COURT OF CRIMINAL APPEAL UPDATE
REVIEW OF 2013

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

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SENTENCE APPEAL CASES

INTRODUCTION

The repercussions for the criminal law consequent upon the High Court decision in ***Muldrock v The Queen*** (2011) 244 CLR continued to reverberate throughout 2013.

1. STANDARD NON-PAROLE PERIOD

Standard non-parole periods (SNPPs) were inserted into Part 4 Div 1A of the ***Crimes (Sentencing Procedure) Act* 1999** in 2002. The provisions created SNPPs for a large number of offences. The High Court in ***Muldrock v The Queen*** (2011) 244 CLR 120 held that the leading case on SNPPs - ***Way*** (2004) 60 NSWLR – was wrongly decided. The SNPP does not have determinative significance in sentencing: at [32]; ***Koloamatangi*** [2011] NSWCCA 288; ***KG*** [2012] NSWCCA 10. ***Muldrock*** held 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 by comparison with a hypothesised offence answering that description and, if so, by inquiring if there are matters justifying a longer or shorter period: at [28].

The following topics are covered:-

(a) Cases pre-***Muldrock*** – particularly in the area of 'Appeals'.
(b) Case law post-***Muldrock***
(c) The new legislation*:* ***Crimes (Sentencing Procedure) Amendment (Standard Non-Parole Periods) Act 2013***

(a) Cases pre- Muldrock

Cases pre- Muldrock – Appeals - Re-opening proceedings is not available under s 43 Crimes (Sentencing Procedure) Act 1999 - Achurch v R [2013] NSWCCA 117 [Five judge bench]

In ***Achurch v R (No 2)*** [2013] NSWCCA 117 [Five judge bench] the applicant applied to re-open a successful Crown appeal in which the CCA had applied ***Way*** (2004) 60 NSWLR 168. That Crown appeal had been heard prior to the High Court judgment in ***Muldrock.*** The applicant submitted 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').

Held: Appeal dismissed (Bathurst CJ and Garling J; Bellew J agreeing; Johnson J agreeing with additional reasons; McClellan JA agreeing with the orders with different reasons). The sentences imposed in the appeal were not contrary to law within s 43(1)(a): at [99]. For there to be jurisdiction under s 43(1) error must be identified and shown to have led to a penalty not otherwise open: at [65]. Section 43 is a discretionary provision designed to correct manifest error generally apparent from the sentence itself, not from an analysis of the legal reasoning which underpins the sentence. It should not be used as an alternate to an appeal: at [66]. Section 43 cannot be used as a vehicle to review 'the ***Muldrock*** appeals' - with a possible exception of cases where it is alleged the CCA erroneously sentenced on the basis of ***Way***. In the case of sentences imposed by other Courts, an application for leave to appeal is to be made out of time: at [66]-[67].

***NOTE*: On 2 April 2014, the High Court delivered judgment in *Achurch v The Queen* [2014] HCA 10. Dismissing the Applicant's appeal, the High Court held that s 43 permits the correction of penalties, however, the penalty must be contrary to law.**

Cases pre-Muldrock – Appeals

Since ***Muldrock***, there have been a significant number of cases challenging the approach of judges who had (correctly at the time) followed ***Way*** (2004) 60 NSWLR 168. Challenges fall into three categories. The first are offenders who make challenge in the ordinary course of an appeal against sentence, within time, under the ***Criminal***

Appeal Act 1912. The other two categories are discussed below*:* (i) Application for an extension of time in which to seek leave to appeal; (ii) Offenders who had already exhausted their rights of appeal.

(i) Application for extension of time to appeal

During 2013 the Legal Aid Commission and the Public Defenders reviewed a number of cases which had been dealt with pre-***Muldrock*** and said to involve '***Muldrock*** error'. The Legal Aid Commission made out-of-time applications to appeal to the CCA. (Notice to appeal to the CCA must be given within 28 days of sentence: s 10(1)(a) ***Criminal Appeal Act 1912.*** An extension for leave to appeal may be made under: s 10(1)(b)).

In ***Abdul*** [2013] NSWCCA 247 (sexual assault) the CCA considered the applicable principles for determining whether to grant an extension of time for an appeal based on a change of law. The CCA (Hoeben CJ at CL; Johnson and Bellew JJ) referred to the principles for the granting of an extension of time as stated in ***Etchell*** (2010) 205 A Crim R 138, and also reviewed the "change of law" cases in the United Kingdom (***Jawad*** [2013] EWCA Crim 644). The CCA stated the principles as follows:

> "[53]….. Accordingly, when considering an application for extension of time based on "*Muldrock* error", all relevant factors need to be considered - the length of the delay, the reasons for the delay, the interests of the community, the interests of the victim and whether, if an extension of time were refused, **substantial injustice would result. This last factor will inevitably require an assessment of the strength of the proposed appeal although as *Etchell* made clear, that assessment can be carried out in a "more summary fashion" than would be done in an application for leave to appeal that was brought within time." [Emphasis added]**

The application in ***Abdul*** was dismissed. The length of the delay was substantial - over 4 years. To allow an extension of time would offend the principle of finality, involve added trauma for the victim and the explanation for the delay was not compelling. Legal Aid had twice rejected applications to appeal - the only change which had since occurred was the handing down of the decision in ***Muldrock***: at [54].

Subsequent cases have held that the principles outlined in ***Abdul*** apply in all cases where an extension of time is required, and is not confined to applications for extension of time based upon ***"Muldrock-error"***: see discussion below under *"Sentence Cases – 9. Appeals: Application for extension of time to appeal – principles to be applied";* ***Alpha*** [2013] NSWCCA 292.

Prior to the decision in ***Abdul*** leave to extend time to appeal had been granted by the CCA in almost all appeals alleging a ***Muldrock*** error. The test enunciated in ***Abdul*** imposes an additional requirement on the applicant of establishing "whether, if an extension of time were refused, substantial injustice would result". Previous decisions such as ***Edwards*** [2009] NSWCCA 199 and ***Arja*** [2010] NSWCCA 190 dealing with extension of time for leave made no mention of the requirement of substantial injustice.

Special leave applications have been filed in the High Court in two cases dealing with applications for extension of time for leave to appeal where there has been a ***Muldrock*** error and leave to extend time to appeal has been refused applying the test in ***Abdul***: ***Kentwell*** [2013] NSWCCA 266 and ***O'Grady*** [2013] NSWCCA 281. The basis of these applications is that the test enunciated in ***Abdul*** for considering applications for extension of time for leave to appeal where there is an asserted ***Muldrock*** error is not correct.[1]

(ii) Offenders who had already exhausted their rights of appeal against sentence – application for inquiry into sentence under s 78 Crimes (Appeal and Review) Act 2001 – referral to CCA under s 79

The Legal Aid Commission is also reviewing cases in which the offender had exhausted their right of appeal prior to the High Court judgment in ***Muldrock***.

An application for an inquiry into a conviction or sentence may be made to the Supreme Court by the convicted person: s 78 ***Crimes (Appeal and Review) Act 2001***. The Supreme Court may refer a matter to the CCA where "it appears there is a doubt or question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case": s 79(2).

In ***Sinkovich v AG NSW*** [2013] NSWCA 383 the Court of Appeal held that an error of law on the part of the sentencing judge or the CCA which may have caused a sentence to be imposed of greater severity than would

[1] We acknowledge the assistance of Robyn Burgess, Public Defender, in relation to the commentary on ***Abdul***.

otherwise have been the case, may form the basis of a doubt or question as to circumstances having the potential to mitigate the sentence imposed, for the purpose of an application under s 79.

This reasoning has been applied in several cases where applications under s.78 have been granted on the basis that there was a doubt or question as to a mitigating circumstance, namely that the sentence was infected by a ***Muldrock*** error: see ***Application by Adam Carlton pursuant to s 78 Crimes (Appeal and Review) Act 2001*** [2013] NSWSC 1705, Latham J; ***Application by Walter James Kuehne pursuant to s 78 Crimes (Appeal and Review) Act 2001*** [2013] NSWSC 1537, Latham J; ***El-Helou Gary - Application pursuant to Part 7 of the Crimes (Appeal and Review) Act 2001*** [2014] NSWSC 66, Button J; ***Application by Paul Rajendran pursuant to s.78 Crimes (Appeal and Review) Act 2001*** [2014] NSWSC 270, Johnson J. In each case the matter was referred to the CCA to be dealt with as an appeal against sentence. The subsequent appeal in ***Carlton*** was dismissed (***Carlton*** [2013] NSWCCA 14) and the appeal in ***Kuehne*** allowed (***Kuehne*** [2014] NSWCCA 22). The appeals in ***El-Helou*** and ***Rajendran*** have not yet been heard.

There is no requirement for leave to appeal, or for an extension of time to appeal, at least in respect of grounds the subject of the referral under s 79: ***Carlton*** [2014] NSWCCA 14 at [38]-[39]; ***Kuehne*** [2014] NSWCCA 22 at [6].

Cases decided pre-Muldrock - ***Where too much emphasis placed on the SNPP***

In cases dealt with prior to ***Muldrock***, the CCA will intervene where a sentencing judge has placed too much significance on the SNPP, resulting in a sentence that is not warranted in law: ***Ross*** [2012] NSWCCA 161 at [22].

In ***Essex*** [2013] NSWCCA 11 the sentencing judge's reference to the SNPP as *"not merely a guideline"* and "*binding*" gave the SNPP primary significance. Such an approach was not saved by the fact that in the end result, the non-parole period imposed was less than the prescribed standard: at [31].

In ***Truong*** [2013] NSWCCA 36 the judge took as a starting point the SNPP of 10 years; made a finding that the objective seriousness of the offence fell below, but not substantially below, the mid-range of objective seriousness; and took as a starting point a non-parole period of imprisonment for 8 years (that point being below, but not substantially below, the SNPP of 10 years). The CCA found the approach overly prescriptive and inconsistent with ***Muldrock***. The judge engaged in a process of reasoning that was rigid to the point of being inconsistent with ***Muldrock*** and ***Markarian*** (2005) 228 CLR 357: at [32]-[34].[2]

(b) Case law post-Muldrock

No error in making assessment as to objective seriousness

In ***Zarakas*** **[2013] NSWCCA 144** Button J stated it is not an error to make an evaluation of the objective seriousness of an offence: at [36]. A number of decisions after ***Muldrock*** *state* that is not inappropriate for a sentencing judge to make an evaluation of the objective seriousness of the offence: ***Ehrlich*** [2012] NSWCCA 38; ***Stewart*** [2012] NSWCCA 183; ***Atchison*** [2012] NSWCCA 82. Merely because a sentencing judge has assessed the objective seriousness of an offence with more specificity than may now be necessary does not of itself demonstrate error: at [37].

See also ***Kertai*** [2013] NSWCCA 252 where it was not an error that the judge had made a finding that the objective seriousness of the offence was "slightly below" the midrange. The judge did not demonstrate an unduly prescriptive approach. The judge had not engaged in a two-step approach but applied an instinctive synthesis approach consistent with ***Markarian***: at [28]-[29].

Whether specificity required in assessing level of objective seriousness

The High Court in ***Muldrock*** stated that in regard to SNPP offences, a court is not required or permitted to engage in a two-stage approach to sentencing, commencing with an assessment of whether the offence falls within the middle range of objective seriousness by comparison with an hypothesised offence answering that description and, in the event that it does, by inquiring if there are matters justifying a longer or shorter period: at [28].

[2] See also ***ZZ*** [2013] NSWCCA 83.

In ***Jolly*** **[**2013] NSWCCA 76 Bellew J (Hoeben CJ at CL and Slattery J agreeing) found that a failure to make a comparison between the offence before the court with an offence in the middle-range was not erroneous:

> "[55] In *PK v R* [2012] NSWCCA 263 McCallum J (with whom Macfarlan JA and Price J agreed) expressed the view that following *Muldrock*, a sentencing judge need not, and arguably should not, attempt to quantify the distance between the actual offence before the court and a putative offence in the middle of the range.
>
> [56] In these circumstances, and although it is not a matter which is necessary to decide for the purposes of determining the applicant's appeal, **I am doubtful that her Honour's failure to provide a specific indication of the extent to which the applicant's offending was above the mid range amounted to an error. ……." [Emphasis added]**

See now new s 54B(6) of the ***Crimes (Sentencing Procedure) Act 1999*** as inserted by the ***Crimes (Sentencing Procedure) Amendment (Standard Non-Parole Periods) Act 2013 –*** discussed below.

