# COURT OF CRIMINAL APPEAL UPDATE

# REVIEW OF 2014

***Chrissa Loukas SC, Barrister, Public Defender, Public Defenders Chambers***

***Updated and presented by***

***Richard Wilson, Public Defender, Public Defenders Chambers***

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## INTRODUCTION

The relentless march of Criminal Legislation continued apace in 2014 in New South Wales, in particular the ***Bail Act*** and ***Bail Amendment Act*** are of note.

The High Court had much to say in the areas of the role of the prosecution and sentencing range (***Barbaro; Zirilli*** [2014] HCA 2; (2014) 305 ALR 323); the issue of the NSW Crime Commission and fair trial (***Lee*** [2014] HCA 20); and the application for extension of time to appeal to the Court of Criminal Appeal (***Kentwell; O'Grady*** [2014] HCA 37).

## SENTENCE APPEAL CASES

### 1. SENTENCING PROCEDURES

In relation to standard non-parole periods (SNPPs) (ss 54A-D ***Crimes (Sentencing Procedure) Act* 1999**) the High Court in ***Muldrock*** (2011) 244 CLR 120 stated that when sentencing for a SNPP offence a Court is not to engage in a two-stage approach commencing with an assessment of whether the offence falls within the middle range of objective seriousness and, if so, by inquiring if there are matters justifying a longer or shorter period: ***Muldrock*** at [28], [32]; ***Koloamatangi*** [2011] NSWCCA 288 .

The ***Crimes (Sentencing Procedure) Amendment (Standard Non-Parole Periods) Act 2013*** commenced on 29.10.2013 giving legislative effect to ***Muldrock*** through amendments to ss 54A-54B ***Crimes (Sentencing Procedure) Act*****.** The amendments apply to offences committed prior to the commencement of the amendments but does not affect any sentence imposed prior to the amendments. The new provisions have not yet arisen for appellate consideration.

Post-***Muldrock***, one issue is the question of the degree to which a sentencing judge should specify the level of objective seriousness.[1] The CCA has said that while a finding as to the level of objective seriousness of a SNPP offence is not mandatory, making such a finding is also not erroneous.[2] The exercise of assessing objective seriousness plays a lesser role in sentencing for SNPP offences, however, it nevertheless remains desirable for a sentencing judge, having reviewed the objective features of the matter in the remarks on sentence to the degree necessary, to make some assessment of objective seriousness: ***Stewart*** [2012] NSWCCA 183 at [41]; ***Ehrlich*** (2012) 219 A Crim R 415; ***Muldrock*** at [27]. The objective gravity of the crime may be considered as part of the process of instinctive synthesis of sentencing: ***Beldon*** [2012] NSWCCA 194 at [78]; ***Zreika*** (2012) 223 A Crim R 460 at [46].

#### *Assessment of objective seriousness critical to sentencing process*

In ***Campbell*** [2014] NSWCCA 102 (Crown appeal) the Crown submitted there was no real attempt by the judge to place the offence on any scale of objective seriousness. Allowing the appeal, the CCA stated that an assessment of objective seriousness is critical to the sentencing process. The respondent was sentenced for break and enter a dwelling house in circumstances of special aggravation (s 112(3) ***Crimes Act*** - maximum penalty 25 years imprisonment and a SNPP 7 years). The respondent broke into his ex-girlfriend's home, removed a rifle from her safe and, when she and her partner came home, pointed the rifle at her head. The judge had imposed a sentence of 3 years 11 months, NPP 2 years 1 month.

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[1] See The Honourable Justice RA Hulme, "After Muldrock – Sentencing for Standard Non-Parole Offences in NSW", ***Judicial Officers' Bulletin***, November 2012, Vol 24, No 10

[2] Ibid citing *Butler* [2012] NSWCCA 23 at [25]; *Lawson* [2012] NSWCCA 56 at [19]; *DAJ* [2012] NSWCCA 143 at [20]; *DS* [2012] NSWCCA 159 at [142]; *Williams* [2012] NSWCCA 172 at [35]–[36]; *Aldous* [2012] NSWCCA 153 at [33].

Simpson J (Hall J agreeing; Harrison J dissenting as to the importance of an assessment of objective seriousness, and as to the total sentence after appeal) made the following points:

. The assessment of objective seriousness is critical to the sentencing process. There is nothing in ***Muldrock*** (2011) 240 CLR 120 that cuts across this principle: at [27]; ***Dodd*** (1991) 57 A Crim R 349; ***Markarian*** (2008) 228 CLR 357.

**.** ***Muldrock*** exposed error in over emphasising the assessment of objective gravity in SNPP offences, of notional offences in the mid-range of objective seriousness. It does not preclude proper attention being paid to the objective seriousness of the particular offence under consideration: at [27]; ***Koloamatangi*** [2011] NSWCCA 288.

. In respect of SNPP offences, two "legislative guide posts" are observed - the maximum sentence and the SNPP. A "legislative guide post" is an instrument of measurement. Standing alone, it is meaningless. It is used to measure the relevant features of a particular instance of a crime against (in the case of the maximum penalty) a worst case: see ***Markarian*** at [30]-[31]; (in the case of the SNPP) an offence in the mid-range of objective seriousness: at [28].

. Objective seriousness is a relative concept. A maximum penalty of 25 years for a s 112(3) offence reveals the legislature sees such offences (measured against other offences) as serious - other than life imprisonment, 25 years is the longest maximum sentence. For sentencing, it is also necessary the particular offence be assessed against other instances of such offences. This is often done instinctively, by sentencing judges with the benefit of experience of other such offences: at [29].

***Campbell*** is referred to in two cases. In ***Biles*** [2014] NSWCCA 170 (s 112(3) SNPP offence) the appellant submitted that while the judge referred to matters relevant to objective seriousness, he did not announce a conclusion as to the level of that seriousness, and that a number of factors to which the judge had not made reference should have led to a finding of "lower end of the scale of seriousness": at [19]. Rejecting this ground, Bathurst CJ and Adams and R A Hulme JJ said first, one may infer from the judge's recitation of the facts and various aggravating factors together with the sentence imposed that the judge regarded this an offence of greater seriousness: citing ***Stewart*** at [42]. Second, the experienced criminal practitioner at sentence made no submission about the level of objective seriousness, making no attempt to identify matters relevant to an assessment of seriousness such as the factors listed in the written submissions to this court: at [18]-[19].

***West*** [2014] NSWCCA 250 (drug offences) did not involve a SNPP offence. Allowing the applicant's appeal, the CCA held the judge failed to assess objective seriousness. Adamson J (Hoeben CJ at CL and RA Hulme J agreeing), citing ***Campbell***, agreed that the assessment of objective seriousness is an important part of sentencing. The remarks on sentence contained no assessment of the objective seriousness or of the offender's moral culpability. It is not satisfactory that an appeal court is left to undertake an analysis of exchanges between the bench and counsel during submissions in an attempt to ascertain the judge's reasons for determination: ***DPP (NSW) v Illawarra Cashmart Pty Ltd*** [2006] NSWSC 343; 67 NSWLR 402 at [19]. The latitude afforded to remarks on sentence given ex tempore by busy judges does not entitle this Court to infer that a matter as fundamental to the sentencing process as the assessment of objective seriousness was taken into account when it was not addressed in the remarks: at [27]-[28].

In ***Ninness*** [2014] NSWCCA 288 the CCA referred to cases where although the judge made no specific assessment of the objective seriousness of the offending, the court found the judge had implicitly done so: at [68]-[75]; ***Simpson*** [2014] NSWCCA 23; ***Delaney v R*****;** ***R v Delaney*** [2013] NSWCCA 150.

***Fact finding – impermissible use of findings made by another judge in relation to co-offender***

In ***Baquiran*** [2014] NSWCCA 221 the sentencing judge erred in finding the offender was a principal in a drug supply based on findings made by another judge who had sentenced a co-offender. This was an impermissible use of that other judge's findings. Those findings were relevant to identify the basis upon which the co-offender had been sentenced and in that sense were part of the factual circumstances to be taken into account in sentencing the offender (***Tisalandis*** [1982] 2 NSWLR 430 at 434-5 per Street CJ). However the offender's role had to be determined by reference to the facts in evidence, essentially those set out in the Statement of Agreed Facts. Sentences of co-offenders may occur on differing factual bases if the evidence before the sentencing judges differs: ***Chandler*** [2012] NSWCCA 135 at [6]; ***Ith*** [2013] NSWCCA 280 at [61]. Material in relation to the sentencing of the co-offender was tendered without objection, however, the tender was for the former purpose and not to be used as evidence of truth of matters asserted or accuracy of findings in them: at [27].

***Fact finding – appeal - adverse inference drawn by judge from agreed facts***

In ***Lay*** [2014] NSWCCA 310 the judge inferred from the Statement of Agreed Facts that the offender became involved in a drug operation several months before his arrest, not on the day of his arrest as he claimed in his police record of interview. The CCA held this was open to the judge.

The applicant did not give evidence offering an innocent explanation regarding agreed facts from which the judge drew adverse inferences. While the applicant was not obliged to give evidence, the fact that he did not, quite properly allowed for a contrary inference to be safely drawn, and beyond reasonable doubt, from the agreed facts: at [50].

The fact an alternate inference was open does not mean the judge's finding cannot stand. The distinction between a sentencing judge's assessment of facts and what they are capable of proving, and factual findings which the CCA might make if it were to furnish its own view of agreed facts, must be maintained: at [51]; ***Aoun*** [2011] NSWCCA 284 at [8]. The CCA has no power to substitute its own factual findings for those of the sentencing judge in the absence of error being demonstrated: at [52].

***Credit for time served in custody on unrelated matter leading to acquittal or discharge (known in Victoria as "dead time") is not relevant to sentencing – Five judge bench decision – correctness of R v Niass (NSWCCA, 16 November 1998, unreported)***

In ***Hampton*** [2014] NSWCCA 131 [Five judge bench] the CCA upheld the correctness of ***Niass*** (NSWCCA, 16 November 1998, unreported) and other similarly decided cases regarding credit for time served in custody on unrelated matters. ***Niass*** makes clear that a period in custody for an unrelated matter leading to acquittal or discharge, is not, in and of itself, relevant to the sentencing exercise: at [27], [35].

Evidence showed the applicant had spent 4 months in custody on an unrelated matter, which was not referable to any sentence imposed and appeared to be from a bail refused matter on which he was eventually found not guilty. The applicant submitted the sentencing Judge was bound to consider this matter and take it into account on sentence: at [25]-[26].

Time for which an offender has been held in custody in relation to the offence for which sentence is to be passed is a mandatory factor to be taken into account on sentence: ss 24(a), 47(3) ***Crimes (Sentencing Procedure) Act 1999***. There is nothing in s 21A ***Crimes (Sentencing Procedure) Act*** which supports the Applicant's submission.

Later decisions confirm ***Niass***. Some have accepted that other events which occur during such a period in custody may bear upon sentence. However, that is because they relate to the offender's subjective circumstances: ***Evans*** (NSWCCA, 21 May 1992, unreported); ***Webster and Jones*** (NSWCCA, 3 August 1992, unreported); ***Chung*** (NSWCCA, 9 March 1994, unreported); ***David*** (NSWCCA, 20 April 1995, unreported); ***Hudd*** (NSWCCA, 5 December 1995, unreported); ***Baartman*** (NSWSC, Dunford J, 18 December 1988, unreported); ***Karageorge*** [1999] NSWCCA 213; ***Giam (No. 2)*** [1999] NSWCCA 378; ***Rozynski*** [2001] NSWCCA 257; ***Huntingdon*** [2007] NSWCCA 196; ***Kerr*** [2008] NSWCCA 201.

These decisions confirm that bare reliance on a period in custody for an unrelated matter, without more, is extraneous to the exercise of sentencing discretion, particularly where there is a broken period of custody, as in this case: at [30]. If events occurred during the period in custody which could aid the offender's case on sentence, such as marital breakdown, loss of employment, illness or other matters going to subjective circumstances for offences later committed, then that may be relevant: at [31]. The CCA held it has not been established that any decision under challenge was wrong and should not be followed: at [35].

## 2. MITIGATING FACTORS

### *Drug addiction – failure to allow measure of leniency – real rehabilitative progress*

In ***Brown*** [2014] NSWCCA 335 the judge failed to give appropriate weight to the origin of the applicant's drug addiction and his rehabilitation. The applicant became drug addicted at the age of 9 or 10. The CCA at [25] referred to the following passage by Wood CJ at CL in ***Henry*** (1999) 46 NSWLR 346:

> "[273]…..... (c) It may also be relevant as a subjective circumstance, in so far as the origin or extent of the addiction, and any attempts to overcome it, might:
>
> (i) impact upon the prospects of recidivism/rehabilitation, in which respect it may on occasions prove to be a two-edged sword (eg Lewis Court of Criminal Appeal New South Wales 1 July 1992)
> ;
>
> (ii) suggest that the addiction was not a matter of personal choice but was attributable to some other event for which the offender was not primarily responsible, for example where it arose as the result of the medical prescription of potentially addictive drugs following injury, illness, or surgery (cf Hodge Court of Criminal Appeal New South Wales 2 November 1993; and Talbot); or where it occurred at a very young age, or in a person whose mental or intellectual capacity was impaired, so that their ability to exercise appropriate judgment or choice was incomplete;
>
> (iii) justify special consideration in the case of offenders judged to be at the "cross roads": Osenkowski(19882) 5 A Crim R 394."……."

Further (citing Simpson J in ***Henry*** at [336], [344]), drug addiction may have its origins in social disadvantage, poverty, emotional, financial, or social deprivation, poor educational achievement, unemployment. Where such circumstances have been the foundation for the drug addiction, and part of the causal chain leading to the commission of crime, then it would be appropriate for the rehabilitative aspects of sentencing to assume a more significant role. In an appropriate case, rehabilitation might outweigh other sentencing factors. There would need to be strong evidence of real progress towards actual rehabilitation: at [26].

The CCA allowed the appeal. The applicant's pattern of offending had its origin in his disturbed background and the drug addiction attributable to it. Addiction commenced at 9 or 10, an age at which use of drugs could hardly be classified as a personal choice, followed by drug abuse and criminal activity. At age 28, the applicant defeated his drug addiction and was on the path to rehabilitation: at [24]. There was force in defence counsel's submissions at sentence that the

applicant was "a classic product" of his childhood and was "at a cross-roads": at [28].

***Error in failing to have proper regard to the offender's voluntary cessation of criminal activity and reporting of the offence to the police***

In ***RCW (No 2)*** [2014] NSWCCA 190 the offender was involved in a drug importation under duress but withdrew after a short period, reported the matter to police and then continued his participation to assist the police investigation. The CCA held that the judge failed to have proper regard to the offender's voluntary cessation of criminal activity and reporting of the offence to police.

The voluntary cessation of criminal activity can be relevant in a number of respects: it served a public policy in encouraging offenders to cease their criminal activities; specific deterrence could be given little or no weight; it was evidence of remorse, contrition and rehabilitation; and may support the proposition that the offence was committed due to need rather than greed: at [52]; ***Burns*** [2007] NSWCCA 228.

The judge did not express any finding about personal deterrence and rehabilitation: see s 16A(2)(j),(n) ***Crimes Act 1914*** **(Cth)**. It was open to find the applicant was unlikely to re-offend and had good prospects of rehabilitation: at [56]-[58]. The applicant should not have been sentenced to provide an example of the consequences of becoming involved in a drug importation, but of what might become of someone who has the good conscience to come forward and assist authorities: at [74].

***s 21A(3)(g) Crimes Sentencing Procedure Act 1999 "unlikely to re-offend" - s 21A(3)(h) "good prospects of rehabilitation" - failure to consider in child sexual assault case***

In ***TU*** [2014] NSWCCA 155 (child sexual assault offences) the judge erred in making no finding as to prospects of re-offending and rehabilitation. The judge had made only brief reference to the concerns of the experts' reports. It remains the responsibility of a sentencing Judge to take account of the need to protect the community, and to make an assessment of the material before the Court, including an assessment of the offender's prospects of rehabilitation: at [54]; ***Beldon*** [2012] NSWCCA 194; ***Bugmy*** (1990) 169 CLR 525. In this case there was material addressing the submission that the applicant had good prospects of rehabilitation and low prospects of reoffending. It is an important aspect of the sentencing judge's task to ascertain the risk posed by the applicant especially in cases of child sexual assault. It was incumbent on the sentencing judge to address the applicant's prospects of rehabilitation and reoffending. Given the submissions made by the applicant to the judge, the significance of the topic of the applicant's prospects of re-offending to the sentencing exercise and the body of material tendered, one would expect further discussion if the matter was truly addressed. If the sentencing judge was not satisfied by the material as to whether any finding in relation the applicant's prospects of rehabilitation could be made then it can be expected that the judge would have so stated: at [53]-[56].

***Relevance that offender is mother of young child at time of sentence***

In ***HJ*** [2014] NSWCCA 21 the judge failed to have proper regard to the fact the applicant (a juvenile) was the mother of a young baby at sentence. First, the applicant was the mother of a young baby and the effect of separation from her child was relevant and needed to be considered. Second, if exceptional circumstances could have been shown it was relevant to have regard to any effect on the child. Third, there were no facilities for the applicant to be with her baby while in juvenile custody and consideration should have been given to declining to make an order the term be served in juvenile detention: at [76].

## 3. AGGRAVATING FACTORS

***s 21A(eb) Crimes (Sentencing Procedure) Act – Aggravated break, enter and steal - offence committed in home of victim - aggravating factor***

***Bennett*** [2014] NSWCCA 197 held that for an offence of Aggravated break, enter and steal and commit indictable offence under s 112(2) ***Crimes Act***, it is not an element of the offence that the offence was committed in the home of the victim. Therefore that the offence is committed in a *home* can be taken into account as an aggravating factor under s 21A(2)(eb) ***Crimes (Sentencing Procedure) Act***. Section 112(2), by reference to s 112(1), is concerned with offences committed in "any dwelling-house or other building". "Dwelling house" is defined in s 4 ***Crimes Act***. That a "dwelling house" includes unoccupied premises, and that s 112(2) envisages break and entry into buildings other than a dwelling house, both indicate that the offence is *not* limited to buildings that constitute the home of the victim or other person: at [9]-[13].

***s 21A(2)(g) – substantial harm - harm suffered by child sexual assault victims – Aggravated sexual assault of child under 10 - s 66A Crimes Act***

In ***Gavel*** [2014] NSWCCA 56 the offender was convicted of aggravated sexual assault of child under 10 - 66A(2) ***Crimes Act.*** The sentencing Judge stated that, without seeking in any way to trivialise or minimise the effect of the offences upon the victim, *"this is not a matter where the harm is a matter of aggravation"* thus addressing s.21A(2)(g) ***Crimes (Sentencing Procedure) Act 1999*** as to whether the injury, emotional harm, loss or damage caused by the offence is substantial: at [104].

Sentencing judges are entitled to proceed on the basis that serious sexual assaults can be expected to have adverse psychological consequences and thus care needs to be taken to avoid double counting with regard to the aggravating feature of substantial emotional harm: at [106]; ***Stewart*** [2012] NSWCCA 183 at [61]. In the area of sex offences committed against young children, s.66A(2) provides for a very substantial penalty. It may be taken that a factor which contributes to the setting of this penalty (and the SNPP) is the expectation that substantial harm will result to a young child victim of sex offences: at [107]. The victim impact statement pointed to many of the adverse psychological consequences affecting the 8 year old victim including anxiety, confusion, mistrust, shame, anger and guilt: at [109].

Child sex offences have profound and deleterious effects upon victims for many years, if not the whole of their lives: at [110]; ***CMB*** [2014] NSWCCA 5; and will result in long term and serious harm, both physical and psychological: ***G*** [2009] 1 AC 92; ***SW*** [2013] NSWCCA 255 at [52]. This factor no doubt contributes to the setting of the heaviest maximum penalty known to the criminal law for s.66A(2) offences, with a SNPP of 15 years. It is important that sentences for s.66A(2) offences reflect this grave element implicit in the offence itself: at [111]. This is an important feature in the present case. Young child victims are especially vulnerable. It is important that sentences passed for s.66A(2) offences recognise the harm done to the victim of the crime: at [112]; see s 3A(g) ***Crimes (Sentencing Procedure) Act 1999***.

***s 21A(2)(g) – substantial harm - emotional harm suffered by child victims***

In ***Bennett*** [2014] NSWCCA 197 the offender was convicted of aggravated break, enter and steal and commit indictable offence under s 112(2) ***Crimes Act***. The offender entered the victim's home

and punched and threatened her in the presence of her two young children. The judge erred in not finding the harm suffered by the children was 'substantial' and therefore an aggravating factor under s 21A(2)(g). One child was diagnosed with post-traumatic stress disorder, the other child displayed symptoms consistent with post-traumatic stress and depression. These were not merely transient injuries and constituted harm significantly more deleterious than the harm that may be expected to result from an offence of this kind: at [40]-[43]; ***Youkhana*** [2004] NSWCCA 412 at [26].

***Relevance of motive - offence which involves the deliberate infliction of violence, threats of harm or deliberate damage to property***

In ***Carr*** [2014] NSWCCA 202 the applicant was sentenced for making an explosive device with intent to injure (s 55(a) ***Crimes Act***). The CCA held that the judge erred in finding that the applicant's motive (that he sent the parcel bomb to punish the victim for making advances to his daughter) increased the objective seriousness of the offence.

The relevance of motive will depend upon the particular facts. Motive may be important to factors in the exercise of the sentencing discretion but may in some cases point in different directions. It may mitigate the objective seriousness of the offence yet indicate the need for a more severe sentence in order to address issues of deterrence: at [33]; ***Mitchell & Gallagher*** (2007) 177 A Crim R 94.

Whether motives of revenge or retaliation at some perceived wrong aggravate the objective seriousness of an offence has not been considered. This is likely because, irrespective of whether an offender is motivated by vengeance, grievance or hatred to commit an offence which involves the deliberate infliction of violence, the threats of harm or damage to property, it is the nature of the particular offending and its consequences, and the offender's appreciation of the consequences of the offending, that informs an assessment of objective seriousness: at [34]; ***Muldrock*** *(2011)* 244 CLR 120 at [27]. Whilst an assessment of an offender's moral culpability is part of an assessment of objective seriousness, care must be taken that an offender's motives (which might, in a given case, render his or her moral culpability of a high order) do not overwhelm the assessment of objective seriousness referable to the offending conduct itself: at [34].

Here, the applicant's motives did not elevate his moral culpability in any relevant sense nor the objective seriousness. Otherwise an untargeted delivery of a parcel bomb with a generalised intent to cause harm to whomever opened it might be regarded as less morally culpable. That cannot be correct. The only significance of the applicant's motive was to meet the need for the sentence to address both general and specific deterrence: at [35].

## 4. DISCOUNTS

***Plea of guilty - Discount for utilitarian value of guilty plea withheld***

In ***Milat; Klein*** [2014] NSWCCA 29 (murder sentence) it was not an error to decline to allow a discount for M's early plea of guilty due to the extreme seriousness of the murder and future dangerousness. A reduction of a sentence in recognition of the utilitarian value of a guilty plea and to encourage early pleas of guilty is recognised. But there are circumstances in which the protection of the public requires a long sentence to be imposed so that no discount is appropriate: ***Thomson; Houlton*** (2000) 49 NSWLR 383 at [157]-[158]. There are crimes that so offend the public interest that the maximum sentence, without any discount for any purpose, is appropriate. This includes situations in which a life sentence is imposed, notwithstanding the plea: at [73]-[75]; see ***Robinson*** [2002] NSWCCA 359; ***Kalache*** [2000] NSWCCA 2; ***Stani-Reginald*** [2013] NSWSC 567; ***Corrie Loveridge; AB*** [2013] NSWSC 1591. *Note: An application for special leave to appeal to the High Court was refused.*

***Plea of guilty - Error in failing to refer to plea of guilty***

In ***Woodward*** [2014] NSWCCA 205 the judge failed to refer to the applicant's plea of guilty. The record should reflect clearly and transparently that the plea has been taken into account and the extent to which it has ameliorated the sentence. A failure to explicitly state that the plea of guilty has been taken into account will generally be taken to indicate it was not given weight: ***Thomson & Houlton*** (2000) 49 NSWLR 383. There are cases where failure to do so has not resulted in interference by this Court, but such cases do not diminish the guideline judgment in ***Thomas & Houlton***. In most cases where this Court has not intervened, the sentencing judge has at least made passing reference to the fact the plea was entered. A discount for the plea of guilty could not be inferred from the sentence originally imposed: at [6]-[8].

