *Crimes Act*; and one count of aggravated sexual assault without consent (threaten actual bodily harm with an offensive weapon, namely a knife) (count 2): s 61J(1) *Crimes Act*.

Orders

Appeal allowed. Respondent re-sentenced.

Sentence

Count 1, Imprisonment non-parole period 3 years, balance of term 3 years

Count 2, Imprisonment non-parole period 6 years, balance of term 6 years, partly consecutive on count 1

Total Imprisonment non-parole period 6 years 6 months, balance of term 6 years

New sentence

Count 1, Imprisonment non-parole period 3 years, balance of term 3 years

Count 2, Imprisonment non-parole period 8 years 9 months, balance of term 3 years 9 months, partly consecutive on count 1

Total Imprisonment non-parole period 9 years 9 months, balance of term 3 years 9 months

Held

The CCA held that an act of fellatio may not necessarily fall below the middle of the range of offences under s 61J of the *Crimes Act*, and is to be determined based on the circumstances of the offence. at [41] – [43]

In the present case, the invasion of the victim's home, coupled with the use of arms, threats and the presence of young children justified a finding that the offence was above the middle of the range of objective seriousness.

The CCA also found that the degree of concurrency in the sentences for the two offences were unnecessarily lenient. Although the offences were part of a sequence of offending, they were separate offences requiring separate sentences.

The sentencing judge also failed to give reasons as required by s 54B(4) of the *Crimes (Sentencing Procedure) Act 1999* for departing from the standard non-parole period.

***Nguyen v R* [2007] NSWCCA 14**

Howie J, with whom Sully and Price JJ agreed, allowing the appeal - 7 February 2007.

Sentence appeal. The applicant was convicted of one count of aggravated sexual assault: s 61J(1) *Crimes Act*; and one count of armed robbery: s 97(1) *Crimes Act*.

Orders

Appeal allowed to correct a formal error.

Sentence

Imprisonment, non-parole period 6 years, balance of term 2 years each count to be served concurrently and to be wholly accumulated on the sentence imposed by Morgan DCJ.

Total Imprisonment 12 years, non-parole period 10 years

New Sentence

Sentences imposed by Hughes DCJ quashed as they did not comply with s 44 *Crimes (Sentencing Procedure) Act 1999* as it stood when the offences occurred.

New sentence, Imprisonment 8 years, non-parole period 6 years on each count to be served concurrently.

Held

There was a failure to consider the principle of totality in relation to accumulating the current sentences with a previous sentence. The sentencing judge should have taken into account the

criminality involved in the offence that the applicant was sentenced for by Morgan DCJ and the fact that that offence was committed three weeks after the offences that Hughes DCJ was sentencing the applicant for. at [17]

The sentencing judge was obliged to consider that the accumulation of sentences constituted special circumstances. The judge should also have considered the overall non-parole period the applicant was to serve as a result of the accumulation of sentences and how that should affect a finding of special circumstances for the purposes of arriving at an appropriate parole period. at [17]. The parole period imposed was out of proportion to the non-parole period, especially as the applicant was a young person with some issues that could be addressed by assistance on parole.

In addition to the grounds of the appeal, Howie J identified three significant errors in the exercise of the sentencing discretion which operated in favour of the applicant. at [9]. These errors were held to be: (a) the judge's assessment of the seriousness of the offence; (b) making the sentences for both offences totally concurrent; and (c) sentencing the applicant on the bases of having no prior offences and of being of good character.

The offences could not be described as being "at the lower mid range" of objective seriousness. at [10]. The armed robbery was aggravated by planning, being committed in company, being committed in the victim's home and by the way in which the victim was treated. at [10]. The sexual assault was aggravated by the threat to inflict actual bodily harm, its commission in the victim's home and the blindfolding and binding of the victim. at [10]

It was an error of principle to make both offences totally concurrent. This decision was based on both offences having been committed on the same day. at [11]. Howie J said that it was obvious from a number of recent matters before the court that the principles of totality are not sufficiently understood.

"...There is no rule that sentences for offences committed on the same day or in the same criminal enterprise should be served concurrently. The issue has been considered in a number of decisions of this Court that should make it plain that the question to be asked is whether the criminality of one offence can be encompassed in the criminality of the other offence: see generally *R v MMK* [2006] NSWCCA 272. The position was explained in *Cahyadi v R* [2007] NSWCCA 1...". at [12]

Howie J questioned why the applicant should receive the same sentence as he would have received had he left the premises after committing the robbery, and without committing the sexual assault. at [13]

The offender's good character before he committed the offences was irrelevant. In *R v MAK and MSK* [2006] NSWCCA 381 the court held that where, after the offences for which sentence was being passed, the offender had committed other serious offences of a similar nature, "... little or no significance could be given to the fact that the offender had no prior convictions as the time of the commission of the offences for which he was being sentenced". at [14]. In that matter the offender's absence of prior offences could not be considered to be a mitigating factor. at [14]

Howie J observed that the applicant's commission of another serious home invasion three weeks after these offences meant that the offender's prior good character before committing the current offences was irrelevant. at [15]

A less severe sentence was not warranted. The sentencing discretion miscarried in a number of ways, but overall the errors operated significantly in favour of the applicant. A sentence of eight years with a non-parole period of six years was "probably inadequate". at [16]. This was notwithstanding the applicant's age and delay in the matter being dealt with. That delay caused no prejudice to the applicant. The applicant displayed no remorse and any steps made toward rehabilitation had to be viewed in the context of the applicant's refusal to accept responsibility for his offending. at [16]. There were no relevant mitigating personal circumstances to explain the offences, particularly the sexual assault. at [16]

***Thorne v Regina* [2007] NSWCCA 10**

Howie J, with whom Sully and Hall JJ agreed, dismissing the conviction appeal and allowing the sentence appeal – 7 February 2007

Conviction and sentence appeal. Conviction following trial of one count of aggravated sexual assault (maliciously inflict actual bodily harm) (count 1), s 61J *Crimes Act*; and two counts of sexual intercourse without consent (counts 2 and 3), s 61I *Crimes Act*.

Orders

Conviction appeal dismissed. Sentence appeal allowed.

Sentence

Count 1, Imprisonment non-parole period 10 years, balance of term 3 years 4 months

Counts 2, 3, Imprisonment non-parole period 7 years, balance of term 2 years 4 months on each count, concurrent with count 1

Total, Imprisonment non-parole period 10 years, balance of term 3 years 4 months

Held

The judge erred in treating the appellant's conviction for sexual assault over 14 years before the present matters as an aggravating factor under s 21A(2)(d) of the *Crimes (Sentencing Procedure) Act* 1999. The application of s 21A(2)(d) is governed by common law principles confining it to situations where there is a demonstrative need for retribution, deterrence or protection of the community, none of which applied in this case: *R v Johnson* [2004] NSWCCA 76; *R v Wickham* [2004] NSWCCA 193.

The judge failed to consider the appellant's mental state at the time he committed the offences. While there was no psychiatric or psychological report before the sentencing judge, it was clear that as well as being intoxicated and in a state of despair the appellant had an abnormal state of mind. at [77]

The appellant's mental state was demonstrably a relevant factor in determining whether his offending fell within the mid-range of objective seriousness, yet the judge made no reference to it. at [78]. The sentencing discretion miscarried because of the judge's failure to take into account the relevant factor of the appellant's mental health. In re-sentencing it was appropriate to consider the psychological report tendered on appeal. at [79]

It could not be said that the offences were in the mid-range of objective seriousness. Count 1 "fell significantly below the mid-range of seriousness." The aggravating feature of inflicting actual bodily harm was not particularly serious. at [85]

Similarly, counts 2 and 3 fell short of mid-range objective seriousness. No consideration was given to what might constitute

a mid-range offence under s 61I. This exercise is complicated by assessing the range of offending “without taking into account matters that would give rise to aggravating factors under the more serious offence under s 61J.” at [86]

It was a misrepresentation to categorise the appellant’s conduct as a breach of trust within s 21A (2)(l). The judge should have given less weight to the element of general deterrence. at [84], [87]

Imposing concurrent sentences inadequately addressed the criminality of the conduct. The sentence for count 1 did not reflect the total criminality of the conduct. The sentences should have been partially accumulated. There was an interval between the commission of count 1 and counts 2 and 3. at [89]

New Sentence

Count 1, Imprisonment non-parole period 6 years, balance of term 3 years 6 months

Counts 2 and 3, Imprisonment non-parole period 3 years 6 months, balance of term 3 years 6 months on each count partly consecutive on count 1

Total, Imprisonment non-parole period 7 years 6 months, balance of term 3 years 6 months

Item 9A – s 61M(1) Crimes Act

Aggravated indecent assault

SNPP - 5 years

AIS v Regina [2006] NSWCCA 355

Hislop J, with whom Beazley JA and Sully J agreed, dismissing the appeal – 20 November 2006.

Sentence appeal. Plea of guilty to one count of aggravated indecent assault (child under 16 years), s 61M(1) *Crimes Act*.

Orders

Appeal dismissed.

Sentence

Imprisonment non-parole period 9 months, balance of term 2 years, 2 weeks and 4 days

Held

The sentencing judge did not err in determining that a custodial sentence was appropriate in this case. Her Honour was mindful that the appellant was aged 19 years at the time of the offence and this reduced an otherwise mid-range offence to one at the lower end of the mid-range of objective seriousness. at [12]

The submission that the judge considered herself bound to impose a prison sentence was without foundation. Her Honour said no more than that the absence of a prior criminal record and the fact that the offence occurred spontaneously were not sufficient reasons alone to prevent the imposition of a full time custodial sentence. In this case prior good character carried little weight and general deterrence needed to be emphasised. Her Honour did

not advance a proposition that in all cases of sexual assault by adults on children a custodial sentence had to be imposed. at [13]-[16]

The sentence imposed was “at the upper and outer limit...” of the relevant range available to the sentencing judge, with a starting point of three years and six months discounted by 20 per cent for the guilty plea. at [26]. Her Honour’s finding of special circumstances resulted in a non-parole period of nine months. There was no justification for adjusting this further. No error was established warranting a less severe sentence. at [27]-[29]

***GAT v R* [2007] NSWCCA 208**

Adams J, with whom Howie and Price JJ agreed, allowing the appeal – 17 July 2007.

Sentence appeal. Pleas of guilty to one count of carnal knowledge of a girl between 10 and 16 years (count 1): s 71 *Crimes Act* (now repealed); one count of indecent assault of a child under 16 years (count 2): s 61E(1) *Crimes Act* (now repealed); one count of aggravated indecent assault (child under 16 years) (count 3): s 61M(1) *Crimes Act*; one count of aggravated act of indecency (under authority) (count 4): s 61O(1) *Crimes Act*; one count of aggravated sexual intercourse with a child between 14 and 16 years (under authority) (count 5): s 66C(4) *Crimes Act*; and one count of aggravated sexual intercourse with a child between 10 and 14 years (under authority) (count 6): s 66C(2) *Crimes Act*.

Orders

Leave to appeal granted. Applicant resentenced.

Sentence

Count 1, Imprisonment non-parole period 4 years, balance of term 2 years

Count 2, Imprisonment 3 years fixed term, concurrent with count 1

Count 3, Imprisonment non-parole period 3 years, balance of term 2 years, partially cumulative on count 1

Count 4, Imprisonment 1 year 6 months fixed term, concurrent with count 3
Count 5, Imprisonment non-parole period 3 years, balance of term 1 year 6 months, partially cumulative on count 3

Count 6, Imprisonment non-parole period 4 years, balance of term 3 years 6 months, partially cumulative on count 5

Total Imprisonment non-parole period 9 years 6 months, balance of term 3 years 6 months

New sentence

Count 1, Imprisonment non-parole period 4 years, balance of term 2 years

Count 2, Imprisonment 3 years fixed term, concurrent with count 1

Count 3, Imprisonment non-parole period 1 year 6 months, balance of term 1 year 1 month, concurrent with count 1

Count 4, Imprisonment 1 year fixed term, concurrent with count 1

Count 5, Imprisonment non-parole period 3 years, balance of term 1 year 6 months, partially cumulative on count 3

Count 6, Imprisonment non-parole period 3 years, balance of term of 2 years, partially cumulative on count 5

Total Imprisonment non-parole period 7 years, balance of term 3 years 6 months

Held

The sentencing judge erred in referring to the applicant as having “avoided the automatic application” of the standard non-parole period, contrary to the law in *R v Way* (2004) 60 NSWLR 168, on the basis of his plea of guilty. Adams J noted at [23] that –

“... it is especially important not to use the standard non-parole period as a starting point or as a fulcrum around which the various relevant features – objective and subjective – oscillate. Rather, all the objective and subjective features of the case must be brought together in a synthesis giving rise to the ultimate appropriate sentence. For the purpose of undertaking this exercise, the standard non-parole period is one of a number of matters to be considered, bearing in mind the ways in which the objective features of the case differ from an abstract case in the middle of the range.”