New s 54B(6) makes clear that a court is not permitted to engage in a two-stage approach to sentencing as stated in ***Muldrock*** at [28], see above.

Matters personal to the offender

The High Court in ***Muldrock*** (2011) 85 ALJR 1154 at [27] stated that "The objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders. It is to be determined wholly by reference to the nature of the offending." However, the issue of w*hether matters personal to the offender should not be taken into account in assessing the objective seriousness of an SNPP offence remains unresolved:* ***Yang*** [2012] NSWCCA 49 per Hulme J at [27]–[36].

In ***Subramaniam*** [2013] NSWCCA 159 the CCA considered whether the offender's personality disorder reduced the objective gravity of the offences. Latham J (Simpson J agreeing; Emmett JA not referring to this point but agreeing as to the result) took the view that attributes personal to the applicant (in particular, her mental state at the time of offending) more appropriately belonged to an assessment of moral culpability. Such personal attributes ought be distinguished from the objective features of the offences: at [57].

See now new s 54A(2) of the ***Crimes (Sentencing Procedure) Act 1999*** as inserted by the ***Crimes (Sentencing Procedure) Amendment (Standard Non-Parole Periods) Act 2013 –*** discussed below.

New s 54A(2) reflects the view in ***Muldrock*** at [27] that objective seriousness is to be assessed wholly by reference to the nature of the offending, and not by matters personal to an offender, see above.

SNPP may be more significant where offender has little in the way of a subjective case

In ***Nguyen*** [2013] NSWCCA 195 the CCA stated that the SNPP may be a more significant factor on sentence whether there is little in the way of subjective mitigating factors:

> "[63] There is force in the Crown submission that the standard non-parole period may be a more significant factor on sentence of an offender where there is little operating in the offender's favour on sentence. Its significance in a particular case may vary. In *Muldrock*, it was said that the standard non-parole period said "little about the appropriate sentence for this mentally retarded offender and this offence": *Muldrock* at [32]. In other cases, its significance may well be greater: *AB* at [51]. The present case falls into the latter category."

Nguyen was cited in ***Black*** [2013] NSWCCA 265.

Special circumstances where SNPP is 80% of the maximum penalty

In ***KW*** **[2013] NSWCCA 31, the appellant** was sentenced for 'Aggravated indecent assault on person under 16' under s 61M(2) ***Crimes Act 1900***. Because the offence carries an SNPP of 8 years and a maximum penalty of 10 years, the judge said he was precluded from giving effect to a finding of special circumstances justifying a reduction of the non-parole period below 75% of the head sentence. (The judge was sentencing before the High Court's decision of ***Muldrock*** (2011) 244 CLR 120). *Held*: The appeal was allowed. Simpson J (Harrison and Harrison JJ agreeing) said that ***Muldrock*** is clear that a judge is not constrained to impose a sentence that begins

with the SNPP: at [29], [34]. The CCA re-structured the sentence to take into account the sentencing judge's finding of special circumstances: at [43].

(c) The new legislation: Crimes (Sentencing Procedure) Amendment (Standard Non-Parole Periods) Act 2013

Given its importance, the new legislation is referred to here (rather than at the end of the Paper at "*Annexure B – Legislation 2013*.")

The Act commenced on 29.10.2013. The Act amends the ***Crimes (Sentencing Procedure) Act 1999*** and aims to clarify to role of the SNPP in sentencing as a consequence of ***Muldrock*** (2011) 244 CLR 120. The amendments implement recommendations by the NSW Law Reform Commission in its '*Interim Report on Standard Minimum Non-Parole Periods'* (May 2012).

The Act applies to offences committed prior to the commencement of the amendments but does not affect any sentence imposed prior to the amendments.

It is useful to set out the repealed provisions to compare to the new provisions.

(i) New s 54A(2)

> ***"Repealed s 54A(2) What is the standard non-parole period?***
> ……
> *(2) For the purposes of sentencing an offender, the standard non-parole period represents the non-parole period for an offence in the middle of the range of objective seriousness for offences in the Table to this Division."*

> ***"New s 54A(2) What is the standard non-parole period?***
> ***……..***
> *(2) For the purposes of sentencing an offender, the standard non-parole period represents the non-parole period for an offence in the Table to this Division that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness. "*

Explanatory Note to Act: The Explanatory Note states that this amendment "makes it clear that a SNPP represents the non-parole period not for the actual offence for which an offender is to be sentenced but for an offence of the same kind that is in the middle of the range of seriousness, and that is determined by taking into account only objective factors that affect its relative seriousness (and without reference to matters personal to a particular offender of class of offenders)."

The Judicial Commission[3] notes that the words "*taking into account only the objective factors affecting the relative seriousness of that offence"* in the new s 54A(2) reflect the High Court's view in ***Muldrock*** (2011) 85 ALJR 1154 at [27] that: "The objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders. It is to be determined wholly by reference to the nature of the offending." The issue of w*hether matters personal to the offender should not be taken into account in assessing the objective seriousness of an SNPP offence has to date remained unresolved:* ***Yang*** [2012] NSWCCA 49 per Hulme J at [27]–[36].[4]

It is also noted that the NSW Law Reform Commission[5] had recommended that Parliament should legislate ***Muldrock*** and that *subjective* matters causally connected to the offence should be included in any assessment of the

[3] Hugh Donnelly, Director, Research & Sentencing, Judicial Commission of NSW "Special Bulletin 5 – SNPP Amendments" 31.1.2014 www.http://sis.judcom.nsw.gov.au/recentlaw

[4] ; The Honourable RA Hulme "Significant criminal appellate decisions in 2013" (2013) 25 *Judicial Officers' Bulletin* 89

[5] NSW Law Reform Commission, *Interim Report on Standard Non-Parole Sentencing*, Report 134 (May 2012) at 2.67 – 2.69

offence. However, the new Act does not adopt the NSWLRC's proposal. Section 54A(2) refers only to *"the objective factors".* This may however not be a matter of great significance given that Courts are no longer required to make a comparative assessment of a case with a mid-range offence under the new s 54B(6), discussed below.

(ii) New s 54B

Section 54B has been repealed and replaced with a new s 54B.

The repealed ss 54B(2), (3), (4) originally provided as follows:-

> ***"Repealed s 54B Sentencing procedure***
> *…….*
> *(2) When determining the sentence for the offence (not being an aggregate sentence), the court is to set the standard non-parole period as the non-parole period for the offence unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period.*
> *(3) The reasons for which the court may set a non-parole period that is longer or shorter than the standard non-parole period are only those referred to in section 21A.*
> *(4) The court must make a record of its reasons for increasing or reducing the standard non-parole period. The court must identify in the record of its reasons each factor that it took into account."*

The Judicial Commission notes[6] that The repeal of the old s 54B(2) reflects the High Court's view in ***Muldrock*** (2011) 244 CLR 120 that it was a mistake to give determinative significance to so much of s 54B(2) that appears before the word "unless.": at [32]. It was an error by the CCA in ***Way*** (2004) 60 NSWLR 168 to characterise s 54B(2) as being framed in mandatory terms. The SNPP operates as a guidepost only: at [26]-[27]. The repeal of the old s 54B(3) reflects the High Court's view in ***Muldrock*** that s 54B(3) did not limit the courts because the matters that may be taken into account under s 21A are broad and encompasses the common law: at [19]. [7]

The new section 54B is set out below. The main points to note are:

. Sections 54B(2)-(3) replace the repealed ss 54B(2), (3), and (4).
. Section 54B(6) is an entirely new provision.
. Sections 54B(4), (5) and (7) do not alter the law and are the same as the previous repealed provisions.

> ***"New s 54B Consideration of standard non-parole period in sentencing***
> *……..*
> *(2) The standard non-parole period for an offence is a matter to be taken into account by a court in determining the appropriate sentence for an offender, without limiting the matters that are otherwise required or permitted to be taken into account in determining the appropriate sentence for an offender.*
>
> *(3) The court must make a record of its reasons for setting a non-parole period that is longer or shorter than the standard non-parole period and must identify in the record of its reasons each factor that it took into account.*
>
> *(4) When determining an aggregate sentence of imprisonment for one or more offences, the court is to indicate, for those offences to which a standard non-parole period applies, the non-parole period that it would have set for each such offence to which the aggregate sentence relates had it set a separate sentence of imprisonment for that offence.*
>
> *(5) If the court indicates under subsection (4) that it would have set a non-parole period for an offence that is longer or shorter than the standard non-parole period for the offence, the court must make a record of the reasons why it would have done so and must identify in the record of its reasons each factor that it took into account.*
>
> *(6) A requirement under this section for a court to make a record of reasons for setting a non-parole period that is longer or shorter than a standard non-parole period does not require the court to identify the extent to which the seriousness of the offence for which the non-parole period is set differs from that of an offence to which the standard non-parole period is referable.*
>
> *(7) The failure of a court to comply with this section does not invalidate the sentence."*

[6] Judicial Commission of NSW, *ibid*.
[7] Ibid

The new s 54B(2) states that the SNPP is "*a matter to be taken into account by a court in determining the appropriate sentence for an offender"* reflecting the approach that "[T]he judge identifies all factors relevant to sentence, discusses their significance and then makes a value judgment as to the appropriate sentence given all the factors of the case": at [26]; ***Markarian v The Queen*** (2005) 228 CLR 357 at [51]; ***Muldrock*** (2011) 244 CLR 120. [8]

The new s 54B(6) reflects the High Court's view in ***Muldrock*** that 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 by comparison with a hypothesised offence answering that description and, if so, by inquiring if there are matters justifying a longer or shorter period: at [28]. [9]

***Explanatory Note to Act*:** The Explanatory Note states that the new s 54B:

. "makes it clear that a SNPP is a matter to be taken into account in determining the appropriate sentence for an offender (as a "legislative guidepost"). The amendment does not affect a court's usual sentencing practice of assessing the relative seriousness of an offence taking into account objective and subjective factors and does not limit the other matters that a court is required or permitted to take into account in determining the appropriate sentence for an offender."

. "in taking a SNPP into account, a court is not required to make an assessment of the extent to which the seriousness of the offence for which the non-parole period is set differs from that of an offence to which the SNPP is referable" (new s 54B(6)).

2. AGGRAVATING FACTORS

s 21A(2)(ea) – offence committed in the "presence" of a child

In ***McLaughlin*** **[2013] NSWCCA 152 the offender** was sentenced for three assault offences upon his partner. The assaults took place in their home where they lived with the victim's young son. There was no evidence that the child was present on the first two offences or that the child witnessed the third offence as he was asleep at the time. The CCA found it was an error to take into account as an aggravating feature the "generalised presence" of the child: at [27]. This court calls for a for a strict approach to proof of this aggravating feature pursuant to s 21A(2)(ea): ***Gore*** (2010) 208 A Crim R 353 at [103]–[104].

s 21A(2)(eb) – the offence was committed in the home of the victim or any other person

Under s 21A(2)(eb), and earlier common law, it is not an aggravating factor when an offence is committed in the home in which both the offender and the victim reside; it is only an aggravating factor when the offender is an intruder: ***Comert*** [2004] NSWCCA 125; ***EK*** [2010] 79 NSWLR 740, ***Ingham*** [2011] NSWCCA 88, ***BIP*** [2011] NSWCCA 224, ***DS*** [2012] NSWCCA 159, ***Essex*** [2013] NSWCCA 11.