***Plea of guilty - Offender believed he had pleaded guilty early***

In ***Atkinson*** [2014] NSWCCA 262 the applicant believed he had entered pleas of guilty to firearm offences at a much earlier stage than was in fact done, and had given those instructions to his legal representatives. The legal representatives were focused upon a more serious conspiracy to murder charge of which the applicant was ultimately acquitted. The evidence established the applicant was not at fault. The judge discounted the sentence by less than 25%. The judge found the reason for the delay to be irrelevant and that it was a matter for the applicant to have given clear and unequivocal instructions if his course was to plead guilty and to ensure that that was done: at [18].

Allowing the appeal, the CCA said this placed too much weight upon the applicant, who was in custody, refused bail, and facing a very serious charge of conspiracy to murder. Moreover, it has not been demonstrated that the delay in entering the pleas of guilty significantly affected their utilitarian value. It is unlikely that these matters would have been disposed of in advance of the conspiracy charge: at [18]-[19]. This was one of those exceptional cases in which the reason for delay must be regarded as being relevant: at [88].

***Offender turned himself into police – may be regarded as assistance to authorities***

In ***Mencarious*** [2014] NSWCCA 104 the offender had turned himself into police. On appeal against sentence, Adams J (Simpson and McCallum JJ agreeing) stated:

> "[22] One other matter requires some short discussion. It will be recalled that the appellant turned himself into police a few hours after committing the murder. This is capable of being regarded as assistance to the authorities within the meaning of s 23 of the ***Crimes (Sentencing Procedure) Act 1999*** **(NSW)** and, given the substantial public interest in encouraging offenders to surrender themselves to police, gives rise to the need to consider whether any downward adjustment should be made to the sentence otherwise appropriate. However, in this case, it is clear that the appellant understood that his identification as the deceased's assailant was inevitable and he approached police in order to make such excuses as he was able in the hope that he might escape punishment …. Accordingly, I would not in this case make an allowance for his surrender to the police. "

***Discount for assistance – onerous imprisonment conditions as a result of assistance are not exceptional circumstances – level of appropriate discount***

In ***Haouchar*** [2014] NSWCCA 227 the judge fixed a combined discount of 50% for the plea of guilty and assistance to authorities. The applicant submitted the discount for assistance to authorities did not reflect the level of assistance, including consideration of the onerous conditions in prison he would have to serve as a result of giving assistance. The CCA dismissed the appeal. Where there will not be more onerous conditions of imprisonment, the reduction for the combined effect of plea of a guilty and assistance should be no more than 40%, other than in exceptional

circumstances: at [37]. Where, as in this case, there will be more onerous conditions of imprisonment, then the combined reduction for the plea of guilty and assistance should be no more than 50%, unless very exceptional circumstances are disclosed. In that latter aspect, onerous conditions of imprisonment are not exceptional circumstances, they are part of the process by which a sentencing judge fixes a figure up to 50% and are a corollary of the assistance granted: at [37] citing ***FS*** [2009] NSWCCA 301 at [21].

***Discount for assistance to authorities – where offender pleads not guilty***

It has been said that a single, combined discount should be given for both a plea of guilty and assistance and that such a discount should not normally exceed 50 per cent: ***SZ*** (2007) 168 A Crim R 249. In ***Z*** [2014] NSWCCA 323 the judge erred in stating he was constrained by the offender's not guilty plea to stop at a discount of 25% for assistance to authorities: at [33]; at [27]. The CCA said that the only constraint is that imposed by s 23(3) ***Crimes Sentencing Procedure Act 1999*** which will not generally be met by allowing a combined discount of more than 50%: at [33]. Section 23(3) states that a lesser penalty imposed under this section must not be unreasonably disproportionate to the nature and circumstances of the offence.

On the authority of ***SZ***, it may appear that an offender who pleads not guilty but provides assistance of the highest order is eligible to have his penalty reduced by the same amount as an offender who provides assistance of the same high order but also pleads guilty at the earliest opportunity. To the extent that there is a possibility of unequal justice, it is resolved by s 23(3). As explained by Howie J in ***SZ***, that provision reflects the common law principle that there is "a bottom line beneath which a sentence cannot legitimately be set". It is recognised that the bottom line ordinarily sits at 50% of the sentence that would have been imposed but for the discounts allowed by the statute. But it does not follow that the Act must be construed with an implied algorithm that a discount for assistance cannot exceed 25%. To construe the Act with that level of mathematical rigidity would come close to punishing some offenders who offer assistance for not pleading guilty: at [34].

## 5. SENTENCING OPTIONS

***Section 11 Crimes (Sentencing Procedure) Act 1999 – Deferral of sentence for rehabilitation, participation in intervention program or other purposes***

Section 11 ***Crimes (Sentencing Procedure) Act 1999*** allows a court to defer the sentencing of an offender for the purpose of rehabilitation or participation in an intervention program.

In ***Farrell*** [2014] NSWCCA 30 the CCA (RA Hulme J; Hoeben CJ at CL and Adams J agreeing) made the following points:

. A s 11 order should not be granted unless there are good reasons for concluding that it is likely to assist the court in determining whether an offender should be sent to gaol or in fixing the length of the sentence or the non-parole period: at [51] citing ***Trindall*** (2002) 133 A Crim R 119

. There must be some assessment of the objective gravity of the offence before consideration can properly be given to making an order under s 11: at [52] citing ***Palu*** (2002) 134 A Crim R 174

. The exercise of the power given under s 11 will inevitably result in delay in the finalisation of the prosecution of the offender. The further delaying of the sentencing of the offender must be *wholly justified in order to ensure that the sentencing discretion is properly exercised*: at [53] citing ***Palu*** (2002) 134 A Crim R 174

. A s 11 remand is <u>not</u> confined to cases where something other than a full-time custodial sentence is contemplated by a sentencing judge if rehabilitation is successful: at [55]; *Trindall* at [64]. (Per RA Hulme J: "[55]: One of the concerns ventilated by the Crown on this appeal was that by making an

order under s 11 the judge must have it in mind that a sentence will be imposed that will not involve any further incarceration. I am not satisfied that this is so. I have mentioned what the judge said about the offender not holding out any false hope and he has referred to the offence as being "a serious one".)

. The fundamental issue posed by an exercise of the discretion in s 11 is whether the adjournment of the imposition of the final sentence to be imposed *assists in the proper determination of that final sentence*: at [58] citing ***Rayment*** (2010) 200 A Crim R 48

. This rationale must be understood as bearing upon the exercise of the discretion afforded by s 11: at [61]

. RA Hulme J referred to ***Trindall*** (2002) 133 A Crim R 119 where Smart AJ gave examples of situations in which s 11(1)(c) might apply: where there is a "significant risk of suicide if the offender remained in custody, for example, arising from severe depression" (at [58]) and "to enable recommended and important surgery to take place" (at [61]). RA Hulme J said that such matters would not necessarily require deferral to enable a proper determination of the final sentence: at [61].

***Aggregate Sentencing - Section 53A Crimes (Sentencing Procedure) Act 1999***

Section 53A ***Crimes (Sentencing Procedure) Act*** **1999** allows an aggregate sentence to be imposed where there are multiple offences. (The scheme is aimed at simplifying sentencing for multiple offences). Section 53A was recently amended by the ***Crimes Legislation Amendment Act 2014*** to provide that the court must make a written record of the fact that an aggregate is being imposed and the sentences it would have imposed had a separate sentence been imposed.

Section 53A presently states:

> *(1) A court may, in sentencing an offender for more than one offence, impose an aggregate sentence of imprisonment with respect to all or any 2 or more of those offences instead of imposing a separate sentence of imprisonment for each.*
>
> *(2) A court that imposes an aggregate sentence of imprisonment under this section on an offender must indicate to the offender, and make a written record of, the following:*
>
> > *(a) the fact that an aggregate sentence is being imposed,*
> >
> > *(b) the sentence that would have been imposed for each offence (after taking into account such matters as are relevant under Part 3 or any other provision of this Act) had separate sentences been imposed instead of an aggregate sentence.*
>
> *(3) Subsection (2) does not limit any requirement that a court has, apart from that subsection, to record the reasons for its decisions.*
>
> *(4) The term, and any non-parole period, set under this Division in relation to an aggregate sentence of imprisonment is not revoked or varied by a later sentence of imprisonment that the same or some other court subsequently imposes in relation to another offence.*
>
> *(5) An aggregate sentence of imprisonment is not invalidated by a failure to comply with this section.*

***Aggregate sentencing – Obligation to assess criminality for each offence and indicate each sentence***

***SHR*** [2014] NSWCCA 94 stated that s 53A does not relieve the sentencing judge of the obligation to assess the criminality for the separate offending inherent in the individual counts: at [40].

In ***Khawaja*** [2014] NSWCCA 80 the CCA said that s 53A(2) is directed to ensuring transparency in the process of imposing an aggregate sentence. While the subsection does not in terms require that a judge "state" that, but for the decision to impose an aggregate sentence, a sentence for each offence of a number of years would be imposed, but only to "indicate" that is what s/he would have

done, clearly to "state" that sentence would be the simplest way of complying with the section: at [18]. However, a sentence is not invalidated by failure to comply: s 53A(5). In this case as the sentence was not manifestly excessive, the appeal was dismissed: at [19].

***Aggregate sentencing – Discount for guilty plea should be applied to each indicative sentence and not to hypothetical aggregate***

Section 53A(2)(b) states the judge must indicate to the offender the sentence that would have been imposed for each offence "*after taking into account such matters as are relevant under Part 3"* of the ***Crimes (Sentencing Procedure) Act* 1999**. A plea of guilty is a matter relevant under Part 3.

In ***SHR*** [2014] NSWCCA 94 and ***Khawaja*** [2014] NSWCCA it was an error to announce the indicative sentences prior to the application of the discount for the plea of guilty. The judge announced the indicative sentences, then stated he would allow a discount of 20% for the guilty plea, then imposed the aggregate sentence: at [37]. This did not follow s53A(2)(b) which requires that a guilty plea is to be applied to each indicative sentence and not the aggregate: at [41], [43].

In ***Khawaja*** [2014] NSWCCA 80 the judge imposed an aggregate sentence for two separate offences, stating that if he were sentencing for each offence separately he would have imposed 5 years imprisonment for each, accumulating in part to a total sentence of 8 years. He then adopted 8 years as an "hypothetical aggregate" and allowed a discount of 25% for the plea of guilty. This did not comply with s 53A(2). A step was required to apply the 25% to each of the 5 year periods as distinct from applying it to the "hypothetical aggregate".

***Aggregate sentencing – Summary of principles***

In ***JM*** [2014] NSWCCA 297 RA Hulme J summarised the issues and principles relevant to imposing an aggregate sentence.

> "[39] A number of propositions emerge from the above legislative provisions and the cases that have considered aggregate sentencing:
>
> 1. Section 53A was introduced in order to ameliorate the difficulties of applying the decision in *Pearce* (1998) 194 CLR 610 in sentencing for multiple offences: *Nykolyn* [2012] NSWCCA 219 at [31]. It offers the benefit when sentencing for multiple offences of obviating the need to engage in the laborious and sometimes complicated task of creating a "cascading or 'stairway' sentencing structure" when the principle of totality requires some accumulation of sentences: *Rae* [2013] NSWCCA 9 at [43]; *Truong; Le; Nguyen* [2013] NSWCCA 36 at [231]; *Behman* [2014] NSWCCA 239; *MJB* [2014] NSWCCA 195 at [55]-[57].
>
> 2. When imposing an aggregate sentence a court is required to indicate to the offender and make a written record of the fact that an aggregate sentence is being imposed and also indicate the sentences that would have been imposed if separate sentences had been imposed instead (the indicative sentences): s 53A(2). The indicative sentences themselves should not be expressed as a separate sentencing order: *Clarke* [2013] NSWCCA 260 at [50]-[52]. See also *Cullen* [2014] NSWCCA 162 at [25]-[40].
>
> 3. The indicative sentences must be assessed by taking into account such matters in Part 3 or elsewhere in the *Crimes (Sentencing Procedure) Act* as are relevant: s 53A(2)(b).
>
> There is no need to list such matters exhaustively, but commonly encountered ones in Part 3 include aggravating, mitigating and other factors (s 21A); reductions for guilty pleas, facilitation of the administration of justice and assistance to law enforcement authorities (ss 22, 22A and 23); and

offences on a Form1 taken into account (Pt 3 Div 3). Commonly encountered matters elsewhere in the Act are the purposes of sentencing in s 3A, and the requirements of s 5 as to not imposing a sentence of imprisonment unless a court is satisfied that there is no alternative and giving a further explanation for the imposition of any sentence of 6 months or less.

*SHR* [2014] NSWCCA 94 is an example of a case where a sentencing judge took pleas of guilty into account only in relation to the aggregate sentence, and not in relation to the indicative sentence. This was held (at [42]) to be in breach of the requirement in s 53A(2)(b). *Khawaja* [2014] NSWCCA 80 is another example. *Martin* [2014] NSWCCA 124 is a case in which a sentencing judge was held (at [17]) to have correctly taken into account pleas of guilty in relation to the indicative sentences.

In *JL* [2014] NSWCCA 130 at [54] it was said by way of conclusion in an appeal against the asserted severity of a sentence that "The starting point for the aggregate sentence of 24 years before the allowance of a discount of 25 per cent to reflect the utilitarian value of the early pleas of guilty was not excessive". This must be understood as a broad assessment within the conclusion rather than indicating that it is the aggregate sentence to which the discount should be applied. *Stoeski* [2014] NSWCCA 161 is anomalous in that at [33]-[34] it rejected a complaint that the sentencing judge had not discounted the aggregate sentence for the plea of guilty rather than rejecting the assertion that the discount applied to the aggregate sentence at all.

4. It is still necessary in assessing the indicative sentences to have regard to the requirements of *Pearce* (1998) 194 CLR 610. The criminality involved in each offence needs to be assessed individually. To adopt an approach of making a "blanket assessment" by simply indicating the same sentence for a number of offences is erroneous: *Brown* [2012] NSWCCA 199 at [17], [26]; *Nykolyn*, supra, at [32]; [56]-[57]; *Subramaniam* [2013] NSWCCA 159 at [27]-[29]; *SHR*, supra, at [40]; *Lolesio* [2014] NSWCCA 219 at [88]-[89]. It has been said that s 53A(2) is "clearly directed to ensuring transparency in the process of imposing an aggregate sentence and in that connection, imposing a discipline on sentencing judges": *Khawaja*, supra, at [18].

5. The imposition of an aggregate sentence is not to be used to minimise the offending conduct, or obscure or obliterate the range of offending conduct or its totality: *MJB*, supra, at [58]-[60].

6. One reason why it is important to assess individually the indicative sentences is that it assists in the application of the principle of totality. Another is that it allows victims of crime and the public at large to understand the level of seriousness with which a court has regarded an individual offence: *Nykolyn*, supra, at [58]; *Subramaniam*, supra, at [28]. A further advantage is that it assists when questions of parity of sentencing as between co-offenders arise: *Clarke*, supra, at [68], [75].

7. Non-parole periods need not be specified in relation to indicative sentences except if they relate to an offence for which a standard non-parole period is prescribed: ss 44(2C) and s 54B(4); *AB* [2014] NSWCCA 31 at [9].

8. Specification of commencement dates for indicative sentences is unnecessary and is contrary to the benefits conferred by the aggregate sentencing provisions: *AB*, supra, at [10]. Doing so defeats the purpose of a court availing itself of the power to impose an aggregate sentence: *Behman* [2014] NSWCCA 239 at [26]. See also *Cullen*, supra, at [25]-[26].

9. If a non-custodial sentence is appropriate for an offence that is the subject of the multiple offence sentencing task, it should be separately imposed as was done in *Grealish* [2013] NSWCCA 336. In my respectful view, there was error involved in *Behman* [2014] NSWCCA 239 where an offence with an indicative, but unspecified, non-custodial sentence was included in an aggregate sentence imposed by this Court. The provision for imposing an aggregate sentence in s 53A appears within Part 4 of the *Crimes (Sentencing Procedure) Act* which is headed "Sentencing procedures for imprisonment", and within Division 1 of that Part which is headed "Setting terms of imprisonment".

[40] The following further propositions emerge from the cases in relation to appellate review of aggregate sentencing exercises:

10. Another benefit of the aggregate sentencing provision is that it makes it easier on appeal to impose a new aggregate sentence if one of the underlying convictions needs to be quashed: *Brown*, supra, at [51]; *FP* [2012] NSWCCA 182; 224 A Crim R 82 at [327]-[329]; *Nykolyn*, supra, at [58]-[59]; *Subramaniam* at [28].

11. The indicative sentences recorded in accordance with s 53A(2) are not themselves amenable to appeal, although they may be a guide to whether error is established in relation to the aggregate sentence: *Brown*, supra, at [17]; *Nykolyn*, supra, at [58]; *PD* [2012] NSWCCA 242 at [44]; *Rae* [2013] NSWCCA 9 at [32]-[33], [42]-[43]; *Truong; Le; Nguyen*, supra, at [218], [227]; *Subramaniam*, supra,

at [28]; *SHR*, supra, at [40]; *Clarke*, supra, at [56]; *Martin* [2014] NSWCCA 124 at [47]; *JL* [2014] NSWCCA 130 at [17]; *Stoeski*, supra, at [43]; *CL* [2014] NSWCCA 196 at [53]-[55].

12. Even if the indicative sentences are assessed as being excessive, that does not necessarily mean that the aggregate sentence is excessive: *PD* at [44], [82]; *BJS* [2013] NSWCCA 123 at [252]-[254].

13. A principle focus of determination of a ground alleging manifest inadequacy or excess will be whether the aggregate sentence reflects the totality of the criminality involved: *Brown*, supra, at [37]; *Rae*, supra, at [42]-[46], [62], [69]. This Court is not in a position to analyse issues of concurrence and accumulation in the same way that it can analyse traditional sentencing structures: *Truong; Le; Nguyen*, supra, at [231]; *Martin*, supra, at [33]-[41].

14. Erroneous specification by a sentencing judge of commencement dates for indicative sentences (such as there being gaps between the expiry of some indicative sentences and the commencement of subsequent sentences) are immaterial and may be ignored as being otiose: *AB*, supra, at [10], [67].

15. A failure of a judge to specify a non-parole period in the indicative sentence for a standard non-parole period offence will not lead to an appeal being upheld. Failure to do so does not invalidate the sentence: s 54B(7). Setting non-parole periods for the indicative sentences for standard non-parole period offences would have no effect upon the aggregate sentence imposed: *Truong; Le; Nguyen*, supra, at [214]-[218]."

***Sections 12, 99 Crimes (Sentencing Procedure) Act 1999 – Suspended sentences – revocation of s 12 bond – correct approach when sentencing at the same time as other fresh offences***

In ***Taane*** [2014] NSWCCA 330 the applicant faced sentencing for two offences. The applicant had previously received suspended sentences under s 12 ***Crimes (Sentencing Procedure) Act 1999*** for two earlier offences. The judge erroneously sentenced for the two later offences before revoking the s 12 bonds and adding further terms of imprisonment for the breach. The correct approach would have been to revoke the suspended sentence bonds under s 99 and then determine the appropriate sentence for those earlier offences at the same time as determining sentences for the later offences, guided by the totality principle: at [39].

***Revocation of bail to allow use of non-custodial sentence***

In ***West*** [2014] NSWCCA 250 the sentencing judge erred in revoking the bail of the offender for three months, then sentencing him to an Intensive Corrections Order. This was a manipulative and erroneous use of bail where there was no justification for refusing bail and was a subversion of the legislative requirements about ICOs.

Note: In this case, the circumstances were deliberately manipulated by the judge who adjourned the proceedings to allow a particular amount of time on remand. This case does not necessarily preclude a judge from imposing an ICO or s12 bond in a case where, at the time when the question is considered, an offender happens to have served pre-sentence custody and, after discounting for that period, a sentence of 2 years or less is called for.

## 6. MENTAL ILLNESS

***Mental illness relevant to moral culpability and objective seriousness***

In ***Elturk*** [2014] NSWCCA 61 the applicant pleaded guilty to two offences. The Crown made an application to the trial judge, supported by expert evidence, to reject those pleas on the basis that a more appropriate outcome would be a special verdict of not guilty by reason of mental illness (under s 38 ***Mental Health (Forensic Provisions) Act 1900***). The trial judge refused the

application. In sentencing, the judge said that because the applicant had chosen not to avail himself of the defence of mental illness, the applicant's mental condition was not to be taken into account when assessing the objective seriousness of the offence.

The CCA allowed the applicant's appeal. The judge erred in determining that in pleading guilty the applicant had waived his right to have his mental illness considered as a causal factor in the commission of the crime. The applicant's mental state at the time of offending was still relevant to the assessment of his moral culpability and the objective seriousness of the offence: at [33]-[35], [39]; ***McLaren*** [2012] NSWCCA 284; ***Muldrock*** [2011] HCA 39; 244 CLR 120. The sentence imposed failed to make appropriate allowance for the applicant's mental condition and his low level of moral culpability, and was thus not proportionate to the criminality: at [45]; ***Veen v R (No 2)*** (1988)164 CLR 465.

***No presumption of a more lenient sentence for an offender who has limited intellectual functioning***

The CCA made statements to the effect that there is no presumption of a more lenient sentence for an offender who has limited intellectual functioning: ***Aslan*** [2014] NSWCCA 114 at [33]-[35]; ***Catley*** [2014] NSWCCA 249 at [52]; ***Do*** [2014] NSWCCA 189.

***Omission to adduce relevant psychiatric evidence on sentence resulted in a miscarriage of justice***

In ***Pym*** [2014] NSWCCA 182 the omission to adduce relevant psychiatric evidence on sentence resulted in the sentence proceedings miscarrying. The offender pleaded guilty to Wound with intent to murder. A psychiatrist prepared three reports for the offender's sentence hearing, however, as he was unavailable on the day a redacted copy of just one of the reports was tendered by the offender's legal representatives. The sentencing judge found he was not able to place any considerable weight upon the opinion of the psychiatrist and was not persuaded that, as a consequence of any mental health or psychological issues, there was any reduction in the offender's moral culpability: at [43]. On appeal, the applicant submitted the reports were foundational to the psychiatrist's opinion that the applicant was in an altered state of consciousness at the time of the offence and this was not in evidence before the sentencing judge: at [47].

The CCA said the question is not the weight that might have been attributed by the judge to the unpresented psychiatric material, but whether the failure to present the entirety of the material relevant to the applicant's mental state resulted in a miscarriage of justice: at [75]. Evidence which may be relevant to establish a defence, even a complete defence such as on the basis of mental illness (or by parity of reasoning the defence of automatism), if eschewed by a plea, may be relevant to the issues relevant to the sentencing exercise, including consideration of moral culpability and future dangerousness: at [82]-[83]; applying ***Elturk*** [2014] NSWCCA 6; ***McLaren*** [2012] NSWCCA 284. If the judge had the entirety of that evidence, his findings as to the applicant's mental state would not have been open. The matter was remitted to the District Court: at [84]-[85].

## 7. STATISTICS AND COMPARABLE CASES

***Use of statistical material – summary of principles***

In ***Skocic*** [2014] NSWCCA 225 the CCA made observations regarding the use of statistical material on sentence as follows at [19]:

> "(i) consistency in sentencing is not demonstrated by, and does not require, numerical equivalence. What is sought is consistency in the application of the relevant legal principles: *Hili v R; Jones v R* [2010] HCA 45; (2010) 242 CLR 520 at [48]-[49].
>
> (ii) sentences imposed in other cases do not mark the outer bounds of the permissible sentencing discretion but stand as a yardstick against which to examine a proposed sentence. What is important are the unifying principles which such sentences reveal and reflect: *Barbaro v R; Zirilli v R* [2014] HCA 2; (2014) 305 ALR 323 at [41];
>
> (iii) the presentation of sentences passed in the form of numerical tables and graphs is of limited use: *Hili* (supra) at [48]. This is because reference to the lengths of sentences passed says nothing about why the sentences were fixed as they were;
>
> (iv) this Court has emphasised the need to adopt a careful approach when asked to have regard to statistics: *R v Nikolovska* [2010] NSWCCA 153 at [117] per Kirby J, Beazley JA (as her Honour then was) and Johnson J agreeing. A similarly careful approach is required when the Court is asked to compare a sentence imposed in one case with a sentence imposed in another: *RLS v R* [2012] NSWCCA 236 at [132] per Bellew J, McClellan CJ at CL and Johnson J agreeing. The need to take care in each instance arises, in part, from the fundamental fact that there will inevitably be differences, both in terms of the objective circumstances of offending and the subjective circumstances of the offender, between one case and another;
>
> (v) the fact that a particular sentence is, by reference to statistics, the highest imposed for a single instance of particular offending does not demonstrate that the sentence is unduly harsh. As a matter of common sense, there will always be one sentence which constitutes the longest sentence imposed for particular offending: *Jolly v R* [2013] NSWCCA 76; (2013) 229 A Crim R 198 at [75].
>
> "

In this case, the applicant submitted the statistics demonstrated that 75 per cent of persons charged with an offence under s 112(2) **Crimes Act 1900** received a sentence less than that imposed on the applicant. The CCA said that, without more, such a suggestion reflects an approach contrary to principle. As noted in (i) above, consistency is not demonstrated by, and does not require, numerical equivalence. Bare statistics say nothing about the circumstances of the offending or the offender: at [20].