Further error occurred in making a finding of special circumstances but failing to adjust the statutory ratio accordingly.

The sentencing judge also omitted to properly apply the principle of totality by considering the overall sentence. The sentence was found to be manifestly excessive, given the strong subjective circumstances of the offender.

Item 9B – s 61M(2) Crimes Act

Aggravated indecent assault – child under 10 years

SNPP - 5 years

Darrigo v R [2007] NSWCCA 9

Price J, with whom Hodgson JA and Howie J agreed, allowing the appeal – 5 February 2007.

Sentence appeal. Plea of guilty to one count of aggravated indecent assault (child under 10 years): s 61M(2) *Crimes Act*.

Orders

Leave to appeal granted. Appeal allowed.

Sentence

Imprisonment non-parole period 5 years, balance of term 2 years

New sentence

Imprisonment non-parole period 4 years 6 months, balance of term 1 year 6 months

Held

The sentencing judge did not err in translating the applicant's prior criminal history into an aggravating factor. Criminal history is relevant insofar as it reflects the applicant's failure in respect of rehabilitation and treatment and the need to protect the community. at [33]. However, His Honour fell into error by suggesting that prior criminal convictions go to the objective seriousness of the offence. Further, the starting point of the sentence was excessive and the case was not one where the maximum penalty should be imposed.

The court characterised the offence as "beyond the mid-range of objective seriousness." at [57]. Despite the plea of guilty, the standard non-parole period was still to be used as a reference point: *R v AJP* (2004) 150 A Crim R 575; *MLP v R* [2006] NSWCCA 271. When imposing a custodial sentence for a standard non-parole period offence the principal issues to be addressed, as set by Kirby J in *MLP v R* [2006] NSWCCA 271, are –

- "(i) What term of imprisonment is appropriate having regard to the offence and the circumstances of the offender?
- (ii) Should the offence be characterised as being in the mid-range of objective seriousness?
- (iii) Are there other reasons in the matters identified in s 21A (relating to the offender) for departing from the standard non-parole period?
- (iv) Are there special circumstances?" at [54]

The court noted that these issues do not need to be addressed in any particular order: *MLP* [at 34]; *R v Moffit* (1990) 20 NSWLR 114. at [55]

The sentencing judge also failed to comply with s 44(2) of the *Crimes (Sentencing Procedure) Act 1999* in fixing the balance of the term of sentence, as the balance of term exceeded one third of the non-parole period and His Honour had declined to find special circumstances.

Item 10 – s 66A Crimes Act

Sexual intercourse – child under 10

SNPP - 15 years

***MLP v R* [2006] NSWCCA 271**

Kirby J, with whom Grove and Hislop JJ agreed, allowing the appeal – 6 September 2007.

Sentence appeal. Convicted of one count of sexual intercourse with a child under ten years: s 66A *Crimes Act*.

Orders

Leave to appeal granted. Appeal allowed.

Sentence

Imprisonment non-parole period 12 years, balance of term 4 years

New sentence

Imprisonment non-parole period 11 years, balance of term 5 years

Held

The sentencing judge misapplied *R v Way* (2004) 60 NSWLR 168 by treating the offender's subjective circumstances as indicia of the objective seriousness of the offence.

The sentencing judge also fell into error by placing the offence above the mid range of objective seriousness. Although it was found to be in the mid range, the CCA held that there were circumstances that warranted a departure from the standard non-parole period, namely the applicant's health problems and the need for the sentence to be served on protection. at [55]

With respect to age, Kirby J said at [22] –

“...it does not follow that, because age is relevant and because the section contemplates a range of ages, an offence against a child approaching the age of 10 cannot be regarded, or should not be regarded, as being within the mid range. The section is concerned with the protection of the vulnerable from sexual exploitation and violation. No doubt, as a generalisation, the younger the child the more defenceless and vulnerable. However, the entire class of children under the age of 10 years is vulnerable. ...”

In relation to the fact that the offence was an isolated act, Kirby J said at [26] that –

“... The fact that conduct is an isolated act does not determine, however, whether the offence is within the mid range. It may be in the mid range, even though an isolated act, depending upon the nature of the act.”

***DBW v R* [2007] NSWCCA 236**

Spigelman CJ, with whom Simpson and Harrison JJ agreed, dismissing the appeal – 27 July 2007.

*Note: This matter also features an **Item 9B** s 61M(2) Crimes Act offence.*

Sentence appeal. Plea of guilty to two counts of aggravated act of indecency (counts 1 and 10): s 61O(2) *Crimes Act*; one count of aggravated indecent assault (count 4): s 61M(2) *Crimes Act*; and two counts of sexual intercourse with child under 10 years (counts 6 and 11): s 66A *Crimes Act*.

Two counts of aggravated act of indecency were taken into account on a Form 1 in relation to count 1: s 61O(2) *Crimes Act*.

one count of aggravated indecent assault was taken into account in relation to count 4: s 61M(2) *Crimes Act*; three counts of sexual intercourse with a child under 10 years were taken into account in relation to count 6: s 66A *Crimes Act*; and three counts of sexual intercourse with child under 10 years were taken into account in relation to count 11: s 66A *Crimes Act*.

Orders

Leave to appeal granted. Appeal dismissed.

Sentence

Count 1, Imprisonment non-parole period 2 years, balance of term 2 years, taking into account Form 1 (concurrent with counts 6 and 11)

Count 4, Imprisonment non-parole period 1 year 9 months, balance of term 1 year 9 months, taking into account Form 1 (concurrent with counts 6 and 11)

Count 6 and 11, Imprisonment non-parole period 3 years, balance of term 3 years, taking into account Form 1's (partially cumulative on count 10)

Count 10 Imprisonment non-parole period 1 year 6 months, balance of term 1 year 6 months

Total Imprisonment non-parole period 3 years 6 months, balance of term 3 years

Held

The sentencing judge failed to identify which matters under s 21A of the *Crimes (Sentencing Procedure) Act 1999* were taken into account. Spigelman CJ found that it could not be inferred that the sentencing judge accepted the Crown submission that there was substantial emotional harm for the purposes of s 21A(2)(g) of the

Crimes (Sentencing Procedure) Act 1999 although such a finding was open. at [37] and [40]. *R v Wilson* [2005] NSWCCA 20 not followed.

While not expressly referred to, the term of the sentence indicates that substantial weight was placed on the applicant's confession to the authorities. The potential to be discovered through other means did not detract from this discount.

The sentencing judge however was correct in observing that the applicant's conduct adversely affected the young victim. This inference can be made in the absence of expert evidence on the basis of common sense. The observations by

Hunt J (as he then was) in *R v Muldoon* (unrep, 13/12/1990, NSWCCA) as to —

"the kind of evidence that should be adduced in order to conclude what impact there would be by way of future harm to very young children who had been subject to sexual abuse" are no longer of assistance in light of the increased knowledge of the effects of child sexual abuse. at [39]

Item 11 — s 98 Crimes Act

Robbery with arms etc and wounding

SNPP - 7 years

***R v AS* [2006] NSWCCA 309**

Sully J, with whom Mason P and Latham J agreed, allowing the appeal – 22 September 2007.

Crown appeal. Plea of guilty to one count of assault with intent to rob armed with an offensive weapon (knife) (count 1): s 98 *Crimes Act*; one count of robbery from the person (count 2): s 94 *Crimes Act*; one count of malicious wounding (count 3): s 35(1) *Crimes Act*; and one count of assault officer in the execution of duty (count 4): s 58 *Crimes Act*. Eight matters including conspiracy to commit armed robbery, robbery, assault, resist arrest, intimidate police and offensive language were taken into account on a Form 1 in relation to count 1. One count of drive whilst unlicensed was dealt with as a related offence under s 166 *Criminal Procedure Act 1986*.

Orders

Appeal allowed. Respondent re-sentenced.

Sentence

Count 1, Imprisonment non-parole period 2 years, balance of term 1 year 6 months, partly consecutive on count 3 (taking into account Form 1)

Count 2, Imprisonment fixed term 6 months

Count 3, Imprisonment fixed term 9 months, partly consecutive on count 2

Count 4, Imprisonment fixed term 3 months, concurrent with count 3

s 166 certificate, Disqualified for 3 years

Total Imprisonment non-parole period 2 years 9 months, balance of term 1 year 6 months (to be served in a Juvenile Detention Centre)

New sentence

Count 1, Imprisonment non-parole period 3 years, balance of term 1 year, partly consecutive on count 2 (taking into account of the Form 1)

Count 2, Imprisonment non-parole period 1 year, balance of term 4 months

Count 3, Imprisonment non-parole period 1 year, balance of term 4 months, concurrent with count 2

Count 4, Imprisonment fixed term 3 months, concurrent with count 3

s 166 certificate, Disqualified for 3 years

Total Imprisonment non-parole period 3 year 9 months, balance of term 1 year to be served in a Juvenile Detention Centre

Held

The subjective features of an offender cannot “swamp” the relevant objective seriousness of an offence, particularly where the criminality is of a very high order. The respondent’s prospects of rehabilitation were secondary to the need to protect the community. The original sentence was manifestly inadequate.

The CCA held that there were three broad categories where a court may exercise a discretion not to intervene on a Crown appeal where manifest inadequacy has been established. First, where there has been a substantial delay or passing of time; secondly, where the difference between the original sentence and the sentence that the court would otherwise impose is insignificant; and lastly, where events have occurred between sentence at first instance and on appeal that require, in the interests of justice, that the court should refrain from intervening. at [37] – [39]

Where the court exercises its jurisdiction to intervene, it must bear in mind the need to not unfairly disrupt any personal rehabilitation that the offender has undergone.

***R v Henry* [2007] NSWCCA 90**

Howie J, with whom Simpson and Hislop JJ agreed, allowing the appeal – 2 April 2007.

Crown appeal. Plea of guilty to one count of assault with intent to rob whilst armed with an offensive weapon, with wounding (count 1): s 98 *Crimes Act*. An offence of common assault (s 61 *Crimes Act*) and an offence of being in custody of an offensive implement (s 11B *Summary Offences Act 1998*) were before the court pursuant to s 166 *Criminal Procedure Act 1986*.

Orders

Appeal allowed. Respondent re-sentenced.

Sentence

Count 1, Imprisonment non-parole period 3 years, balance of term 1 year

s 166 certificate, Imprisonment fixed term 4 months, each count concurrent and concurrent with count 1

Total Imprisonment non-parole period 3 years, balance of term 1 year

New sentence

Count 1, Imprisonment non-parole period 4 years 6 months, balance of term 2 years 3 months

s 166 certificate, Imprisonment fixed term 4 months, each count concurrent and concurrent with count 1

Total Imprisonment non-parole period 4 years 6 months, balance of term 2 years 3 months

Held

The sentence imposed at first instance was found to be too lenient. Despite a determination that the offence was in the mid range of objective seriousness, the non-parole period did not reflect the middle of the range criminality, notwithstanding the guilty plea. The sentencing judge's remarks contain no reference to the standard non-parole period being used as a guideline or reference point. If the judge had properly applied s 54B(4) of the *Crimes (Sentencing Procedure) Act 1999* and identified each of the factors taken into account in departing from the standard non-parole period, it would have been apparent that the sentence was too great a departure from the standard non-parole period. at [37]. The plea of guilty could not have justified such a substantial departure, even with some further reduction arising from a

reduction in general deterrence. The fact that the respondent was on parole, and the extent of his criminal record, warranted a sentence above the standard non-parole period. at [37]

The sentencing judge erred by failing to consider the danger to society arising from the offender's mental condition and the need for personal deterrence. Mental illness can impact on the objective seriousness of an offence by mitigating the offender's culpability; increasing the severity and onerousness of imprisonment; moderating the need for general deterrence; or indicating the actual or potential danger to society: *R v Israil* [2002] NSWCCA 255. The trial judge addressed only two of these issues.