This principle has been called into question. In two appeal matters the Crown had proposed to argue that these decisions were wrongly decided, however, the argument was abandoned and the correctness of those decisions was conceded: see ***Melbom*** [2013] NSWCCA 210 and ***Montero*** [2013] NSWCCA 214.. In ***Melbom***, RA Hulme J (Simpson and Price JJ agreeing) said the plain words of s 21A(2)(eb) and the intention of Parliament did not support the limitation that the Court has placed on their application. However, given the Crown's concession, this was not the occasion to reconsider the authorities: at [44]. Simpson J said perhaps it was time for a re-examination by this Court of those decisions: at [1]-[2].

Offender and victims shared home - No error where further matters were relevant to assessment of seriousness of offence

[8] Ibid
[9] Ibid

In ***Melbom*** [2013] NSWCCA 210 the appellant was convicted of reckless wounding against his two housemates in the home they shared. R A Hulme J concluded that the judge did not err in finding the offence aggravated under s 21A(2)(eb) because the judge had not just referred to the fact that the offence was aggravated by the fact it had occurred in the home. Such an approach would have been contrary to authority if that was all that was said: at [51]. But the judge went on explain why the offence was more serious:- there was "an element of domestic violence"; the victims had nowhere to go; and the offender had a right to be in the residence "which made him more dangerous". All matters were relevant to the assessment of the seriousness of the offence: at [51]-[55].

Victim was a house guest – Entitlement of victim to safety and security

In ***Montero*** [2013] NSWCCA 214 the offender was convicted of sexual offences against the 15 year old female victim staying in his home as a guest. The judge did not err in finding the offence aggravated under s 21A(2)(eb) as it was not that fact alone which had been taken into account. Other factors had been found to aggravate the offence:- that the complainant was a guest and was entitled in those circumstances to a sense of safety and security: at [51].

Remarks by sentencing judge that step-daughter victim had "no place of safety to escape to" - no double counting

In ***DJM*** [2013] NSWCCA 101 the judge found the sexual assault offence aggravated because the offence took place in the home where, due to custody arrangements, it was also the home of the Applicant's step-daughter (victim) and she had no place of safety to escape to: at [7]. The CCA found that the statement did not make any reference to s 21A(eb). The judge had noted it was an obvious aggravating feature where the offender was in a position of trust: at [9]. The comments that the victim had 'no place of safety to escape to' was nothing more than a statement of the obvious in relation to these sorts of offences committed in the family home and did not amount to double counting: at [10].

s 21A(2)(g) – the injury, emotional harm, loss or damage caused by the offence was substantial

Where psychological damage multifactorial
In ***RO*** [2013] NSWCCA 162 the judge erred in finding the victim suffered "significant psychological damage" as a result of sexual assault offences and that the offences were aggravated under s 21A(2)(g). Due to the victim's difficult background, any psychological damage was multifactorial. Although the judge was entitled to find some psychological damage resulted, there was no medical evidence upon which the judge could make any qualitative or quantitative assessment on the extent of any harm: at [91]-[92].

Threaten judicial officer – long-term psychological damage not required
In ***Linney*** [2013] NSWCCA 251 the applicant was sentenced for 'Threaten judicial officer' under s 326 ***Crimes Act***. The victim said in a statement he felt "extremely concerned" and "extremely upset" for his family's safety as a result of threatening emails. The CCA held the judge did not err in finding the emotional harm caused was substantial and therefore an aggravating factor under s 21A(2)(g). First, emotional harm is not an inherent characteristic of the offence in s 326: at [57]. Second, whether there is substantial emotional harm caused is a question of fact. It was open to the judge to find the aggravating factor established beyond reasonable doubt: at [58]. Third, s 21A(2)(g) does not require long-term psychological damage. There is no requirement there be evidence the victim requires counselling or psychiatric care: at [59].

s 21A(2)(m) – the offence involved multiple victims or a series of criminal acts

Error in approach where separate sexual offences involving separate victims
In ***Magnuson*** **[2013] NSWCCA 50** the appellant was sentenced for a number of separate sexual assault offences against three different young female victims. Each offence related to one victim. Each offence came for separate consideration, and for the imposition of a separate sentence. It was an error to find the offences aggravated on the basis of the multiplicity of the victims and that they were part of a series of criminal acts under s 21A(m): at [56]. That circumstance of aggravation is directed towards offences that themselves encompass a series of criminal acts; not towards offences that take their place as one of a series of criminal acts: at [57]; ***Tadrosse*** (2005) 65 NSWLR 740 at [28]-[29].

Culpable driving – the number of persons "put at risk" refers to people other than the victims
In ***Stanyard*** [2013] NSWCCA 134 the applicant was convicted of two counts of 'Driving manner dangerous occasioning grievous bodily harm' (s 52A(3) ***Crimes Act***). The two victims were rear seat passengers. The guideline

judgment ***Jurisic*** (1998) 45 NSWLR 209 at 231E lists *"(ii) Number of persons put at risk"* as an aggravating factor. The judge found that more than one person was "put at risk" because there were the two passengers in the rear. The CCA said this was an error. In ***Jurisic***, where the nature and extent of injuries has been recognised as a discrete aggravating factor and where grievous bodily harm is an element of the offence of dangerous driving, the number of persons "put to risk" must refer to people other than the victims. Otherwise there is a danger of double counting: at [29].

3. MITIGATING FACTORS

Intoxication

'Out of character' exception rarely applies

Intoxication may mitigate a crime because the offender has by reason of that intoxication acted 'out of character': ***Stanford*** [2007] NSWCCA 73 at [53]-[55] applying ***Coleman*** (1990) 47 A Crim R 306 at 327.

In ***ZZ*** [2013] NSWCCA 83 the CCA affirmed that the 'out of character' exception is "acknowledged to exist, but it has almost never been applied": *GWM* [2012] NSWCCA 240 at [78], [80]-[82]; ***Hasan v The Queen*** [2010] VSCA 352 [21]. There has been almost no judicial exploration of when the exception might apply but it seems clear the circumstances must be quite exceptional before intoxication can mitigate an offender's moral culpability: The offender would bear the onus of showing that he/she did not know what effect alcohol would have. Given the widespread use of alcohol, and that even a non-drinker would be well aware of its effects, this is a difficult burden to discharge. There is the risk that investigation of the offender's drinking habits might lead to the conclusion that the intoxication is an aggravating rather than a mitigating circumstance: ***Hasan*** at [33]-[34].

Intoxication - Aboriginal offenders

In ***Bugmy v The Queen*** [2013] HCA 37 (discussed below under 'High Court Cases') the High Court stated that, as explained by Wood J in ***Fernando*** (1992) 76 A Crim R 58, drunkenness does not usually operate by way of excuse or to mitigate an offender's conduct. However, there are Aboriginal communities in which alcohol abuse and alcohol-related violence go hand in hand**.** Where an offender's abuse of alcohol is a reflection of the environment in which s/he was raised it should be taken into account as a mitigating factor**.** To do so is to acknowledge the endemic presence of alcohol in Aboriginal communities: at [37]-[38].

Note: Statutory abolition of the 'out of character' exception

It has been stated that the out of character exception has now been abolished by the introduction of s 21A(5AA) ***Crimes (Sentencing Procedure) Act***.[10] Section 21A(5AA) commenced on 31.1.2014 and states:-

> *"**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."*

Section s 21A(5AA) was inserted by the ***Crimes and other Legislation Amendment (Assault and Intoxication) Act 2014*** (discussed below under "Stop Press 2014 – Legislation").

It has further been stated that s 21A(5AA) **"**also abolishes that part of ***R v Fernando*** (1992) 76 A Crim R 58 that the High Court approved in ***Bugmy v The Queen*** [2013] HCA 37 at [38], [40]"[11] – cited and discussed above.

The Court may still take into account the impact of drug and alcohol abuse on an offender's upbringing as set out in ***Bugmy*** at [40]: [12]

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[10] See Judicial Commission NSW **Special Bulletin 6: New assault offences - Intoxication (February 2014)** at http://sis.judcom.nsw.gov.au/recentlaw**.**

[11] Ibid

> "… The circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way."

Manufacture drugs - offence primarily motivated by addiction not financial gain - whether moral culpability diminished by addiction

In ***Dang*** [2013] NSWCCA 246 Basten JA and Adams J (Latham J dissenting) allowed the Applicant's appeal against sentences imposed for two offences of manufacture drugs. The drugs were manufactured to feed the Applicant's addiction and to provide a source of drugs for his girlfriend and "others". The judge found there was no commerciality involved. The Applicant submitted the moral culpability of that conduct was different from a case of manufacture for commercial profit. Further, that the comparative cases which supported the level of sentences imposed on the Applicant involved manufacture for commercial purposes, and accordingly, the sentences imposed were excessive.

Basten JA discusses in some detail how addiction has been described as an explanation for criminality and whether moral culpability is diminished by addiction: at [22]-26]. To conduct a criminal enterprise relating to prohibited drugs for profit is more reprehensible than pursuing personal satisfaction – see s 21A(2)(o) ***Crimes (Sentencing Procedure) Act*** which treats as an aggravating factor that "the offence was committed for financial gain". Drug use which causes limited harm to others should not attract as heavy a punishment as would actual supply to others: at [28].

Manufacture is an essential prerequisite to both use and supply. The extent of the manufacturing operation and the quantity of product for consumption is an important consideration: at [28]. Even in drugs trafficking, a distinction is drawn between categories. The objective criminality of an offender who traffics in drugs to feed a personal habit is less than a trafficker for greed: ***Day*** (1998) 100 A Crim R 275 at 277. The circumstance of addiction is also accepted as potentially relevant to moral culpability. A person in the grip of addiction has less freedom of choice than would otherwise be the case. Moral culpability is a function of perceived freedom of choice. The cases have drawn a distinction between selling drugs for commercial gain and for feeding a habit: at [29]-[30] citing from ***Cicciarello*** [2009] NSWCCA 272; ***Bowden*** at [55]-[60].

Basten JA concluded that manufacture for financial gain would have involved an aggravating factor in the comparative cases, but not in this case. Although the sentencing judge accepted that those consuming the drug would extend beyond the Applicant and his girlfriend, no figures or amounts were known. In those circumstances the CCA must act on the basis that supply would be to a relatively small number, in small amounts. That diminishes the culpability of the Applicant: at [33]. The fact that the primary purpose of the manufacture was to feed the applicant's addiction, rather than to supply any other person, again diminishes the Applicant's culpability. These factors were missing from the comparative cases which tend to support a range of sentences that were imposed. The judge fell into error and less severe sentences were warranted in law: at [34].

Adams J agreed with Basten JA's conclusions and orders. In a separate judgment, Adams J stated that he regarded the non-commercial character of the offences as a most significant factor and as distinguishing this case from the comparative cases: at [57]. Where the drugs were manufactured for personal use, though some was given to the Applicant's girlfriend and others, the overall sentence is manifestly excessive: at [62].

s 21A(3)(f) Good character – firearm offences do not fall within the category of offence where less weight is afforded to prior good character

There are certain categories of offences where it has been held that limited weight may be given to good character including, for example, child pornography and white collar crime. The category of offence is not closed: ***Gent*** (2005) 162 A Crim R 29 at [64].

In ***Athos*** [2013] NSWCCA 205 the CCA held that possession of firearm does not fall within the category of offence where less weight is afforded to prior good character: at [44]. The judge erred in giving less weight to the applicant's good character because he was charged with offences involving the possession of prohibited firearms. It would have been acceptable for the judge to consider the weight to be given to the applicant's good character in all the circumstances of the offending but the error occurred when the reduction in weight was tethered to the type of offence: at [45].

Hardship to third parties - employees of business did not come within principle of hardship

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[12] We acknowledge the assistance of Mark Ierace SC, Senior Public Defender, in relation to the commentary on s 21A(5AA).

In ***Macleod*** [2013] NSWCCA 108 the Crown appealed against the Respondent's suspended sentence. The Respondent ran two businesses. Allowing the Crown appeal, the CCA held the judge erred in taking into account the hardship to the Respondent's employees as a result of his imprisonment and on that basis suspending the sentence. The evidence did not establish "exceptional circumstances" within the recognised principle of hardship to third parties: at [52], [55]; ***Edwards*** (1996) 90 A Crim R 510.