***Error in using other sentence decisions to establish a range of sentences for 'one-punch' manslaughter cases - role of other sentencing decisions***

In ***Loveridge*** [2014] NSWCCA 120, a so-called 'one-punch' manslaughter case, the CCA considered the role of other sentencing decisions on sentence. When other sentencing decisions are provided, it is important that the purpose for which the information was provided be kept in mind: at [221]; ***Van Haltren*** (2008) 191 A Crim R 53 at [76]; ***RR*** (2011) 216 A Crim R 489 at [135]. The High Court decision ***Barbaro v The Queen*** (2014) 88 ALJR 372 restricts the capacity of the Crown to propose a numerical range of penalty in a particular case (at [20]-[43]); and narrows the long-standing ethical rule which allowed a prosecutor to inform the court of an appropriate range of penalty by reference to relevant decisions: Clause 93(e), ***NSW Barristers' Rules*** (which commenced on 6 January 2014). However, parties may hand up sentencing decisions where relevant to the case: at [223]; ***Hili*** (2010) 242 CLR 520 at [53]-[54]; ***Barbaro*** at [41].

In this case, the decisions handed to the sentencing judge represented nothing more than decisions depending upon their particular facts and circumstances. It was an error to treat the decisions as if they were comparable cases giving rise to a range; as each case is unique in its facts and circumstances and due to the distinction between a manslaughter committed in public and in private: at [222]- [225]; see also discussion of UK authorities at [208]-[213].

***Error in having regard to so-called "comparable" case***

In ***RCW (No 2)*** [2014] NSWCCA 190 (drug offence) the judge erred in imposing sentence on the basis of a single so-called comparable case. The judge's focus was confined to a comparison of the criminality of one particular case furnished by the prosecution. There was no process of instinctively synthesising all of the relevant objective and subjective facts and then looking at the outcome of other cases that may have provided a check or yardstick: at [48]; ***Barbaro*** (2014) 88 ALJR 372; ***Markarian*** (2008) 228 CLR 357. The CCA allowed the appeal and substantially reduced the sentence.

Compare ***Behman*** [2014] NSWCCA 239 where it was held not to be an error that the judge used as a guide the sentencing in one other case. ***Behman*** involved sentencing for an offence of giving false evidence to the Police integrity Commission and other offences of making a false statement to obtain a financial advantage. The other case did not involve a co-offender but was an offender who had committed similar crimes. The CCA accepted that the other case "stands as a strong guide to the appropriate range.": at [22].

***Statistics - Error in having regard to Local Court sentencing statistics and finding a custodial sentence was consistent and within range - consideration of use of sentencing statistics***

In ***Peiris*** [2014] NSWCCA 58 the applicant was sentenced to 18 months with NPP 9 months for two offences of aggravated indecent assault (s 61M(1) – in the form it then took; and s 61M(2)). The judge found the offences were "below mid-range but above the low range." The CCA allowed the appeal and imposed lesser suspended sentences.

The sentence was not manifestly excessive. However, the repeated reliance by the judge on the statistics including from the Local Court disclosed material error. The judge's findings about the level of criminality are impossible to reconcile with the sentences imposed by the Local Court.

First, even if the sentences imposed by *all* courts since 2009 for s 61M(2) are aggregated, half of the sentences are non-custodial. The custodial sentence cannot be reconciled with the "yardstick" to be discerned from the data, given that objective seriousness was found to be *below* mid-range: at [90].

Second, the judge *expressly* stated the sentence was appropriate having regard to the statistics in the Local Court: at [92]-[92]. The fact that the most frequently occurring subclass of sentence is a custodial sentence is irrelevant. *The relevant question is*: are most offenders, or for that matter most offenders who plead guilty, who are sentenced in the Local Court, sent to prison? Only a minority of such offenders receive prison sentences, and significant majorities of around half as many again do not. This fact clashes with the remarks on sentence: at [94].

## 8. PROCEDURAL FAIRNESS

***Procedural fairness – judge ordered ICO report and later imposed a sentence of longer than 2 years***

In ***Thompson*** [2014] NSWCCA 88, the sentencing judge ordered an ICO report on the basis that he was considering an ICO but might change his mind once he considered all the material including the ICO report. No further sentencing submissions were made and, after the report was available (which said the appellant was suitable for an ICO), the judge imposed sentences of 9 months and 2 years, accumulated to a total effective sentence of 2 ½ years.

The CCA rejected the appellant's submission that there had been a breach of procedural fairness in both (a) not imposing an ICO and (b) imposing a total effective sentence of more than 2 years. It was clear the judge's order for an ICO report was preliminary and tentative only: at [55]-[57]. That the applicant was not afforded the opportunity to make further submissions after receipt of the report did not constitute procedural fairness: at [60].

Note: While it does not seem to have been part of the CCA's reasoning, but since neither of the individual sentences were in fact longer than 2 years, query whether there was even a significant change of position from the judge's necessary finding, when ordering the ICO report, that "the sentence" was likely be longer than 2 years.

***Procedural fairness – judge accepted mid-range objective seriousness in submissions but found above mid-range in decision***

In ***Tran*** [2014] NSWCCA 85 the CCA found that the appellant had been denied procedural fairness. The sentencing judge, during submissions, had accepted the submissions of the appellant's counsel that the objective seriousness was mid-range but, on delivering sentence and without giving the parties the opportunity to make further submissions on this change of position, found it to be above mid-range: at [12]-[15].

(Ultimately the sentence was found to be appropriate for a mid-range offence and the appeal was dismissed under s 6(3) on the basis that no other sentence was warranted in law).

***Procedural fairness – judge's failure to warn of intention to accumulate sentences not a denial of procedural fairness - judge not obliged to bring concessions with which he or she disagrees to attention of counsel – legal representatives have obligation to raise matters in favour of clients on sentence***

In ***Toole*** [2014] NSWCCA 318 (drug supply offences) the Crown submitted that "concurrent sentences could be imposed." The judge imposed accumulated sentences. The applicant submitted he was denied procedural fairness because the judge failed to warn of her intention to accumulate the sentences, contrary to the Crown's submission. Dismissing the appeal, RS Hulme J (Basten JA; Button J agreeing) held there was no denial of procedural fairness.

## 9. PARTICULAR OFFENCES

***Dangerous driving - factors set out in guideline judgment of Whyte (2002) 55 NSWLR 252 do not operate as a checklist***

In ***Greaves*** [2014] NSWCCA 194 the respondent was sentenced for Dangerous driving causing grievous bodily harm (s 52A(3)(c) ***Crimes Act***) which carries a maximum penalty of 7 years imprisonment. The Crown appealed against the sentence of 19 months 17 days to be served by way of Intensive Correction Order.

The judge failed to determine the level of objective seriousness: at [39]; ***Muldrock*** (2011) 244 CLR 120. It was not sufficient that the judge simply refer to considerations raised in ***Whyte*** (2002) 55 NSWLR 252 but otherwise reach no conclusion. A proper assessment of the objective seriousness of the offending would have led to a conclusion that this was objectively a very serious offence and required a significant custodial penalty: at [40]. A brief reference to the factors identified in ***Whyte*** make such a conclusion as to objective seriousness of the offending clear - the extent of the injuries of the victim were catastrophic (paraplegic), all passengers were placed at great risk, excessive speed, intoxication and failure to stop: at [42].

The factors in ***Whyte*** do not operate as a checklist the presence or absence of which have some mathematical relationship with the sentence to be imposed. They merely describe the typical case. Because the judge did not properly consider the objective seriousness of the offending, he failed to appreciate that the respondent fell outside the typical case envisaged by ***Whyte*** in that the offending was more serious: at [44]- [45].

***Manslaughter by excessive self-defence - miscarriage of justice through wrong admission of intent to kill as opposed to intent to cause grievous bodily harm***

In ***Grant*** [2014] NSWCCA 67 the applicant pleaded guilty to manslaughter on the basis of excessive self-defence. The judge sentenced on the basis the appellant acted with an intent to kill, on the basis of representations by defence counsel.

Where an offender pleads guilty to manslaughter on the basis of excessive self-defence, all the elements of murder are present and it is for the Court to determine whether the offender intended to kill or commit grievous bodily harm, or acted with reckless indifference to human life: ***Grant*** [2014] NSWCCA 67 at [64]-[66]; ***Lane*** [2013] NSWCCA 317. The plea of guilty means the offender accepts he held one of the mental states sufficient to amount to murder, but for the availability of excessive self-defence in s 421 ***Crimes Act***: at [66]. The state of mind must be proved beyond reasonable doubt: at [77].

Allowing the appeal, the CCA held there was a miscarriage of justice because counsel did not explain to the appellant the distinction between the two states of mind within the offence of manslaughter and failed to obtain clear instructions. The judge was satisfied of an intention to kill because of counsel's statement. That intention was not something otherwise proven beyond reasonable doubt. The circumstances of the offence was consistent with such an intent, but it was also consistent with the appellant's evidence on appeal that he acted with an intent to cause grievous bodily harm. The appellant was entitled to have his position correctly conveyed: at [71], [77].

***No range of sentences for 'one-punch' manslaughter cases - Prevalence of alcohol-fuelled offences of violence – general deterrence***

In ***Loveridge*** [2014] NSWCCA 120 the Crown appealed against the sentences imposed upon the respondent, aged 18, for manslaughter and other assault offences. The manslaughter resulted from a 'one-punch' attack in Kings Cross upon the victim who hit his head on the pavement and later died. An overall sentence of 7 years, 2 months comprising a non-parole period of 5 years, 2 months was imposed.

The CCA said first, it is not meaningful to speak of one-punch manslaughter cases as constituting a single class of offences as circumstances vary widely and attention must be given to each particular case: at [215]. Second, offences of violence, including manslaughter, in the context of alcohol-fuelled conduct in a public place is of great community concern, and calls for an emphatic sentencing response to give particular effect to the need for denunciation, punishment and general deterrence: at [216].

There is no range of sentences for so-called 'one-punch' manslaughter cases; or for offences of manslaughter which may be said to have a single common component relating to the mechanism of death (such as the victim's head striking the ground after a blow to the head, or use of an implement such as a knife or rock): at [226]. The myriad circumstances of manslaughter offences render it unhelpful to speak in terms of a range, or tariff, for a particular form of manslaughter: at [227]; ***Blacklidge*** (NSWCCA, unreported, 12 December 1995).

There were a number of errors including failure to take into account the need for general deterrence due to the prevalence of alcohol-fuelled violence: at [103]-[109]; ***Hopley*** [2008] NSWCCA 105, ***Carroll*** (2010) 77 NSWLR 45. Allowing the Crown appeal, the CCA resentenced the respondent to an overall sentence of 13 years, 8 months with a non-parole period of 10 years, 2 months.

***Manslaughter / Murder – accessory after the fact – assessment of seriousness***

In ***TT*** [2014] NSWCCA 206 the Court discussed the factors relevant to the assessment of objective gravity of the accessory after the fact to manslaughter / murder. Per Hamill J (McFarlan JA and Fullerton J agreeing) said:

> "[15] In *R v Johnson* [2014] NSWSC 1254 I suggested that an assessment of the objective gravity of offences of this kind (in that case accessory after the crime of murder) involves a consideration of a number of factors which include, but are not limited to:
>
> (1) The circumstances of the homicide itself.
>
> (2) The extent of the knowledge in the accessory of those circumstances.
>
> (3) The precise act, or acts, which constitutes the offence of being an accessory after the fact.
>
> (4) The length of time over which the offender assisted the principal offender in escaping justice.
>
> (5) The extent to which the acts of the offender successfully delayed, or thwarted, the investigation and prosecution of the principal offender.
>
> (6) The motivation of the offender in committing the crime.
>
> (7) The offender's conduct in being motivated by a sense of misguided loyalty or emotional attachment to the principal offender. This is a circumstance of particular significance in cases where a family member assists the principal offender.
>
> (8) The disposal or destruction of a corpse. These cases generally fall at the upper end of the range of criminality for the offence."

Where an accessory is involved in the disposal of a corpse, that fact is likely to take the case into the more serious end of a s 350 offence: at [12]; ***Quach*** [2002] NSWSC 1205; ***Cowen*** [2008] NSWSC 10]; ***Galea, Yeo*** [2000] NSWSC 301; ***Faulkner*** [2000] NSWSC 944.

The present case was at the top range of objective seriousness. It was the homicide of a very young woman, the applicant was intimately aware of the circumstances in which the victim died, the applicant arranged the disposal of the body and told lies to distract the victim's family and police from discovering the death of the victim for two years. The appeal was dismissed: at [19].

***Sexual assault – digital penetration – form and duration of intercourse – objective seriousness determined according to all of the circumstances***

In ***Simpson*** [2014] NSWCCA 23 (sexual assault) the appellant argued that a relevant consideration was that the sexual intercourse was digital and of short duration: ***MH*** [2011] NSWCCA 230 at [37], [41]; ***Muldrock*** (2011) 244 CLR 120 at [60]. Dismissing the appeal, the CCA said objective seriousness of sexual offences depends on all of the circumstances. The form of intercourse can be an important factor, but also important are the degree of violence, physical hurt, humiliation and duration. The "act of intercourse" was of short duration, but occurred after a severe beating with threats and conduct designed to humiliate and degrade. Those circumstances make duration largely irrelevant: at [31]-[32]. There is no decision of this Court to support the proposition that digital sexual intercourse is less serious than some other form of forced sexual intercourse: at [33]; ***Doe*** [2013] NSW CCA 248.

***Hindering discovery of evidence – s 315 Crimes Act – s 10A Crimes (Sentencing Procedure) Act imposed***

In ***Sampson*** [2014] NSWCCA 19 the applicant was sentenced to 3 years NPP 18 months for Hindering investigation pursuant to s 315 ***Crimes Act*** which carries a maximum penalty of 7 years imprisonment. The applicant assisted in hiding the ammunition relevant to an alleged murder by a friend. The CCA allowed the appeal, quashed the sentence and refrained from imposing a penalty under s 10A ***Crimes (Sentencing Procedure) Act***.

The offence was committed in connection with an investigation for murder, which is a marker of significant seriousness. However, the offence was not premeditated but on the spur of the moment. The applicant's role was a secondary one: at [11]. The judge found the offence to be "in the lower part of the middle range" but the starting point of 4 years was well over half the maximum prescribed penalty. This is not to suggest that the middle of the range of objective seriousness suggests a sentence at half the statutory maximum. Nevertheless, it is difficult to relate the judge's measure of objective seriousness to the starting point: at [12]. Several other sentencing decisions under s 315 were referred to: at [20].

***Money laundering (dealing with proceeds of crime) – sentencing principles***

In ***Ly*** [2014] NSWCCA 78 the CCA set out the relevant considerations in sentencing for federal money laundering offences: at [86].

> "Money Laundering Sentencing Considerations
>
> 1. The statutory scheme has a graduated series of offences varying in gravity depending on the value of the money or property and the offender's state of mind: *R v Li* at [17]-[19], [41].
> 2. The offences are broken down into the mental element of the offender: belief/intention or recklessness or negligence. The prescribed maximum penalty depends upon the culpability of the offender's mental state concerning the source of the money for offences involving proceeds of crime or what is to become of it, for offences involving an instrument of crime: *R v Huang; R v Siu* [2007] NSWCCA 259; 174 A Crim R 370 at [28].
> 3. The amount of money involved is a highly significant matter and is the primary identifier of what is the maximum penalty for an offence: *R v Huang; R v Siu* at [34]; *R v Ansari* [2007] NSWCCA 204; 70 NSWLR 89 at [122]; *R v Li* at [41].
> 4. The number of transactions and the period over which they occurred are also significant matters as they indicate the extent of an offender's criminality. Generally speaking, a number of transactions involving small amounts of money will be more serious than a single transaction of a larger amount, for the latter may be seen as an isolated offence: *R v Huang; R v Siu* at [35].
> 5. The offences are not only concerned with the source of the money or property dealt with, but also its ultimate use. The offences cover money obtained illegally or to be used for illegal purposes or dealt with in a manner that is illegal: *Sentencing Bench Book*, Judicial Commission of New South Wales, at [65-205].
> 6. The serious criminal activity of money laundering warrants severe punishment not the least in order to reflect general deterrence of a very significant degree. When the activity is engaged in for profit over a significant period of time and with a large number of transactions, the prior good character of the offender is of less significance than might otherwise be the case: *R v Huang; R v Siu* at [36].
> 7. Knowledge as to the illegality of the conduct is clearly a matter that increases the seriousness of the
> offence."

In this case the respondent falsely caused the Australian Taxation Office to pay refunds into

accounts controlled by himself (Dealing with proceeds of crime in excess of $100,000 - s 400.4(1) ***Criminal Code Act 1995 (Cth)*** maximum penalty 20 years imprisonment). The offence was very serious due to the 10 month period of offending; financial benefit of $357,568, significant planning; and the respondent's role and actions: at [87]. There were virtually no mitigating circumstances: at [122]. The sentencing judge had imposed a sentence of 3 years 6 months, NPP 2 years 4 months. Allowing the Crown appeal a new sentence was imposed of 8 years, NPP 4 years 6 months.

***s 400.9 – dealing with money or property reasonably suspected of being proceeds of crime***

In ***Shi*** [2014] NSWCCA 276 the NSWCCA accepted that the offences created by s. 400.9 fall at the lowest of the scale and do not require proof of any subjective criminality. The sentencing judge breached the *De Simoni* principle by finding and taking into account that the offender knew the money she dealt with was proceeds of crime.

## 10. CROWN APPEALS

***Crown appeal against sentence - remittal from High Court - exercise of residual discretion s 5D Criminal Appeal Act 1912 - consideration of relevant factors including health and delay***

In ***Reeves*** [2014] NSWCCA 154 the CCA further considered a Crown appeal against sentence after the matter had been remitted from the High Court. ***Reeves v The Queen*** [2013] HCA 57; 88 ALJR 215. The High Court had upheld the respondent's appeal on the basis that the CCA had not given consideration to the possible exercise of the residual discretion to dismiss a Crown appeal notwithstanding the inadequacy of a sentence under s 5D ***Criminal Appeal Act 1912***: see ***Reeves*** [2013] NSWCCA 34.

The CCA (Bathurst CJ, Hall and RA Hulme JJ in a joint judgment) concluded there was an insufficient basis to decline to re-sentence in the exercise of the residual discretion. However, on the material now available the extent of intervention should be moderated. In the present case, the combined effect of delay, ill-health (physical and mental) and the respondent's conditions of quasi-custody since released on parole, call for an amelioration of response. The CCA allowed the Crown appeal but re-sentenced the respondent to a lesser sentence than that imposed at the first Crown appeal: at [71].

The Court set out the principles concerning the exercise of the residual discretion:

. Under Section 5D(1) *Criminal Appeal Act 1912* where error is identified in a Crown appeal, the Court is not obliged to re-sentence but has a residual discretion to refuse or decline to interfere even though the sentence is erroneously lenient: at [11]-[12]; *Green & Quinn* (2011) 244 CLR 462 at [2]

. In exercising the residual discretion, the Court is to answer two questions:

> (1) Whether, notwithstanding the inadequacy of the sentence, the Court should decline, in the exercise of its "residual discretion" under s 5D, to allow the appeal and thereby interfere with the sentence appealed from.
>
> (2) To what extent, if the appeal is allowed, the sentence appealed from should be varied: *Green & Quinn* at [35].

. The purpose of Crown appeals against sentence is not simply to increase an erroneous sentence but to achieve consistency in sentencing and the establishment of sentencing principles. This is a "limiting purpose" that provides a framework within which to assess the significance of factors relevant to the exercise of the discretion: at [14]-[15]; *Borkowski* (2009) 195 A Crim R 1 at [70]; *Green & Quinn* at [36].

. It may thus be appropriate to dismiss a Crown appeal where "*circumstances may combine to*

*produce the result that if the appeal is allowed the guidance provided to sentencing judges will be limited and the decision will occasion injustice*": at [16]; *Green & Quinn*.

. Additional non-exhaustive factors that may favour the exercise of the residual discretion include: at [17]

- Delay by the Crown in lodging the appeal
- Deteriorating health of respondent since sentence
- Non-parole period imposed at first instance already expired or respondent's release on parole is imminent
- Respondent has made substantial progress towards rehabilitation
- The "effect of re-sentencing on progress towards the respondent's rehabilitation"

. In determining whether to exercise the residual discretion, it is open to the court to look at material available at the time of the appeal: *Deng* (2007); 176 A Crim R 1 at [28]; *Todorovic* [2008] NSWCCA 49 at [32]. The court resentences in light of all facts and circumstances at time of resentencing including events which occurred after the original sentencing: *Allpass* (1993) 72 A Crim R 561 at 562: at [19].

See also ***DH; AH*** [2014] NSWCCA 326. The CCA dismissed the Crown appeal against sentence. . In this case, no "principle for governance and guidance" of sentencing courts was identified in the Crown's submissions. The purpose of the appeals appears to be for the "general correction of error" asserted against the sentencing judge. at [19]-[20]. Simpson J discussed the limited role of a Crown appeal against sentence. The primary purpose of Crown appeals against sentence is "to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons": at [17]. That purpose distinguishes Crown appeals from appeals against the severity of sentence by convicted persons, which are concerned with the correction of judicial error: ***Green; Quinn*** (2011) 244 CLR 462.

***Crown appeal – residual discretion – relevant factors – delay, imminent release on parole, alteration of Crown submissions at each hearing - Crown appeal dismissed***

In ***Bugmy (No 2)*** [2014] NSWCCA 322 the CCA found the sentences imposed were manifestly inadequate, however, in the exercise of its residual discretion, dismissed the Crown appeal. This case had been remitted from the High Court: ***Bugmy*** (2013) 249 CLR 571.

Bathurst CJ reiterated that the principal purpose of a Crown sentence appeal is to lay down principles for the governance and guidance of courts: ***Green; Quinn*** (2011) 244 CLR 462. Further relevant factors include delay, parity, the totality principle, rehabilitation, fault on the part of the Crown: ***DPP v Karazisis*** (2010) 31 VR 634 at [104]; and the imminence of the release of the respondent on parole: ***Munda*** (2013) 249 CLR 600 at [72]. In this case, there had been significant delay including remittal from the High Court, the respondent was eligible for parole in 4 months, and any guidance as to the relevant sentencing principles will have been given in the High Court decision. No further guidance will be given by this Court resentencing: at [21].

Rothman J also found the delay and change in the Crown position on significant matters to be of most relevance. There had been a significant alteration in the Crown's submissions, including to the particulars regarding the alleged manifest inadequacy, from those that were put before the sentencing judge; those that were put before the CCA in the first appeal; those that were put before the High Court; and those that have been put before this Court. Even the Crown's attitude to the application of the ***Fernando*** principles altered between the sentencing judge and the first CCA hearing and altered again in the High Court: at [102]. For these reasons the residual discretion should be exercised and appeal dismissed: at [104].

***Crown appeal – prolonged history of sentence proceedings in District Court – Crown appeal dismissed***

In ***Greaves*** [2014] NSWCCA 194 the CCA dismissed the Crown appeal against sentence on the basis that the sentence proceedings in the District Court were prolonged and had been repeatedly adjourned for assessment and reassessment for suitability for an intensive correction order. The period between the plea of guilty and conclusion of sentence proceedings was over 2 years, and it was 3 years since the offence occurred: at [59], [69].