The CCA held that an offender's mental disorder does not necessarily result in the imposition of a lesser sentence. The respondent's mental condition did not reduce the objective seriousness of the offence. It was an error for the sentencing judge to reduce the sentence so far below the standard non-parole period based on the respondent's mental condition without having regard to the other aims of punishment. Any mitigation in sentence by way of general deterrence by reason of the respondent's mental condition was offset by the very strong need to impose a sentence for the purpose of specific deterrence. at [32]

In relation to the application of the guideline judgment in *R v Henry* (1999) 46 NSWLR 346 the CCA noted that although the guideline in *Henry* has a reduced role to play in determining a sentence for a s 98 offence, it represents a guide to the sentencing for related offences, including an offence under s 98. This is so notwithstanding that that offence carries a standard non-parole period. at [35]

The CCA noted —

“the problems that are posed for a sentencing court by a standard non-parole period that is out of proportion to the maximum penalty and the difficulty in determining the rationale of parliament in specifying a standard non-parole period that is well above or well below half the maximum penalty” at [26]

***R v Witchard* [2007] NSWCCA 167**

McClellan CJ at CL, with whom Hidden and Rothman JJ agreed allowing the appeal – 19 June 2007.

Crown appeal. Plea of guilty to one count of robbery in company (count 1): s 97(1) *Crimes Act*; and one count of assault with intent to rob with wounding (count 2): s 98 *Crimes Act*. Offences of common assault; assault officer in the execution of duty; and resist officer in execution of duty were on a s 166 certificate pursuant to the *Criminal Procedure Act 1986*.

Orders

Appeal allowed. Respondent re-sentenced.

Sentence

Count 1, Imprisonment non-parole period 1 year 6 months, balance of term 2 years

Count 2, Imprisonment non-parole period 1 year 6 months, balance of term 2 years, concurrent with count 1

s 166 certificate, Imprisonment 3 months fixed term, each count concurrent and concurrent with count 1

Total Imprisonment non-parole period 1 year 6 months, balance of term 2 years

New sentence

Count 1, Imprisonment fixed term 1 year 6 months

Count 2, Imprisonment, non-parole period 2 years, balance of term 2 years, partly consecutive on count 1

s 166 certificate, Imprisonment 3 months fixed term, each count concurrent and concurrent with count 1

Total Imprisonment non-parole period 3 years, balance of term 2 years

Held

The sentencing judge's finding that the standard non-parole period applicable to the s 98 offence was irrelevant because of the respondent's guilty plea was inconsistent with the approach required by *R v Way* (2004) 60 NSWLR 168. Even though the respondent pleaded guilty, the standard non-parole period still functions as a benchmark or guide post to relate the offence to the middle of the range of objective seriousness. at [32]

The CCA found that although the offences were part of one episode of offending, there were two victims and the sentences should not have been made totally concurrent. at [35], [38]

Notwithstanding the offender's strong subjective features, the circumstances were worse than the guideline judgment in *R v Henry* (1999) 46 NSWLR 346, with the offence being committed in company with the use of actual violence, and the offender being on conditional liberty at the time of the offence and having a criminal history. The sentence imposed at first instance was outside the acceptable range of sentences for the offence.

Item 12 – s 112(2) Crimes Act

Breaking etc into any house and committing serious indictable offence in circumstances of aggravation

SNPP 5 years

***R v Brooks* [2006] NSWCCA 169**

Hidden J, with whom Hulme and Hall JJ agreed, allowing the appeal – 9 August 2006.

*Note: This matter also features an **Item 8** offence: s 61J Crimes Act*

Sentence appeal. Pleas of guilty to one count of aggravated break, enter and commit serious indictable offence (aggravated sexual intercourse without consent) (count 1): s 112(2) *Crimes Act*; two counts of aggravated sexual intercourse without consent (counts 2 and 4): s 61J(1) *Crimes Act*; one count of attempted aggravated sexual intercourse without consent (count 3): s 61J(1)/s 61P *Crimes Act*; and one count of aggravated robbery (count 5): s 95 *Crimes Act*.

Form 1, Escape lawful custody; aggravated sexual assault.

Orders

Appeal allowed. Applicant re-sentenced.

Sentence

Count 1 and Form 1, Imprisonment non-parole period 12 years, balance of term 4 years, partly consecutive on count 5

Counts 2 & 4, Imprisonment fixed term 8 years, concurrent with count 1

Count 3, Imprisonment fixed term 4 years 6 months, partly consecutive on count 1

Count 5, Imprisonment fixed term 7 years

Total sentence Imprisonment non-parole period 13 years, balance of term 4 years

New Sentence

Count 1 and Form 1, Imprisonment non-parole period 6 years 6 months, balance of term 3 years 6 months, partly consecutive on count 5

Counts 2, Imprisonment fixed term 7 years, concurrent with count 1

Counts 4, Imprisonment fixed term 5 years, concurrent with count 1

Count 3, Imprisonment fixed term 4 years 6 months, partly consecutive on count 1

Count 5, Imprisonment fixed term 3 years

Total sentence, Imprisonment non-parole period 10 years 6 months, balance of term 3 years 6 months

Held

The sentencing judge erred in classifying the offences, particularly the sexual assaults, as falling into the worst category of offences of that kind. An offence is generally characterised as falling into the worst category when the maximum penalty is imposed. The maximum penalty was not imposed for any of the offences.

Despite the severe emotional impact on the victim, arising from the threat, indignities, deprivation of liberty and pain suffered,

the CCA found that this fell short of the circumstances of the worst case matters. The assessment, individually and in totality was found to be manifestly excessive.

In re-sentencing it was noted that although the applicant pleaded guilty it was appropriate to have regard to the standard non-parole period of five years as a reference point or guide post: *R v Way* (2004) 60 NSWLR 168 at [117]. Offences contrary to s 112(2) involve the commission of “any serious indictable offence”, an expression that covers a wide range of criminality. The nature of the serious indictable offence also has a significant bearing on the gravity of the offence.

***R v Barrett* [2006] NSWCCA 348**

Hulme J, with whom McClellan CJ at CL and Hall J agreed, allowing the appeal – 6 November 2006.

Crown appeal. Plea of guilty to one count of aggravated break, enter and commit serious indictable offence (larceny) [maliciously inflict actual bodily harm] (count 1): s 112(2) *Crimes Act*; and three counts of assault occasioning actual bodily harm (counts 2, 3 and 4).

Orders

Crown appeal allowed. Sentence for count 1 quashed.

Sentence

Count 1, Imprisonment non-parole period 1 year 3 months, balance of term 1 year 3 months, partly consecutive on counts 2, 3 and 4

Counts 2, 3 & 4, Imprisonment each non-parole period 6 months,
balance of term 2 months

Total sentence, Imprisonment non-parole period 1 year 7 months,
balance of term 1 year 3 months

New Sentence

Count 1, Imprisonment non-parole period 1 year 3 months,
balance of term 3 years, partly consecutive on counts 2, 3 and 4

Counts 2, 3 & 4, Sentence confirmed

Total sentence, Imprisonment non-parole period 1 year 7 months,
balance of term 3 years

Held

Insufficient weight was given to the objective seriousness of the offences. The fact that the offender was under the influence of drugs was not a mitigating circumstance. The offender was sufficiently in control of his actions at the time of committing the offence.

Despite the prosecution failing to inform the sentencing judge that the present offence was one of which the standard non-parole period applied, it should still have been a benchmark against which the decision as to the appropriate sentence was determined. The rule in *R v Way* (2004) 60 NSWLR 168 still applies.

In setting the total term of imprisonment, a degree of accumulation for each sentence should have been made.

Further, while the sentence imposed by the CCA was lenient, the court should not deprive the offender of the opportunity to enter into the Drug Court's detoxification and rehabilitation program. The increase in sentence was confined to the balance of the term as the respondent was due to be sentenced by the Drug Court on

the expiration of the non-parole period for the offence successfully appealed against. It was anticipated that a suspended sentence would be imposed to facilitate his rehabilitation.

***R v Marshall* [2007] NSWCCA 24**

Howie J, with whom McClellan CJ at CL and Simpson J agreed, allowing the appeal in part – 14 February 2007.

Note: Simpson J expressed a contrary view as to the imposition of terms of imprisonment for two offences which exceeded the statutory maximum.

Sentence appeal. Pleas of guilty to two counts of aggravated break, enter and commit serious indictable offence (steal) [knowing person present] (counts 1 & 2): s 112(2) *Crimes Act*; one count of aggravated break, enter and commit serious indictable offence (steal) [deprive person of liberty] (count 5): s 122(2) *Crimes Act* and two counts of larceny (counts 3 & 4): s 117 *Crimes Act*.

First Form 1, Take and drive conveyance without consent of owner; drive vehicle in a manner dangerous.

Second Form 1, Take and drive conveyance without consent of owner.

Third Form 1, Take and drive conveyance without consent of owner.

Orders

Appeal allowed on counts 3, 4 and 5.

Sentence

Count 1, Imprisonment non-parole period 1 year 6 months, balance of term 6 months, concurrent with count 5

Count 2, First Form 1, Imprisonment non-parole period 1 year 6 months, balance of term 6 months, concurrent with count 5

Count 3, Second Form 1, Imprisonment non-parole period 4 years, balance of term 1 year 4 months, concurrent with count 5

Count 4, Third Form 1, Imprisonment non-parole period 4 years, balance of term 1 year 4 months, concurrent with count 5

Count 5, Imprisonment non-parole period 5 years, balance of term 1 year 8 months

Total sentence, Imprisonment non-parole period 5 years, balance of term 1 year 8 months

New Sentence

Sentences for counts 1 & 2 confirmed

Count 3, Second Form 1, Imprisonment fixed term 2 years, concurrent with count 5

Count 4, Third Form 1, Imprisonment fixed term 2 years, concurrent with count 5

Count 5, Imprisonment non-parole period 4 years 6 months, balance of term 1 year 2 months, partly consecutive on counts 1 and 2

Total sentence, Imprisonment non-parole period 5 years, balance of term 1 year 2 months

Held

The sentencing judge was found to have merely paid lip service to the principle of totality. The individual sentences did not reflect the objective criminality of the offences and the concurrent sentences imposed were erroneous and illogical. No explanation was provided for reducing the non-parole period below the applicable standard non-parole period. A guilty plea does not relieve a judge from complying with s 54B(4) of the *Crimes (Sentencing Procedure) Act 1999: R v Zegura* [2006] NSWCCA 230. Further, there was no justification for imposing a sentence in excess of the maximum sentence for larceny. These errors were sufficient to warrant the court's intervention with respect to the larceny charges and one count of s 112(2).

The judge did not attempt to hypothesise an offence in the middle of the range of seriousness for an offence under s 112(2) to determine where in that range the applicant's offences fell: *R v Way* (2004) NSWLR 168 at [74]-[77]; *R v AJP* (2004) 150 A Crim R 575. Howie J discussed the approach to determining the objective seriousness of an offence under s 112(2) at [34]-[40].

No reference was made to s 21A of the *Crimes (Sentencing Procedure) Act* or the fact that the applicant was on parole at the time of the commission of the offences, an aggravating factor at both common law and under s 21A(2)(j).