Young offenders

A summary of sentencing principles relating to sentencing of young offenders is set out in ***Tammer-Spence*** [2013] NSWCCA 297 at [36]-[39].

Remorse

In two cases Simpson J strongly linked the mitigating feature of remorse with rehabilitation. In ***Mariam*** [2013] NSWCCA 338 (Price and RA Hulme JJ agreeing):

> "[64] … although it is well established that remorse may be taken into account as a mitigating factor in sentencing, some attention needs to be paid to the logic of doing so. Genuine remorse may be an indicator of the unlikelihood of further offending, in which case it may have significant relevance. If it is not indicative of that likelihood, I see little relevance in such evidence. There was nothing in Mariam's evidence, affidavit or oral, that persuaded me that his expressions of remorse should be taken as indicative that he is unlikely to re-offend. The findings of fact by Latham J point in the opposite direction. With respect to Mariam's personal circumstances, nothing additional to what was contained in Latham J's Remarks on Sentence was put."

In ***Stojanovski*** [2013] NSWCCA 334 per Simpson J (Hoeben CJ at CL and Johnson J agreeing):

> "[41] In my opinion, remorse is to be seen as a mitigating factor because it is a concomitant of rehabilitation, meaning that future offending is unlikely or less likely. Rehabilitation was treated by his Honour in some depth. Even if his Honour had expressly referred to, and accepted, the evidence of remorse as an independent factor, it could not have had any real bearing on the outcome."

4. SETTING TERMS OF IMPRISONMENT

Aggregate sentencing s 53A Crimes (Sentencing Procedure) Act 1999

Identical and overlapping offences - wrong to increase aggregate sentence because of significant overlap

In ***Connell*** [2013] NSWCCA 155, a Crown appeal, the respondent was sentenced for 13 counts of Demand money with menaces (s 99(2) ***Crimes Act***) and 11 counts of Knowingly deal with the proceeds of crime (s 193B(2)). The respondent received an aggregate sentence of imprisonment for 3 years 3 months, with a NPP of 1 year 9 months. The victim had opened a tattoo parlour. The respondent attended the victim's shop on twelve occasions and received various cash amounts following threats made to the victim. The s 193B offences related to those monies. The Crown submitted that in imposing an aggregate sentence, the judge failed to assess the criminality of each individual offence and erred in imposing identical penalties for the offences.

Held: Crown Appeal dismissed. The s 99 offences were identical and there was no logical basis to differentiate one from the other. Because the offences were part of a continuing course of conduct there was a need for accumulation which did occur. It would have been wrong to have increased the aggregate sentence by having regard to the s 193B charges because of the significant overlap between the s 99 and s 193B offences: at [34]-[35]; ***Pearce*** (1988) 194 CLR 610. The relationship and overlap between the two sets of offences was such that there was no error in imposing the same sentence for each and making them wholly concurrent: at [37].

Aggregate sentences and implicit accumulation

In ***Rae*** [2013] NSWCCA 9, a Crown appeal, the respondent received an aggregate sentence of 5 years 7 months with an aggregate NPP of 4 years for three offences. One of the offences was 'Discharge firearm with intent to inflict grievous bodily harm' (s 33A) for which the judge had indicated a sentence of 5 years 7 months.

Noting that the aggregate head sentence was identical with the indicative head sentence for the s 33A offence, the CCA held the judge erred in imposing an aggregate sentence that failed to reflect any degree of partial accumulation.

The separate and serious criminality encompassed in another of the offences "should have led to some implicit accumulation upon the indicative head sentence" expressed for the s 33A offence, and that "accumulation should have been reflected in the aggregate head sentence": at [46]. Button J (McFarlan and Price JJ agreeing) made the following observations:

. Under the new procedure, a single aggregate sentence is imposed reflecting the criminality of all offences. To speak of questions of "partial accumulation" is perhaps not entirely apt: at [42].

. Sentencers are to indicate the sentences that would have been imposed with regard to individual counts so that an analysis of the kind that the Crown has asked this Court to undertake is available: at [43].

. Aggregate sentencing frees sentencers from the complicated task of creating a cascading sentencing structure for multiple offences. However, this does not mean that considerations of accumulation, whether partial or complete, need no longer be taken into account: at [45].

. Where the indicative head sentence for one offence is the same as the aggregate head sentence, an appellate court might infer that the judge has failed to reflect any degree of accumulation for the other offences: at [35], [46].

A new aggregate sentence was imposed of 7 years 7 months, with a new aggregate non-parole period of imprisonment for 5 years 5 months: at [73].

"Indicative" head sentence cannot be subject of appeal

Section 5D(1) ***Criminal Appeal Act*** states the Crown may appeal "against any sentence pronounced" and the CCA may "impose such sentence as is proper".

In ***Rae*** [2013] NSWCCA 9 the CCA said that the Crown cannot appeal an indicative sentence because it is neither 'pronounced' or 'imposed'. The aggregate sentence is the only one sentence that is 'pronounced'. Nor would it be appropriate for the CCA to "impose" any sentence with regard to an offence for which no sentence had been imposed at first instance: at [32]-[34]. The correct approach is to consider the inadequacy or otherwise of the indicative sentence when examining whether the aggregate sentence is inadequate: at [32]-[33]; ***PD*** [2012] NSWCCA 242; ***Brown*** [2012] NSWCCA 199.

The Court does not analyse each indicative sentence, rather, it looks at the whole of the sentencing structure in order to determine whether the aggregate sentence can stand or not: see ***Truong & Ors*** [2013] NSWCCA 36; ***BJS*** [2013] NSWCCA 123 at [252].

Indicative sentences should reflect Form 1 offences

In ***Grover*** [2013] NSWCCA 149 the judge erred in that he failed to take into account Form 1 offences as required by ***Attorney-General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 2002*** (2002) 56 NSWLR 146: at [59]. Imposing an aggregate offence for multiple offences, the judge indicated identical sentences even though there were Form 1 offences to be taken into account on Count 1. There were nineteen Form 1 offences and some were serious. The judge clearly erred by not taking the Form 1 offences into account: ***Abbas & Ors*** [2013] NSWCCA 115. For the Form 1 offences in this matter to have been taken into account, the sentence for Count 1 would have had to be greater than those imposed for the other offences: at [58]-[59].

Commencement of sentence - sentence cannot be accumulated upon balance of parole – re-sentencing - error to take into account previous determination which was contrary to law

Section 47 of the ***Crimes (Sentencing Procedure) Act*** states, inter alia:-

"**47 Commencement of sentence**

……..

(2) A court may direct that a sentence of imprisonment:

(a) is taken to have commenced on a day occurring before the day on which the sentence is imposed, or

(b) commences on a day occurring after the day on which the sentence is imposed, but only if the sentence is to be served consecutively (or partly concurrently and partly consecutively) with some other sentence of imprisonment.

……

(5) A direction under subsection (2) (b) may not be made in relation to a sentence of imprisonment (or an aggregate sentence of imprisonment) imposed on an offender who is serving some other sentence of imprisonment by way of full-time detention if:
(a) a non-parole period has been set for that other sentence, and
(b) the non-parole period for that other sentence has expired, and
(c) the offender is still in custody under that other sentence."

In ***Thomson-Davis*** [2013] NSWCCA 75 the applicant was released from prison on parole in relation to a prior offence of robbery. The applicant then committed the subject offence (break, enter and steal (BES) whilst on parole. His parole was revoked and he was returned to custody. The non-parole period for the robbery offence had expired but the additional term was yet to expire. The sentencing judge imposed a sentence for the BES to be partially accumulated upon the prior robbery sentence. However, this was contrary to law. Section 47(2)(b) allows a sentence to commence on a future date and to be partially accumulated upon another sentence but not where "the non-parole period for that other sentence has expired" and the offender is "still in custody under that sentence": s 47(5); at [34]-[35].

The sentencing judge subsequently reopened the proceedings and resentenced the applicant under s 43(2) ***Crimes (Sentencing Procedure) Act 1999***. The judge added four months to the head sentence and commenced the sentence from the date of the re-sentencing hearing: at [36]. The effect was that the applicant would be released 1 month earlier but that his non-parole period and additional term were now longer: at [36]-[38]. The applicant appealed.

Allowing the appeal, the CCA held the sentencing judge erred in the exercise of the wide power conferred by s.43(2) by treating the date of the expiration of the additional term as originally fixed as decisive: at [47]. The judge erred by taking into account an irrelevant consideration, namely, his previous determination, affected as it was by an error of law: at [52]. The CCA re-sentenced the applicant, as to remit the matter would cause further delay and anxiety: at [71]-[73].

Suspended sentences

Determination to suspend the sentences before determining their length - multiple offences

In ***Egan*** [2013] NSWCCA 196 the Crown appealed against suspended sentences of 22 months imposed for an offence of sexual assault and an offence of assault occasioning actual bodily harm. The CCA noted some of the principles regarding suspended sentences relevant to the case at hand:

. There are three matters to be determined before a sentence of imprisonment can be suspended: first, whether no penalty other than imprisonment is appropriate (s 5(1) of the *Crimes (Sentencing Procedure) Act*) *1999* (NSW); secondly, if the answer to the first question is affirmative, the length of the sentence; thirdly, having regard to the length of the sentence, whether the sentence can, and should, be suspended: at [79]; *Douar* (2005) 59 A Crim R 154 at [69]-[72].

. An important issue in the decision to order suspension of the execution of a sentence of imprisonment is whether it would result in a sentence that reflects the objective seriousness of the offence and fulfils the manifold purposes of punishment: at [80]; *Zamagias* [2002] NSWCCA 17 per Howie J at [28].

. It is erroneous to reduce the length of a sentence solely for the purpose of enabling its execution to be suspended: at [81]; *Ryan* (2006) 167 A Crim R 241 at [2], [4]. That is a corollary of the proposition that it is impermissible to determine that the sentence should be suspended before determining its length: *Burnard* (2009) 193 A Crim R 23 at [114]-[116].

. Part 4 of the *Crimes (Sentencing Procedure) Act* does not apply when a sentence of imprisonment is suspended: s 12(3). Part 4 includes s 47, which provides for the commencement of sentences and a power to order that a sentence be served consecutively, or partly concurrently and partly consecutively, with some other sentence of imprisonment. It follows that there is no power to back-date or post-date a sentence of imprisonment that is suspended and, where there are multiple sentences to be imposed, there is no power to order any degree of accumulation: at [82].

. It follows that where a court is sentencing for multiple offences, it is necessary to have regard to what the overall term of the sentence should be before considering whether an alternative to full-time imprisonment is appropriate: at [83]; *Burnard* at [111].

In ***Egan***, the judge had not given any indication that he had determined what the length of the sentences, and the overall sentence, should be. The CCA could only interpret his Honour's remarks as indicating that he wanted to impose something other than full-time imprisonment, and was searching to find a way to achieve that end: at [89]. The judge erred in deciding to suspend the sentences before determining their length. There was a failure to impose partially accumulated sentences. And, in any event, the individual sentences, and the total sentence, were manifestly inadequate: at [92]. The Crown appeal was allowed and new sentences of imprisonment imposed.

Asking whether term of imprisonment should be suspended before announcing the term of imprisonment is not necessarily an error

In *Eckermann* [2013] NSWCCA 188 the judge did not err in asking the question whether the sentence should be suspended before announcing the term of imprisonment. The judge did not overlook the necessity of first determining the length of the sentence. A sentencing judge is not required to expressly state that these two steps have been taken before the sentence is suspended: ***Zamagias*** at [30]. The Crown's complaint amounts to no more than a matter of form rather than substance: at [52].

5. DISCOUNTS

Mathematical precision in specifying a discount for plea of guilty not necessary

In ***Ayache*** [2013] NSWCCA 41 the applicant received a discount of "about 25%" to reflect his early plea of guilty. The applicant submitted on appeal that the judge erred as he ought to have allowed a discount of less than 25%. *Held*: The appeal was dismissed. Sentencing is a process of intuitive synthesis and is not a mathematical exercise. The appropriate range for a discount is from 10 – 25%: ***R v Thomson; R v Houlton*** (2000) 49 NSWLR 383. There is nothing in the remarks on sentence to suggest that the term "about 25 per cent" was less than 25%. It may well have been more than 25%. The sentencing judge was entitled to describe the discount at the highest end of the range as "about 25 per cent" when it was being applied in circumstances where other matters were being taken into account which required a reduction in what might otherwise have been an appropriate sentence: at [15]-18].