## 11. SLIP RULE

***The slip rule in sentencing and appeals – limited to correction of reasons or to give effect to what the court intended***

In ***Ly*** (No. 2) [2014] NSWCCA 91 the CCA corrected errors in its originally published decision on resentencing, including references to finding "special circumstances" to vary the "statutory ratio" in relation to a Commonwealth sentence where no such considerations applied. The court said that its power to do so was under the slip rule and that the power was available for a court to make a correction which did not affect "the substance of the reasons or the orders made" (at [5])

Reference was made to ***Burrell*** [2008] HCA 34; 238 CLR 218 where the High Court said that the rule of finality was not offended by a power to correct certain types of errors (at [21]):

> "The power to correct the record so that it truly does represent what the court pronounced or intended to pronounce as its order provides no substantial qualification to that rule. The power to correct an error arising from accidental slip or omission, whether under a specific rule of court or otherwise, directs attention to what the court whose record is to be corrected did or intended to do. It does not permit reconsideration, let alone alteration, of the substance of the result that was reached and recorded."

This rule may be increasingly more important given the extremely limited scope of s43 of the *Crimes (Sentencing Procedure) Act* 1999 following ***Achurch*** [2014] HCA 10 (see below 'Annexure B – 2014 High Court Cases').

***Limitations of the court under the slip rule***

Note: In ***Bungie*** [2015] NSWCCA 9 the CCA found that the power to re-open under s.43 is limited to the correction of the error only. The court cannot reconsider the original decision or accept and take into account additional evidence.

## 12. PROCEDURES AND POWERS OF COURT ON SENTENCE APPEAL

***Crimes (Appeal and Review) Act 2001 Part 7 ss 77, 79, 86 – offenders who have already exercised rights of appeal against sentence prior to Muldrock – whether leave to appeal required and, if so, whether extension of time required***

Challenges to the approach of sentencing judges who had (correctly at the time) followed ***Way*** (2004) 60 NSWLR 168 before the High Court's judgment in ***Muldrock*** (2011) 244 CLR 120 are dealt with in these ways:

(1) In the ordinary course of an appeal against sentence, within time under s 5 *Criminal Appeal Act 1912*;

(2) By application for an extension of time in which to seek leave to appeal; or

(3) A third category of cases involve offenders who have already exercised their rights of appeal against sentence prior to *Muldrock*.

In ***Carlton*** [2014] NSWCCA 14 the appellant fell into that third category, and was the first case to be referred under Part 7 ***Crimes (Appeal and Review) Act 2001***. The appellant had been sentenced in accordance with ***Way***, prior to ***Muldrock***, for aggravated sexual assault which carries a standard non-parole period of 10 years (s 61J ***Crimes Act***).

Part 7 ***Crimes (Appeal and Review) Act 2001*** provides for the review of convictions and sentences. Applications may be made to the Supreme Court and may result in a referral "of the whole case to the Court of Criminal Appeal, to be dealt with as an appeal under the ***Criminal Appeal Act 1912***": s 79(1)(b). A referral may also be made via a successful application by petition to the Governor: s 77(1)(b).

The Crown submitted that under Part 7 leave to appeal was required and, due to the lengthy period of time that had elapsed, an extension of time for leave to appeal was also required: at [9].

The CCA rejected the Crown's submissions. Hulme JA (Ward JA and Harrison J agreeing) held that no leave to appeal is required in respect of a referral of a case pursuant to s 77(1)(b) or s 79(1)(b); nor is extension of time to seek leave to appeal required. This conclusion is unequivocal in respect of grounds of appeal raising matters that are the subject of the referral: at [39]. (If an appellant seeks to raise additional grounds, the Court is required to consider them unless they are thought to be frivolous or vexatious. However, the Court refrained from expressing a concluded view on this point as it was not argued in the present case: at [39]).

***Crimes (Appeal and Review) Act 2001 Part 7 ss 79, 86 – power of CCA to review earlier CCA decision***

In ***Louizos*** [2014] NSWCCA 242 the CCA held that it has authority to review and, if appropriate, set aside an earlier sentence imposed by it. The CCA had previously allowed a Crown appeal against sentence for solicit to murder and had imposed a new sentence: ***Louizos*** (2009) 194 A Crim R 223. The appellant sought an inquiry under Part 7 of the ***Crimes (Appeal and Review) Act 2001*** following the High Court decision in ***Muldrock*** (2011) 240 CLR 120.

The CCA allowed the appeal. The inquiry into a conviction or sentence authorised by s 78 of the ***Crimes (Appeal and Review) Act*** extended to a sentence imposed by the CCA: at [12]. The effect of ss 79(1)(b) and 86 is that the CCA has authority to review and, if appropriate, set aside the sentence imposed *by it* in 2009. That is something it would otherwise be incapable of doing: at [14]. The procedure created by ss 79(1)(b) and 86 to be determined similarly to the appeal elsewhere created in the ***Criminal Appeal Act****,* that is, it amounts to an appeal by way of rehearing, whose success depends upon the identification of error: at [17].

Sections 79(1)(b) and 86 bypass the rights of appeal created by s 5 of the ***Criminal Appeal Act*** and create a "quasi-appeal": at [36]. The subject matter of the appeal is the sentence imposed by the earlier Court. It is for the appellant to identify error in that sentence. If material error be found, then s 6(3) applies, for s 86 requires the assumption to be made that "the convicted person had appealed against the ... sentence under the ***Criminal Appeal Act****,* and that Act applies accordingly." Thus the power conferred by s 6(3) extends to quashing the sentence imposed

following the earlier successful Crown appeal, and imposing the sentence which "is warranted in law": at [36]; ***Kentwell*** [2014] HCA 37 at [42]-[43]. The new process created is not a rehearing of the Crown appeal. It is a new "appeal" by the offender against the sentence imposed following the Crown appeal: at [37].

## CONVICTION APPEAL AND OTHER CASES

### 1. EVIDENCE

***Section 165B Evidence Act – Delay in complaint – significant forensic disadvantage to the accused***

In ***Jarrett*** [2014] NSWCCA 140 the 12 year old child sexual assault complainant did not make a complaint against the appellant until 19 months after the incident. The appellant submitted the trial judge failed to provide a direction regarding any "significant forensic disadvantage" suffered by the applicant from the delay in complaint.

Dismissing the appeal, the CCA (Basten JA; RA Hulme and Campbell JJ agreeing) held that no significant forensic disadvantage was caused by the delay. The applicant knew the victim was contemplating making a complaint and contributed to the delay by threatening that he would commit suicide if she told anyone. Even if a disadvantage was established, his threat to commit suicide provided good reason not to warn the jury: at [60]-[64].

Previously, where there was delay in complaint, a judge directed the jury that as the evidence of the complainant could not be adequately tested after the passage of time, it would be dangerous to convict on that evidence alone unless the jury, scrutinising the evidence with great care, were satisfied of its truth and accuracy: at [51]; ***Longman*** (1989) 168 CLR 79.

However, after 1 January 2009, the relevant law is now found in s 165B of the ***Evidence Act 1995*** (NSW):

> ***165B Delay in prosecution***
>
> *(1) This section applies in a criminal proceeding in which there is a jury.*
>
> *(2) If the court, on application by a party, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of that disadvantage and the need to take that disadvantage into account when considering the evidence.*
>
> *(3) The judge need not comply with subsection (2) if there are good reasons for not doing so.*
>
> *(4) It is not necessary that a particular form of words be used in informing the jury of the nature of the significant forensic disadvantage suffered and the need to take that disadvantage into account, but the judge must not in any way suggest to the jury that it would be dangerous or unsafe to convict the defendant solely because of the delay or the forensic disadvantage suffered because of the consequences of the delay.*
>
> *(5) The judge must not warn or inform the jury about any forensic disadvantage the defendant may have suffered because of delay except in accordance with this section, but this section does not affect any other power of the judge to give any warning to, or to inform, the jury.*
>
> *(6) For the purposes of this section:*
>
> *(a) delay includes delay between the alleged offence and its being reported, and*
>
> *(b) significant forensic disadvantage is not to be regarded as being established by the mere existence of a delay.*

*(7) For the purposes of this section, the factors that may be regarded as establishing a* ***significant forensic disadvantage*** *include, but are not limited to, the following:*

*(a) the fact that any potential witnesses have died or are not able to be located,*

*(b) the fact that any potential evidence has been lost or is otherwise unavailable.*

Basten JA at [53] stated that the effect of this provision is:

"(a) to prohibit the judge from directing the jury "about any forensic disadvantage the defendant may have suffered because of delay" otherwise than in accordance with the section (subs (5));

(b) there is a duty to warn, but only where the judge is satisfied that the defendant has "suffered a significant forensic disadvantage because of the consequences of delay" (subs (2));

(c) the obligation to warn is subject to a rider where there are "good reasons" for not taking that step (subs (3));

(d) the judge is prohibited from suggesting that it would be dangerous or unsafe to convict "solely because of" the delay or the disadvantage (subs (4));

(e) subject to the last prohibition, no particular form of words need be used (subs (4))."

The judge must identify the significant forensic disadvantage and inform the jury of the nature of that disadvantage; the direction will therefore need to be case specific: at [54]. In finding the applicant had not suffered a significant forensic disadvantage as a consequence of delay, Basten JA said made the following points:

. First, the focus of the section is on the disadvantage to the accused; it does not reflect any degree of prejudgment of the reliability of a complainant's evidence: at [60]

. Secondly, the concept of delay is relative. Significant lapses of time may be reasonable in the context of child sexual assault. Whether that which is not unreasonable constitutes "delay" for the purposes of s 165B will depend upon particular circumstances: at [61]

. Thirdly, although various factors may contribute to a delay, where a significant element is misconduct by the accused, any resultant forensic disadvantage may not be characterised as a consequence of delay or, in the alternative, may provide a good reason for a judge not to give a direction, pursuant to the permissible exception in s 165B(3). In this case, the complainant alleged that the applicant had threatened suicide. If the trial judge had been satisfied that such a threat had been made that would have provided a good reason not to treat the direction as required or, if the power were engaged, a good reason for not exercising it: at [62].

. Fourthly, if the accused is put on notice of the complaint, any failure to make inquiry thereafter will not normally constitute a consequence of the delay, but a consequence of the accused's own inaction: at [63].

***Section 165B Evidence Act – Delay in complaint – credit of complainant***

s 294 of the ***Criminal Procedure Act*** states**:**

***294 Warning to be given by Judge in relation to lack of complaint in certain sexual offence proceedings***

*(1) This section applies if, on the trial of a person for a prescribed sexual offence, evidence is given or a question is asked of a witness that tends to suggest:*

*(a) an absence of complaint in respect of the commission of the alleged offence by the person on whom the offence is alleged to have been committed, or*

*(b) delay by that person in making any such complaint.*

*(2) In circumstances to which this section applies, the Judge:*

*(a) must warn the jury that absence of complaint or delay in complaining does not*

*necessarily indicate that the allegation that the offence was committed is false, and*

*(b) must inform the jury that there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about the assault, and*

*(c) must not warn the jury that delay in complaining is relevant to the victim's credibility unless there is sufficient evidence to justify such a warning.*

Section 294 overrides the presumption that failure of a complainant to complain at the earliest reasonable opportunity may be used by the jury as evidence relevant to the falsity of complaint: ***Kilby*** (1973) 129 CLR 460.

In ***Jarrett*** [2014] NSWCCA 140 (above) the CCA said that the introduction of paragraph s 294(2)(c) (in 2007) significantly recasts the section. It must also be read as complemented by s 294AA which, in respect of relevant sexual offence proceedings, prohibits the judge warning a jury that "complainants as a class are unreliable witnesses" and in particular prohibits a warning to a jury of the danger of convicting on the uncorroborated evidence of a complainant: at [38].

Section 294(2)(c) provides a warning is not to be given unless there is "sufficient evidence to justify such a warning": at [42] Basten JA (RA Hulme J and Campbell J agreeing) said that the circumstances and the nature of the warning will vary from case to case and is not an area in which a standard form of warning is appropriate: at [38]. The requirement of "sufficient evidence" must mould the content of the warning, and must also fit with the mandatory directions required by paragraphs (a) and (b).

> "[43] ….. Without being prescriptive, there must be something in the evidence sufficient to raise in the judge's mind the possibility that the jury may legitimately consider that the delay could cast doubt on the credibility of the complaint. Usually, one would expect that such matters would have been put to the complainant in the course of cross-examination. Those very matters may constitute the "good reasons" why there was no timely complaint for the purposes of par (b), but, if not believed, may form the evidence justifying the warning under par (c)."

***s 165B Evidence Act - Delay in complaint – s 165B applies in judge alone trial***

In ***W*** [2014] NSWCCA 110 the appellant was convicted at a trial by judge alone of sexual assault offences. The appellant had been found unfit to plead and was tried at a special hearing under s 21 ***Mental Health (Forensic Provisions) Act 1990.*** The appellant submitted the judge misdirected himself because he failed to give himself a *Longman* direction: ***Longman v R*** (1989) 168 CLR 79.

Dismissing the appeal, the CCA held that s 165B(4) ***Evidence Act*** –- which prohibits the giving of a *Longman* warning – applied.

Section 165B ***Evidence Act*** (reproduced above) applies in judge alone trials. This is because s 133(3) ***Criminal Procedure Act*** requires that in a judge alone trial, a judge is to give to him/ herself a warning if one is required to be given to a jury by an Act or laws. Notwithstanding also that s 165B(1) provides: "This section applies in a criminal proceeding in which there is a jury": at [127].

In this case, as an application for such a direction was in fact made, s 165B(2) obliged the judge, if he was satisfied the appellant suffered a significant forensic disadvantage due to delay, to inform himself of the nature of the disadvantage and the need to take it into account when considering the evidence. The trial judge recognised the delay had resulted in a significant forensic disadvantage to the appellant in relation to the calling of evidence, his own recollection and his inability to find witnesses. The judge thus did not err in failing to give a *Longman* warning: at [130]-[132].

***Tendency - s 97 Evidence Act – appellant had exposed himself in public on past occasions to older females – not admissible on charge of 'Indecent assault of child'- failure to undertake weighing exercise under s 101***

In ***Sokolowskyj*** [2014] NSWCCA 55 the appellant was convicted of indecent assault of a child (s 61M(2) ***Crimes Act***). The CCA held that the Crown should not have been permitted to lead as tendency evidence, evidence of the appellant having exposed himself in public on past occasions to an older teenage female, a number of people and an adult female. The evidence did not have "significant probative value" as required by s 97 ***Evidence Act***, given the high level of generality of the tendency relied upon. A tendency to have sexual urges was so general as to be meaningless: at [40]; ***Townsend*** [2001] NSWCA 136 at [78]. There was marked dissimilarity between the tendency conduct and the offence (prepubescent victim with no public exhibition against tendency evidence of public display and no prepubescent victim or active assault): at [41].

The judge also failed to carry out the weighing exercise under s 101. He considered whether the evidence had probative value but not whether its probative value was significant; and did not assess prejudicial effect and balance that against its probative value. There was a risk the jury would view the appellant as a sexual deviant likely to have committed the offence. If the weighing exercise had been carried out properly, it would have been found that the probative value was not high and was substantially outweighed by the risk of unfair prejudice: at at [51]-[56].

***Tendency and coincidence - ss 97, 98, 101 Evidence Act - consideration of Velkoski v The Queen [2014] VSCA121***

Tendency and coincidence evidence is inadmissible unless it can be established as having significant probative value: ss 97, 98 ***Evidence Act 1995***. The prosecution cannot use such evidence against a defendant "unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant": s 101.

In ***Saoud*** [2014] NSWCCA 136 the applicant was charged with sexual offences committed against two separate complainants occurring in similar circumstances in 2009 and 2011. The complainants were both former employees of the applicant who resisted his sexual advances when helping with work after hours. The applicant denied the first complaint; he conceded some of the conduct of the second complaint but claimed it was consensual.

The trial judge found that the evidence of one complainant was held to have significant probative value with respect to charges concerning the other and admitted the evidence as tendency and coincidence evidence pursuant to ss 97, 98 and 101 ***Evidence Act***. Dismissing the appeal, Basten JA (Fullerton and R A Hulme JJ agreeing) held that firstly**,** the evidence had significant probative value as to whether the applicant's willingness to persist in attempting sexual intercourse despite the absence of consent: [26], [49]-[53]. Second, the probative value of the evidence outweighed any prejudicial effect. The evidence was confined to establishing the charges laid, did not involve deviant behaviour and there were no issues of collaboration or contamination of the complaints: [54]-[59]; ***Sokolowskyj*** [2014] NSWCCA 55.

The CCA also considered the Victorian Court of Appeal decision in ***Velkoski v The Queen*** [2014] VSCA 121 where the VSCA stated that "there are undoubted differences between the decisions of this Court and the New South Wales Court of Criminal Appeal as to whether similarity of features need be present in order for evidence to be admissible as tendency evidence" (at [34]). A line of authority in NSW was said to have "emphasised that tendency reasoning is not 'based upon similarities', and evidence of such a character need not be present", referring to ***R v PWD*** [2010] NSWCCA 209; 205 A Crim R 75; ***BP v R*** [2010] NSWCCA 303: at [35].

The CCA said it was not appropriate to consider whether the opinions expressed in ***Velkoski*** are

correct. However, each Court has cited judgments of the other over the years without major points of departure. More significantly, it is possible to derive a number of basic propositions and which are sufficient to resolve the issues in this case: at [37].

Basten JA stated that "tendency" evidence will usually depend upon establishing similarities in a course of conduct, even though s 97 does not refer (by contrast with s 98) to elements of similarity: at [44]. That inference is inevitable, because that which is excluded is evidence that a person has or had a tendency to act in a particular way, or to have a particular state of mind. Evidence of conduct having that effect will almost inevitably require degrees of similarity, although the nature of the similarities will depend very much on the circumstances of the case. ***PWD*** does not "remove any requirement of similarity or commonality of features", as suggested in ***Velkoski*** at [164]: at [45]-[46]. Where relevant and appropriate, a proper consideration of similarities will constitute an essential part of the application of s 97, as this Court has accepted on numerous occasions: at [47]-[48]; ***BP*** [2010] NSWCCA 303.

***Opinion evidence ss 79, 80(b) Evidence Act – specialised knowledge not established***

In ***Campbell*** [2014] NSWCCA 175 the appellant was convicted of Murder. The Crown sought to prove the appellant pushed his wife from a cliff. A shoe print impression was left by the deceased next to the cliff. The Crown was permitted to call Professor C from the Physics Department of a university in Sydney to give evidence about the foot impression and scenarios as to how the deceased had left it there. The CCA (Bathurst CJ; Simpson J agreeing with additional observations; Hidden J agreeing with both) held that the evidence should not have been admitted.

Section 79(1) ***Evidence Act 1995 (NSW)*** states:

> *"If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge."*

First, did Professor C have the requisite specialist knowledge to give the evidence? Second, was his opinion wholly or substantially based on such specialised knowledge?: at [221]. At common law, evidence from an expert was not admissible if it was no more than an attempt to guide the jury on matters which it was within their capacity to determine for themselves: at [222]. However, s 80(b) now provides that evidence of a person is not inadmissible only because it is about a matter of common knowledge. The section makes it clear that in arriving at an opinion based on specialised knowledge, training or experience there can be no objection to an expert relying on matters generally known. In that way ss 79 and 80(b) can be read harmoniously: at [225]; ***Velevski*** (2002) 76 ALJR 402.

Much of Professor C's evidence could be derived from common experience; his conclusion that the deceased was upright and to have tripped would have had to have been walking at a moderate to fast pace, would be based on specialised knowledge in biomechanics. If Professor C had appropriate knowledge in that field, he would be entitled to give the evidence he gave based on such expertise. That his process of reasoning involved the expression of opinions on matters which could be said to be matters of common knowledge did not render his evidence inadmissible: at [228]. However, his formal qualifications (in physics), studies and experience did not show specialised knowledge in biomechanics such as to enable him to express the opinion given by him: at [229]-[231].

(Other evidence properly admitted at trial was capable of establishing the applicant's guilt beyond reasonable count. The proviso was applied and the appeal dismissed: at [279]).

***Surveillance Devices Act 2007 s 7 – conversation recorded on mobile phone by sexual assault complainant admissible***

Section 7(3)(b)(i) ***Surveillance Devices Act 2007*** allows a "principal party" to a conversation to record it if that is "reasonably necessary" to protect their "lawful interests."

In ***DW*** [2014] NSWCCA 28 (sexual assault offences) the Crown was permitted to rely on evidence of a recording made by the 14 year old complainant on her mobile phone of the appellant (her father) telling her how to show her breasts. The appellant submitted the evidence contravened s 7(1)(b) which prohibits private recordings.

Dismissing the appeal, the CCA held that the recording fell within the exception in 7(3)(b)(i). The interest of a child complainant to not be the victim of a serious criminal offence is a "lawful interest": at [27], [30]-[37]. The recording was "reasonably necessary" to protect the complainant's lawful interest given her age and family circumstances: at [48]-[49], [53]. The recording was made prior to any police investigation while the assaults were ongoing and it was not practicable for her to contact police to obtain a warrant to make recordings: at [49]-[51]; ***Sepulveda*** (2006) 167 A Crim R 108 distinguished.

***Question of Law – Trial judge ordered production of reports regarding deceased child by Department of Family and Community Services - s 29 Children and Young Persons (Care and Protection) Act 1998 - principle of legality requires s 29 be read down so as not to interfere with right to fair trial***

In ***The Application of the Attorney General for NSW dated 4 April 2014*** [2014] NSWCCA 251 (murder) the accused caused subpoenas to be issued to the Department of Family and Community Services for the production of reports made under the ***Children and Young Persons (Care and Protection) Act 1998*** concerning the deceased child. The trial judge ruled that s 29 did not preclude an order for production from being made. The accused was acquitted at a judge alone trial. Section 29 concerns the *"Protection of persons who make reports or provide certain information."* The accused was acquitted.

The Attorney General submitted three questions of law:

> (1) Did [the trial judge] err in construing s 29 as enabling a Court to order production to the Court in response to a subpoena and over objection of reports under Part 2 of the Act except insofar as they disclosed or tended to disclose the identity of the person or persons who made the reports?
>
> (2) Did [the trial judge] err in construing s 29(1)(e) of the Act?
>
> (3) Did [the trial judge] err in making the order for [production]?: see at [3].

The CCA (Macfarlan JA; Beazley P and Bellew J agreeing) answered in the negative to all three questions: at [49]. The CCA made the following observations:

1. The ability for an accused person to seek access to relevant material for the purpose of defending criminal charges is an aspect of the overarching right to a fair trial: at [23]. Section 29 should not be construed so as to preclude the accused from compelling production of s 29 reports. The principle of legality requires that s 29(1)(e) be read down so as not to interfere with the accused's right to a fair trial. That right relates to the "whole course of the criminal process" and includes an accused's right to require third parties to produce relevant documents on subpoena *duces tecum*: at [29].

2. The protections afforded by s 29 are by no means absolute. Section 29 does not exhibit

an intention to preclude an accused from ever coming into possession of reports. The intention is limited to precluding production from being compelled: at [28].

3. The purpose of s 29 to protect reporters rather than to protect the contents of reports as an end in itself: at [31]-[32].

***Rejection of uncontroverted psychiatric opinions – procedural fairness - court used ERISP recording which had not been provided to the psychiatrists***

In ***Goodridge*** [2014] NSWCCA 37 the CCA found that the trial judge in a trial by judge alone was entitled to reject the evidence of psychiatrists based upon her observations of the accused in an ERISP video *which the psychiatrists had not seen*. There was no procedural unfairness since the judge had expressed her reservations about the material, even though she had not explicitly said that she was intending to reject (or even considering rejecting) the opinions. The CCA said (at [137]):

> "Having clearly expressed her reservations and concerns with respect to the psychiatric material, it was for the parties to decide what course they wished to take. It was not her Honour's role to decide how they should proceed. That was a matter for counsel. Importantly, there was no requirement for her Honour to tell the parties outright that she intended to reject the evidence of the psychiatrists. In fact her Honour may not have reached that conclusion at that point in time given that submissions were continuing. The identification of her concerns was sufficient. "

## 2. PROCEDURE

***Views – right of an accused to attend view – whether accused misled by trial judge and defence counsel that he had no right to attend view***

In ***Tongahai*** [2014] NSWCCA 81 the CCA considered whether there was a miscarriage of justice on the basis that the accused had been misled, by judge and his counsel, to believe he had no right to attend the view.