The judge erred in determining that the principal offence under s 112(2) was above the mid-range of objective seriousness. An appellate court is more likely to interfere with such a finding if there are no, or insufficient, reasons justifying that assessment: *Dang v R* [2005] NSWCCA 430. This offence was in the mid-

range of objective seriousness. Although the offence of larceny committed in the premises was not a particularly serious example of that offence, there were three aggravating circumstances, two of which were particularly serious. at [41]-[43]

The CCA noted that

“statistical information [is] of less significance when dealing with standard non-parole period cases. If the offence is one of mid-range seriousness... the appropriate sentence is the standard non-parole period regardless of what the statistical information discloses.” at [33]

The CCA also said that s 112(2) is confusing as it carries a standard non-parole period of five years as against a head sentence of 20 years. Logically speaking, the standard non-parole period would be expected to be seven years and six months. at [34]. Further, the section can cover a diverse range of objective seriousness, as an element of the offence is that a “serious indictable offence” is committed. Accordingly, an assessment of the objective seriousness of the offence must take into account the nature of the offence, including its seriousness as against offences of its type generally. The problem with this section is reflected in the lack of sentences equal to or above the standard non-parole period. at [35]

***R v Quinlan* [2007] NSWCCA 109 – 18 April 2007**

Hoeben J, with whom McClellan CJ at CL and Hall J agreed, dismissing the appeal – 18 April 2007.

Sentence appeal. Pleas of guilty to one count of aggravated break, enter and commit serious indictable offence (sexual intercourse without consent) [maliciously inflict actual bodily harm] (count 1

(a): s 112(2) *Crimes Act*; three counts of sexual intercourse without consent (counts 1(b),(d),(e)): s 61I *Crimes Act*; one count of incite act of indecency with person over the age of 16 years (count 1(c)): s 61N(2) *Crimes Act*; one count of robbery (count 1(f)): s 94 *Crimes Act*; two counts of break, enter and commit serious indictable offence (steal) (counts 2 & 4): s 112(1) *Crimes Act*; one count of aggravated break, enter and commit serious indictable offence (steal) [armed with an offensive weapon – knife] (count 3): s 112(2) *Crimes Act*; and one count of aggravated break, enter and commit serious indictable offence (steal) [maliciously inflict actual bodily harm] (count 5): s 112(2) *Crimes Act*.

Orders

Appeal dismissed

Sentence

Count 1(a), Imprisonment non-parole period 6 years, balance of term 3 years

Counts 1(b), (d) & (e), Imprisonment each non-parole period 3 years, balance of term 1 year, concurrent with count 1(a)

Count 1(c), Imprisonment fixed term 1 year, concurrent with count 1(a)

Count 1(f), Imprisonment fixed term 2 years, concurrent with count 1(a)

Counts 2 & 4, Imprisonment each fixed term 2 years, consecutive on count (1)(a)

Counts 3 & 5, Imprisonment non-parole period 3 years, balance of term 2 years, consecutive on count (1)(a)

Total sentence, Imprisonment non-parole period 9 years, balance of term 2 years

Held

The sentencing judge did not err in imposing a statutory ratio where the balance of term did not reflect one third of the non-parole period. The applicant's level of criminality, individually and cumulatively, was very high, notwithstanding his youth and the need for rehabilitation.

***Drinan v R* [2006] NSWCCA 303**

Rothman J, with whom Spigelman CJ and Hoeben J agreed, dismissing the appeal – 22 September 2006

Sentence appeal. Plea of guilty to one count of aggravated break, enter and commit serious indictable offence (maliciously inflict grievous bodily harm) (count 1): s 112(2) *Crimes Act*; one count of common assault (count 2): s 61 *Crimes Act*; and one count of maliciously damage property: s 195(a) *Crimes Act*.

Orders

Appeal dismissed.

Sentence

Count 1, Imprisonment non-parole period 2 years 6 months, balance of term 3 years 6 months

Count 2, s 9 good behaviour bond for 1 year, concurrent with count 1

Count 3, s 9 good behaviour bond for 1 year, concurrent with count 1

Total, Imprisonment non-parole period 2 years 6 months, balance of term 3 years 6 months

Held

In applying the standard non-parole period the sentencing judge made the following comments —

“... I am required to have regard to the non-parole period which is fixed as one guide post and the maximum as another. I am then required to look at questions of discount of sentence that might apply because of an early plea of guilty and any matters in aggravation and mitigation. What, in truth, I am required to do is to determine, having regard to the fact that I do not have to impose that period but do have to determine where in the range of objective seriousness this applies, what is the non-parole period that I would fix before discounting it for an early plea of guilty. I must have regard to all the aggravating and mitigating features.” at [13]

It was held that there was no error in His Honour’s approach. at [14].

***R v Merrin* [2007] NSWCCA 255**

Howie J, with whom Giles JA and Fullerton J agreed, allowing the Crown appeal— 28 August 2007

Crown appeal. Pleas of guilty to nine offences comprising six counts of break, enter and steal (s 112(1) *Crimes Act*) (counts 1-6). In relation to count 1, three offences of break, enter and steal and one offence of break and enter with intent to steal were taken into account on a Form 1. Two counts of aid and abet aggravated break enter and steal (s 112(2) and 345 *Crimes Act*) (counts 7-8); and one count of aid and abet aggravated break and enter with intent to steal (count 9), (s 112(2) and 345 *Crimes Act*).

Orders

Appeal allowed.

Sentence

Counts 1-6, Imprisonment non-parole period 18 months, balance of term 2 years 6 months

Counts 7-9, Imprisonment non-parole period 1 year 9 months, balance of term 2 years 9 months

Total: Imprisonment non-parole period 1 year, 9 months, balance of term 2 years, 9 months

New sentence

Count 1 and Form 1, Imprisonment non-parole period 14 months, balance of term 8 months

Counts 2, 3 and 4, Imprisonment fixed term 7 months each count

Count 5, Imprisonment fixed term 10 months

Count 7 and Form 1, Imprisonment non-parole period 18 months, balance of term 2 years, 5 months

Counts 8 and 9, Fixed term 15 months

Total: Imprisonment non-parole period 4 years, balance of term 3 years

Held

The sentencing judge erred in failing to impose sentences in accordance with the principles in *Pearce v The Queen* (1998) 194 CLR 610. The sentencing discretion miscarried by the imposition of concurrent sentences for all the offences, notwithstanding that they were committed over a long period of time and therefore

could not constitute a single incident of criminal offending. Further, some of the offences were committed whilst the respondent was on parole for similar offences.

“It was not open to the Judge to determine that the sentence for any one offence of aggravated break, enter and steal could encompass the total criminality for all offences...” at [35]

The case of *R v Harris* [2007] NSWCCA 130 discussed in *Merrin*

“... dealt with sentencing for multiple offences having regard to the principle of totality and the appropriate punishment for repeat offenders.”

The court in that case emphasised that

“... heavy sentences should generally be imposed for break, enter and steal offences committed by repeat offenders on domestic premises, whether or not they were aggravated forms of the offence.” at [38]

In *Merrin*, although the offender’s criminal record was considered on sentence, it was not relevant to determining whether sentences for multiple offences should be cumulative or concurrent. Error was also made because the sentencing judge omitted to appropriately consider the Form 1 offences when imposing penalties for counts 1 and 7.

Error was also occasioned due to the judge’s failure to consider the standard minimum non-parole period when sentencing for the offences of aid and abet aggravated break, enter and steal on counts 7 to 9. The application of standard non-parole period provisions for offences under s 112(2) *Crimes Act* , and some attendant difficulties, were considered in *Marshall v R* [2007] NSWCCA 24 at [34] –[39]. These factors include determining where the seriousness of the offence lies, where it exceeds the mid

range of objective seriousness but falls below the most serious category of offence proscribed by s 112(2) and the diverse range of offending that is covered by the section.

In *R v Huynh* [2005] NSWCCA 229, also dealt with in *Merrin*, it was held that in determining whether an offence falls in the mid-range of objective seriousness, a court is obliged to consider the nature of the offence “including its seriousness as against offences of its type generally.” The element of aggravation must also be considered in the context of its nature and the conduct that gave rise to the aggravating factor. The number and severity of aggravating features are also pertinent. In relation to the aggravating feature of knowing that person/s are present on the premises, relevant matters to be considered include the presence of a child or other vulnerable person, and the time of day when the offence is committed. The latter is because late at night occupants of premises are likely to be asleep and for that reason, more vulnerable.

The respondent’s objective criminality was not addressed on sentence at first instance, and no attempt was made to “reflect the significance of the standard non-parole period.” Section 54B of the *Crimes (Sentencing Procedure) Act 1999*, which requires reasons to be given for departing from the standard non-parole period, was also not complied with.

The judge’s approach at first instance resulted in the imposition of sentences which failed to reflect the objective seriousness of offences committed by a serial burglar to obtain money to satisfy a drug addiction. In addition, the commission of further offences to fund this addiction constituted an aggravating factor because the respondent’s use of illegal drugs constituted a breach of his parole conditions.

In re-sentencing the respondent Howie J stated —

“56 In respect of the offences for which a standard non-parole period applies the offences are below mid-range of objective seriousness notwithstanding that they were aggravated both by the fact that the offences were committed in company and that there were persons in the premises. Further the offences were committed at night when the occupiers feel more vulnerable. However the property stolen was not of great value, at least in monetary terms. The offences were aggravated by the fact that the respondent was on parole for similar offending. They were mitigated by the pleas of guilty and the fact that the respondent had good prospects of rehabilitation. The respondent receives no benefit from the absence of criminal record, so far as it was understood by the sentencing Judge, as he undoubtedly received that benefit when he was sentenced in the District Court on the prior occasion. The standard non-parole period is also reduced by a finding of special circumstances warranting a reduction in the non-parole period from the statutory ratio.”

The sentencing judge’s application of a discount of 20 per cent, partly attributable to the offender’s remorse, was contrary to the principles in *R v MAK and MSK* (2006) 167 A Crim R 159. However, as this issue was not challenged by the Crown, the respondent is entitled to the benefit. The case was not one where it was appropriate to back date the sentences. The respondent had breached parole by committing the offences the subject of the present matter, and by resuming the use of illegal drugs on being released to parole. As no challenge was made by the Crown, the benefit of this finding should go to the respondent.

For the purposes of achieving a measure of proportionality with sentences imposed on co-offenders, and in light of the principles

which govern a Crown appeal, the sentences were made concurrent.

NOTE

R v Merrin (No 2) [2007] NSWCCA 310

A sentencing oversight in *R v Merrin [2007] NSWCCA 255* was formally corrected in *R v Merrin (No 2) [2007] NSWCCA 310* on 5 November 2007.

The sentences imposed on 28 August were revoked and in lieu the following sentence orders made —

Count 1 (and Form 1), Imprisonment non-parole period 14 months, balance of term 8 months

Counts 2, 3 and 4, Imprisonment non-parole period 7 months, balance of term 4 months

Counts 5 and 6, Imprisonment non-parole period 10 months, balance of term 6 months

Count 7 (and Form 1), Imprisonment non-parole period 18 months, balance of term 3 years

Counts 8 and 9, Imprisonment non-parole period 15 months, balance of term 8 months

Total, Imprisonment non-parole period 4 years, balance of term 3 years

Item 13 – s 112(3) Crimes Act

Breaking etc into any house etc and committing serious indictable offence in circumstances of aggravation

SNPP - 7 years

***R v Milane* [2006] NSWCCA 281**

Giles JA, with whom Sully and Latham JJ agreed, dismissing the appeal – 5 September 2006.

Sentence appeal. Plea of guilty to one count of specially aggravated break, enter and commit serious indictable offence (steal) in circumstances of aggravation (armed with an offensive weapon – replica pistol) [wounding]: s 112(3) *Crimes Act*.

Orders

Appeal dismissed.

Sentence

Imprisonment non-parole period 4 years 4 months, balance of term 2 years 6 months

Held

The sentencing judge paid proper consideration to the principle of parity. The sentence reflected His Honour's view that the applicant was slightly less culpable than the co-offender. The sentencing judge also paid due consideration to the applicant's subjective circumstances and particularly noted the aggravating factor that the offence was committed while the applicant was on parole and subject to bonds.