Requirement to indicate all three discounts for plea of guilty, past assistance and future assistance

Section 23 of the ***Crimes (Sentencing Procedure) Act*** provides as follows:

> "**23 Power to reduce penalties for assistance provided to law enforcement authorities**
> (1) A court may impose a lesser penalty than it would otherwise impose on an offender, having regard to the degree to which the offender has assisted, or undertaken to assist, law enforcement authorities in the prevention, detection or investigation of, or in proceedings relating to, the offence concerned or any other offence.
> ...
> (4) A court that imposes a lesser penalty under this section on an offender because the offender has assisted, or undertaken to assist, law enforcement authorities must:
> (a) indicate to the offender, and make a record of the fact, that the lesser penalty is being imposed for either or both of those reasons, and
> (b) state the penalty that it would otherwise have imposed, and
> (c) where the lesser penalty is being imposed for both reasons-state the amount by which the penalty has been reduced for each reason.
> (5) Subsection (4) does not limit any requirement that a court has, apart from that subsection, to record the reasons for its decisions.
> (6) The failure of a court to comply with the requirements of subsection (4) with respect to any sentence does not invalidate the sentence."

Section 23(4) was only recently amended on 14 March 2011 and applies to sentences imposed after this date.

In ***LB*** [2013] NSWCCA 70 Button J (Bathurst CJ and Hidden J agreeing) stated that where a discount is given for a guilty plea, past assistance and then future assistance, in most cases the court will be required to indicate the discount for all three to comply with s 23(4): at [44]. Button J made the following points:-

. To comply with s 23(4), where a discount is to be given for a plea of guilty, and past and future assistance, it is appropriate in most cases to indicate the discount for all three. That is because s 23(4) requires that a sentencing judge indicate the penalty that would have been imposed but for the assistance, and s 23(4)(c) requires that a sentencing judge indicate the amount by which that sentence has been reduced for each of past and future assistance. While s 22 ***Crimes (Sentencing Procedure) Act*** does not mandate statement of the discount given for a plea of guilty, it is very common and useful to indicate that discount: at [44].

. Compliance with ss 23(3) and 23(4) cannot be fulfilled by a statement of individual discounts followed by a process of "compression" of them in order to achieve a result that does not contravene s 23(3). Section 23(3) simply requires that the ultimate sentence not be unreasonably disproportionate. If the individual discounts that first come to mind would have that result, in combination with each other, then the discounts should be reduced before the final determination of their quantum: at [45].

. This approach may lead to somewhat short discounts for past and future assistance in cases where a substantial discount has also been given for an early plea of guilty. But that is the result of long-standing authority of this Court, acting in combination with the requirements of the section: at [46]; see ***Sukkar*** [2006] NSWCCA 92, ***SZ*** (2007) 168 A Crim R 249; ***Brown*** [2010] NSWCCA 73.

LB was followed in ***GD*** [2013] NSWCCA 212 at [18] where Button J (Leeming JA and RA Hulme J agreeing) said that pursuant to s 23(4) a judge is now required to quantify the discounts for past and future assistance.

Discount for assisting authorities – prisoner serving sentence in protection

In ***C*** [2013] NSWCCA 81 it was an error by the sentencing judge to ignore the fact that the prisoner was serving his sentence in protection for his assistance to authorities. However in the absence of any further evidence, the weight to be given to that fact could only be modest: at [42]-[43].

Hoeben JA discussed whether it should be assumed that such a prisoner would serve their sentence in more onerous conditions than the general prison population. The better view is that if such an offender wishes to gain some benefit because of the conditions under which the sentence is likely to be served, then s/he should adduce evidence as to those conditions. The Crown can call evidence to dispute such evidence, otherwise the offender's evidence should be given appropriate weight: at [41].

In this case the only evidence was that the applicant was serving his sentence under some form of protection. There was no evidence as to the nature and extent of any restrictions. The fact that he was under protection should have been taken into account by the judge but only in a general sense, that is, that normally some additional restrictions and constraints are imposed upon a person serving a sentence in such a way. If an applicant seeks to have the conditions under which s/he is serving a sentence taken into account in such a way as to have a significant effect on the sentence to be imposed, then some evidence of those conditions needs to be adduced: at [42].

Discount for assistance should apply to all sentences

In ***CM*** [2013] NSWCCA 341 the applicant was sentenced for five offences, receiving a twenty per cent discount for assistance given in unrelated matters. The sentencing judge partially accumulated the individual sentences and applied the discount to the final sentence only. The CCA found this was an error, there being no reason not to apply the discount to each of the sentences.

6. FACT FINDING AT SENTENCE

Crown permitted to tender statement of person not available to give evidence pursuant to s 65(2)(b), (d) Evidence Act

Section 65 ***Evidence Act*** **1995** allows for the admission in criminal proceedings of hearsay evidence where the maker is not available. *In* ***Youkhana*** [2013] NSWCCA 85 it was not an error to permit the Crown to prove disputed facts by relying upon representations of an unavailable co-offender pursuant to ss 65(2)(b), (d)**.** It was open to find

that the representations were made in circumstances that made it unlikely that they were a fabrication (s 65(2)(b)) or make it likely that the representations were reliable (s 65(2)(d)): at [51]-[63].

De Simoni principle

Breach to take into account the absence of a fact that if present would have rendered offender guilty of a more serious offence

In ***Nguyen*** [2013] NSWCCA 195, a Crown appeal, the respondent pleaded guilty to manslaughter. The victim was a police officer. The Crown accepted the plea on the basis of excessive self-defence - that the respondent defended himself based on a mistaken belief that the victim was a robber. The sentencing judge took into account the absence of knowledge by the respondent that the victim was a police officer to reduce the objective seriousness of the manslaughter offence. The Crown submitted the judge breached the principles in ***The Queen v De Simoni*** (1981) 147 CLR 383 at 389 by factoring into the range of offending a circumstance that was outside the scope of the offence: at [42]-[43].

Held: Crown appeal allowed. At [52]: For the purpose of assessing the objective seriousness of the manslaughter, it was erroneous to have regard to the absence of a factor which, if it existed, would have rendered the Respondent guilty of murder: ***De Simoni***. In this way, an extraneous or irrelevant consideration had affected the sentencing decision: ***House v The King*** (1936) 55 CLR 499.

No breach where "less than substantial" injuries taken into account on s 95 Robbery with deprivation of liberty

In ***Bonett*** [2013] NSWCCA 234 the applicant pleaded guilty to aggravated robbery (deprivation of liberty) under s 95 ***Crimes Act***. The sentencing judge was entitled to take into account the injuries sustained by the victim but not that the victim had suffered grievous bodily harm. To do so would infringe the ***De Simoni*** principle because it would have the effect of punishing the offender for the more serious offence of robbery inflicting grievous bodily harm under s 96. The injuries, as evidenced by the photographs and medical report, were capable of amounting to grievous bodily harm. However, the judge properly limited the gravity of the injuries taken into account in determining the sentence to actual bodily harm rather than grievous bodily harm. The judge made clear he would sentence on the basis of harm that was "less than substantial" (that is, not amounting to grievous bodily harm) but "certainly significant" (that is, actual harm but not grievous bodily harm): at [41]-[43].

7. FORM 1 OFFENCES

Offences placed on a Form 1 Schedule may be taken into account on sentence for the principal offence under s 33 of the ***Crimes (Sentencing Procedure) Act 1999:***:

> "**33 Outstanding charges may be taken into account**
> (1) When dealing with the offender for the principal offence, the court is to ask the offender whether the offender wants the court to take any further offences into account *in dealing with* the offender for the principal offence.
> (2) The court may take *a further offence into account in dealing with the offender for the principal offence*:
> (a) if the offender:
> (i) admits guilt to the further offence, and
> (ii) indicates that the offender wants the court to take the further offence into account in dealing with the offender for the principal offence, and
> (b) if, in all of the circumstances, the court considers it appropriate to do so.
> (3) If the court takes a further offence into account, the penalty imposed on the offender for the principal offence must not exceed the maximum penalty that the court could have imposed for the principal offence had the further offence not been taken into account.
> ..."
> (emphasis added)

Manner in which a court can take into account criminality of Form 1 offences to increase penalty for the principal offence - Abbas & Ors [2013] NSWCCA 115 [Five judge bench]

In ***Abbas & Ors*** [2013] NSWCCA 115 [Five judge bench] A was sentenced for two drug supply offences. Four supply offences on a Form 1 were taken into account on Count 1. A submitted that although the judge stated he was

not imposing a separate sentence for the matters on the Form 1, it was an error to state that *"greater weight should be given to the need for personal deterrence and the community's entitlement to extract retribution";* the *"criminality in the matters on the form one is substantial"* and that the *"additional criminality in the form one offences needs to be reflected in the sentence imposed for the primary offence"*: at [6]. ***Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002*** (2002) 56 NSWLR 146 had been wrongly applied by the judge insofar as he expressed the view that the additional criminality in the Form 1 offences needed to be reflected in the sentence for the primary offence: at [7]-[8].

Held: Appeals dismissed. Per Bathurst CJ (Hoeben CJ at CL, Garling and, Campbell JJ agreeing in separate judgments; Basten JA concluding there was no error):

. Section 33(1) empowers the Court to take the further offences into account where the preconditions in that section and s 32 are met. It is clear from the provisions of s 33(3) that that could lead to an increase in penalty up to the maximum penalty for the principal offence: at [22].

. The existence of these additional offences may demonstrate the greater need for personal deterrence and retribution in respect of the offence charged. This does not mean the Court is imposing a separate penalty for the Form 1 offences. Rather, as part of the instinctive synthesis approach to sentencing (*Markarian v The Queen* (2005) 228 CLR 357 at [51]-[54]) it takes these matters into account as required by the statute in determining the appropriate penalty for the offence for which the offender is convicted: at [22].

. That approach would generally, but not universally, lead to the imposition of a sentence longer than would otherwise be required if the Form 1 offences were not taken into account: *Barton* (2001) 121 A Crim R 185: at [23].

Form 1 offence to be taken into account on principal offence only – criminality disclosed by Form 1 offences not relevant to questions of accumulation and concurrence and application of totality principle

In ***Sparos*** [2013] NSWCCA 223 the applicant was sentenced for drug importation (Count 1 – Commonwealth offence) and drug supply (count 2 – State offence). . A Form 1 offence ('Dealing with proceeds of crime") was taken into account on Count 2. The judge partially accumulated the sentences. The judge remarked, "The Form 1 matter requires an increase in the sentence for the principal offence and *militates against complete concurrence of that offence with that to be imposed for the Commonwealth matters*" (emphasis added). The applicant submitted that after taking the Form 1 offence into account on Count 2, it was not open to the sentencing judge to have regard to the Form 1 offence a second time in determining to accumulate the sentences.

The CCA held the judge erred in his approach to the Form 1 offence. Fullerton J (Beazley P agreeing; Beech-Jones J dissenting on this point but agreeing with orders) made the following points:

. ***Abbas*** [2013] NSWCCA 115 did not deal with whether the Form 1 offending can also be taken into account as part of the total criminality for totality purposes, the issue raised in this case: at [5].

. Section 33 empowers a sentencing court to take Form 1 offences into account on the principal offence, but at that stage in the proceedings when the court is "dealing with the offender for the principal offence". It is "a dealing" that is intended to operate at the time that the sentence for *that* offence is imposed and not at the next stage in the sentencing process, when questions of accumulation or concurrency are considered: at [6].

. After the criminality of the Form 1 offence was taken into account on Count 2, and which resulted in a heavier sentence than would otherwise have been imposed, it was not then open to the judge, when determining questions of accumulation, to inflate the term of the effective sentence by taking the Form 1 offending into account a second time.