An accused person has a right to attend a view although not obligated to do so. The accused may elect not to be present, and a court cannot compel him or her to attend: at [20]-[26], [37]; ***Karamat v The Queen*** [1956] AC 256 at 265.

The judge used language which might have suggested the accused had no right to be present despite his wish to attend. However, the accused was represented by experienced senior counsel who obtained instructions and with whom the matter was discussed before a final decision was made. The accused decided not to attend: at [38]. It is unlikely the accused would have formed a subjective belief he had no right to attend, however, if he did it was a matter he had an opportunity to discuss with counsel. Those circumstances provided no warrant to investigate why particular decisions were made and revealed no basis for concluding there had been a miscarriage of justice: at [43]. Leave to appeal against conviction was refused.

***Jury - majority verdicts - "deliberation" - whether eight hours had elapsed - whether lunch time is to be counted in the eight hour period***

Section 55F(2)(a) ***Jury Act 1997*** states a jury may return a majority verdict if a unanimous verdict has not been reached after a period of time (being not less than 8 hours) that the Court considers reasonable, having regard to the nature and complexity of the proceedings.

In ***BR*** [2014] NSWCCA 46 the jury failed to return a unanimous verdict on any of the four charges. The appellant submitted that s 55F was not satisfied because a period of 1 hour had been counted during which the jury did not deliberate. It occurred at the time the jury had sent a note that it was impossible to reach a unanimous verdict.

The CCA dismissed the appeal. The onus is on the appellant to establish the trial miscarried because the jurors were not actually deliberating, notwithstanding they were together during that period. In the absence of evidence to the contrary, an inference should be drawn that, while the jurors were confined together, they were continuing to deliberate. The prerequisite of deliberation for an 8 hour period was thus satisfied: at [28], [48].

The meaning of "deliberation" and its application to individual cases may be guided by two considerations: (1) whether the jury is sequestered in the same location (such as the jury room); and (2) whether the jury is able to conduct discussions about the case at hand: at [19]-[20]. The Court made the following points:-

Time away from the courtroom: Discrete and substantial breaks from deliberations, such as retirement overnight or returning home, should be excluded from the 8 hour period: at [21].

Time for lunch / dining: Emmett JA said that adjournment for lunch, where lunch is not taken in the jury room, should be excluded from the 8 hour period: at [21]. A court should be slow to make an assumption that time spent dining is **necessarily** a time spent in deliberation: at [24]. In this case, there was insufficient evidence to find that deliberations ceased at lunch time: at [29]-[31]. Hulme AJ said that the lunch period should be included as some deliberation likely occurs: at [43].

Time receiving jury directions: The jury is together listening to a direction but are unable to consider and discuss the case. This period would not ordinarily be seen as "deliberation": at [22], [44].

Time spent travelling: “Travel time” between jury room and court room should not be included in the 8 hour period: at [23],
[45].

Time for short breaks: For example, cigarette breaks. Hulme AJ considered that more recording needs to be made of these times as deliberations arguably cease during these breaks: at [45]-[46].

***Question Trails***

In ***Burodeen*** [2014] NSWCCA 332 the CCA referred to question trails, which is common practice and becoming more commonplace. Such question trails can be of great use in complex trials but extreme care must be taken that all issues are covered and that there are no gaps in the findings necessary to establish guilt or otherwise: at [3].

The applicant was convicted of aggravated indecent assault and sexual intercourse with a person between 14 and 16 years of age (ss 61M(2), 66C ***Crimes Act***). The applicant’s case relied on the defence of honest and reasonable mistake of fact that the complainant was 16. The applicant's case also involved a claim that the complainant consented; but s 77 ***Crimes Act*** provides that the consent of the child shall be no defence to a charge under ss 61M(2) and 66C.

The trial judge directed the jury by use of a question trail. The judge directed that if the Crown proved beyond reasonable doubt that the complainant did not consent to the sexual activity of the applicant, then provided the jury were also satisfied that the complainant was under the age of 16 and that the applicant committed the physical act alleged, then the jury should return a verdict of

guilty. The judge directed the jury that if they were satisfied of the age and physical act elements but not of the consent element, only then should they consider whether the Crown had established beyond reasonable doubt that the accused did not have an honest belief on reasonable grounds that the complainant was aged 16 or above: at [20].

Directing the jury in this way was erroneous in that it required the jury to be satisfied beyond reasonable doubt about an issue that, having regard to s 77, was entirely irrelevant. But in directing the jury as to the essential elements of the offences in the form of a question trail, the jury were given a prescriptive chain of reasoning to follow. The directions left it open to the jury to by-pass the single critical issue in the case (honest and reasonable mistake as to the complainant's age) and to convict the applicant on the basis that they were satisfied of the irrelevant fact that the complainant did not consent: at [23].

None of this should be seen as criticism of the practice of using the question trail approach to directing a jury as to the elements of an offence. However, particular care is needed when prescribing a sequential process of reasoning. It is trite to observe as well that care is required in the identification of the elements of the offence: at [24].

## 3. SPECIFIC OFFENCES

### *s 93B Riot – "present together"*

In ***Parhizkar*** [2014] NSWCCA 240 the applicant, a detainee at an immigration detention centre, threw tiles from a roof top during a protest. Other detainees protested from the ground as well as the roof. The trial judge directed the jury that the words "present together" in s 93B ('Riot') meant persons being in the same place. The applicant submitted "present together" required that 12 or more persons should be in close proximity to each other, close enough to assist each other by force.

Dismissing the appeal, the CCA (Price J; McCallum J agreeing; Basten JA dissenting) held that the phrase "present together" is intended to have its ordinary meaning and there is nothing to suggest the words are intended to be used in any unusual sense. The Crown is not obliged to prove that 12 or more persons are in close proximity, close enough to assist each other by force if necessary, to be considered "present together". The phrase is directed at persons being in the same place: [85]-[90]; ***Regina v W(N)*** [2010] 1 WLR 1426.

### *Unassembled crossbow does not fall within the definition of 'crossbow' – Weapons Prohibition Act 1998*

In ***Jacob*** [2014] NSWCCA 65 the applicant was convicted of selling a prohibited weapon on an ongoing basis: s 23B ***Weapons Prohibition Act 1998***. One of the charges related to a box containing unassembled components for a crossbow. The CCA allowed the appeal and quashed the conviction.

> Clause 2(5) Schedule 1 ***Weapons Prohibition Act*** states:
>
> > *"A crossbow (or any similar device) consisting of a bow fitted transversely on a stock that has a groove or barrel designed to direct an arrow or bolt."*
>
> Section 4(2) ***Weapons Prohibition Act*** states:
>
> > *"(2) For the purposes of this Act:*
> >
> > *(a) anything that would be a prohibited weapon if it did not have something missing from it, or a defect or obstruction in it, is taken to be a prohibited weapon,…*

The appellant did not have a *"bow fitted transversely on a stock"*: at [141]. Under s 4(2)(a) the *"something missing"* must be confined so that what remains is in substance a *"prohibited weapon"*: at [12]; [16]; [147]. Thus "… a rifle would still be a firearm even if the bolt or firing pin or both were missing but those items would not themselves be firearms in circumstances where all the remaining parts, barrel, stock, magazine, trigger mechanism etc were missing. In the case of a crossbow, a missing string, would not prevent the balance of the item being a crossbow, but the absence of a bow or stock would do so": at [147].

***Supply prohibited drug and attempt to possess same drug could both be prosecuted***

In ***Jidah*** [2014] NSWCCA 270 the applicant was convicted of one count of supply prohibited drug (pseudoephedrine), commercial quantity (s 25(2) ***Drug Misuse and Trafficking Act)*** and one count of attempt to possess a precursor, namely pseudoephedrine, intended for use by another person in the manufacture of a prohibited drug (s 24A). The applicant argued there was a miscarriage of justice because the elements of the first count were contained in the elements of the second count: at [15].

The appeal was dismissed. All of the elements of the supply count were not subsumed in the possession count: the supply offence had the additional element of a commercial quantity; and it was possible to be aware the substance was a precursor but not a prohibited drug: at [39]. In these circumstances a conviction or acquittal on one or the other of the counts would not give rise to a plea of autrefois convict or autrefois acquit: at [40]. A Court would have the power to stay the charges if it were necessary to prevent an abuse of process: at [41]-[42]; ***Pearce*** (1998) 194 CLR 610. There are cases in which a conviction was quashed because the whole of the criminality arising out of the charged acts was encompassed in the other offence: at [46]-[55]. This is not so in this case. The s24A offence does not capture the criminality involved in the supply of a large commercial quantity, for which the maximum penalty is life imprisonment, reflecting the seriousness with which Parliament regards that offence. There is a separate element of s 24A (that the possession of the precursor was intended by the accused to be used in the manufacture or production by another person of a prohibited drug) which is not an element of criminality under 25(2). It is not appropriate to quash either conviction: at [56]-[57].

***s 193D Crimes Act – Dealing with property that becomes an instrument of crime – motorcycle is capable of being "property" within the meaning of s 193D***

In ***Madden*** [2014] NSWCCA 291 the applicant was charged under s 193D ***Crimes Act*** (Dealing with property that becomes an instrument of crime) in relation to dealing with a motorcycle that came into the possession of a another person who, whilst riding it, shot and killed the victim. The CCA refused leave to appeal against the judge's ruling that the motorcycle came within the meaning of "property" under s 193D. "Property" is defined to mean "money or other valuables": s 193D(5). Defence counsel submitted that a motorcycle could not meet the Dictionary definition of "other valuables" because it is not a small item of personal property: at [9] However, there is nothing in the legislation to suggest that the words s 193D are to be read down so as to impose a size limit on the kind of item that may be the subject of a charge: at [17].

***s.195 Crimes Act – recklessly destroy property by fire – element of foreseeability***

In ***CB v DPP*** [2014] NSWCA 134 the applicant, a 15 year old boy, had broken into a house and played with a cigarette lighter on a couch. The couch caught fire and ultimately the entire house was destroyed. On appeal the Court of Appeal concluded that it was sufficient for the crown to prove that the applicant had foreseen the possibility of some damage to property – he did not

need to have foreseen the extent of the damage

***s.25A Drug Misuse and Trafficking Act 1985 – ongoing supply – need for "material reward" to the offender in relation to each foundational supply***

In ***White*** [2014] NSWCCA 329 the applicant, despite having pleaded guilty, successfully appealed against his conviction for ongoing supply of prohibited drugs. In relation to 2 out of the 3 foundational drug supplies, the applicant had simply purchased drugs on behalf of undercover police and had passed the money directly to the supplier without receiving any profit or reward himself. In relation to the third supply he had been able to pool his money with that of the police and obtain a bulk discount which the court accepted could amount to a material reward.

## 4. POWER AND PROCEDURE OF COURT ON CONVICTION APPEAL

***No majority ruling in CCA - "highest common denominator" of rational agreement to apply***

In ***Hawi*** [2014] NSWCCA 83, a murder conviction appeal, the CCA could not reach a majority. Bathurst CJ held the verdict was unreasonable and should be set aside: at [349]. Price J held the verdict was reasonable but would have ordered a new trial: at [316]. McCallum J would have dismissed the appeal: at [530].

Where there is no majority in favour of any forms of order, the appropriate course is to attempt to find within the reasons and orders proposed by the judges the "highest common denominator" of rational agreement: at [375]-[376]; ***Woolworths Ltd v Kelly*** (1991) 22 NSWLR 189; ***Robinson*****;** ***Wilson*** (2005) 153 A Crim R 257.

Bathurst CJ stated that, after consultation with Price and McCallum JJ, it was appropriate to concur in the orders proposed by Price J. This gives effect to the majority view that the appeal should be allowed whilst preserving the opinion of each of Price and McCallum JJ that the verdict was not unreasonable: at [379]-[380]. The CCA thus held that the appeal should be allowed, the conviction quashed and a new trial ordered.

Note s 21A(2) ***Criminal Appeal Act*** provides that if judges are equally divided in opinion, the decision of the court is to be in accordance with the opinion of the Chief Justice or other judge presiding. However, s 21A applies where the members of the Court can be equally divided and cannot be extended to circumstances where 3 judges hold different views as to the outcome of the appeal: at [353]-[358]. It was further noted that there is no universal convention that a junior judge defer to a senior judge and withdraw orders to agree with the senior judge: at [373]-[374].

***Power of CCA in relation to evidence of mental illness at trial - s 7(4) Criminal Appeal Act - not necessary to determine whether verdicts are unreasonable or cannot be supported when s 7(4) is raised***

In ***Da-Pra*** [2014] NSWCCA 211 the appellant was convicted by a jury of the manslaughter of his father GD (Count 1), murder (Count 2) and causing grievous bodily harm with intent to murder (Count 3). The essential issue at trial was whether the defences of mental illness or substantial impairment were available in relation to any of the three offences. (The defence of mental illness, or insanity, is a complete defence. 'Substantial impairment' is a partial defence that reduces murder to manslaughter.) The jury, in convicting the appellant of the three offences, found that the

appellant was not entitled to the mental illness defence in relation to any of the three offences. In relation to Count 1, the jury found the appellant guilty of manslaughter as an alternative to murder on the basis of substantial impairment.

The appellant submitted that the verdicts were unreasonable or unsupportable on the evidence under s 6(1) ***Criminal Appeal Act 1912***; and that the court should determine, in accordance with s 7(4), that the appellant was mentally ill at the time of the offences. Section 7(4) states*:*

> "*If, on any appeal, it appears to the court that, although the appellant committed the act… charged against the appellant, the appellant was mentally ill, so as not to be responsible, according to law, for the appellant's action at the time when the act was done or omission made, the court may quash the conviction and sentence passed at the trial and order that the appellant be detained in strict custody…*"

The CCA said it was unnecessary to determine the ground in relation to s 6(1) where the appellant also relies upon s 7(4): see at [348]-[353]; ***Derbin*** [2000] NSWCCA 361 at [12]-[13]; ***Jenkins*** (1963) 64 SR(NSW) 20.

The CCA held that the jury ought to have found the defence of mental illness was made out in relation to Count 1, and allowed the appeal on this Count: at [374]. Each of the three psychiatrists at trial expressed the opinion that the appellant lacked the capacity to understand that his actions in killing his father were wrong. There was a considerable body of evidence supporting the proposition that the appellant did hold a delusional belief that in killing GD that he would be saving his mother. The court was satisfied on the balance of probabilities that at the time of killing GD the appellant was suffering from mental illness and that that the jury ought to have been satisfied the defence was made out: [369]-[374].

However, the evidence relating counts 2 and 3 did not involve unchallenged unanimous opinions by the psychiatrists. The CCA was not satisfied that the material relied upon for the opinions of the psychiatrists was sufficiently reliable to accept on the balance of probabilities that the defence of mental illness was made out. The CCA did not consider that "the evidence was so strong in favour of the view that the appellant was mentally ill, so as not to be responsible according to law": at [383]-[384]; ***Jenkins*** [1964] NSWR 721, although both killings occurred on the same day.

<u>Note</u>: *Special Leave to the High Court was refused in this matter on 13 March 2015.*

## 5. OTHER CASES

### *Medicare is not immune to subpoenas*

In ***Osborne*** [2014] NSWCCA 17 the CCA found that Medicare is not protected from production of documents on subpoena. For many years, Medicare had relied upon s135A of the *National Health Act* 1953 (Cth) to refuse to comply with any subpoena seeking documents such as claims histories. The CCA found that, while the section prohibited the divulging or communicating "to any person" information with respect to the affairs of a third person, this did not extend to prohibiting compliance with a subpoena requiring production to a court, which is not a person.

Note: this will not affect all other agencies since some other legislation, such as that protecting records of notifications to Family and Community Services (NSW) and the investigations of the Australian Transport Safety Bureau, specifically prohibits production on subpoena.

***Costs – arraignment and entering of not guilty pleas, date fixed for trial – DPP terminates proceedings – jurisdiction to grant costs certificate – meaning of "trial"***

Section 2 of the ***Costs in Criminal Cases Act 1967*** provides that a certificate of costs may be granted "after the commencement of a trial in proceedings."

In ***JC v DPP(NSW)*** [2014] NSWCCA 228 (sexual offences) the applicants were arraigned in the District Court, entered pleas of not guilty and a date was fixed for trial. No jury was empanelled. The DPP subsequently terminated proceedings. The judge held that the court had no jurisdiction to grant costs on the basis that no "trial" had commenced. On application for judicial review, the CCA held the judge was incorrect in determining he had no jurisdiction to grant a costs certificate under s 2 of the ***Costs in Criminal Cases Act***. The DPP's direction that no further proceedings be taken against the applicant was given "after the commencement of the trial."

The CCA considered the meaning of "trial": at [21]-24]. The CCA looked to s 130 of the ***Criminal Procedure Act 1986***:

> ***130 Trial proceedings after presentation of indictment and before empanelment of jury***
>
> *(1) In this section, court means the Supreme Court or District Court.*
>
> *(2) The court has jurisdiction with respect to the conduct of proceedings on indictment as soon as the indictment is presented and the accused person is arraigned, and any orders that may be made by the court for the purposes of the trial in the absence of a jury may be made before a jury is empanelled for the trial.*
>
> *(3) If proceedings are held for the purpose of making any such orders after the indictment is presented to commence the trial and before the jury is empanelled:*
>
> - *(a) the proceedings are part of the trial of the accused person, and*
> - *(b) the accused person is to be arraigned again on the indictment when the jury is empanelled for the continuation of the trial.*

First, the purpose of s 130(2) is to declare the point from which the court has jurisdiction with respect to "the conduct of proceedings on indictment". Section 130 should not be read in a restricted fashion as limited to orders relating to evidence or otherwise dealing with matters which could be dealt with in the course of a hearing, albeit in the absence of the jury: at [27]. Secondly, if that is so, both taking a plea and fixing a date for trial involve proceedings and, in the latter case an order, falling within the scope of s 130. Both steps were taken in the present case. It follows that the proceedings constituted "part of the trial of the accused person", pursuant to s 130(3): at [27].

***Mental Health (Forensic Provisions) Act 1990 ss 24, 27 – judge must make order under s 27 that offender be detained in a mental health facility***

In ***DPP v Khoury*** [2014] NSWCA 15 [Five judge Bench] the trial Judge erred in holding he had a discretion under s 27 to decline to make order as to K's detainment and order K be unconditionally released. The Court of Appeal held that s 27 confers the power to determine the place where the person, held by the Tribunal to be suffering from mental illness, should be detained, not *whether* he or she should be detained at all. A limiting term has already been set (s 24) and the discretion under s.27 is as to the place of detainment, that is, the Court may decide whether to order the person in a Mental Health Facility or some other place: at [23], [47], [58]; ***R v AN (No 2)*** (2006) 66 NSWLR 523 *not followed*.

***Judge erred in refusing to grant permanent stay – historical sexual assault offences – allegations based on repressed memories***

In ***TS*** [2014] NSWCCA 174 it was an error to refuse to grant a permanent stay of proceedings where the applicant was charged with sexual offences alleged to have occurred 40 years ago and the complainant's allegations were based on repressed memories.

The applicant was found unfit to be tried. The judge refused a permanent stay at the commencement of a special hearing under s 19 of the ***Mental Health (Forensic provisions) Act* 1990**. The CCA said that the test of whether a permanent stay should be granted applied even though the proceedings were a special hearing not a trial: at [56]-[58].

The alleged conduct took place 40 years ago and gives rise to a significant number of factors generating unfairness, including lack of documentary evidence and inability to challenge particular evidence. The case relies on a process of recollection that has been categorised by expert evidence as unreliable, and for which there is no independent corroboration: at [72]-[73]. In combination with old age, health and mental health, these factors give rise to unacceptable injustice and unfairness warranting a permanent stay: at [70], [77]; ***R v Glennon*** (1992) 173 CLR 592.

***Doli incapax – a strictly subjective test***

In ***RH v DPP*** [2014] NSWCA 305 the Court of Appeal upheld the appeal judge's finding that the magistrate had wrongly applied an objective test to an assessment of whether the prosecution had rebutted the presumption of *doli incapax*. The NSWCA noted that the appeal judge had effectively gone on to make the same error by imputing knowledge of a normal 12 year old to the young person when he said, "The importance of the object of the break-in being a fire station was that *it would have been appreciated* by [the applicant] that the fire station existed for a specific purpose and that he was not meant to be there."

The error of law made by the appeal judge was, having found that the magistrate had made an error of law, failing to remit the matter. The appeal judge had dismissed the appeal on the ground that it was open to the magistrate to make the finding he did but should have set aside the finding of guilt unless the magistrate's finding was the only possible finding.

## STATISTICS

The Judicial Commission Statistics for the Court of Criminal Appeal for 2014 sentencing and Crown appeals are available.

**Table 1 — Severity Appeals (2000–2014)**

| Year | Severity Appeals | Allowed | |
|---|---|---|---|
| | N | n | % |
| **2000** | 313 | 127 | 40.6 |
| **2001** | 343 | 138 | 40.2 |
| **2002** | 331 | 148 | 44.7 |
| **2003** | 272 | 109 | 40.1 |
| **2004** | 285 | 131 | 46.0 |
| **2005** | 318 | 141 | 44.3 |
| **2006** | 259 | 106 | 40.9 |
| **2007** | 242 | 94 | 38.8 |
| **2008** | 216 | 83 | 38.4 |
| **2009** | 230 | 78 | 34.3 |
| **2010** | 216 | 84 | 38.9 |
| **2011** | 188 | 93 | 49.5 |
| **2012** | 168 | 65 | 38.7 |
| **2013** | 224 | 57 | 25.4 |
| **2014** | 191 | 61 | 31.9 |
| | **3796** | **1515** | **39.9** |
| **Source: Judicial Commission NSW Court of Criminal Appeal database** | | | |

**Table 2 — Crown Appeals (2000–2014)**

| Year | Crown Appeals | Allowed | |
|---|---|---|---|
| | N | n | % |
| **2000** | 84 | 42 | 50.0 |
| **2001** | 55 | 34 | 61.8 |
| **2002** | 80 | 49 | 61.3 |
| **2003** | 65 | 32 | 49.2 |
| **2004** | 101 | 52 | 51.5 |
| **2005** | 58 | 34 | 58.6 |
| **2006** | 76 | 47 | 61.8 |
| **2007** | 59 | 35 | 59.3 |
| **2008** | 62 | 32 | 51.6 |
| **2009** | 48 | 31 | 64.6 |
| **2010** | 69 | 49 | 71.0 |
| **2011** | 34 | 15 | 44.1 |
| **2012** | 32 | 12 | 37.5 |
| **2013** | 33 | 19 | 57.6 |
| **2014** | 55 | 36 | 65.5 |
| | **911** | **519** | **57.0** |
| **Source: Judicial Commission NSW Court of Criminal Appeal database** | | | |

## ANNEXURE A

## 2014 HIGH COURT CASES

***Barbaro; Zirilli [2014] HCA 2; (2014) 305 ALR 323. Appeal from Vic CA.***

*It is not the role or duty of the prosecution to make submissions as to available range of sentences. Held: Appeal dismissed.*

The High Court held, by majority, that the prosecution is not required, and should not be permitted, to make a statement as to the range of available sentences to a sentencing judge: at [7], [39]. To the extent to which ***MacNeil-Brown*** (2008) 20 VR 677 stands as authority for supporting the practice of the prosecution providing a submission about the bounds of the available range of sentences, the decision should be overruled. The practice is wrong in principle: at [23], [39]. The sentencing judge's refusal to receive submissions about range did not deny procedural fairness: at [44]. ***Barbaro*** has subsequently been applied in:

***Wood*** [2014] NSWCCA 184: "[54] However, it is our view that his Honour was incorrect when he said in the passage quoted at [52] above that "the court [was] also constrained to provide a sentence as guided by the overall pattern of current sentencing." Sentencing statistics do not act as a restraint in sentencing an offender but in appropriate cases may act as a yardstick against which a proposed sentence may be examined: *Barbaro* [2014] HCA 2 at [41]."

***MLP*** [2014] NSWCCA 183: "[42] Secondly, in seeking consistency, other cases may establish a range of sentences which have been imposed. But the sentences imposed in other cases do not mark the outer bounds of the permissible sentencing discretion. They stand as a yardstick against which to examine a proposed sentence. What is important are the unifying principles which such sentences reveal and reflect: *Barbaro; Zirilli* [2014] HCA 2; (2014) 305 ALR 323 at [41]."