Item 14 — s 154C(1) Crimes Act

Taking motor vehicle or vessel with assault or with occupant on board
(car jacking)

SNPP – 3 years

***R v Thompson* [2007] NSWCCA 233**

Hulme J with whom Hall J (with additional remarks) and Handley AJA agreed, allowing the appeal – 3 August 2007

Crown appeal. Conviction following trial on one count of robbery with wounding (s 96 *Crimes Act*) (count 1) and one count of car jacking (s 154C(1)(a) *Crimes Act*) (count 2). Plea of guilty to summary offences on a s 166 certificate: one count of assault officer in the execution of duty, two counts of resist officer in the execution of duty and one count of escape lawful custody.

Orders

Crown appeal allowed. Respondent re-sentenced.

Sentence

Count 1, Imprisonment non-parole period 2 years, balance of term 2 years partly consecutive on count 2

Count 2, Imprisonment non-parole period 18 months, balance of term 18 months

s 166 offences, Imprisonment 6 months on each count

Total, Imprisonment non-parole period 3 years 6 months, balance of term 2 years

New sentence

Count 1, Imprisonment non-parole period 4 years 3 months,
balance of term 1 year 9 months partly consecutive on count 2

Count 2, Sentence confirmed

s 166 Offences, sentence confirmed.

Total, Imprisonment non-parole period 5 years 3 months, balance
of term 1 year 9 months

Held

The robbery with wounding offence committed by the respondent was sufficiently similar to the armed robbery offence considered in the guideline judgment of *R v Henry* (1999) 46 NSWLR 346 to enable an appropriate comparison to be made. However, a number of factors suggested a heavier sentence was warranted than the four to five years indicated in the guideline judgment.

Considerations which led the court to hold that the sentence of four years, being at the bottom of the range in *Henry*, was manifestly inadequate included: the respondent being ineligible for the discount in *R v Thomson and Houlton* (2000) 49 NSWLR 283 because he pleaded not guilty, his prior criminal record and the commission of the offences in the context of three grants of conditional liberty.

The Crown appeal was allowed in spite of delay by the Crown of two months in signing the Notice of Appeal. The respondent had not learned from lenient sentences previously imposed on him and notwithstanding whatever mental problems he may have had,

“... he still has enough reasoning power to appreciate the benefits to be derived from offending and put plans in that regard into effect.” at [48]

The strain imposed on respondents when the Crown delays an appeal has been acknowledged in *Hernando* [2002] 36 A Crim R 451. That strain may, for offenders awaiting a Crown appeal, "... have been put more strongly than the circumstances warrant." at [41], [42]

Item 15 - s 154C(2) Crimes Act 1900

Car-jacking in circumstances of aggravation

SNPP – 5 years

***MB v Regina* [2007] NSWCCA 245**

Hidden J, with whom Giles JA and Harrison J agreed, allowing the appeal – 14 August 2007

Sentence appeal. Conviction following trial on one count of aggravated car-jacking (in company) (1st Indictment: count 1), s 154C(2) *Crimes Act*. Plea of guilty to an unrelated count of malicious wounding (2nd Indictment: count 1), s 35 *Crimes Act*.

Orders

Appeal allowed.

Sentence

1st Indictment, Count 1 Imprisonment non-parole period 5 years, balance of term 2 years 6 months

2nd Indictment, Count 1, Imprisonment non-parole period 2 years 6 months, balance of term 1 year 6 months, partly consecutive on 1st Indictment, count 1

Total: Imprisonment non-parole period 6 years, balance of term 1 year 6 months

Held

The applicant was 17 years of age at the time of committing the malicious wounding offence and had just turned 18 when he committed the aggravated car-jacking offence. However, the sentencing judge made no reference to the principles applicable to

sentencing young offenders: *R v GDP* (1991) 53 A Crim R 112; s 6 *Children (Criminal Proceedings) Act* 1987. at [12]

The judge erred in finding that he was obliged to impose the standard non-parole period for the car-jacking offence as that offence was “squarely within the mid-range of seriousness for such offences”, without any of the mitigating factors “of the type listed” in s 21A of the *Crimes (Sentencing Procedure) Act 1999*. at [13]

While s 54B of the *Crimes (Sentencing Procedure) Act* provides that the standard non-parole period is to be set in the absence of reasons referred to in s 21A, it is clear from s 21A(1) that the section is not restricted to the factors set out in s 21A(2) and (3). Section 21A(1) is expressed broadly and refers to “any other objective or subjective factor that affects the relative seriousness of the offence” and “any other matters that are required or permitted to be taken into account by the court under any Act or rule of law.” at [14]

Consideration of the applicant’s youth was not reflected in the “head” sentences. In addition, his youth was a factor that fell within the terms of s 21A(1) and the judge was not bound to set the standard non-parole period.

The sentencing order also failed to achieve the judge’s stated intention of applying the principle of totality when assessing the aggregate sentence and giving effect to a finding of special circumstances. at [16]-[22]

New Sentence

1st Indictment, Count 1, Imprisonment non-parole period 3 years, balance of term 2 years, partly consecutive on 2nd Indictment:
count 1

2nd Indictment, Count 1, Imprisonment non-parole period 1 year 6 months, balance of term 2 years 6 months

Total, Imprisonment non-parole period 4 years, balance of term 2 years

Item 18 – s 25(2) Drug Misuse and Trafficking Act 1985

Supply commercial quantity of prohibited drug other than cannabis leaf

SNPP - 10 years

R v Vincent [2006] NSWCCA 276

Spigelman CJ, with whom Whealy and Howie JJ agreed, allowing the appeal – 28 August 2007.

Crown appeal. Pleas of guilty to one count of supply commercial quantity of prohibited drug (ecstasy/MDMA) (count 1): s 25(2) *Drug Misuse and Trafficking Act*; and one count of supply commercial quantity of prohibited drug (ecstasy/MDMA) (count 2): s 25(2) *Drug Misuse and Trafficking Act*. Form 1, Supply commercial quantity of prohibited drug; supply prohibited drug; possess prohibited drug; possess prohibited weapon (knuckle duster).

Orders

Crown appeal allowed. Applicant re-sentenced.

Sentence

Count 1, Imprisonment non-parole period 1 year 3 months, balance of term 5 months

Count 2, Form 1, Imprisonment non-parole period 2 years 3 months, balance of term 1 year 9 months, consecutive on count 1

Total sentence, Imprisonment non-parole period 3 years 6 months, balance of term 1 year 9 months

New Sentence

Count 1, Imprisonment non-parole period 2 years, balance of term 2 years

Count 2, Form 1, Imprisonment non-parole period 3 years, balance of term 3 years, partly consecutive on count 1

Total sentence, Imprisonment non-parole period 5 years, balance of term 3 years

Held

The sentence imposed at first instance was manifestly inadequate in light of the substantial drug operation the respondent was engaged in. Further, the possession of a knuckle duster indicates the degree of threat or violence associated with the trade. Spigelman CJ said at [32]: “This was a substantial, planned operation in which the respondent played a critical role.”

The moral culpability of an offender charged with actual supply of a prohibited drug is higher than a person who was knowingly concerned with the supply of the drug. There may be circumstances where an accessory has a higher moral culpability than the supplier, however that was not the issue in this case.

Regarding the reduction due to guilty plea, Spigelman CJ noted that “In that context twenty per cent is probably generous but nevertheless no separate challenge is made to it.” at [38]

***R v Mulato* [2006] NSWCCA 282**

Spigelman CJ, with whom Simpson J agreed, Adams J agreeing for different reasons, allowing the appeal – 11 September 2006.

Sentence appeal. Plea of guilty to one count of supply commercial quantity of prohibited drug (methamphetamine): s 25(2) *Drug Misuse and Trafficking Act*. Form 1, Supply indictable quantity of prohibited drug (ecstasy).

Order

Appeal allowed.

Sentence

Imprisonment non-parole period 6 years, balance of term 3 years 7 months 5 days

New Sentence

Imprisonment non-parole period 5 years, balance of term 3 years

Held

The CCA adopted different approaches to finding that a lesser sentence was warranted at law.

Adams J held that the sentencing judge erred by allowing the standard non-parole period to dominate the assessment of the appropriate sentence, and paid insufficient sufficient attention to other factors that were relevant.

Spigelman CJ, with whom Simpson J agreed, concluded that the subjective circumstances were considered and outlined comprehensively in Her Honour's sentencing remarks. Spigelman CJ proceeded to identify the error in using a reference point (either the standard non-parole period or the maximum sentence)

and applying mathematical calculations to arrive at the appropriate sentence. This process was held to be unnecessarily confining to the sentencing discretion. The sentencing judge's reasoning process could be distinguished from above, as Her Honour weighed in the relevant factors under s 21A.

Though their Honours did not agree that the offence was in the mid-range of objective seriousness, that characterisation was open to the sentencing judge. In determining whether the sentence was excessive the crucial question was whether it reflected the subjective case. Their Honours noted that insufficient weight was placed on the subjective circumstances. The appellant was a young offender with no criminal record of significance and demonstrated remorse and contrition, with favourable prospects of rehabilitation and was unlikely to re-offend.

***R v Naim* [2006] NSWCCA 289**

Sully J, with whom Giles JA and Latham J agreed, dismissing the appeal – 5 September 2006.

Sentence appeal. Plea of guilty to one count of supply prohibited drug (methamphetamine) (count 1): s 25(1) *Drug Misuse and Trafficking Act* and one count of supply large commercial quantity of prohibited drug (methamphetamine) (count 2): s 25(2) *Drug Misuse and Trafficking Act*. Form 1, Supply restricted substance (ketamine).

Orders

Leave to appeal granted. Appeal dismissed.

Sentence

Count 1, Imprisonment fixed term 2 years, concurrent with count 2

Count 2, Form 1, Imprisonment non-parole period 6 years, balance of term 3 years

Held

The applicant obtained a “significant benefit” from the imposition of wholly concurrent sentences when the offences did not arise from one criminal enterprise. at [7]. The offences were planned. They were committed while the applicant was on conditional liberty pursuant to a bond, an aggravating factor in sentencing.

It was also held that Judicial Commission statistics are of little comparative value unless reference is drawn to individual cases that provide a fair comparison in terms of the objective criminality of the offending and the subjective features of the offender.

There was no error in the judge’s approach to assessing the facts. Having decided to depart from the standard non-parole period the judge correctly followed the principles in *Regina v Way* (2004) 60 NSWLR 168 in using the standard non-parole period as a reference point of guidepost. It was open to the sentencing judge to impose the sentences that he did.

***R v Burgess* [2006] NSWCCA 319**

Howie J, with whom Sully J and Adams J (with additional remarks) agreed, allowing the appeal – 6 October 2006.

Adams J qualified his support with additional remarks on determining whether a case falls in the mid-range of objective

seriousness and whether sentences will necessarily increase as a result of standard non-parole periods.

Crown appeal. Plea of guilty to one count of supply commercial quantity of prohibited drug (methamphetamine) (count 1): s 25(2) *Drug Misuse and Trafficking Act 1985*; and deemed supply of prohibited drug (cannabis) (count 2): s 25(1) *Drug Misuse and Trafficking Act 1985*. Form 1, Goods in custody.

Order

Appeal allowed.

Sentence

Count 1, Form 1, Imprisonment non-parole period 3 years, balance of term 1 year

Count 2, Imprisonment non-parole period 3 years, balance of term 1 year, concurrent with count 1

Total sentence, Imprisonment non-parole period 3 years, balance of term 1 year

New Sentence

Count 1, Form 1, Imprisonment non-parole period 5 years 6 months, balance of term of 2 years 6 months

Count 2, Confirmed

Total sentence, Imprisonment non-parole period 5 years 6 months, balance of term 2 years 6 months

Held

The sentencing judge erred in adopting a two step approach to considering a sentence, solely reflecting the objective seriousness of the offence and then discounting it with reference matters personal to the respondent. This approach is contrary to the

principles in *Markarian v The Queen* (2005) 79 ALJR 1048. It was erroneous to arrive at a sentence by adding and subtracting arbitrary figures based on aggravating and mitigating factors. The approach requires a synthesis of all relevant factors to be weighed by the sentencing judge. The judge erred by failing to identify the level of objective seriousness of the offence or the culpability of the offender. The issue of parity was raised, and while parity of itself is insufficient to quash a sentence, in the present case, it went to demonstrate the manifest inadequacy of the initial sentence.