. The totality principle ameliorates the effect of two or more sentences being accumulated by obliging the judge to assess overall criminality. It is not permitted to take into account in that assessment the criminality reflected in the Form 1 offences and for which the offender has not been convicted. Reference to "overall criminality" in the authorities concerned with the totality principle (referred to at [38]-[41]) is limited to offending the subject of conviction: at [7].

Form 1 punishable by fine may be taken into account.

In ***Marshall*** [2013] NSWCCA 16 the Court said that there is no statutory inhibition upon taking in account a Form 1 offence punishable by a fine when imposing a custodial sentence: at [11]-[13].

8. PARITY

No 'justifiable sense of grievance' where co-offenders sentenced on erroneous basis and received lesser sentences.

In ***Truong & Ors*** **[2013] NSWCCA 36** the applicant was sentenced for the sale of prohibited firearms and pistols. For one offence, the sentencing judge made a finding that the pistol was capable of firing live rounds. The Applicant's co-offenders were subsequently sentenced by other judges on the erroneous belief that the pistol could not fire live rounds and received lesser sentences. The Applicant submitted he should receive the benefit of that erroneous finding. *Held*: The appeal was dismissed. Nothing can be done about the erroneous sentences imposed upon the co-offenders. This Court should not knowingly replicate that error: at [42]-[44].

Parity principle not to be utilised by Crown to have a sentence increased

In ***Delaney*** [2013] NSWCCA 150 the Crown appealed against the respondent's sentence submitting that it was out of proportion and inadequate compared to the co-offender's sentence. The CCA at [68]-[69] rejected the submission, stating the parity principle is one of amelioration designed to benefit offenders. It was not developed as a means by which the Crown could have sentences increased: ***Lowe*** *(1984)* 154 CLR 606.

A sentence passed on a co-offender may be compared with an aggregate sentence

In ***Clarke*** [2013] NSWCCA 260 the CCA (McCallum J, Rothman J agreeing, Hoeben CJ at CL dissenting) allowed the applicant's appeal on the basis of the existence of a justifiable sense of grievance, since unjustifiable disparity is an infringement of the equal justice norm: ***Green v R; Quinn v R*** [2011] HCA 49 at [32]. McCallum J took the view that in comparing the two sentences, it is necessary to bear in mind the fact that the applicant received an aggregate sentence. There was no reason in principle why, in order to determine whether there has been equal justice, a sentence passed on a co-offender may not be compared with an aggregate sentence, taking due account of the other offences comprehended within the aggregation. A primary consideration in that exercise will of course be to consider the indicative sentence for the equivalent offence. That is one of the functions of the requirement under s 53A(2) for the judge to identify the sentence that would have been passed if not an aggregate sentence. It does complicate the task but that is no warrant for overlooking the norm of equal justice: at [68].

9. PARTICULAR OFFENCES

1. Sexual assault

Historical child sexual assault offences – Sentencing pattern of the late 1970s–early 1980s - Sentences shorter at that time than now

In ***Magnuson*** [2013] NSWCCA 50 the appellant was sentenced to imprisonment for 19 years with a non-parole period of 13 years for a number of sexual assault offences involving three young female children between 1977 – 1984. *Held*: Sentence appeal allowed. New sentence imposed of 16 years with NPP of 9 years.

Button J (McClellan CJ at CL and Bellew J agreeing) said that sentences for child sexual assault offences of the late 1970s – early 1980s were shorter at the time than they are now: at [131]. Button J outlined the following principles at [84]-[89]:-

- A sentencing judge dealing with very old offences must take into account the sentencing patterns that existed at the time of the offences: at [84]; ***MJR*** (2002) 54 NSWLR 368 .
- If such a pattern is unable to be discerned, the judge should commence the sentencing process in the usual way; that is, by reference to the maximum penalty, and the place in the range of objective gravity occupied by the offence: at [85]; ***Moon*** (2000) 117 A Crim R 497 at [66]–[71] per Howie J.
- Even if a sentencing judge does take an established sentencing pattern into account, a failure adequately to reflect the principle and relevant sentencing pattern may cause the sentence to be manifestly excessive or erroneous: at [86]; ***RWB*** (2008) 184 A Crim R 453 at [24]–[26].

- If sentencing for offences committed at a time when the statutory ratio did not exist, sentencing judges should sentence in accordance with that fact: at [87]; ***AJB*** (2007) 169 A Crim R 32 at [36]–[37]; ***Rosenstrauss*** [2012] NSWCCA 25 at [16].

- A court sentencing for old offences to which a different sentencing pattern can be discerned must nevertheless bear in mind that, since 1974, it has been established that a non-parole period represents the minimum period of imprisonment required to be served having regard to all of the purposes of justice: at [88]; ***Power*** (1974) 131 CLR 623, referred to in ***AJB*** and many subsequent cases dealing with the principle under discussion.

- **I**n appeals to this court, reduction has not been automatic, even where the sentencing judge failed to advert to the principle: at [89]; see, for example, ***Mottram*** [2009] NSWCCA 210; ***RLS*** [2012] NSWCCA 236.

Button J found an established sentencing pattern for sexual offences committed against children in the late 1970s and early 1980s based upon five factors:-. statistics, summaries of cases, the general increase in sentences over the past 25 years, the upward movement in maximum penalties, and judicial memory: at [90].

Although it cannot be discerned with exactitude, such sentences were shorter at the time than they are now; both with regard to offences founded upon sexual intercourse, and also with regard to offences of indecent assault and the like: at [131].

The sentences imposed were not excessive but the total head sentence was excessive and did not reflect the sentencing pattern of the time: at [133]-[143]. The total non-parole period of the overarching sentence structure should be closer to 50 per cent of the total head sentence. The individual non-parole periods are 50 per cent of their individual head sentences; but due to accumulation the total non-parole period is 68 per cent of the total head sentence which does not properly reflect the sentencing pattern of the time: at [145].

Historical child sexual assault offences – Repealed offence - Difficulties in establishing past sentencing practice – regard to the spectrum of criminality encompassed by old offence – judicial recollection

In ***MPB*** **[2013] NSWCCA 213** the appellant was sentenced for offences committed in the 1970s of Indecent Assault under s 76 ***Crimes Act*** – now repealed. Garling J (RA Hulme J agreeing; Basten JA agreeing subject to additional reasons) made the following observations regarding sentencing for historical sexual assault cases:-

- The court must take into account sentencing practice where this practice has since moved adversely to the offender: ***MJR*** (2002) 54 NSWLR 368. The application of this principle can be difficult. The court must have a clear picture of the earlier sentencing patterns and practices. Sources such as comparative cases and statistics must be considered with care: at [82]-[84].

- The guide which is entirely objective and easily ascertainable is the maximum penalty together with the range of criminality encompassed by the offence charged. By having regard to these features, a sentencing judge will be able to assess where the particular offence charged falls along the spectrum of conduct encapsulated in the offence, and accordingly how the offence ought be viewed against the maximum penalty: at [87].

- Other matters relevant to sentencing practice include existing statutory regimes such as whether the legislation provided for non-parole periods of a specific length or ratio to the overall sentence: ***AJB*** (2007) 169 A Crim R 32 at [36]-[38]; ***MJL*** [2007] NSWCCA 261 at [27]; ***Rosenstrauss*** [2012] NSWCCA 25 at [16]. However, the court does not engage in understanding the impact of executive practices, for example, the operation of the remission system ought not be reflected in sentences imposed now: ***Rosenstrauss*** at [10]-[12]: at [85]-[86].

- The fact that the ***Parole of Prisoners Act*** **1966** applied to these offences whereupon the non-parole periods imposed were usually in the order of one-third to one-half of the head sentence, should be taken into account in considering whether there are special circumstances: at [93]; ***AJB*** [2007] NSWCCA 51 at [36]; ***GRD*** [2009] NSWCCA 149 at [20]; ***BP*** [2010] NSWCCA 303 at [154]-[156].

- ***Judicial recollection***: Garling J opined that the use of judicial recollection is apt to be unreliable The experience of a particular judge may not reflect a sufficiently broad depth of experience and recollection becomes less reliable with the passage of time. It can be inequitable because whether the judge has a recollection is purely a matter of chance: at [90]-[91]. It can lead to procedural injustice because how does

one challenge the judge's stated judicial recollection? Significant prejudice may arise. Very great care must be taken: at [93]. Garling J acknowledged the use of judicial recollection in ***Featherstone*** (2008) 183 A Crim R 540 at [45], ***PWB*** (2011) 216 A Crim R 365 at [68] and ***Magnuson*** [2013] NSWCCA 50 at [127]-[129]).

***Spectrum of criminality encompassed by old s 76 offence*:**
Sentences for child sexual assault were shorter during the 1970s – 1980s: ***Magnuson*** [2013] NSWCCA 50. However the repealed s76 offence included acts such as fellatio, cunnilingus and acts of penetration, and was much broader than s 76 as it now stands. These acts now fall under the current definition of 'sexual intercourse': at [105]-[106]. In this case, the s 76 offences involved the complainant touching the offender's penis, attempted fellatio, touching the complainant's breast and placing his penis against her. The judge found the offences were "extremely serious" but failed to relate the conduct to the *spectrum of conduct* encompassed by s 76 as it then was. The CCA held that having regard to the spectrum of criminality encompassed by the repealed s 76, the objective criminality of these offences were at the lower end of the range. The sentences were manifestly excessive. The appeal was allowed and new sentences imposed: at [106]-[113].

Child sexual assault: 'Aggravated sexual intercourse of child under 10' mitigated where offence not motivated by sexual gratification

In ***Essex*** [2013] NSWCCA 11 the applicant was sentenced for 'Sexual intercourse with a child under 10 and recklessly inflicting actual bodily harm'. The sentencing judge accepted the applicant was hosing faecal matter from the private parts of the victim (aged 3) and thrust the hose nozzle into the victims' genitalia causing actual bodily harm. *Held*: Appeal allowed. The judge erred in failing to conclude the offending was not motivated by a desire for sexual gratification: at [50]. Whether the conduct was motivated by a desire for sexual gratification is a significant factor to be taken into account in any assessment of objective seriousness: at [49]; ***Dunn*** (CCA (NSW), 15 April 1992, unreported).

Mere fact of pre-existing sexual relationship does not mitigate criminality - but some prevarication or at least initial consent by victim has been found to diminish seriousness

In ***Cortese*** [2013] NSWCCA 148 the respondent received a bond and a suspended sentence for two sexual assault offences against a woman with whom he was in a relationship. The sentencing judge found the objective seriousness of the offence was reduced because the "prior sexual relationship … is an important mitigating factor". Allowing the appeal, Beech-Jones J (Hoeben CJ at CL and Harrison J agreeing) held that the mere fact that there was a pre-existing relationship between an offender and a victim does not mitigate the criminality involved: at [55].

Each case will depend upon facts, but one common circumstance in which a pre-existing relationship has been found to diminish the seriousness of the offence is where it suggests some prevarication or at least initial consent on the part of the victim. Thus, if sexual contact is initiated by the victim or initially consented to by the victim, then the ensuing offence may be considered less serious. However that had no relevance to this case: see at [49]-[55] where His Honour discussed in detail the facts and decisions in ***NM*** [2012] NSWCCA 215*;* ***Bellchambers*** [2011] NSWCCA 131; ***Stewart*** [2012] NSWCCA 183.

2. Assault

s 35(1) 'Recklessly causing grievous bodily harm' - objective seriousness not determined solely by injuries – factors relevant to s 33(1) 'Wound or grievous bodily harm with intent' also relevant to s 35(1)

In ***Mansour and Hughes*** [2013] NSWCCA 35 the applicants were found not guilty of an offence under s 33(1) ***Crimes Act*** ('Wound or grievous bodily harm with intent') and guilty of the statutory alternative under s 35(1) ('Reckless grievous bodily harm') which carries a lesser maximum penalty.

The judge found the victim's injuries were at the lower end of the scale. The applicants submitted there was an inconsistency between the judge's findings as to the degree of bodily harm and the sentences ultimately imposed. Citing ***Mitchell & Gallagher*** [2007] NSWCCA 296, the applicants argued that the nature of the injury will, to a very significant degree, determine the seriousness of the offence and appropriate sentence: at [41].