***Loveridge*** [2014] NSWCCA 120: "[223] Although the decision of the High Court of Australia in *Barbaro* [2014] HCA 2; 88 ALJR 372 restricts the capacity of the Crown to propose to a sentencing Judge a numerical range of penalty in a particular case (at 376–380 [20]–[43]), there is no impediment to the provision of other sentencing decisions which may bear upon the exercise of the sentencing discretion. The decision in *Barbaro* narrows the long-standing ethical rule which permitted a prosecutor to inform the court of an appropriate range of penalty, including a period of imprisonment, by reference to relevant decisions: Clause 93(e), *New South Wales Barrister's Rules* (which commenced on 6 January 2014). However, a prosecutor or defence counsel may hand up to a sentencing Judge other sentencing decisions, where it is clear that those decisions are relevant to the exercise of sentencing discretion in the case at hand. So much is clear from *Hili* at 536–537 [53]–[54] and *Barbaro* at 379 [41]."

*Note*:[3] The Victorian Court of Appeal convened a five-judge bench in ***Matthews, Vu & Hashmi*** [2014] VSCA 291 to consider whether the judge erred in taking into account a quantified sentencing range submission by the Crown, based on ***Barbaro***. The VSCA dismissed the appeals of Matthews and Vu but allowed the appeal of Hashmi. The VSCA said that a quantified range submission will not vitiate the sentencing discretion unless it can be shown the judge was influenced by the submission: at [7], [139, [154], [161]. This did not occur in this case: at [139]. ***Barbaro*** did not suggest that mere receipt of a sentence range constituted taking into account an irrelevant consideration: at [13]. Unless the judge expressly states s/he has taken that into account on sentence, it is not to be lightly inferred s/he has done so: at [17]-[19].

[3] See Judicial Commission, 'Recent Decisions', *Judicial Officers Bulletin* (2015) Vol 27 No 1 p.8

Defence counsel is not subject to the proscription against sentencing range submissions: at [22]. However, if one is made, the Crown is permitted to respond so as to assist the judge not to fall into appealable error: at [25]. The Crown is still obliged to make clear the appropriate sentencing disposition to avoid appealable error: at [27]. Proper and ordinary use of statistics and comparable cases is to be distinguished from the proscription against quantified sentence range submissions: at [28].

***Smith v WA [2014] HCA 3; (2014) 250 CLR 473. Appeal from WA CA.***

*Exclusionary rule – appellant convicted by jury – note found in jury room after jury discharged that suggested juror was physically coerced into changing verdict. Held: Appeal allowed. Matter remitted to WACA.*

After the jury returned a guilty verdict and was discharged an anonymous note found in the jury room suggesting a juror was physically coerced into changing his/her verdict. The High Court held the WACA erred in refusing to receive evidence of the note on the basis of the 'exclusionary rule' (that once a verdict has been entered and jury discharged then evidence of a juror as to jury deliberations is not admissible to impugn the verdict): at [1]. It is consistent with the rationale for the rule that evidence by a juror of unlawful pressure or influence by another juror falls outside the scope of the rule: at [48]. The test for determining whether an irregular incident involving a juror warrants discharge of the juror or jury is whether the incident gives rise to a reasonable apprehension on the part of a fair-minded and informed member of the public that the juror or jury has not discharged or will not discharge its task impartially: ***Webb v R*** (1994) 181 CLR 41 at 53. This test should have been applied to determine whether a miscarriage of justice occurred: at [54]-[55].

***James v R [2014] HCA 6; [2014] 306 ALR 1. Appeal from Vic CCA.***

*Duty of trial judge to leave lesser alternative verdicts for offences other than murder - Judicial obligation to leave manslaughter as an alternative to murder regardless of stance of defence counsel. Held: Appeal dismissed.*

The Applicant, convicted of intentionally causing serious injury, submitted the trial judge erred in failing to instruct the jury on the availability of alternative verdicts. By majority, the High Court held that the trial judge's duty to instruct on alternative verdicts is an aspect of the duty to secure a fair trial. In this case, fairness did not require that alternative verdicts be left: at [48].

The judicial obligation to leave manslaughter as an alternative to murder (regardless of the stance of counsel) is a product of the development of the law of homicide. It does not extend to the trial of offences generally: at [19], [23] disapproving ***R v King*** (2004) 59 NSWLR 515.

For offences other than murder, the question of whether the failure to leave an alternative verdict has occasioned a miscarriage of justice is answered by the appellate court's assessment of "what justice required" in the circumstances of the case. That assessment takes into account the real issues in the trial and forensic choices of counsel. The duty to secure a fair trial rests with the trial judge and on occasions its discharge will require that an alternative verdict is left despite defence counsel's objection: at [34]-[38]. The judge may refrain from leaving an alternative verdict if to do so would jeopardise the appellant's chances of acquittal: at [48].

***Milne v R [2014] HCA 4; (2014) 305 ALR 477. Appeal from NSW CCA***

*Money laundering – Criminal offence under s 400.3(1) Criminal Code (Cth) to deal with property intending it will become "instrument of crime" – Appellant dealt with shares and did not declare capital gain – Shares not "instrument of crime". Held: Appeal allowed. Conviction quashed. Verdict of acquittal entered.*

The Applicant lodged an income tax return that did not declare the capital gain derived from a swap of shares. He was convicted of money laundering under s 400.3(1) ***Criminal Code (Cth),*** which makes it an offence for a person to deal with property worth $1,000,000 or more intending that it "will become an instrument of crime". Property is an "instrument of crime" if it is used in the commission of, or used to facilitate the commission of, an indictable offence: s 400.1(1). The question is whether the shares upon which the capital gain was made could have been intended to be or become "an instrument of crime". Allowing the appeal, the High Court held the answer to that question must be in the negative. Upon the disposal of the shares, which was the relevant dealing for the purposes of s 400.3(1), they were not intended to be "used" in the commission of, or to facilitate the commission of, an indictable offence. The proposition that they were intended to be so used involves giving to the term "use" a meaning which the Code will not bear and which its purpose does not require: at [1]-[3].

***Achurch v R [2014] HCA 10; [2014] 306 ALR 566. Appeal from NSW CCA.***

*s 43 Crimes (Sentencing Procedure) Act 1999 – correction of penalties – "penalty" must be contrary to law. Held: Appeal dismissed.*

In ***Achurch v R (No 2)*** [2013] NSWCCA 117 [Five judge bench] the applicant applied to re-open a successful Crown appeal, heard prior to the High Court judgment in ***Muldrock*** (2011) 244 CLR 120, in which the NSW CCA had applied ***Way*** (2004) 60 NSWLR 168. The NSW CCA dismissed the applicant's submission this was a sentencing error which ought to be corrected under s 43 ***Crimes (Sentencing Procedure) Act 1999*** ('Court may reopen proceedings to correct sentencing errors').

The High Court dismissed the appeal. The NSW CCA was correct in its interpretation of s 43. Section 43 applies where "a court has ... imposed a penalty that is contrary to law". What must be contrary to law is the "penalty". That condition is not satisfied by demonstrating the court has erred in law or fact. A penalty may be said to be contrary to law where it exceeds the maximum penalty prescribed or is beyond the power of the court: at [32]. Correction of legal and factual errors in sentencing may be effected in more than one way. There are classes of sentencing error which would not fall within s 43 but would be within the scope of inherent power or the slip rule or statutory extensions: at [35].

***Achurch*** has subsequently been applied in ***Bungie*** [2015] NSWCCA 9.

***Gillard v R [2014] HCA 16; [2014] 308 ALR 16. Appeal from ACT CA.***

*Sexual intercourse without consent – negation of consent – Crown must prove appellant's knowledge of causal relation between circumstance and consent. Held: Appeal allowed. Convictions quashed. New trial ordered.*

Section 67(1) ***Crimes Act (ACT)*** states the circumstances which may negate a complainant's consent to specified sexual offences. Section 67(1)(h) negates consent where that consent is caused by the abuse of a person's position of authority. Section 67(3) states that if a person knows that the consent of another person has been caused by one of the s 67(1) circumstances, the person is deemed to know that the other person does not consent to the sexual intercourse or the act of indecency. The High Court held that the mental element of the relevant offences is satisfied

by proof of the accused's knowledge that the complainant was not consenting or proof that the accused was reckless as to the complainant's consent. Proof that a person was reckless, in the sense that s/ he was heedless of the risk of the existence of a s 67(1) circumstance, or of the risk that the circumstance may have caused the complainant's consent, would not establish that the person's state of mind was of indifference to consent: at [27] . Where the prosecution relies on the causal relation between a s 67(1) circumstance and the complainant's consent to establish absence of consent, the mental element is proved by establishing the accused had the knowledge stated in s 67(3). As s 67(1) negates consent where a specified circumstance is the cause of the complainant's consent, knowledge of the causal relation between the circumstance and the complainant's consent is knowledge that the sexual intercourse or act of indecency was without consent: at [28].

***Fitzgerald v R [2014] HCA 28; [2014] 311 ALR 158. Appeal from SA CA***

*DNA evidence − Appellant's DNA obtained from an object found near the deceased − Whether DNA evidence sufficient to establish beyond reasonable doubt appellant's presence at, and participation in, crime. Held: Appeal allowed. Conviction quashed. Verdict of acquittal entered.*

The Applicant was convicted of Murder. Men entered a house and attacked the occupants. The prosecution relied on a DNA sample matching the Applicant obtained from a didgeridoo found near the deceased. There was no evidence of how the didgeridoo came to be there or that it was used in the attack: at [17]. The High Court held that it could not be accepted that the evidence was sufficient to establish beyond reasonable doubt that the appellant was present at, and participated in, the attack. The jury verdict was unreasonable and not supported by the evidence: s 353(1) *Criminal Law Consolidation Act* 1935 (SA): at [36]. It was not proved beyond reasonable doubt the Applicant's DNA in the sample was derived from his blood. There were occasions on which a secondary transfer of the Applicant's DNA to the didgeridoo may have occurred. There was no inference about time or the circumstances in which the DNA was deposited. Alternative hypotheses consistent with the Applicant's innocence were not unreasonable and the prosecution had not excluded them: at [36]

***Lee & Lee v R [2014] HCA 20; [2014] 308 ALR 252. Appeal from NSW CCA.***

*Compulsory examination under NSW Crime Commission Act 1985 – non-publication direction – transcripts of appellants' evidence released to DPP before trial – Role of prosecution. Held: Appeal allowed. Convictions quashed. New trial ordered.*

The appellants JL and SL were convicted of drugs and firearms offences. Prior to being charged both appellants had appeared before the NSW Crime Commission. The Commissioner gave a non-publication direction in respect of JL's evidence: s 13(9) ***NSW Crime Commission Act 1985***. However, transcripts of the appellants' evidence were released by the Commissioner to the DPP before their trial. The High Court held that appellants' trial was altered in a fundamental respect by the prosecution having the appellants' evidence in its possession: at [40]-[43].

The prosecution has a specific role which entails particular responsibilities. It is not the point that the defence lawyers did not object or seek a stay. The prosecution's possession of the evidence put at risk the prospect of a fair trial, which s 13(9) sought to protect. The prosecution should have enquired as to the circumstances in which the evidence came into its possession and alerted the trial judge: at [44]. The trial was one where the balance of power shifted to the prosecution: at [46]; ***X7 v Australian Crime Commission*** (2013) 248 CLR 92.

Note: in response to ***Lee*** and ***X7***, the ***Crime Commission Legislation Amendment Act 2014*** has been enacted, discussed below under 'Legislation 2014.' The Second Reading Speech, Hansard, Legislative Assembly, 11.11.14 states "(t)he amendments aim to protect the use of the commission's compulsory examination powers and the admissibility of evidence obtained in

or derived from these commission hearings and to protect criminal prosecutions from challenge solely on the basis that a person has been questioned by the commission."

***Honeysett v R [2014] HCA 29; [2014] 311 ALR 320. Appeal from NSW CCA***

*Prosecution adduced evidence of anatomist regarding physical characteristics common to persons depicted in CCTV and Applicant – s 79(1) Evidence Act 1995 - Whether opinion based wholly or substantially on specialised knowledge. Held: Appeal allowed. Conviction quashed. New trial ordered.*

The Applicant was convicted of Armed Robbery. The prosecution adduced evidence by Professor H, anatomist, regarding physical characteristics common to offenders on CCTV footage and the Applicant. Prof H concluded there was a "high degree of anatomical similarity" between Offender One on the CCTV and the Applicant. His opinion was strengthened by the fact he was unable to discern any "anatomical dissimilarity" between them: [17]. Prof H's evidence was admitted at trial as an exception to the "opinion rule" under s 79(1) *Evidence Act.* The High Court held the evidence was inadmissible. The evidence was not based on Prof H's specialised knowledge and his conclusions were based on a subjective impression: at [43]. The NSW CCA also erred in distinguishing *R v Morgan* (2011) 215 A Crim R 33 (where it had been held that opinion evidence by the same Prof H as to a high degree of anatomical similarity between the offender in CCTV footage and Morgan amounted to identification evidence and was inadmissible). In the present case, Prof H's evidence was admitted as an item of circumstantial evidence to support a conclusion of identity. This was the use made of the evidence by the prosecutor at trial: at [40].

***Tajjour; Hawthorne; Forster v State NSW [2014] HCA 35; [2014] 313 ALR 221. Appeal from NSW.***

*Section 93X Crimes Act 1900 NSW – consorting with convicted offenders – validity. Held: Appeal dismissed. Validity of s 93X upheld.*

Section 93X ***Crimes Act*** **(NSW)** states that a person who habitually consorts with convicted offenders, after having been given an official warning in relation to each of those offenders, is guilty of an offence.

The questions and answers in this Special Case included:

1. Is s 93X invalid because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?

   *Answer*: Section 93X is not invalid.

2. Is there implied into the Commonwealth Constitution a freedom of association independent of the implied freedom of communication on governmental and political matters?

   *Answer*: No.

4. Is s 93X invalid because it is inconsistent with the International Covenant on Civil and Political Rights (ICCPR)?

   *Answer*: No.

The implied freedom of communication on governmental or political matters defines a limit on the legislative power of Commonwealth, State and Territory Parliaments and informs the common law of Australia: at [32]. The questions for determining whether an impugned law exceeds that limit were settled in *Lange v ABC* (1997) 189 CLR 520 and recently restated in *Unions NSW v NSW* (2013) 88 ALJR 227:-

1. Does the impugned law effectively burden the freedom of political communication either in its terms,

operation or effect?

2. If the provision effectively burdens the freedom, is the provision reasonably appropriate and adapted, or proportionate, to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative government?: at [32].

The High Court held that s 93X does effectively burden the implied freedom of communication about government and political matters: at [40]; [71]; [108]; 159]. The effect of s 93X is to proscribe all forms of communication with convicted offenders thus extending to communication of the kind protected in the freedom: at [38], [71], [108]. However, s 93X is reasonably appropriate and adapted, or proportionate, to serve the legitimate end of the prevention of crime in a manner compatible with the maintenance of the constitutionally prescribed system of representative government: at [41], [77], [112], [160]. The ICCPR places no constraint upon the power of a State Parliament to enact contrary legislation; and there is no such free-standing freedom of association to be implied in the Constitution: at [95], [134], [180], [242].

***Kentwell v R [ 2014] HCA 37; O' Grady v R [ 2014] HCA 38; [ 2014] 313 ALR 451. Appeal f rom NSW CCA***

*Application for extension time for leave to appeal against sentence – **Abdul** [2013] NSWCCA 247 wrongly decided - applicant need not demonstrate sentence occasioned 'substantial injustice' - court must consider the interests of justice - where error established, court must exercise discretion afresh under s 6(3). Held:* Appeal allowed. *S*et aside orders of CCA and remit applications for extension of time for determination.

The appellants were each sentenced in respect of a SNPP offence. The CCA dismissed an application for extension of time to appeal against sentence based on ***Muldrock*** error. The CCA found material error but refused the application because there was no substantial injustice - applying ***Abdul*** [2013] NSWCCA 247.

The High Court held ***Abdul*** was wrongly decided. An applicant for an extension of time to apply for leave to appeal against sentence is not required to demonstrate substantial injustice was occasioned by the sentence: ***Kentwell*** at [4], [30], [44]; ***O'Grady*** at [13]. The application is to be determined by a consideration of what the interests of justice require: at [28]-[30]. The finality principle is not a discrete reason for refusing to exercise the power to extend the time limit where the sentence is being served: ***Kentwell*** at [32]. The prospect of success of the appeal is relevant and involves consideration of the merits of an appeal. That issue is addressed by reference to s6(3): ***Kentwell*** at [33]-[34]. Where ***House v The King*** (1936) 55 CLR 499 error is established, the CCA has a duty to re-exercise the sentencing discretion afresh: ***Kentwell*** at [35], [42]; ***Baxter*** (2007) 173 A Crim R 284 at [16]-[19]. The issue is whether a lesser sentence is warranted in law: at [42]-[43]; s 6(3) ***Criminal Appeal Act***.

***Kentwell*** has subsequently been applied in ***AB*** [2014] NSWCCA 339; ***Liles*** [2014] NSWCCA 289 at [55]; ***Monteiro*** [2014] NSWCCA 277 at [117]; ***Lay*** [2014] NSWCCA 310 at [51]-[53].

***Kuczborski v State of Queensland [2014] HCA 46; [2014] 314 ALR 528. Appeal from QLD.***

*Plaintiff sought declaration that Vicious Lawless Association Disestablishment Act 2013 (QLD) and other provisions invalid – principle in Kable v DPP (NSW) (1991) 189 CLR 51 not offended. Held: Plaintiff did not have standing to challenge laws*. *Challenge rejected*.

The plaintiff, a member of the Hells Angels Motorcycle Club, challenged the validity of legislation directed at such clubs and associations. The plaintiff submitted the legislation confers functions on

Queensland courts which, contrary to the Constitution, are incompatible with their institutional integrity: at [2]: ***Kable v DPP (NSW)*** *(1991) 189 CLR 51*. The *VLAD* Act provides for imprisonment to be imposed upon persons convicted of declared offences who are participants in associations; the *Bail Ac*t imposes constraints upon grant of bail to persons in such organisations for some offences; the *Criminal Code* contained new offences imposing restrictions upon freedom of movement and association of participants in criminal organisations; the *Liquor Act* proscribes wearing or carrying in licensed premises items bearing insignia of criminal organisations.

The High Court held that as the plaintiff had not been charged with any offence which would attract the provisions, the plaintiff did not have sufficient interest to challenge some of the provisions as being invalid: at [177]. Other provisions did proscribe certain otherwise lawful activities, however none breached the principle in ***Kable***: at [50], [260], [306]. The laws creating new offences in the *Criminal Code* and *Liquor Act* did not impermissibly enlist the court to give effect to Parliament's intention to destroy criminal organisations. These laws did not require the courts to proceed otherwise than in accordance with the processes which are understood to characterise the exercise of judicial power. There was no breach of institutional integrity of a State Court vested with federal jurisdiction: at [225]; [253].

# ANNEXURE B

# 2014 LEGISLATION

## 1. *Bail Act 2013 and Bail Amendment Act 2014*

The ***Bail Act 2013*** commenced on 20.5.2014. However, it has been substantially amended by the ***Bail Amendment Act 2014*** which commenced on 28.1.2015. The two Acts are therefore discussed here together.

The 2013 Act repealed the ***Bail Act 1978***. The 2013 Act abolished the previous system of presumptions in favour of or against the grant of bail. The 2013 Act introduced an "unacceptable risk" test for the determination of bail contained in sections 17 – 20. *Note that sections 17 – 20 have since been replaced by new provisions of the 2014 Amendment Act.*

***Bail Act 2013 – commenced 20.5.2014***

The main provisions of the 2013 Act were as follows:

* Sections 17 – 20 "Unacceptable risk" test for the determination of bail *(now repealed)*

Section 17: "Unacceptable risk" test
Section 18: Determination that there is no unacceptable risk
Sections 19, 20: Determination that there is an unacceptable risk

* Section 21 - Special rule for offences for which there is a right to release

. s 21 provides that certain offences carry a right of release. For these offences the only bail decisions that can be made are: release without bail, bail must be dispensed with or bail is granted (with or without conditions). For these offences bail cannot be refused: s 20(2).

. Right to release offences are:
  . fine-only offences
  . offences under the *Summary Offences Act 1988* (other than those specified)
  . offences dealt with by a youth justice conference under the *Young Offenders Act 1997*.

. However, if the accused has previously failed to comply with a bail acknowledgement, condition or decision for the offence then the right to release is nullified: s 21(4).

* Other main provisions

. *Bail decision is made or varied - 'Bail acknowledgements'* replace the previous system of bail undertakings. Procedures after a bail decision is made or varied are set out in ss 33-36, and ss 40-42.

. *Power to make and vary bail decisions* - Police officers have certain powers under ss 43-47. Courts and authorised justices have powers under s 48 in relation to a release application by the accused, a detention application by the prosecutor, or a variation application by an 'interested person.' The limitations on the powers of authorised justices to vary a court's bail determination are set out in ss 52- 58 (and are similar to those under the previous ***Bail Act 1978***).

. *Transitional provisions* – Schedule 3 provides that upon repeal of the former ***Bail Act 1978***:

  . Bail granted under the 1978 Act will continue in force until it would have ceased under the 1978 Act

. A bail decision made under the 1978 Act may be revoked or varied under the new 2013 Act

. A 'bail undertaking' will be dealt with as a 'bail acknowledgement'

. A bail agreement under the 1978 Act will continue to have effect and will be dealt with as bail conditions

. Obligations under pre-security agreements continue to have effect

***Bail Amendment Act 2014 – commenced 28.1.2015***

The 2014 Amendment Act applies to offences committed or alleged to have been committed, or charged, before the commencement of the amendment: Schedule 3, Pt 3, s 12.

The 2014 Amendment Act makes the following important amendments to the 2013 Act:

* " Show cause requirement" and "Show cause offences "

. A new s 16A introduces a "Show cause requirement" into the ***Bail Act 2013***. Section 16A(1) states that a bail authority making a bail decision for a "Show cause offence" must refuse bail unless the accused person shows cause why his or her detention is not justified. Section 16A(2) states that if the accused person does show cause, the bail authority must still make a bail decision in accordance with Division 2 – "Unacceptable Risk test – All Offences." Section 16A does not apply if the accused was under 18 at the time of the offence: s 16A(3).

. "Show cause offences" are certain serious offences as listed in s 16B. The offences include offences punishable by imprisonment for life, child sexual assault offences, serious personal violence offences, certain offences involving drugs, firearms or prohibited weapons, and serious offences committed by an accused person while on bail, on parole or subject to a supervision order.

* " Unacceptable Risk test – All Offences " – New sections 17 - 20A

. The 2014 Amending Act omits sections 17 – 20 and replaces those sections with new sections 17 – 20A. The new procedure is as follows:

Section 17: Assessment of bail concerns

. A bail authority must assess bail concerns before making a bail decision. A "bail concern" is a concern that the accused will (a) fail to appear at any proceedings for the offence, (b) commit a serious offence, (c) endanger the safety of victims, individuals or the community, or (d) interfere with witnesses or evidence.

Section 18: Matters to be considered as part of assessment

. The bail authority must consider only the matters listed in s 18. They include the matters previously listed under s 17(3) such as the accused person's background, including criminal history, circumstances and community ties, nature and seriousness of the offence, and strength of the prosecution case. Further matters have been added including whether the accused person has a history of compliance or non-compliance with bail acknowledgments, bail conditions, apprehended violence orders, parole orders or good behaviour bonds, whether the accused person has any criminal associations, and the conduct of the accused towards any victim of the offence or any family member of a victim, after the offence.

Section 19: Refusal of bail - unacceptable risk

. A bail authority must refuse bail if the bail authority is satisfied there is an unacceptable risk. An "*unacceptable risk*" is an unacceptable risk that the accused person will fail to appear, commit a serious offence, endanger the safety of victims, individuals or the community, or interfere with witnesses or evidence: ss 19(1), (2)

. If the offence is a show cause offence, the fact that the accused person has shown cause that detention is not justified is not relevant to the determination of whether or not there is an unacceptable risk: s 19(3)

. Bail cannot be refused for an offence for which there is a right to release: s 19(4)

Section 20: Accused person to be released if no unacceptable risks

. If there are no unacceptable risks, the bail authority must grant bail, release the person without bail, or dispense with bail.