The judge failed to have regard to the standard non-parole period and omitted to comply with s 54B(4) of the *Crimes (Sentencing Procedure) Act* 1999. The judge described the offence as a “significant commercial enterprise” but did not “indicate the level of seriousness of the offending in anything but the most general terms”. at [45]. The judge did not carry out the important step of determining whether he viewed the offending in the mid-range of objective seriousness or above or below it.

Error was also made in imposing the same sentences for the two offences, where count 1 was a standard non-parole period offence with a statutory maximum penalty of 20 years, unlike count 2 which had a statutory maximum penalty of 15 years and where “there was no suggestion of an ongoing commercial venture”. at [48]. The criminality of the two offences was disparate and this should have been reflected in different sentences.

***R v Fahs* [2007] NSWCCA 26**

Howie J, with whom Simpson and Buddin JJ agreed, dismissing the appeal – 14 February 2007.

Sentence appeal. Pleas of guilty to supply large commercial quantity of prohibited drug (ecstasy/MDMA) (count 1): s 25(2) *Drug Misuse and Trafficking Act*; supply prohibited drugs on an ongoing basis (ketamine, methylamphetamine, ecstasy/MDMA, cocaine) (count 2): s 25A(1) *Drug Misuse and Trafficking Act* ; supply commercial quantity of prohibited drug (ecstasy/MDMA) (count 3): s 25(2) *Drug Misuse and Trafficking Act*; supply prohibited drugs on an ongoing basis (ketamine, ecstasy/MDMA) (count 4): s 25A(1) *Drug Misuse and Trafficking Act* .

Orders

Appeal dismissed.

Sentence

Count 1, Imprisonment non-parole period 5 years, balance of term 2 years 6 months, partly consecutive on count 3

Count 2, Imprisonment fixed term 1 year

Count 3, Imprisonment fixed term 4 years, consecutive on count 2

Count 4, Imprisonment fixed term 3 years, concurrent with count 1

Total sentence, Imprisonment non-parole 7 years, balance of term 2 years 6 months

Held

The CCA reiterated that the aggravating factor under s 21A(2)(n) of the *Crimes (Sentencing Procedure) Act*, that “the offence was part of a planned or organised criminal activity” requires more than mere planning. The judge’s finding that there was a “level of planning in the offences” does not necessarily constitute an aggravating factor under s 21A(2)(n). It is important that findings made under s 21A accord with the wording of the provision: at [21]: *R v Wickham* [2004] NSWCCA 193. In this case “it was clear that the applicant was committing the crimes as part of a drug trafficking organisation capable of supplying large amounts of different types of drugs to order.” at [22]

While there was an inconsistency between a finding of special circumstances and the proportion of the overall non-parole period to the total sentence, no lesser non-parole period would reflect the objective criminality of the offending and the other purposes of punishment, particularly personal deterrence. at [23]-[26]

The judge failed to comply with s 54B(4) of the *Crimes (Sentencing Procedure) Act* which obliges a court to give reasons for departing from the standard non-parole period and to identify each factor taken into account. at [28]-[29]. The case however did not warrant the court’s intervention.

***R v JRD* [2007] NSWCCA 55**

Howie J, with whom McClellan CJ at CL and Bell J agreed, allowing the appeal – 5 March 2007.

Crown appeal. Pleas of guilty to one count of supplying a commercial quantity of ecstasy (count 1): s 25(2) *Drug Misuse and*

Trafficking Act; one count of receiving (count 2): s 188 *Crimes Act*; and one count of obtaining credit by fraud (count 3): s 178C *Crimes Act*. Form 1, Two offences of receiving.

Orders

Appeal allowed

Sentence

Count 1, Imprisonment non-parole period 1 year 6 months, balance of term 6 months, suspended on entering into a good behaviour bond for 2 years

Count 2, Form 1: Imprisonment non-parole period 1 year 6 months, balance of term 6 months, suspended on entering into a good behaviour bond for 2 years

Count 3, Imprisonment fixed term 1 year, suspended on entering into a good behaviour bond for 1 year

New Sentence

Count 1, Imprisonment non-parole period 1 year 4 months, balance of term 8 months, consecutive on count 2

Count 2, Form 1, Imprisonment fixed term 10 months, consecutive on count 3

Count 3, Imprisonment fixed term 2½ months

Total sentence, Imprisonment non-parole period 2 years 4½ months, balance of term 8 months

Held

The sentencing judge erred by dealing with each offence separately “as if each represented a completely independent sentencing exercise.” at [26]-[27]. A court sentencing for multiple offences has to consider the outcome for all offences before

imposing a sentence for any one offence, to ensure that the sentences fall within statutory limits and are consistent and that the aggregate sentence reflects the overall criminality of the offences. at [28]-[33]. The judge erred by deciding to impose a suspended sentences before determining the appropriate sentences for each offence. at [37]: *R v Zamagias* [2002] NSWCCA 17.

The judge failed to apply the authorities on the correct approach to sentencing following a guilty plea to a standard non-parole offence. A guilty plea does not relieve the judge from assessing an offender's criminality keeping in mind that benchmark. at [41]

The judge breached s 23(3) of the *Crimes (Sentencing Procedure) Act* by allowing a combined discount for the guilty plea and assistance to authorities somewhere between 85 and 95 per cent. A combined discount exceeding 50 per cent will be unusual: *SZ v R* [2007] NSWCCA 19. In this case the excessive discount produced a sentence that was disproportionate to the offending conduct. at [44]. Nothing in the subjective circumstances, including the assistance to authorities, justified less than a full-time custodial sentence. at [45]

***R v T* [2007] NSWCCA 62**

Bell J, with whom Sully and Hoeben JJ agreed, dismissing the appeal – 16 March 2007.

Note: *This offence also features offences under s 319 Crimes Act.*

Sentence appeal. Pleas of guilty to one count of doing an act with intent to pervert the course of justice (count 1): s 319 *Crimes Act*; and one count of supply commercial quantity of prohibited drug

(methylamphetamine) (count 2): 25(2) *Drug Misuse and Trafficking Act*. Form 1, Possession of prescribed restricted substance (anabolic steroids); good in custody.

Orders

Appeal dismissed

Sentence

Count 1, Imprisonment fixed term 3 months

Count 2, Imprisonment non-parole period 3 years 9 months, balance of term 2 years, consecutive on count 1

Total sentence, Imprisonment non-parole period 4 years, balance of term 2 years

Held

The sentencing judge erred by treating the standard non-parole period as a starting point rather than a mere guidepost or benchmark for the actual sentence imposed: *R v Way* (2004) 60 NSWLR 168; *R v Shi* [2004] NSWCCA 135. His Honour also erred in not taking into account his finding of special circumstances in setting the non-parole period.

The judge discounted the sentence by 62.5 per cent to reflect the utilitarian value of the guilty plea, including a discount for present and future assistance to authorities of 25 per cent off the starting point with the balance discounted by an additional 50 per cent. The discount for assistance was excessive. at [22]. It was not of the exceptional kind that would have justified a combined discount in excess of 50 per cent: *SZ v R* [2007] NSWCCA 19 per Howie J at [11] and Buddin J at [53].

Judicial Commission statistics were held by the CCA to be useful only to a limited extent, due to the lack of information regarding

objective criminality. Sentencing statistics are subject to the limitations discussed in *R v Bloomfield* (1998) 44 NSWLR 734. No lesser sentence was warranted.

***R v Stricke* [2007] NSWCCA 179**

Hislop J, with whom Simpson and Howie JJ agreed, allowing the appeal – 25 June 2007.

Crown appeal. Plea of guilty to two counts of supply large commercial quantity of a prohibited drug (MDMA/ecstasy) (counts 1 & 2): s 25(2) *Drug Misuse and Trafficking Act* and one count of supply prohibited drug (cocaine) (count 3): s 25(1) *Drug Misuse and Trafficking Act*. Section 166 certificate offence of goods in custody.

Orders

Appeal allowed. Sentences for counts 1 and 2 increased.

Sentence

Count 1, Imprisonment non-parole period 5 years, balance of term 3 years, concurrent with count 2

Count 2, Imprisonment non-parole period 6 years, balance of term 3 years

Count 3, Imprisonment fixed term 2 years, concurrent with count 2

Section 166 certificate, Imprisonment fixed 4 months, concurrent with count 2

Total sentence, Imprisonment non-parole period 6 years, balance of term 3 years

New sentence

Count 1, Imprisonment fixed term 6 years

Count 2, Imprisonment non-parole period 8 years, balance of term 5 years partly consecutive on count 1

Count 3, Sentence confirmed

Section 166 certificate, Sentence confirmed

Total sentence, Imprisonment non-parole period 9 years, balance of term 5 years

Held

The sentencing judge did not identify the factors on which she based her conclusion that counts 1 and 2 were “below the mid-range in terms of objective seriousness.” at [17]. The objective factors, at [20]-[21], were such that this conclusion was erroneous and the sentences imposed were outside the appropriate range for these offences: *R v Wall* (2002) NSWCCA 42 at [70], and appellate intervention was required. at [19]

The discount allowed for the pleas of guilty to counts 1 and 2 exceeded the 30 per cent nominated by the judge, which included an allowance for contrition. Quantifying a discount for remorse generally or as manifested by a guilty plea should be avoided: *R v MAK* [2006] NSWCCA 381 at [42], [44]

The sentencing judge also erred by imposing concurrent sentences where there were two separate supplies occurring at different times. Count 3 was a separate offence. The judge erred in the exercise of her sentencing discretion by failing to partially accumulated the sentences for counts 1 and 2. at [32]-[34]

***Ma and Pham v Regina* [2007] NSWCCA 240**

Hulme J, with whom McClellan CJ at CL and Hoeben J agreed, dismissing the appeals – 8 August 2007

Sentence appeals. Each applicant pleaded guilty, after the commencement of their trial, to one count of supply commercial quantity of prohibited drug (heroin), s 25(2) Drug Misuse and Trafficking Act. Form 1: Three counts of organise, conduct and assist in drug premises.

Sentence

Ma - Imprisonment non-parole period 7 years, balance of term 3 years 6 months

Pham - Imprisonment non-parole period 5 years 6 months, balance of term 3 years 6 months

Orders

Appeals dismissed.

Held

The sentences imposed did not disclose any misapplication of parity principles or any basis for appellate intervention based on assessment of the applicants' objective criminality and subjective features. The sentences were not manifestly excessive. at [42]-[46], [65], [71], [75], [76], [102]

However, the sentencing judge erred in her approach to assessing the offences as falling in the mid-range of objective seriousness by concentrating on the serious nature of the criminal operation and failing to consider the motivation, mens rea, actions and role of the individual offenders. at [56]-[57]: R v Way (2004) 60 NSWLR 168 at [85] et seq.

Notwithstanding the incorrect nature of this approach, Pham's offence was correctly categorised in the mid-range of objective seriousness, as he was engaged on a daily basis as an integral part of a "well organised business operation" dealing in significant quantities of heroin. at [59]-[60]

***Nguyen v R* [2007] NSWCCA 15**

Price J, with whom Adams and Howie JJ agreed, dismissing the appeal – 7 February 2007

Sentence appeal. Plea of guilty to one count of supply prohibited drug [heroin] in an amount not less than the commercial quantity: s 25(2) Drug Misuse and Trafficking Act. Two matters were taken into account on a Form 1, namely one charge of goods in personal custody suspected of being stolen or otherwise unlawfully obtained [for the amount of \$2,875]: s 527C(1)(a) Crimes Act; and one charge of goods in personal custody suspected of being stolen or otherwise unlawfully obtained [for the amount of \$280]: s 527C(1)(a) Crimes Act.

Orders

Appeal dismissed.