The appeal was dismissed. ***Mitchell & Gallagher*** does not go as far as saying that the injury is the only consideration to be taken into account: at [42]. The factors relevant to sentencing for an offence against s 33(1), as outlined in ***AM*** [2012] NSWCCA 203, are also relevant to an offence under s 35(1). These include the degree of violence and the ferocity of the attack, that it was sustained, there were opportunities for the offender to desist, it was unprovoked, and perpetrated upon an innocent citizen going about his ordinary business: at [43].

Here, the injuries were at the lower end. But the judge was correct to find this did not mean that the offence was not serious, and to not limit consideration to the injuries. The judge properly took into account the nature and number of blows, the victim was rendered unconscious, and the level of unprovoked violence: at [42]-[44].

Domestic violence - error to give weight to the fact that the victim was not a stranger

In ***Eckerman*** **[2013] NSWCCA 188** the respondent broke into his ex-partner's home and assaulted her. He received a 2 year suspended sentence for aggravated BE&S and commit assault occasioning actual bodily harm (s 112(2) ***Crimes Act***). Allowing the Crown appeal, the CCA said it was an error to give weight to the fact that the victim was not a stranger in characterising the objective seriousness as "towards the lower end". An offence does not become less serious by virtue of a prior domestic relationship. The objective gravity of the crime is to be assessed on its facts: at [32], [35]. A victim who is a relative, and particularly a wife, may be in a more, rather than a less, vulnerable position: citing ***Hussain & Ali*** [2010] NSWCCA 184. The Court has emphasised the seriousness with which violent attacks in domestic settings must be treated: ***Hiron*** [2007] NSWCCA 336.

3. Firearms

Unauthorised manufacture of firearms - s 50A Firearms Act 1996

In ***Truong & Le*** [2013] NSWCCA 36 the CCA dismissed the Crown's appeal against L's sentence for 'Manufacture firearm'. The judge assessed L's offence as "towards the lower end but not at the bottom" of the range: at [106], [114]. The definition of manufacture in s 50A(5) includes to "assemble a firearm from firearm parts." The criminality encompassed by the offence can extend from a very sophisticated operation at one end of the spectrum to a relatively minor adjustment to a pre-existing firearm at the other. L received one pistol in parts and assembled it; and also sought to fix parts. But the fact is that the firearm when sold was not in working order. Nor did he build the other pistol from scratch. The assessment was open to the judge: at [111]-[112], [114].

In ***Sharp*** [2013] NSWCCA 37 the applicant manufactured two sub-machine guns as part of a "small scale business" to make and sell about seven. The offences were premeditated offences committed to earn money: at [12]. The CCA said the judge did not err in imposing the severe sentence (at [40]). The manufacture of the two guns were very serious offences. They were destined for sale and would have delivered, probably to the criminal fraternity, two extremely dangerous weapons. The two offences could not be characterised as an isolated aberration: at [36]. The sentences must be viewed against the maximum sentence of 20 years imprisonment. The sentence for the first offence was high (10 years with a NPP of 5 years) but had to embrace the criminality of the Form 1 matters: [37].

4. White Collar Crime

Delay and difficulty of proof in fraud matters – extra-curial punishment that respondent struck off role of chartered accountants but of limited effect

In ***Zerafa*** [2013] NSWCCA 222 the respondent received community service and a recognizance for two offences of 'conspiring to defraud the Commonwealth' (ss 29D, 86(1) ***Crimes Act 1914 Cth***; s 135.4 ***Criminal Code Cth***). The offences took place between 1997 and 2006. The respondent was charged in 2008. The respondent submitted that the significant delay would make it unfair to now impose a custodial sentence. Allowing the Crown appeal, the CCA said there is no doubt that delay in many cases will be a matter of mitigation. Weight needs to be given to the effect on the convicted person of that delay: at [88]. Notwithstanding, in cases involving complex financial transactions, account has to be taken of the difficulty of proof. There was thus no error in failing to take into account a delay of four years between the offence and the commencement of proceedings: at [89] referring to ***Kearns*** [2003] NSWCCA 367. The delay in this case was substantial but not due to any fault by the Crown. The circumstances of the delay were not such as to prevent the imposition of an appropriate sentence: at [91].

The respondent was struck off the role of chartered accountants. This is extra curial punishment, but its effect is limited. It must have been anticipated by the respondent that an inevitable consequence would be that he would be struck off: at [92].

Advantage of "rolled up" charge – suspended sentence failed to reflect gravity of offence

In ***Donald*** [2013] NSWCCA 238 the respondent received a suspended sentence for an offence of 'Dishonestly using position as employee of a corporation with intention of gaining advantage' (s 184 ***Corporations Act 2001***) – being a "rolled up" charge for a number of transgressions. The judge's discretion with respect to mental illness had miscarried and the decision to suspend the sentence was called into question: at [83]. Allowing the Crown appeal, the

sentence did not reflect the gravity of the offence and failed to serve as a deterrent to professionals in the financial markets for two reasons. First, there is a considerable advantage in a "rolled up" charge, as it restricts the maximum penalty to the one offence instead of what is in reality a number of discrete offences: ***Glynatsis*** [2013] NSWCCA 13: at [85]. Second, the inherent leniency in a suspended sentence. The community (and "white collar" occupations) might be forgiven for thinking that an offender on a bond has escaped meaningful punishment: at [86]. A new sentence of 2 years' imprisonment was imposed, to be released after 1 year upon entering a recognizance.

Intensive Correction Orders and serious fraud cases

In ***Hinchclife*** [2013] NSWCCA 327 the respondent was sentenced for 5 counts of defrauding a body corporate (s 176A ***Crimes Act***). Over $1.5 million was transferred illegally and $800,000 was put to the respondent's personal use. A sentence of 2 years' imprisonment by way of intensive correction order (ICO) was imposed.

Allowing the Crown appeal, the CCA said the offences were serious given the amount involved, length of time over which the offences were committed, motive of financial gain, level of planning and the significant breach of trust by the Respondent, as a company director and company secretary. Good character is of lesser significance for white-collar crime involving officers of a company: at [272].

General deterrence is a very significant factor for this class of offending, even where there is evidence of a mental condition: at [274]; ***Donald*** [2013] NSWCCA 238. There is a significant degree of leniency involved in the use of an ICO as a sentence: at [278]. ***Pogson*** (2012) 82 NSWLR 60 points to the breadth of the concept of rehabilitation but it is necessary not to lose sight of the need for an appropriate level of punishment, in the form of immediate incarceration, in cases such as the present: at [278]. The purposes of punishment require imprisonment by way of full-time imprisonment and not an ICO, in cases of significant white-collar crime: at [279]; ***Glynatsis*** [2013] NSWCCA 131 at [73]-[76]. Sentences of full-time imprisonment were imposed.

5. Common law offences

Sentence imposed for common law offence – may exceed maximum penalty for corresponding statutory offence

In ***Blackstock*** [2013] NSWCCA 172 the applicant appealed against his sentence for the common law offence of misconduct in public office. The CCA considered the corresponding statutory offences in Part 4A ***Crimes Act*** relating to 'corruptly receiving commissions' which carry a maximum penalty of seven years. In respect of common law offences it is the practice of the court to adopt an analogous or corresponding statutory offence, where one is available, as a reference point for the imposition of penalty: ***Hokin, Burton and Peisley*** (1922) 22 SR (NSW) 280. ***Hokin*** does not establish a rule that the sentence imposed for the common law offence cannot, as a matter of law, exceed the maximum imposed for the statutory analogue. The statutory analogue provides no more than a reference point which does not fetter the discretion, which remains at large. There is *no limit* in law to the term of imprisonment which might be imposed for a common law misdemeanour: at [10]-[11]; ***White*** (13 S.C.R). at p. 338

10. APPEALS

Application for extension of time to appeal – principles to be applied

Notice to appeal to the CCA must be given within 28 days of sentence: s 10(1)(a) ***Criminal Appeal Act 1912.*** An extension for leave to appeal may be made under: s 10(1)(b).

As discussed above, during 2013 the Legal Aid Commission reviewed a number of cases said to involve '***Muldrock*** error'. These cases had been dealt with prior to the High Court decision in ***Muldrock***. The Legal Aid Commission made out-of-time applications to appeal to the CCA.

In ***Abdul*** [2013] NSWCCA 247 the CCA stated the applicable principles for determining whether to grant an extension of time for an appeal based on a change of law: at [53]. [See discussion of Abdul, above, under *"1. Standard Non-Parole Period*"]

The same principles outlined in ***Abdul*** apply in all cases where an extension of time is required, and is not confined to applications for extension of time based upon *"**Muldrock-error***": ***Alpha*** [2013] NSWCCA 292 at [1] and [15]; ***Golossian*** [2013] NSWCCA 311 at [28]; ***Outram*** [2013] NSWCCA 329 at [22]

In ***Alpha*** [2013] NSWCCA 292 Leeming JA summarised the principles as follows:

> "[1] I agree with Bellew J's reasons for dismissing this application. In particular, I agree with his Honour that the approach stated by this Court in *Abdul v R* [2013] NSWCCA 247 at [53] is to be applied to all cases in which an extension of time is sought. That approach requires regard to be had to all relevant factors: the extent of and explanation for the delay, the interests of the community and the victim, and also whether substantial injustice would result if the extension were refused. Some of those considerations reflect the principle of finality considered in detail in *Abdul*. However, as Basten JA pointed out in *Sinkovich v Attorney General of New South Wales* [2013] NSWCA 383 at [42] and [46]-[47], the principle of finality is a concept which operates at a high level of generality, and is not to be applied in isolation, but rather falls to be assessed in criminal appeals in light of the high value placed on fair procedure and correct outcome.
>
> [2] It follows that even though the delay by the applicant is significant, and in large measure unsatisfactorily explained, it remains necessary to examine the merits of the proposed appeal. However, that examination can, and in many or most cases should, be conducted in a "more summary fashion" than would ordinarily be the case on the hearing of an appeal. That must be so; it cannot be the case that the same level of curial scrutiny is required in order to determine an application for leave as is required by an appeal. Otherwise the considerations favouring bringing litigation to an end would be disregarded, and the time limits imposed by the Legislature would become entirely otiose."

Mitigating factor not relied upon in court below – rejection of appeal ground that mitigating factor not taken into account on sentence

In ***Pali*** [2013] NSWCCA 65 the applicant argued on appeal that the sentencing judge erred in failing to take into account a mitigating factor, namely, that the offence was unplanned pursuant to s 21A(3)(b) ***Crimes (Sentencing Procedure) Act***. The CCA said that the complaint was without substance. Neither in written or oral submissions did the applicant's representative rely on this factor in the court below. Generally there will be no erroneous failure to take into account a "relevant consideration" in circumstances where it has not been identified and relied upon before the trial judge: at [11]; ***Zreika*** [2012] NSWCCA 44; ***Romero*** [2011] VSCA 45 ; 206 A Crim R 519 at [11]. This principle is not inconsistent with the obligations imposed by s 21A ***Sentencing Procedure Act.***

Subsequent events

In ***Cassar*** [2013] NSWCCA 147 the applicant received a discount of 10% for assistance to authorities. In subsequent sentence proceedings for other offences the applicant was given a 50% discount for assistance. The applicant submitted the evidence in the second proceedings be taken into account in considering whether the applicant was entitled to a larger discount for assistance on his first sentence.

The appeal was dismissed. Button J (Bathurst CJ and Hidden J agreeing) said that the general principle that an appeal against sentence is confined to identification of error in the proceedings at first instance should not be undermined: at [56]. The general rule is that events subsequent to sentence that could have led to a shorter sentence if fully appreciated at the time of sentence are a matter for the Executive, not this court. A long-standing exception has been where the offender's medical condition known at the time of sentence subsequently becomes worse: at [50]; ***Smith*** (1987) 27 A Crim R 375; ***Bailey*** (1988) 35 A Crim R 458. However, that exception should be circumscribed and not extended beyond its current parameters. If matters known to sentencing judges that subsequently develop in favour of a shorter sentence could found successful appeals, this court would be swamped with such appeals: at [55].