Section 20A: Imposition of bail conditions

. Section 20A states that bail conditions are to be imposed only if the bail authority is satisfied that there are identified bail concerns. A bail authority may impose a bail condition only if the bail authority is satisfied of certain listed matters. These include that the bail condition is reasonably necessary to address a bail concern, the bail condition is reasonable and proportionate to the offence, the bail condition is appropriate to the bail concern, and the bail condition is no more onerous than necessary to address the bail concern.

<u>* Further Matters</u>

Section 21: Special rule for offences for which there is a right to release

. A new s 21(5) states that the "Unacceptable risk test—all offences" applies to a bail decision for an offence for which there is a right to release.

Section 22: General limitation on court's power to release

. The 2013 Act provides a court is not to grant bail or dispense with bail for any of the following offences, unless it is established that special or exceptional circumstances exist: (a) an offence for which an appeal is pending in the Court of Criminal Appeal against a conviction or sentence imposed on indictment; or an offence for which an appeal from the Court of Criminal Appeal is pending in the High Court: s 22(1).

. A new s 22(2) states that if the offence is a show cause offence, the requirement that the accused person establish that special or exceptional circumstances exist that justify a decision to grant bail or dispense with bail applies instead of the requirement that the accused person show cause why his or her detention is not justified.

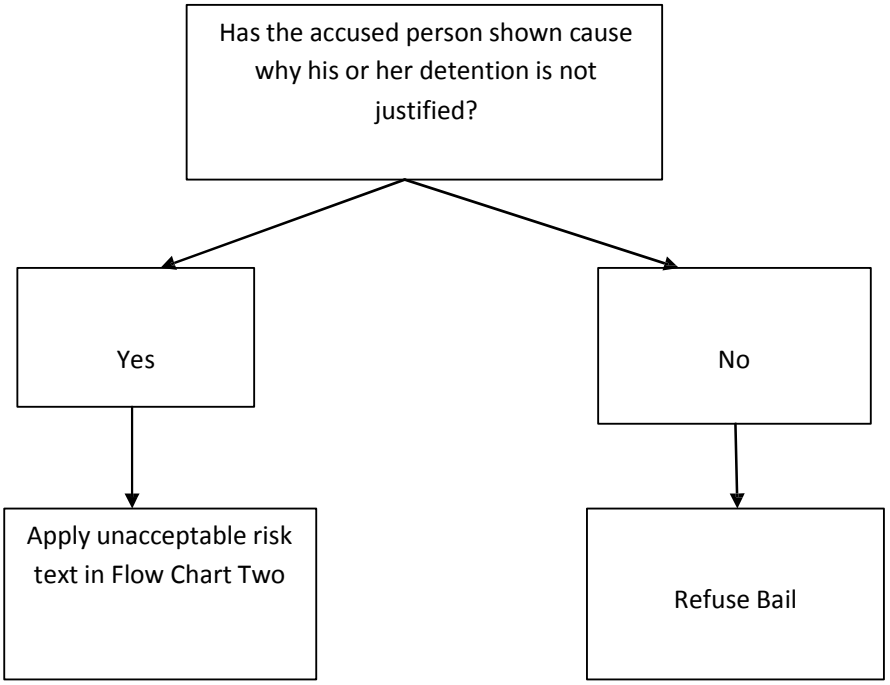
Section 3: Purpose of Act

. The 2014 Amendment Act omits s 3(2) which had stated: "(2) A bail authority that makes a bail decision under this Act is to have regard to the presumption of innocence and the general right to be at liberty."

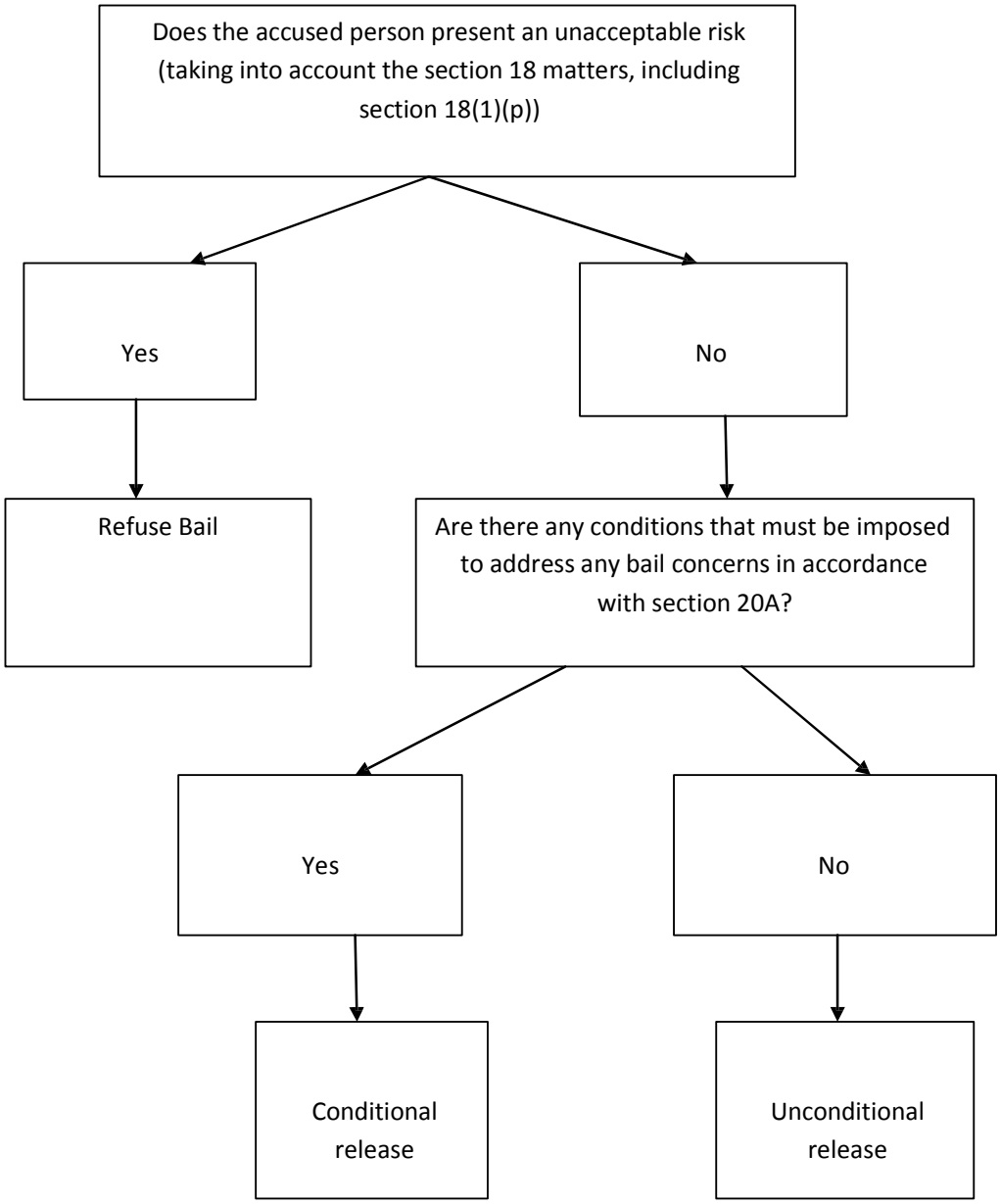
* Section 16: Flow Charts

. Section 16 provides two flow charts:

**Flow Chart One – Show Cause Requirement**



**Flow Chart Two – Unacceptable Risk Chart**




## ***2. Crimes and other Legislation Amendment (Assault and Intoxication) Act 2014***

Commenced 31.1.2014.

The amending Act inserts new offences into the ***Crimes Act 1900 (NSW)***.

**(i) "*Section 25A Assault causing death***

*(1) A person is guilty of an offence under this subsection if:*

*(a) the person assaults another person by intentionally hitting the other person with any part of the person's body or with an object held by the person, and*

*(b) the assault is not authorised or excused by law, and*
*(c) the assault causes the death of the other person.*
*Maximum penalty: Imprisonment for 20 years.*

*(2) A person who is of or above the age of 18 years is guilty of an offence under this subsection if the person commits an offence under subsection (1) when the person is intoxicated.*
*Maximum penalty: Imprisonment for 25 years."*

. An assault causes the death of a person whether the person is killed as a result of the injuries received directly from the assault or from hitting the ground or an object as a consequence of the assault: s25A(3)

. It is not necessary to prove that the death was reasonably foreseeable: s25A(4)

. s25A(5) - ***Defences***: It is a defence in proceedings for an offence under s25A(2) [but not s25A(1)]: (a) if the intoxication of the accused was not self-induced (within the meaning of Part 11A), or (b) if the accused had a significant cognitive impairment at the time of the offence

. s25A(6) - ***Proof of intoxication***: In proceedings for an offence under s25A(2) evidence may be given of the presence and concentration of any alcohol, drug or other substance in the accused's breath, blood or urine at the time of the alleged offence. Analysis is conducted in accordance with new Div 4 (ss 138D-H) in Pt 10 *Law Enforcement (Powers and Responsibilities) Act* 2002. An accused is conclusively presumed to be intoxicated by alcohol if the prosecution proves there was present in the accused's breath or blood a concentration of 0.15 grams or more of alcohol in 210 litres of breath or 100 millilitres of blood: s25A(6)(b). Special police powers are created for testing for intoxication for an offence under s 25A(2) by way of breath testing, breath analysis and a blood or urine sample.

. ***Alternative verdicts***: A person can be convicted of an offence under s25A(1) or (2) as an alternative to murder or manslaughter: s 25A(7). A person can be convicted under s25A(1) as an alternative to s25A(2): s 25A((8

**(ii) *"Section 25B Assault causing death when intoxicated—mandatory minimum sentence***

*(1) A court is required to impose a sentence of imprisonment of not less than 8 years on a person guilty of an offence under section 25A (2). Any non-parole period for the sentence is also required to be not less than 8 years.*

*(2) If this section requires a person to be sentenced to a minimum period of imprisonment, nothing in section 21 (or any other provision) of the Crimes (Sentencing Procedure) Act 1999 or in any other Act or law authorises a court to impose a lesser or no sentence (or to impose a lesser non-parole period).*

*(3) Nothing in this section (apart from subsection (2)) affects the provisions of the Crimes (Sentencing Procedure) Act 1999 or any other Act or law relating to the sentencing of offenders.*

*(4) Nothing in this section affects the prerogative of mercy."*

**(iii) Further amendments**

. ***Intoxication as a sentencing factor***: A new s 21A(5AA) is inserted into s 21A ***Crimes (Sentencing Procedure) Act* 1999**. It creates a new rule for sentencing in regard to self-induced intoxication - *"**s 21A(5AA)** In determining the appropriate sentence for an offence, the self-induced intoxication of the offender at the time the offence was committed is not to be taken into account as a mitigating factor."* Transitional provisions: Existing offences and proceedings: Section 21A(5AA) applies to the determination of a sentence for an offence whenever committed, unless: (a) the court has convicted the person being sentenced of the offence, or (b) a court has accepted a plea of guilty and the plea has not been withdrawn, before the commencement of the amendments (being 31.1.2014).

. ***Self-induced intoxication***: s 428E ***Crimes Act*** is amended to provide that where evidence of intoxication results in acquittal for murder, self-induced intoxication cannot be taken into account in determining whether the offender has the requisite mens rea for an offence under s 25A. Sections 25A(1) and 25A(2) are not offences of specific intent under Pt 11A ***Crimes Act***.

## 3. *Jury Amendment Act 2010*

Commenced 31.1.2014

The amending Act amends the ***Jury Act*** **1977**. The main amendments are:

. s6, Schedule 1 - Persons excluded from jury service. In addition to persons already exempted from jury service, persons now excluded include those who have committed certain serious offences; are serving or who have served a sentence of imprisonment or a period of detention; are subject to certain orders and disqualifications or in custody; are holding particular office; employed or engaged in certain occupations in the public sector; have access to information about inmates and other detainees; are undischarged bankrupts. (Categories removed from this list are persons who are unable to read or understand English, and those unable to discharge the duties of a juror because of sickness, infirmity or disability. These person but will be eligible for an exemption for good cause under new s 14).

. ss 14 and 14A Exemption for good cause. A new s 14 provides the sheriff can exempt a person from jury service, whether or not on the request of the person, if the sheriff is of the opinion that there is good cause for the exemption. Section 14A lists what constitutes "good cause":- hardship, serious inconvenience, disability, conflict of interest, or some reason that would affect the person's ability to perform the functions of a juror. A person can request a permanent exemption due to a permanent mental or physical impairment: s14A(2).

. s7, Schedule 2 - Persons with a right to claim exemption from jury service. The list has been revised and includes clergy, pharmacists, dentists, medical practitioners, emergency service workers and certain other persons who previously served or were prepared to serve as a juror.

. Unlawful dismissal or prejudice to employees. s 69 has various offences including dismissing a person from employment or altering a person's position to his or her prejudice due to jury service. The penalties are increased from 20 penalty units to 200 penalty units (for corporations) or 50 penalty units and/or 12 months imprisonment (individuals). A new 69A prevents employers from requiring that employees use leave or work extra time if summoned for jury service.

## 4. *Graffiti Control Amendment Act 2014*

Commenced 16.5.2014

The amending Act makes the following main amendments to the ***Graffiti Control Act 2008***:

s 4 'Marking premises or property'. Repeals and replaces old s 4.

It is an offence for a person to intentionally mark any premises or property unless consent has been obtained. Maximum penalty 4 penalty units: s 4(1)

It is an aggravated form of the offence where a person intentionally marks the premises or other property: s 4(2). Circumstances of aggravation are intentionally marking premises/property by means of any graffiti implement; or in such a manner that the mark is not readily removable by wiping or the use of water or detergent: s 49(3).

A person cannot be sentenced to imprisonment for the aggravated offence except where s/he has been previously been convicted of the offences specified "on so many occasions" the court is satisfied "the person is a serious and persistent offender and is likely to commit such an offence again": s 4(4).

s 6 'Posting bills.' Repeals and replaces old s 6.

It is an offence to intentionally affix a placard or paper on any premises so they are in view from a public place unless the person has obtained consent. Maximum penalty 4 penalty units.

s 9B Making of order for community clean up work

A community clean order can be made on application by the prosecutor, offender or court's own motion: s 9B(1A).

An application may be made before or after a fine has been imposed. An order can only be made before the fine has been paid: s 9B(5).

s 9G Number of hours of community clean up work

The maximum hours for a community clean up must not exceed 300 hours (for adult offenders) or 100 hours (for child offenders): s9G(3)

In the case of child offenders, community clean up may be performed concurrently with another clean up order or community service order: s 9G(4).

## 5. *Crimes Amendment (Female Genital Mutilation) Act 2014*

Commenced 20.5.2014

The amending Act makes the following amendments to the ***Crimes Act 1900***:

. increases the maximum penalty for the offence of 'female genital mutilation' in s 45 from 7 years to 21 years imprisonment.

. inserts s 45A to create a new offence for a person to take another person, or arrange for another person to be taken, from NSW intending that female genital mutilation is performed on that person. Maximum penalty 21 years imprisonment.

. s 45(2), relating to jurisdiction, is repealed and re-enacted under s 10F(3) which provides that the "necessary geographical jurisdiction" for a s 45 or s 45A offence exists if the person against whom the offence is committed is ordinarily a resident of NSW.

## 6. *Crimes Amendment (Strangulation) Act 2014*

Commenced 5.6.2014

The amending Act repeals and replaces the strangulation offence in s 37 ***Crimes Act 1900*** with 2 new offences. The amendment seeks to address difficulties with prosecuting under the old s 37, particularly domestic violence offences involving strangulation. The old s 37 had limited application in domestic violence cases due to requiring an intention to commit a separate indictable offence, such as sexual assault or robbery. Where the assault itself was the act of strangulation / choking only, the old s 37 had difficulty in applying: *Second Reading Speech, 7.5.2014, Legislative Assembly.*

The new s 37 provides: (i) a basic offence requiring an intentional act plus recklessness; and (ii) an aggravated offence - an intention to commit another indictable offence is required to establish the aggravated offence but is no longer required to establish strangulation.

**s 37(1) Basic offence:**

. s 37(1) creates a new offence that applies if a person:

> . Intentionally chokes, suffocates or strangles another person so as to render them unconscious, insensible or incapable of resistance; and
>
> . Is reckless as to rendering the other person unconscious, insensible or incapable of resistance.

. Unlike the old s 37, the new s 37(1) basic offence does not require proof of an intention to commit any other offence. The act of strangulation alone will be sufficient: *Second Reading Speech,*

*7.5.2014, Legislative Assembly.*

. s 4A ***Crimes Act*** states that the element of recklessness can also be established by proof of intention or knowledge.

. Section 37(1) will apply to the offender who may not have an intention to kill but simply an intention to overpower. The phrase "incapable of resistance" from the old s 37 is retained and emphasises that actual unconsciousness is not a requisite element. This addresses domestic violence when a victim is in such a state of fear by the offender's actions that s/he is incapable of resisting the offender. It avoids the evidentiary difficulty of proving a lack of consciousness when the only prosecution witness may be the person who was unconscious: *Second Reading Speech, 7.5.2014, Legislative Assembly.*

. Maximum penalty is 10 years imprisonment. The offence is a Table 1 offence (***Criminal Procedure Act* 1986**, Sch 1): Sch 2[1].

**s 37(2) Aggravated offence**

. Section 37(2) provides that an offence will be committed if a person:

. Chokes, suffocates or strangles another person so as to render them unconscious, insensible or incapable of resistance;

. With the intention of enabling themselves to commit, or assisting another person to commit, another indictable offence (meaning an indictable offence other than an offence against s 37: s 37(3)).

. s 37 (3) provides that "another indictable offence" in s 37 (2) means an indictable offence other than an offence against this section. This makes clear that the act itself of choking, suffocation or strangulation will not constitute the other indictable offence which is sought to be committed: *Second Reading Speech, 7.5.2014, Legislative Assembly*.

. Intoxication: s 428B ***Crimes Act* 1900** has been amended to include an offence against s 37(2) in the list of offences of specific intent: sch 1[2]. Intoxication at the time of the offence may be relevant to whether an offender had the necessary specific intent: s 428C.

. Maximum penalty is 25 years. Section 37(2) is strictly indictable.

## ***7. Crimes Amendment (Provocation) Act 2014***

Commenced 13.6.2014

Section 23 of the ***Crimes Act 1900*** allowed provocation as a partial defence to a charge of murder so that an accused can be acquitted of murder and convicted of manslaughter.

The amending Act repeals and replaces s 23***.*** The amendment reformulates the law of provocation so as to restrict its operation. The new s 23 provides a more limited partial defence of extreme provocation. The amendments were made to ensure the partial defence could not be used in cases where the provocation claimed was “infidelity, leaving a relationship or a non-violent sexual advance” (*Second Reading Speech, Hansard, Legislative Council, 5 March 2014*).

Under the previous s 23 the partial defence was available where the accused loses self-control because of the words or other conduct of the deceased and that conduct could have caused *“an ordinary person in the position of the accused”* (a subjective test) to have lost self-control to the extent of intending to kill or inflict grievous bodily harm on the deceased.

New s 23(2) states:

*"s23 (2) An act is done in response to extreme provocation if and only if:*
*(a) the act of the accused that causes death was in response to conduct of the deceased towards or affecting the accused, and*
*(b) the conduct of the deceased was a serious indictable offence, and*
*(c) the conduct of the deceased caused the accused to lose self-control, and*
*(d) the conduct of the deceased could have caused an ordinary person to lose self-control to the extent of intending to kill or inflict grievous bodily harm on the deceased."*

Section 23(2)(b) aims to cover those offences related to domestic violence such as assault, stalking and intimidation

Section 23(2)(c) retains "*caused the accused to lose self-control*" (a subjective test). However, s 23(2)(d) "*could have caused an ordinary person to lose self-control to the extent of intending to kill or inflict grievous bodily harm on the deceased*" is now an objective test.

Section 23(3) expressly excludes "non-violent sexual advances" and "conduct incited by the accused in order to provide an excuse to use violence against the deceased" from being provocative conduct.

Section 23(5) expressly excludes evidence of self-induced intoxication from being taken into account in determining whether the accused acted in response to extreme provocation. (Self-induced intoxication was relevant under the subjective test under the previous s 23: *Second Reading Speech, p 27036*).

Section 23(4) retains that the killing of the deceased need not occur immediately after the provocative conduct.

Section 23(7) states that if there is any evidence that the act causing death was in response to extreme provocation, the onus is on the prosecution to prove beyond reasonable doubt that the act causing death was not in response to extreme provocation.

*Application* - The amendments do not apply to an accused on trial for a murder that was allegedly committed before commencement of the Act: s 23(9).

## 8. *Crimes (Sentencing Procedure) Amendment (Family Member Victim Impact Statement) Act 2014*

Commenced 1.7.2014

The amending Act amends the ***Crimes (Sentencing Procedure) Act 1999*** to enable a court to take into account on sentence a 'family member victim impact statement' in appropriate circumstances. The amending Act overturns ***R v Previtera*** (NSWSC) (1997) 94 A Crim R 76 which held that a victim impact statement (VIS) is not relevant to sentence where it concerns only the effect of the victim's death on his or her family.

The amending Act:

. Repeals and inserts a new s 28(4) to provide that a VIS by a family member may be taken into account on sentence, upon application by the prosecutor and if the court deems it appropriate. The VIS may be considered on the basis that the harmful impact of the victim's death on the family is an aspect of harm to the community. (This does not affect the application of evidence law in sentence proceedings: s 28(4A)).
. The absence of a family member VIS does not give rise to an inference the offence had little or no impact on the immediate family: s 29(4).

The new scheme applies to offences whenever committed unless the offender was already convicted or had entered a plea prior to commencement of the Act: Schedule 1[5].

## 9. *Drug Court Legislation Amendment Act 2014*

Commenced 17.9.2014

The amending Act amends the ***Drug Court Act 1998***. The purpose of the amendments is to make the program available to a greater number of participants.

. s 5A 'eligible convicted offender' is amended so that an eligible offender must - at the time of sentence - be sentenced to full-time imprisonment with an unexpired NPP of at least 18 months and an unexpired total sentence of not more than 6 years.

. 'eligible convicted offender' does not include an offender convicted of any offence involving the use of a firearm or if convicted at *any* time of an offence involving the violent use of a firearm: s 5A(2)(a), a 5A(2)(iii).

. The multi-disciplinary team required to have regard to the offender's history of offences involving weapons, as well as current requirement of previous offences involving violence, and an offender's history of committing offences related to 'long-term drug dependency and associated lifestyle.': s 18E(2)(c1), (c2).

. Repeals s 5A(1)(c) which required an 'eligible convicted offender' to have at least 2 previous convictions in a nominated period. (This allows more flexibility to admit recidivist offenders who may not have had 2 convictions within the previous 5 year period: Second Reading Speech).

. Inserts s 5A(1A) and s 18BA – providing that eligible convicted offenders may include offenders whose parole has been revoked in relation to a sentence previously subject of a compulsory drug treatment order. Section 18C is amended to enable the Drug Court to make new compulsory drug treatment orders in respect of such offenders.

## 10. *Crimes Legislation Amendment Act 2014*

Commenced 23.10.2014

The main amendments include:

***Crimes Act 1900***

. s 61HA is amended so that the statutory definition of consent is extended to *attempts* to commit specified sexual assault offences. This addresses ***WO v DPP*** [2009] NSWCCA 275 where it was held that the definition of consent did not apply to attempts to commit sexual assault.

. s 61HA(5)(c) – the term "medical" is replaced with "health." The circumstances in which consent is negated is expanded to include where consent is given under a mistaken belief that sexual intercourse is for health purposes.

***Crimes (Sentencing Procedure) Act 1999***

. ss 53A(2) and 54B(4) are amended to require a court imposing an aggregate sentence to make a written record of the sentences that would have been imposed for each individual offence had separate sentences been imposed.

***Criminal Procedure Act 1986***

. s 190 is amended to make clear that the Local Court can convict an accused in his or her absence either on the first return date or any subsequent mention date if satisfied that the accused had reasonable notice of the first return or mention date.

## 11. *Child Protection (Offenders Registration) Amendment (Statutory Review) Act 2014*

Commenced 23.10.2014

The amending Act subjects offenders who are sentenced in respect of a "registrable offence": (Class 1 or 2 offence, or an offence resulting in the making of a child protection registration order) to ongoing reporting conditions.