Sentence

Imprisonment, non-parole period 6 years, balance of term 4 years

Held

The sentencing judge was entitled to find that the offence was at the upper end of the scale of objective seriousness. Pursuant to *R v Olbrich* (1999) 199 CLR 270, *R v Lam* [2006] NSWCCA 11 and *R v Stankovick* [2006] NSWCCA 229, the sentencing judge had to

assess the applicant's criminality by reference to his role and participation in the criminal enterprise. at [36] In this respect, the applicant's role was as a wholesaler supplying to co-offenders who on-sold the drugs as retailers. at [37]

The applicant could not hold a justifiable sense of grievance on the basis of the lesser sentence imposed on one of his co-offenders. The applicant's degree of criminality was greater than that of the co-offender based on his role in the criminal enterprise. Moreover, in contrast to the applicant, the co-offender was found to on-sell the heroin to support his own habit. This finding ameliorated, to some extent, the co-offender's degree of criminality. at [45]

The fact that the applicant's subjective case was stronger than his co-offender's did not dictate that the applicant's sentence should be of the same duration as that of the co-offender. The applicant's criminality was greater and prior good character carries less significance in drug offences. at [52]

By not referring to the standard non-parole period, the sentencing judge failed to follow the correct procedure in relation to the imposition of sentences where standard non-parole periods apply. If the correct approach had been followed, a longer sentence may have been imposed. Despite this, however, the sentence imposed was well within the range appropriate. at [61] – [62]

Item 19 – s 25(2) Drug Misuse and Trafficking Act 1985

Supplying commercial quantity of prohibited drug

SNPP - 15 years

***CTC v Regina* [2006] NSWCCA 263**

Kirby J, with whom Grove and Hislop JJ agreed, dismissing the appeal – 6 September 2007

Sentence appeal. Plea of guilty to one count of supply not less than a large commercial quantity of prohibited drug (heroin): s 25(2) *Drug Misuse and Trafficking Act 1985*.

Orders

Leave to appeal granted, appeal dismissed.

Sentence

Imprisonment non-parole period 5 years 6 months, balance of term 3 years

Held

The applicant's contention that insufficient weight was given to his plea of guilty and assistance to authorities was not made out. The sentencing judge's application of a 40 per cent discount was a matter for His Honour's discretion. In assessing the discount for the plea and the assistance given to authorities, His Honour referred to a range of discounts that were open. Reference was also made to s 23(3) of the *Crimes (Sentencing Procedure) Act 1999* which requires that the discount for assistance "... must not be unreasonably disproportionate to the nature and circumstances of the offence." at [18].

In *R v Sukkar* [2006] NSWCCA 92 at [54], Latham J, with whom McClellan CJ at CL and Howie J agreed, acknowledged that while there was “no fixed tariff for assistance”, cases in which discounts of 50 or 60 per cent were given were comparatively rare. Their Honours also said that —

“... discounts for a plea and assistance of more than 40 per cent should be very exceptionally, if at all, granted in a case where there is no evidence that the offender will spend the sentence, or a substantial part of it, in more onerous conditions than the general prison population.” at [5]

The extent of the applicant’s assistance to authorities was unquestionably considerable and the sentencing judge made no error in describing it as “significant.” The cost of the applicant’s assistance to authorities was that he had to be accommodated in protective custody for his own safety, and that as a result of his assistance he may be at risk upon being released.

The sentencing judge’s characterisation of the applicant as a “principal” in the criminal enterprise was appropriate, even though this finding was contrary to the agreed facts in the matter and the concession made by the Crown. The applicant arranged the supply of the 700g of heroin and he agreed to take the 2.1 kilograms he received, which was three times the quantity he had requested. He arranged for a party to take delivery of the drugs and also organised for payment of a co-offender. In addition, he negotiated the return of 1.4 kilograms which he was unable to sell. at [33]

The applicant had no justifiable sense of grievance based on the fact that he received a heavier sentence than his co-offender, Mr Chan. Mr Chan had no previous convictions, whereas the

applicant had several prior convictions for supplying prohibited drugs, in relation to which he had served periods of imprisonment.

The sentencing judge accorded sufficient weight to the applicant's subjective considerations, assessed the applicant as unlikely to re-offend and also considered his contrition and remorse. In all the circumstances, the sentence imposed was not manifestly excessive.

***R v Nikolic* [2007] NSWCCA 232**

Hidden J, with whom McClellan CJ at CL and Rothman J agreed, allowing the appeal – 8 August 2007

Note: Hidden J states at [2] that a standard non-parole period applies to an offence of knowingly take part in supply. This offence is not listed in Item 19 of the Table of Standard Non-Parole Period Offences which follows s 54D of the Crimes (Sentencing Procedure) Act 1999.

Crown appeal. Plea of guilty to one count of knowingly take part in the supply of a large commercial quantity of prohibited drug (ecstasy): s 25(2) *Drug Misuse and Trafficking Act 1985*.

Orders

Appeal allowed. Respondent re-sentenced.

Sentence

Imprisonment non-parole period 6 years, balance of term 3 years

New sentence

Imprisonment non-parole period 8 years 6 months, balance of term 4 years 3 months

Held

The judge calculated the sentence imposed by incorrectly using the non-parole period as a starting point and applying a 15 per cent discount for the plea of guilty. His Honour then determined the sentence by applying the proportion specified in s 44(2) of the *Crimes (Sentencing Procedure) Act 1999*. Grove J in *R v Stankovic* [2006] NSWCCA 229 (a sentence appeal by the co-offender) adopted the correct approach. This methodology involved taking the appropriate sentence as the starting point and applying a discount for the plea of guilty. His Honour then determined the non-parole period in relation to the discounted starting point. at [19]-[20]

Section 44(1) of the *Crimes (Sentencing Procedure) Act* prescribes the procedure for imposing a sentence and requires a court to first set the non-parole period. This procedure must not however “... be allowed to dominate the process of reasoning by which a sentence is arrived at.” at [20]. “To do so carries the danger that the court will lose sight of the primacy of the ‘head’ sentence.” at [20]

A determination of the appropriate sentence will be influenced by any relevant standard non-parole period, as the court explained in *R v Way* (2004) 60 NSWLR 168. Simpson J in *R v Tobar* (2004) 150 A Crim R 104 at [38] observed, in relation to the approach to sentencing generally, that ‘... although s 44 requires the non-parole period to be pronounced first, it does not require ‘that that term be the first *determined*.’” at [20]

The notional starting point adopted by the sentencing judge was too low. If the approach taken by Grove J in sentencing the co-offender Mr Stankovic had been adopted, a total term of nine years, after application of a 15 per cent discount, would have given a notional starting point of less than 11 years. This figure

contrasts with the notional starting point in *Stankovic* of 18 years.

The respondent participated “... to some extent in the production process, assisted in the collection and delivery of items of production and ran messages for Mr Stankovic.” at [10]. There was no evidence that the respondent was offered any financial reward for this. His involvement was based on his sense of obligation to Mr Stankovic’s family, whose brother had protected the respondent’s son by providing him with accommodation during the civil unrest in Serbia.

The respondent was a lesser participant in the criminal enterprise relative to the co-offender. Unlike the co-offender, he was not subject to conditional liberty and had no Form 1 matters. However, a difference of some seven years between the respondent’s sentence and that imposed on the co-offender was unjustifiably lenient. The judge’s “bottom-up” approach to the sentencing exercise led His Honour into error. at [25]

The appropriate starting point was 15 years which, after applying a 15 per cent discount for the plea of guilty, results in a term of sentence of 12 years and nine months.

ANNEXURE C: SECTION 21A CRIMES (SENTENCING PROCEDURE) ACT 1999

Section 21A was introduced through the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*. Its purpose was to foster individualised justice by requiring the sentencing court to consider a number of specific aggravating and mitigating circumstances when imposing a sentence. Its reach has been extended by amendments made in 2007 which have added several additional aggravating factors which need to be taken into account.

The Council identified in its previous annual reports a number of problems that have arisen in its application. Notwithstanding the many decisions of the NSW Court of Criminal Appeal concerning the way in which it is to be applied, error continues to emerge. In this Annexure the Council cites a number of cases decided in the period under review where error was identified on appeal, or where relevant principles were stated.

Aggravating factors

a) s 21A(2) – aggravating factors which are elements of the offence

There is a risk of double-counting, giving rise to potential sentencing error, if a circumstance which is an element of the offence charged is also taken into account as an aggravating factor. To do so is contrary to the direction in s 21A(2) that the court is not to have additional regard to that factor.¹¹¹

¹¹¹ See *R v Wickham* [2004] NSWCCA 193 and *R v Johnson* [2005] NSWCCA 186 for a statement of the relevant principles.

Set out hereunder are examples of recent cases where this error has emerged.

s 21A(2)(b) – actual / threatened use of violence; and

s 21A(2)(c) - actual / threatened use of a weapon

In *Fairbairn v R*¹¹² the court held that the sentencing court erred by treating the threatened use of violence and the threatened use of a firearm as aggravating factors in relation to a charge of assault with intent to rob whilst armed with an offensive weapon.

By way of contrast in *Huynh v R*¹¹³ the court held that the act of firing a weapon in the case of a robbery was not an element of the offence charged of robbery whilst armed with a dangerous weapon, with the result that it was appropriate for the sentencing court to take into account the actual use of violence as an aggravating factor.

s 21A(2)(e) – offences committed in company

In *Stevens v R*¹¹⁴ the sentencing court was found to have erred in treating as an aggravating factor that the offence was committed in company where the offence with which the applicant was charged, being one of affray, necessarily involved as an element the presence of at least two persons.

s 21A(2)(g) – injury, emotional harm, loss or damage caused by offender was substantial

In *Heron v R*¹¹⁵ it was held that the sentencing court erred in treating the infliction of a significant laceration to the

¹¹² [2006] NSWCCA 337

¹¹³ [2006] NSWCCA 224

¹¹⁴ [2007] NSWCCA 152

¹¹⁵ [2006] NSWCCA 215

victims neck or its potential consequences had timely first aid not been provided, as an aggravating factor in a case where the offender was charged with the offence of maliciously inflicting grievous bodily harm.

In *Aslett v R*¹¹⁶ it was confirmed that this factor is not limited to injury, emotional harm, loss or damage to the victim but potentially extends to that suffered by the victim's spouse and dependents.

s 21A(2)(i) Offence committed without regard for public safety

In *Ward v R*¹¹⁷ it was held that the sentencing court erred in taking into account, as an aggravating factor, that the three offences of supplying a prohibited drug were committed without regard for public safety, since that was either an inherent feature of the offence or added nothing to the criminality in question. The courts have taken an inconsistent approach in the application of this factor¹¹⁸ and the relevant test for its application is yet to be settled. It has proved to be an occasion for error in relation to offences of dangerous driving occasioning death or grievous bodily harm, where its presence or otherwise seems to depend upon how heinous the court regarded the particular transgression.

s 21A(2)(k) Offender abused a position of trust or authority in relation to the victim

Although error was not found in relation to this relevant aggravating factor, the decision in *KJH v R*¹¹⁹ is of interest in so far as it makes it clear that not all offences involving

¹¹⁶ [2006] NSWCCA 360

¹¹⁷ [2007] NSWCCA 22

¹¹⁸ as noted *Elyard v R* [2006] NSWCCA 43

¹¹⁹ [2006] NSWCCA 189

the sexual abuse of children necessarily involve, as an element thereof, an abuse of a position of trust or authority, and that in appropriate circumstances such factor can be treated as an aggravating factor. There is not a bright line between cases where this will be an available aggravating factor and those where it will not constitute such as is evidenced by the decision in *R v Higgins*.¹²⁰

s 21A(2)(l) Victim was vulnerable

In *JAH v R*¹²¹ it was held that taking into account the vulnerability of the victim, as an aggravating factor in relation to offences involving the sexual assault of a child under the age of 10 years was in error, since that factor was an element of the offence. In *Stevens v R*¹²² it was held that the fact that the victim lived in a rural and isolated location could provide a basis for a finding of vulnerability; while a similar finding was made in *Dyer v R*¹²³ concerning a victim who was attacked while seated in an isolated area of a train.

s 21A(2)(m) Offence involved multiple victims or a series of criminal acts

Difficulties can arise in determining whether the number of acts involved, for example, in an ongoing supply of drugs charge, go beyond the elements of the offence so as to invoke an application of this factor, as can be seen from the decisions in *Smith v R*,¹²⁴ *JAH v R*,¹²⁵ and *Aslett v R*.¹²⁶ Error