The amendments are:

- s 3 definition of "Class 2 offence" amended to include manslaughter of a child (but not as a result of a motor vehicle accident; wounding or grievous bodily harm (s 33(1)) ***Crimes Act***) where child in under 10, child abduction (s 87 ***Crimes Act***) where person has not had parental responsibility for the child.
- s 3E amended to extend the time in which a Commissioner of Police may apply for an order for a person to comply with reporting obligation from 21 days to 60 days after the conclusion of criminal proceedings.
- New s 3H(3) lists matters to assist court in determining whether a person poses a risk to the lives or sexual safety of children. These include: seriousness of each registrable offence, age of offender, age of victim, impact of the registration order, any other relevant matter.
- The penalty for applying to register a change of name without approval of the Commissioner of Police is increased from a maximum of 5 penalty units to a maximum of 500 penalty units or imprisonment for 5 years, or both: s 19E

## *12. Courts Legislation Amendment (Broadcasting Judgments) Act 2014*

Amendments to ***Supreme Court Act*** commenced 27 October 2014. Amendments to ***District Court Act*** commenced 1 February 2015.

The amending Act amends the ***District Court Act 1973*** and ***Supreme Court Act 1970***:

- introduces provisions permitting recording and broadcast of "judgment remarks" in those courts as well as Court of Criminal Appeal.
- creates a presumption in favour of recording and broadcasting judgment remarks, unless court is satisfied an exclusionary ground is present.

The legislative policy is "Justice should be seen to be done and be accessible to all. Allowing more people to watch court decisions will help to show the considerations that go into the decisions judges make." (*Second Reading Speech, Hansard, 18 June 2014*).

New s178 ***District Court Act*** and new s127 ***Supreme Court Act*** define "Judgment remarks."

***"judgment remarks*** of the Court means:

(a) in relation to a criminal trial—the delivery of the verdict, and any remarks made by the Court when sentencing the accused person, that are delivered or made in open court, and
(b) in relation to any other proceedings—any remarks made by the Court in open court when announcing the judgment determining the proceedings. "

### Amendments to *District Court Act* 1973

New *Part 5 – Broadcast of judgments*.

- *Section 177 Application of Part 5*. Part 5 applies to all proceedings other than:
  - proceedings held in closed court
  - proceedings under ***Bail Act 2013***
  - proceedings on an appeal under ***Children (Criminal Proceedings) Act*** or ***Children and Young Person (Care and Protection) Act***
  - proceedings under ***Crimes (Forensic Procedures) Act***

- *Section 179 Presumption in favour of permitting recording and broadcast of judgment remarks*

provides:

. A person may apply to Court for permission to record and broadcast judgments (s 179(1))

. The Court is to permit the recording of the judgment remarks and their broadcast by news media organisations (whether or not the organisations are also the applicants) unless satisfied that:
  - an exclusionary ground is present (s 179(2)(a)) and
  - it is not reasonably practicable to implement measures to prevent the broadcast of any thing that gives rise to the exclusionary ground (s 179(2)(b)).

. ***Exclusionary grounds:*** Under s 179(3) the following matters constitute an exclusionary ground:
  (a) broadcast likely to reveal identity of a person subject to suppression or non-publication order: s 179(3)(a);
  (b) judgment remarks contain material:
  . subject to suppression or non-publication order, or the publication of which is prohibited by law: s 179(3)(b)(i);
  . likely to be prejudicial to other criminal proceedings: s 179(3)(b)(ii);
  . likely to reveal existence of covert law enforcement operations: s 179(3)(b)(iii); or
  (c) broadcast would pose a significant risk to safety of any person in courtroom or who has been involved in the proceedings: s 179(3)(c).
  (d) where Chief Judge has directed judgment remarks not be recorded or broadcast if of the opinion would be detrimental to orderly administration of Court: s 179(3)(d).

. Images that identify any of the following persons must not be recorded: jurors; accused or victim in a criminal trial (or members of accused's or victim's immediate families): s 179(4).

. The Court, either on its own motion or on application of a "relevant person" in the proceedings (defined in s 178), may make such orders as it thinks fit for the purpose of preventing the broadcast of anything that gives rise to an exclusionary ground or preventing a contravention of s179(4): s 179(5).("Relevant person" means the Minister, the accused, the prosecution, a witness, a person seeking permission for recording and/or broadcasting: s 178).

. Court may make rules about manner in which recordings are made including number and kinds of persons involved in recording, shared use of recordings among broadcasters: s 179(6).

**Amendments to *Supreme Court Act* 1970**

. New *Part 9A Broadcast of Judgments* (ss 126-128) corresponds with new provisions in ***District Court Act***.

. Provisions apply to judgment remarks of the Supreme Court, Court of Appeal and Court of Criminal Appeal: s 126(1), (3).

. *Section 126 Application of Part 9A*. Part 9A applies to all proceedings other than:
  . proceedings held in closed court
  . proceedings in exercise of the Supreme Court's parens patriae jurisdiction
  . proceedings under ***Bail Act 2013***
  . proceedings under ***Crimes (Forensic Procedures) Act***
  . proceedings under ***Crimes (High Risk Offenders) Act* 2006**

. *Section 128 Presumption in favour of permitting recording and broadcast of judgment remarks* - corresponds with s 179 ***District Court Act*** above.

. ***Supreme Court Rules (Amendment No 426) 2014*** provides new rules. Part 13 'Recording and Broadcast of Judgment Remarks' makes rules as to: application is to be made to the Media Manager, the limit on recording equipment in courtroom, and recording must be shared as soon as practicable with other news media organisations.

## 13. *Law Enforcement (Powers and Responsibilities) Amendment Act 2014*

Commenced 1.11.2014

The amending Act amends the ***Law Enforcement (Powers and Responsibilities) Act 2002*** as follows:

. Repeals and replaces Part 15 to clarify and simplify provisions relating to safeguards applying to the exercise of police powers by recasting the provisions in plain language, in particular:
(i) the time at which police officers must provide evidence they are a police officer (if not in uniform), provide their name and place of duty and provide the reason for exercising the power, and
(ii) consolidate the warnings to a person to whom a direction, requirement or request is given to a single warning that the person must by law comply (instead of a warning that the person must comply and a warning that failure to comply is an offence), and
(iii) failure by a police officer to provide his or her name and place of duty does not render the exercise of the power unlawful (except in the case of a direction, requirement or request to a single person).

New ss 201-202 in Part 15 set out clearly the information a police officer must provide when exercising powers.

. Part 9 is amended to clarify safeguards relating to investigations and questioning, in particular:
(i) Separate safeguards are to apply to "protected suspects" and "detained persons". A 'detained person" is a person detained after arrest. A "protected person" is one whom police believe there is sufficient evidence that person has committed the offence but the person is told they are free to leave: ss 109-111.
(ii) The safeguards under Division 2, part 9 (eg time limits for investigation period) apply only to detained persons.
(iii) The safeguards under Division 3, Part 9 (eg giving caution, right to contact relative or independent person etc) apply to both protected suspects and detained persons.
(iv) Extends the initial investigation period for a detained person from 4 to 6 hours. However, the overall maximum period of 12 hours is retained by limiting the additional period of investigation to 6 hours instead of 8: ss 115, 118
(v) Part 9 apply to the scene of a search warrant so that a person need not be taken back to the police station to have their rights under Part 9 administered: s 112A

## 14. *Surveillance Devices Amendment (Police Body-Worn Video) Act 2014*

Commenced 19.11.2014

The Act amends the ***Surveillance Devices Act 2007*** to allow the overt use of body-worn video devices by police. The devices are intended to "operate as a modern day equivalent of a police notebook providing for a contemporaneous record of observations and events:"(Second Reading Speech) .

. Body worn video means equipment on the person of a police officer capable of recording viual images, sound or both: s 4
. It will not be an offence (under ss 7, 8) to use body worn video equipment where the officer is acting in the execution of duty, the use of the video is overt, and the officer is recording a private conversation, is in uniform and has provided evidence s/he is a police officer to each party: s 50A

## 15. *Criminal Records Amendment (Historical Homosexual Offences) Act 2014*

Commenced 24.11.2014

New Part 4A (ss 19A – 19I) is inserted into the ***Criminal Records Act 1991*** to allow a person convicted of homosexual offences which existed prior to 1984 to make an application for the conviction to be extinguished.

. "Eligible homosexual offence" is defined in s 19A
. Application is made to the Secretary of the Department of Justice; and can be made on behalf of a deceased convicted person: s 19B.
. If the sexual activity was consensual and the other person was of or above 16 (or 18 if under the applicant's special care), the conviction is extinguished upon written notice to the applicant: s 19C(1). Relevant information may be provided by agencies such as the DPP, courts and Police: s 19D.
. Where a conviction is extinguished, the person is not required to disclose the conviction to any person for any purpose, including to a question regarding criminal history: s 19F.
. There are disclosure offences relating to accessing such information or fraudulently obtaining such information punishable by maximum penalty of 50 penalty units or 6 months imprisonment or both: ss 19G-H.
. Administrative review under the ***Administrative Review Decisions Review Act 1977*** may be applied for: s 19E(1).

## 16. *Crime Commission Legislation Amendment Act 2014*

Commenced 28.11.2014

Amendments are made to the ***Crime Commission Act 2012*** in response to the High Court judgments in ***Lee v The Queen*** [2014] HCA 20 and ***X7 v Australian Crime Commission*** (2013) 248 CLR 92. ***Criminal Procedure Act. Lee*** held that the release to the prosecution of the appellant's transcript of evidence before the NSW Crime Commission represented a fundamental departure from a fair trial. ***X7*** stated that the compulsory examination of a person about matters relevant to the offence charged should be expressly authorised by the legislation.

The main amendments include:

*Evidence of Accused Persons*

. New s 35A prohibits compulsory examination of an accused except with leave of the Supreme Court. Leave may only be granted if the Court is satisfied that any prejudicial effect likely to arise to the person's trial is outweighed by the public interest in having the matter referred to the Commission fully investigated: s 35A(5).

. Evidence obtained under s 35A cannot be used against the person in criminal or civil proceedings (other than for an offence against the ***Crime Commission Act*** or an offence relating to giving false evidence) but is not inadmissible against other persons: s 35A(3).

*Derivative Evidence*

. New s 39A provides that further evidence, information, document or thing (*derivative evidence)* btained from questioning of a witness at a Commission hearing is admissible in a civil or criminal proceeding despite specified grounds on which it might be inadmissible.

. However, this does not extend to making any derivative evidence admissible against a person questioned in relation to the subject matter of the offence charged unless the derivative evidence could have been obtained or its significance understood without the testimony of the person: s 39A(4).

*Disclosure of Evidence*

. s 45 amended to require the Commission to make evidence given before it available to a Court if the Court certifies it may be in the interests of justice the evidence be made available to the prosecutor even though the Commission has made a non-publication direction.

. New s 45A prohibits the Commission from disclosing to an investigative agency or prosecutor evidence that is the subject matter of an offence given by the person charged and who objected to providing the evidence.

. The evidence may be disclosed in relation an offence against the ***Crime Commission Act***, an

offence relating to giving false evidence or offences by another person if the Commission considers it desirable in the interests of justice to do so: s 45A(3); or may be disclosed to the DPP for purposes of advising the Attorney General with regard to indemnity or undertaking: s 45A(4); or may be disclosed to the DPP for indemnities or undertakings: s 45B.

*Stay applications due to Disclosure*

. The matters a court must consider on an application for a stay of proceedings due to disclosure are set out in s 45C.

. Further, the fact the Commission examined the person or that a transcript was given to an investigative agency or prosecutor is not capable of giving rise to a presumption that there is a fundamental defect in criminal proceedings.

## 17. *Statute Law (Miscellaneous Provisions) Act (No 2) 2014*

Commenced 8.1.2015

The main amendment is to the ***Criminal Procedure Act:***

. s 130A provides that certain pre-trial orders and orders made during a trial bind the trial judge. New s 130A(5) states: "To avoid doubt, this section extends to a ruling given on the admissibility of evidence. " The amendment removes an uncertainty, raised by Simpson J in *JG v R* [2014] NSWCCA 138 as to whether section 130A applies to rulings on the admissibility of evidence.

# ANNEXURE C

## 2014 SUPREME COURT CASES

***Victim impact statements – Crimes (Sentencing Procedure) Amendment (Family Member Victim Impact Statement) Act 2014 – s 28(4) Crimes (Sentencing Procedure) Act 1999***

This amending Act introduced a new s 28(4) into the ***Crimes (Sentencing Procedure) Act 1999*** to enable a court to take into account on sentence a 'family member victim impact statement' in appropriate circumstances. The amendment overturned ***R v Previtera*** (NSWSC) (1997) 94 A Crim R 76 which held that a victim impact statement (VIS) is not relevant to sentence where it concerns only the effect of the victim's death on his or her family.

The amended provisions under s.28(4) have been considered in several Supreme Court sentencing cases. In ***Hines*** (No 3) [2014] NSWSC 1273 at [75]-[85] Hamill J pointed out that neither the legislation nor the Second Reading Speech explain how the section is to be applied, particularly in view of the accepted principle that all human life is of equal value. Despite these concerns, Hamill J accepted the concession of the defence solicitor that it was appropriate to take into account the suffering of the family in determining the appropriate sentence. In ***Halloun*** [2014] NSWSC 1705 at [45]-[46] McCallum J uses the evidence of the family to 'give texture to the undoubted proposition that every unlawful taking of a human life harms the community in some way. In that way, the provision serves the purposes of sentencing stated in s 3A of the Act, one of which is to recognise the harm done to the victim of the crime and the community'. In ***Johnson*** [2015] NSWSC 31 at [54]-[56] Hamill J adopts this 'sound and sensitive approach'. Button J takes the statements into account in determining the appropriate sentence pursuant to s.28(4): see ***Hunter*** (No 15) [2014] NSWSC 1456 at [70]; ***Jones (No 3)*** [2014] NSWSC 1511 at [121]; ***Briggs (No 9)*** [2014] NSWSC 1805 at [55].

***Procedural fairness - plaintiff wrongfully convicted in her absence despite solicitor being present - s 3, 36, 196 Criminal Procedure Act - McKellar v DPP [2014] NSWSC 459 (Adamson J)***

The plaintiff was convicted in the Local Court in her absence despite her solicitor being present. The solicitor's request for an adjournment was refused. Adamson J quashed the conviction and sentence and remitted the matter to the Local Court. Under the ***Criminal Procedure Act***, "accused person" includes an Australian legal practitioner representing the accused: s 3. An accused may appear personally or be represented by a legal practitioner: s 36(1). The effect of ss 3 and 36 was that the appearance by the plaintiff's solicitor meant that the plaintiff was before the court: at [34]. Section 196 – which permits the court to hear and determine a matter in the absence of an accused - did not apply. Once the Magistrate had refused the plaintiff's adjournment application, the Court was obliged to proceed to hear and determine the matter: s 192(1). Further, the Magistrate was obliged to hear the prosecution evidence: s 202. Section 202 contemplates that the accused person will not necessarily be present during the hearing: at [34].

***Procedural fairness – magistrate erred in determining matter in chambers without knowledge of prosecutor - DPP(NSW) v Gatu [2014] NSWSC 192 (Button J)***

The defendant was charged with drive whilst licence cancelled. The matter was adjourned. Later that day the defendant presented documentary evidence to the registry affirming his belief that his licence was not cancelled. The magistrate dismissed the charge in chambers without the prosecutor's knowledge. Button J allowed the DPP's appeal and remitted the matter to the Local Court. It is a fundamental principle that legal disputes be the subject of adjudication in a courtroom. An opponent in litigation must be given the right to be heard. It was an error of law to dismiss the charge against the defendant without hearing from the prosecutor, to provide no reasons for the dismissal of the charge and to determine the matter prior to the date that had been fixed for hearing by way of order: at [22]-[33].

***Procedural fairness – late service by prosecution of expert report - magistrate dismissed adjournment application in chambers - Taylor v Local Court of NSW [2014] NSWSC 1062 (McCallum J)***

McCallum J held that the plaintiff was denied procedural fairness where, after being served with a late expert report by the prosecution, and seeking an adjournment, the magistrate refused to list the application and dismissed the application in chambers. The plaintiff was entitled to have a fair opportunity to respond to the expert evidence and the magistrate had an overriding duty to afford a fair hearing: at [17]; ***Haoui*** [2008] NSWCCA 209. The decision was set aside and the matter remitted to the Local Court.

***Direct communications with judge's chambers and associate – email communications - Stanizzo v Badarne & Ors [2014] NSWSC 689 (Robb J)***

Robb J outlined the procedure to be followed when parties communicate with presiding judge's chambers. Ethical rules and principles of the highest importance to the administration of justice apply: at [72].

Direct communication with judge's chambers is not a "casual, post-modern opportunity" to provide useful information. It must be taken with great care so as not compromise the judge's impartiality. Parties should discuss the proposal to communicate with the judge's chambers with other parties and should obtain other parties' consent: at [79]. Copies of communication should be sent to all parties when sent to the associate. If consent is not forthcoming, arrangements should be considered to re-list the matter with the associate. If urgent, the communication should outline the problem without disclosing information for which unanimous consent has not been obtained: at [79].

Communicating via email in legal proceedings may cause problems for the associate, for instance, identifying parties to whom copies of an email should be sent, whether the matter should be brought to the judge's attention, and the risk that a judge may not be able to avoid reading parts that should not be read in attempting to determine the significance of a document: at [76]-[78].

***Bond granted in Local Court - breach of bond - warrant to appear in District Court was without jurisdiction – judge remanded plaintiff in custody - imprisonment unlawful - habeas corpus issued - Tyron Yates v The Commissioner of Corrective Services (NSW) [2014] NSWSC 653 (Rothman J)***

Where a breach of bond is alleged, the court with which the offender entered the bond is the court that may call the offender to appear. A court of superior jurisdiction may only do so with the offender's consent: s 98(1) ***Crimes (Sentencing procedure) Act 1999***

The plaintiff was convicted in the Local Court of offences and received sentences including a 3 year s 9 good behaviour bond. On appeal to the District Court, the judge varied the sentences and confirmed the bond. When the plaintiff was suspected of breaching the bond a warrant issued for the plaintiff to appear before the District Court. Reserving judgment on the question of jurisdiction under s 98(1), the District Court judge remanded the plaintiff in custody.

Rothman J held the District Court had no jurisdiction to call the plaintiff under s 98(1). Only the Local Court had jurisdiction. Express consent must be given for a superior court to deal with the breach. Informal or implied consent will not suffice and mere appearance in the superior court is not consent. The plaintiff had not consented: at [40]-[43]. The plaintiff was imprisoned even though the District Court was not satisfied it had the jurisdiction to do so. The detention was unlawful and habeas corpus was issued: at [51].

***Police power to stop, search and detain - where police officer "suspects on reasonable grounds" - s 21(1), s 36(1) Law Enforcement (Powers and Responsibilities) Act 2002 - Azar v DPP [2014] NSWSC 132 (Adamson J)***

The applicant's car was stopped by police on suspicion of drugs. Police have the power to stop, search and detain without warrant if the officer "suspects on reasonable grounds" that a particular circumstance exists, including that the person is in possession of a prohibited drug: s 21(1) ***Law Enforcement (Powers and Responsibilities) Act 2002*** and s 36(1) in relation to vehicles).

The question whether there are reasonable grounds for suspicion was considered by the High Court in ***George v Rockett*** (1990) 170 CLR 104 at [14]. Some factual basis for the suspicion must be shown. A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to 'a slight opinion, but without sufficient evidence': at [26]-[27].

A combination of factors was sufficient to give rise to reasonable suspicion: (1) The Applicant was driving a hire car, against a background of police experience that it is not uncommon for drug dealers to use hire cars to transport drugs; (2) He was in an area known to police to be connected with drug use and supply; and (3) The other male got in and out of the car in a short period of time (which led officers to suspect a drug transaction).

Other matters may also be taken into account because what constitutes reasonable grounds for a forming a suspicion or belief must be judged against "what was known or reasonably capable of being known at the relevant time": at [44]; ***Bain v Police*** [2011] SASC 228.

***"Second and subsequent offence" – "occasion" - Road Transport (General) Regulation (repealed) – Appeals from Local Court to Supreme Court – s56 Crimes (Appeal and Review) Act 2001 - Bimson, Roads & Maritime Services v Damorange [2014] NSWSC 734 (Beech-Jones J)***

The respondent was charged with offences under the ***Road Transport (General) Regulation*** (now repealed). The prosecutor informed the Magistrate that the "second and subsequent" penalties for the offences did not apply as all of the offences were being dealt with together.

Beech-Jones J held the Magistrate erred in treating all offences as "first offences" when some were in fact "subsequent offences" attracting a higher penalty. "Occasion" in cl 167 is a reference to the "incident giving rise to the prosecution" and not to the "occasion" of the prosecution. Thus where a person, with no record of previous convictions, is prosecuted for multiple offences then the offence which was first in is to be treated as "a first offence" and remaining offences are treated as "second and subsequent offences": at [75].

The Magistrate erred in applying the wrong maximum penalty and jurisdictional limit. However, the jurisdictional limit is only engaged if the outcome is such that the sentencing court considers that a sentence above the jurisdictional limit should be imposed. The Magistrate had not substituted his understanding of the jurisdictional limit for the maximum. The fines imposed were well below the jurisdictional limits on the Local Court; any misapprehension about that limit did not relevantly affect sentence. This error can be put to one side: at [83]-[84].

The prosecutor (the Roads and Maritime Services) appealed under s 56(1) ***Crimes (Appeal and Review) Act 2001*** which allows an appeal from the Local Court to the Supreme Court against sentence "but only on a ground that involves a question of law alone." A submission that a sentence is manifestly inadequate does not identify "a question of law alone": at [57].

The Magistrate's errors were caused by an incorrect statement of the prosecutor. In circumstances where the only basis for intervention was solely caused by a statement made by the prosecutor, as a matter of discretion this Court should not intervene: at [91]-[94].

**Drive while disqualified – later quashing of disqualification does not mean the offender was never disqualified - *Roads and Maritime Services v Porret* [2014] NSWCA XXX–**

The Court of Appeal held that when a sentence is varied by the District Court on appeal from the Local Court, the variation is prospective, not retrospective. Specifically, where a person drove while disqualified from driving but the disqualification order was subsequently quashed on appeal, this did not mean that the disqualification had never existed or that they had not committed the offence of driving while disqualified.

Note: It remains to be seen how this reasoning might apply to the commonly encountered case of a person who receives a suspended sentence and, after breaching it, lodges an appeal. On one view, if another sentence (eg a fine or s9 bond) is imposed in lieu of the original suspended sentence, there is no remaining s12 bond to revoke nor any sentence to order to be served following revocation.

***Costs - Local Court has power to award costs under s 69 Local Court Act 2007 following a "no jurisdiction" finding - Baglin v Gill [2014] NSWSC 902 (Fullerton J)***

The plaintiff- police officer made an application for orders permitting a forensic procedure. The Magistrate found the application was invalid under the ***Crimes (Forensic Procedures) Act 2000*** and failed to engage the Local Court's jurisdiction. An order for costs was made to the defendant. Fullerton J upheld the costs order. Section 69 of the ***Local Court Act 2007*** governs the power to award costs even in cases where the court finds it has "no jurisdiction": at [11]-[15]. The Local Court has an implied power to decide whether the jurisdiction to hear an application proceeding has been properly invoked: at [20]-[22].

***Evidence Act applies to forensic procedure applications - TS v Constable Courtney James [2014] NSWSC 984 (Adamson J)***

Adamson J held that the ***Evidence Act*** applies to an application under the ***Crimes (Forensic Procedures) Act 2000***. Such proceedings, although related to the suspected commission of an offence, are civil, not criminal, since they do not amount to the prosecution of a person for an offence or for committal, sentence or bail (as per the definition of "criminal proceedings" in the Dictionary): at [20]-[21].

***Murder / Manslaughter – constructive murder – joint criminal enterprise with deceased - Lin (No.2) [2014] NSWSC 1710 (Hamill J)***

The accused and the victim had been involved in the manufacture of a large commercial quantity of drugs in a house owned by the accused on the basis of a common criminal purpose. The victim was killed by an explosion related to the drug manufacturing. The prosecution sought to rely upon constructive murder to establish culpability of the accused for murder, and unlawful and dangerous act for manslaughter. Hamill J rejected both arguments and gave a directed verdict in relation to the death. This matter is the subject of a Crown Appeal to the CCA.