¹²⁰ [2006] NSWCCA 326

¹²¹ [2006] NSWCCA 250

¹²² [2007] NSWCCA 152

¹²³ [2006] NSWCCA 274

¹²⁴ [2007] NSWCCA 138

¹²⁵ [2006] NSWCCA 250, applying *R v Tadrosse* [2005] NSWCCA 145

¹²⁶ [2006] NSWCCA 360

was found in the application of this factor in *McCabe v R*¹²⁷ and also in *Stratford v R*.¹²⁸

s 21A(2)(n) Offence was part of a planned or organised criminal activity

There is some difficulty in establishing a bright line between a planned criminal offence and one that is part of a planned or organised criminal activity, as the discussion in *Fahs v R*¹²⁹ reveals. Error was not found in that case it being observed that:

...it is not an inherent characteristic of supplying drugs that it is part of a planned or organised criminal activity.¹³⁰

Error was found in *Reaburn v R*¹³¹ on the basis that the relatively low level of planning involved in the sexual offence charged, did not justify a finding that that this aggravating factor was invoked.

b) s 21A(2)(d) and s 21A(4) – The offender has a record of prior convictions

This provision has been the occasion of consistent error, arising from the failure of sentencing judges to give effect to the direction in s 21A(4) to the effect that regard is not to be had to any aggravating (or mitigating) factor if it would be contrary to any rule of law. As has been pointed out, on many occasions, the common law does not regard the existence of a record of prior convictions as a factor aggravating the offender's criminality. It is to be treated as a relevant factor where it is such as to indicate

¹²⁷ [2006] NSWCCA 220

¹²⁸ [2007] NSWCCA 279

¹²⁹ [2007] NSWCCA 26

¹³⁰ at [227]

¹³¹ [2007] NSWCCA 60

that there is a need for increased retribution, deterrence or protection of the community¹³² and in a manner consistent with the principles of proportionality.¹³³ Sentencing judges are expected to make clear in the reasons for sentence how the prior record is treated.

Again, this is an area where there is no bright line between the circumstances in which the prior record can properly be used as an aggravating factor and those where it cannot be used. Error was found in its use in the cases of *Thorne v R*,¹³⁴ *Darrigo v R*,¹³⁵ *Ghazi v R*¹³⁶ and *McCabe v R*.¹³⁷

c) s21A(2)(f) – gratuitous cruelty

In two cases, *Curtis v R*¹³⁸ and *Stevens v R*¹³⁹, error was found in the finding that this factor was present, either because the evidence did not sustain the finding or because the act in question was not related to the offence charged.

d) s 21A(2)(j) Offender was on conditional liberty at the time of the offence

It was held in *Frigiani v R*¹⁴⁰ that the fact that the offender was at liberty pursuant to a s 10 bond at the time of the offence could properly be taken into account as an aggravating factor, distinguishing *R v Price*¹⁴¹ where it was held that the imposition

¹³² *R v Johnson* [2004] NSWCCA 76; *R v Wickham* [2004] NSWCCA 193

¹³³ *R v McNaughton* (2006) 66 NSWLR 566 and *Aslett v R* [2006] NSWCCA 360

¹³⁴ [2007] NSWCCA 10

¹³⁵ [2007] NSWCCA 9

¹³⁶ [2006] NSWCCA 320

¹³⁷ [2006] NSWCCA 220

¹³⁸ [2007] NSWCCA 11

¹³⁹ [2007] NSWCCA 152

¹⁴⁰ [2007] NSWCCA 81

¹⁴¹ [2005] NSWCCA 285

of a bond without proceeding to a conviction was not capable of being taken into account as a factor within s 21A(2)(d).

Error was found in *R v Wallace*¹⁴² where the sentencing judge had held, in effect, that this aggravating factor did not come into play, unless the prior offence in respect of which the offender was on parole was of a similar type to the offence before the court.

Mitigating factors

a) s 21A(3)(e) Offender does not have prior record (or significant record)

In *R v MAK* and *R v MSK*¹⁴³ it was held that the sentencing court was in error in taking this matter into account as a mitigating factor, in circumstances where the offender had a record of prior convictions when he appeared for sentencing although they had been imposed in relation to offences committed after the offence before the court.

(b) s 21A(3)(i) Offender has shown remorse, eg. by making reparation or in any other manner

In *R v Cage*¹⁴⁴ error was found in giving the offender the benefit of this mitigating factor in circumstances where there was no evidence of reparation having been made, it being pointed out that before this factor comes into play, there has to be evidence of reparations having been made by the time of the sentence.

¹⁴² [2007] NSWCCA 63

¹⁴³ [2006] NSWCCA 381

¹⁴⁴ [2006] NSWCCA 304

(c) s21A(3)(j) Offender was not fully aware of the consequences of the offence

In *R v JRD*¹⁴⁵ error was found in allowing the offender the benefit of this mitigating factor since there was no basis for that finding on the evidence.

Aggravating and mitigating factors generally

In *Marshall v R*¹⁴⁶ the court emphasised the need for the sentencing court to identify in the reasons for sentence, inter alia, the factors falling within s 21A(2) or (3) that were of significance in determining the sentence, the failure to do so in that case being one of several matters in which it was held that the sentencing exercise had miscarried. Similar observations were made in *Ghazi v R*¹⁴⁷, where Rothman J noted¹⁴⁸ the inappropriateness of judges including some “overriding limitation or intention clause”, in the remarks on sentence, which is designed to convey that all relevant sentencing principles have been respected and applied.

¹⁴⁵ [2007] NSWCCA 55

¹⁴⁶ [2007] NSWCCA 24

¹⁴⁷ [2006] NSWCCA 320

¹⁴⁸ at [28]

Annexure D: Sentencing Council Publications

Reports

The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices

Report on Sentencing Trends and Practices 2005 - 2006

Seeking a Guideline Judgment on Suspended Sentences

Abolishing Prison Sentences of Six Months or Less: Final Report

Abolishing Prison Sentences of Six Months or Less: Issues Paper

Whether Attempt and Accessorial Offences should be included in the Standard Non-Parole Sentencing Scheme

Firearm Offences and the Standard Non-Parole Sentencing Scheme

How Best to Promote Consistency in the Local Court

Monographs

Judicial Perceptions of Fines as a sentencing option: A survey of NSW Magistrates

Information booklets

The Sentencing Information Package (with the Attorney General's Department of NSW)

Papers

The Role of Sentencing Advisory Councils

The NSW Sentencing Council

Annexure E: Sentencing Council Member Profiles

Current members

The Hon James Wood AO QC, Chairperson

The Hon James Wood AO QC, who commenced his term as chairperson of the NSW Sentencing Council on 28 April 2006, has been the Chairperson of the NSW Law Reform Commission since January 2006. He was Chief Judge at Common Law, 1998-2005, having been appointed a Supreme Court Judge in 1984. He was also Commissioner of the Royal Commission into Police Corruption, 1994-1997 and previously a full-time Commissioner with the Law Reform Commission, 1982-1984.

The Hon John Dunford QC, Deputy Chairperson

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

Mr Howard Brown OAM, Victims of Crimes Assistance League

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

Mr N R Cowdery AM QC, Director of Public Prosecutions

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

Assistant Commissioner Catherine Burn APM, NSW Police

Assistant Commissioner Catherine Burn joined the NSW Police in 1984, and has spent much of her career working as a criminal investigator, including general detectives, homicide, strike forces and special crime and internal affairs. She was appointed as Assistant Commissioner, Professional Standards, in December 2006.

Ms Burn holds a Bachelor of Arts degree, an Honours Degree in Psychology and a Masters of Management. Her considerable achievements include receipt of the National Medal (2000); the Police Medal for 20 years service (2004); two Commissioner's Commendations; and the Australian Police medal (2007). Assistant Commissioner Burn was the Burwood Citizen of the Year (2005); 2007 Woman of the Year for the Heffron electorate (Redfern) and the International Women's Day 2007 NSW Woman of the Year for achievement in valuing difference - Leading change.

Mrs Jennifer Fullford, Community Representative

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

Ms Martha Jabour, Homicide Victims Support Group

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

Mr Norman Laing, Barrister and Aboriginal Representative

Mr Laing was a full time soldier with the Australian Regular Army from 1995 to 2003 whilst completing his Bachelor of Laws. He also served with the Royal Australian Army Legal Corps as well as with the Australian Military Prosecutions Office. In 2002, after completing a fulltime volunteer position with the Aboriginal Legal Service, Mr Laing was one of the first indigenous graduates of the Bachelor of Laws and Indigenous Australian Law degrees offered by the University of Technology, Sydney. Mr Laing recently held the position of Indigenous Research Associate for the Federal Court of Australia. He now works as a barrister in Sydney.

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

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

Mr Mark Ierace SC, Senior Public Defender

Mr Ierace was admitted as solicitor of the NSW Supreme Court in 1979 and as a Barrister in 1981, and was appointed as Senior Counsel in 1999. He has practised as a Public Defender, has been a consultant to the NSW Law Reform Commission, and In-house Counsel to the Commonwealth Director of Public Prosecutions. From 2000 to 2004 he was Senior Prosecuting Trial Attorney with the United Nations International Criminal Tribunal for the former Yugoslavia, The Hague, The Netherlands. Mr Ierace was appointed as Senior Public Defender in 2007.

Ms Jennifer Mason, Department of Juvenile Justice

Jennifer Mason was appointed Director General of the Department of Juvenile Justice in October 2005. She worked for a decade for the Attorney General of NSW and the former Minister of Corrective Services, and previously held positions in the Office of the Ombudsman and the Legal Aid Commission. Ms Mason is responsible for the management of juvenile facilities across the state and the community and conferencing functions of the Department of Juvenile Justice, and is a member of the Justice Health Board. Ms Mason was appointed to the Sentencing Council in 2007.

Ms Laura Wells, Criminal Law Review Division

Ms Laura Wells was admitted as a Solicitor in NSW in 1995 and as a Barrister in 1996, and appointed as a Crown Prosecutor in 1996. She has been Director of the Criminal Law Review Division, NSW Attorney General's Department since January 2006, and was appointed to the Sentencing Council in 2007.

Mr Ronald Woodham, PSM, Corrective Services

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

In 1980 Mr Woodham has received a commendation from the Minister for Corrective Services for bravery in the line of duty and has received five citations for devotion to duty.

Retired members

As previously mentioned, the following members retired from the Council during 2006-07:

Hon J P Slattery AO QC, Deputy Chairperson

The Honourable John Patrick Slattery AO QC was appointed as a Judge of the Supreme Court in 1970 and Chief Judge at Common Law in 1984, a position he held until his retirement in 1988. He has held a number of Chair and Committee member appointments including Royal Commissioner of the Chelmsford Private Hospital and Mental Health Services between 1988 and 1990, Chair of the NSW Parole Board between 1976 and 1983 and Director of Langton Clinic between 1972 and 1981. Mr Slattery retired as the Deputy Chairperson of the Sentencing Council in March 2007.

Assistant Commissioner Chris Evans APM, NSW Police

Assistant Commissioner Evans retired in 2007 after more than 40 years of Service for the New South Wales Police. Mr Evans has completed a Bachelor of Policing Studies at Monash University, Melbourne and has received numerous medals for his service within NSW Police. He brought to the Council considerable expertise and experience in law enforcement

The Hon Judge Peter Zahra SC, (former Senior Public Defender)

Peter Zahra SC, former Senior Public Defender in New South Wales, resigned from the Sentencing Council in 2007 after being appointed as a Judge of the District Court.

Mr Chris Craigie SC, Acting Senior Public Defender

Mr Craigie was admitted as a Solicitor in 1976 and as a Barrister in 1980, and was appointed as Senior Counsel in 2001. Mr

Craigie was appointed to the Sentencing Council in 2007 and replaces the Hon Judge Peter Zahra as the Council member with expertise in defence matters. He now holds office as the Commonwealth Director of Public Prosecutions.