11. OTHER CASES

Procedural fairness – Sentencing judge failed to warn that he did not accept uncontested evidence of duress

In ***Cherchoochatri*** [2013] NSWCCA 118 the offender had submitted at his sentence hearing that he had committed a drug offence out of duress. Neither the Crown nor sentencing judge made any response. The judge then said in his remarks he was not satisfied the offence was committed due to any anxiety. The CCA allowed the appeal and remitted the matter back to the judge. The applicant relied to a significant extent on that evidence and there was no opposition by the Crown. Fairness dictated that the applicant's counsel be notified the judge was sceptical about the applicant's account which would have enabled counsel to make further submissions: at [58].

On the one hand, a sentencing judge is not obliged to accept "passively and unquestioningly" evidence presented by either party: ***Chow*** (1992) 28 NSWLR 593 On the other hand, as pointed out in ***O'Neil-Shaw*** [2010] NSWCCA 42,

the adversarial system requires that the opposing party identify any challenge to material before the court. If no such challenge is identified, it is not unreasonable to assume the evidence is not disputed. If so, it might also reasonably be expected that the sentencing judge would accept the evidence, at least in the absence of some signal that might not be the case. A signal would give the party an opportunity to marshal additional evidence or argument: at [52].

***Home invasion by offender known to victim* not necessarily less serious than where committed by a stranger**

In ***Eckermann*** [2013] NSWCCA 188 the sentencing judge erred in giving weight to the fact that the respondent was not a stranger to the victim. The respondent and victim had been in a relationship. The respondent received a suspended sentence for breaking and entering a dwelling house and occasioning actual bodily harm. Allowing the Crown appeal, Price J said that home invasions by strangers are undoubtedly serious but so may be break and enters where an offender has been in a relationship with the occupant, particularly when there has been a history of domestic violence. An offence does not become less serious by virtue of a prior domestic relationship: at [35]; ***Hussain*** *&* ***Ali*** [2010] NSWCCA.184.

Victim statements – excessive weight given to statement

In ***RP*** [2013] NSWCCA 192 (Indecent assault) the judge erred in giving excessive weight to the contents of the victim impact statement. The judge found that the victim statement showed that "*the victim has suffered profoundly as a result of what happened to her and has experienced psychological problems throughout her entire life as a result of it. "* The judge had uncritically accepted the statement and considered the harm to be substantial. Although the victim suffered harm, the statement went beyond what might be regarded as the type of harm expected from the offending: at [26]-[27]. The judge was obliged to approach the statement with caution. The harm described was not supported by other evidence: ***Berg*** (2004) 41 MVR 399: at [28].

People smuggling – prosecution choice between statutory provisions where one offence carried mandatory minimum sentence - provisions valid - Karim & Ors [2013] NSWCCA 23; (2013) 83 NSWLR 268 [Five judge Bench]

In ***Karim & Ors*** [2013] NSWCCA 23; (2013) 83 NSWLR 268 [five judge Bench] the appellants were sentenced for people smuggling. The prosecution could prosecute an offence of 'Aggravated people smuggling' under either s 233A or s 233C ***Migration Act* (Cth).** Section 233C carried a mandatory minimum sentence of 5 years with a non-parole period of 3 years under s 236B. The Applicant (K) argued the provisions were invalid and that the overlapping of the offence provisions, with mandatory minimum sentences applying to only one of the offences, violated the principle of equal justice: at [51]. *Held*: The appeal was dismissed (Allsop P; Bathurst CJ,,Hall and Bellew JJ agreeing; McClellan CJ at CL agreeing with additional comments). Mandatory sentencing provisions are within the authority of Parliament. Such laws are valid even where they operate with gross injustice: at [94]; ***Palling v Corfield*** (1970) 123 CLR 52.

The High Court dismissed a further appeal in this matter in ***Magaming v The Queen*** [2013] HCA 40. [Discussed below under '*Annexure A - High Court Cases'*].

CONVICTION AND OTHER CASES

1. Evidence

s 137 Evidence Act - Shamouil (2006) 66 NSWLR 228 remains the law in NSW - Dupas [2012] VSCA 328 not followed - XY [2013] NSWCCA 121 [Five judge bench]

Section 137 ***Evidence Act*** states that "a court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant." In ***Dupas*** [2012] VSCA 328 the Victorian Court of Appeal held that for the purposes of s 137, the alleged unreliability of the evidence is a factor to be taken into account in determining its probative value. The Victorian Court declined to follow ***Shamouil*** (2006) 66 NSWLR 228 in which the NSW CCA held that reliability and credibility cannot be considered by a court in determining questions of admissibility of evidence.

In ***XY*** [2013] NSWCCA 121 a five judge bench was convened to resolve this issue. The respondent was charged with child sexual assault offences. The Crown sought to lead evidence of two recorded telephone conversations between the respondent and the complainant in which the respondent made 'admissions'. The trial judge refused to admit the evidence under s 137. The Crown appealed that ruling under s 5F(3A) ***Criminal Appeal Act* 1912.** The Court (Blanch J, Hoeben CJ at CL and Price J agreeing; Basten JA and Simpson J dissenting) dismissed the Crown appeal on the ground that the evidence was unfairly prejudicial.

However, the CCA held by majority that ***Shamouil*** continues to apply in NSW so that when assessing the probative value of evidence under s 137, the credibility, reliability or weight of the evidence should not be considered: Basten JA at [66]; Simpson J at [175]; Hoeben CJ at CL at [86]-[87]; Blanch J at [194]: Price J dissenting ar [224].

Basten JA summarised the principles as follows:-

> "[66] The importance of *Shamouil* lies not in the precise language used (the judgment is not to be treated as a statute) but in the general principle it articulates. The operation of that principle may vary depending upon the circumstances of the case. In broad terms, the principle has three elements:
>
> > (1) in determining inadmissibility under s 137, the judge should assess the evidence proffered by the prosecution on the basis of its capacity to advance the prosecution case;
> >
> > (2) it follows from (1) that the judge should deal with the evidence on the basis of any inference or direct support for a fact in issue which would be available to a reasonable jury considering the proffered evidence, without speculating as to whether the jury would in fact accept the evidence and give it particular weight;
> >
> > (3) it also follows from (1) that the judge should not make his or her own findings as to whether or not to accept the inference or give the evidence particular weight.
>
> [67] This principle does not produce uniformity of approach in all cases. The "weighing" exercise required if s 137 is engaged not only involves incommensurates, but elements that may interrelate in a variety of ways. "

"Competing inferences" / alternative explanations – whether relevant to s 137 Evidence Act

In ***XY*** [2013] NSWCCA 121 (above) Hoeben CJ at CL agreed with Basten JA and Simpson J regarding the application of ***Shamouil***: at [86]-[87]. However, in concluding that the evidence was unfairly prejudicial, both Hoeben CJ at CL at [88]-[90] and Blanch J at [105] further considered that the existence of "competing inferences" (or alternative interpretations) was relevant to the assessment of probative value for the purposes of s 137. Per Hoeben CJ at CL:

> [88] "When assessing the probative value of the prosecution evidence sought to be excluded, ie, its capacity to support the prosecution case, a court can take into account the fact of competing inferences which might be available on the evidence, as distinct from determining which inference or inferences should be or are most likely to be preferred ...":

In ***Burton*** [2013] NSWCCA 335 (sexual assault) the Crown sought to tender alleged admissions made in a recorded telephone conversation in which the accused 'apologised' to the complainant. The trial judge refused to admit the evidence on the basis that the probative value of the alleged admission was weak and by reason of the existence of "competing inferences" or "alternative explanations". The Crown appealed against the ruling (s 5F(3A) ***Criminal Appeal Act 1912***).

The CCA allowed Crown appeal and vacated the ruling, Simpson J (RA Hulme J and Barr AJ agreeing) said the trial judge's determination was a direct reference to the judgments of Hoeben CJ at CL and Blanch J in ***XY***: at [195]. Simpson J said that "competing inferences" available to be drawn from (or alternative interpretations of) the proposed prosecution evidence is not relevant to the assessment of probative value for the purpose of s 137:-

> "[196] I am unable to accept that the existence of "competing inferences" available to be drawn from (or alternative interpretations of) the proposed prosecution evidence has any part to play in the assessment of probative value for the purpose of s 137 of the *Evidence Act*.That is because of the different exercise required by (for example) s 98, and s 137. Section 98 requires an assessment of the significance of the probative value of the evidence tendered as coincidence evidence in the context of the whole of the case of the tendering party. That is why, in *DSJ*, it was held that the existence of alternative explanations could have a bearing on the significance of the probative value of the evidence.
>
> [197] Section 137 requires assessment of the probative value of the evidence without regard to other evidence in the Crown case (s 137 applies only to evidence tendered by the prosecution) but balanced against the danger of any unfair prejudice.
>
> [198] In my opinion, the decision to exclude the evidence based on s 137 of the *Evidence Act* resulted from an incorrect approach to the task required by the section. The starting point of the assessment is to assume

that the inferences most favourable to the Crown will be drawn, and to assess the potential probative value on that basis, without regard to the availability of any competing inference.

[199] The only potential unfair prejudice to the respondent identified by the judge was the possible "conflation" of an explanation for his conduct that, while not criminal, might be seen as discreditable with the explanation proposed by the Crown. The judge effectively discarded any possibility that directions to the jury could and would ameliorate any such prejudice. That, in my opinion, was an incorrect approach. The criminal justice system proceeds on the foundation that juries can and do abide by the directions they are given (*Lansdell*).

[200] The probative value of the evidence, which was significant in the respects I have outlined above, was not outweighed by the danger of unfair prejudice.

[201] The evidence should not have been excluded under s 137."

Evidence of accused's sexual interest in child complainant – requirement for tendency direction – s 97 Evidence Act

In ***Colquhoun*** (No 1) [2013] NSWCCA 190 (child sexual assault) the Crown tendered CDs containing photographs and video of the appellant and the complainant who was dressed in boxer shorts or swimmers. The appellant submitted that as the CDs were not relevant except to show sexual interest, it amounted to tendency evidence and the judge ought to have given a direction in compliance with s 97 ***Evidence Act 1995***.

Allowing the appeal, the CCA held that where the impugned evidence is that an accused, on an occasion prior to the alleged offence, had a sexual interest in a child complainant and acted upon that interest, the need for a tendency direction is readily apparent. If such evidence is admitted simply because it provides context to the complainant's evidence (and not as a result of compliance with ss 97 and 101 of the ***Evidence Act***), the jury must be directed not to use it to reason that because the accused has engaged in such conduct on a prior occasion s/he is the more likely to have engaged in it on the subject occasion: at [21].

The courts have however gone further and treated evidence of an accused's sexual interest in a child complainant as being tendency evidence subject to ss 97 and 101 ***Evidence Act*** even when the evidence does not suggest that the accused had previously committed an unlawful sexual act in relation to the child: ***AH*** (1999) 42 NSWLR 702 at 708; ***Qualtieri*** (2006) 171 A Crim R 462 at [87]; ***BBH*** (2012) 245 CLR 499 at [152]; ***Steadman*** *(No 1)* [2013] NSWCCA 55 at [10]): at [22].

Ss 97, 101 Evidence Act – tendency evidence – concoction – statement in BP [2010] NSWCCA 303 regarding concoction disapproved

In ***BJS*** [2013] NSWCCA 123 (child sexual assault against 4 complainants) the applicant appealed against the Crown being permitted to adduce tendency evidence from 3 other different complainants regarding the appellant's sexual interest in young girls and how he had used his position as a priest to access girls. The appeal was dismissed (Hoeben CJ at CL, Davies and Adamson JJ agreeing).

The applicant submitted the tendency evidence was inadmissible in that it was substantially different to the counts on the indictment. The variety and types of offending, and the offending upon different aged girls, constituted the real prejudice that should have led to the evidence being excluded. However, such an approach is contrary to authority, i.e. that the evidence does not need to be strikingly or closely similar to be admissible as tendency evidence: at [64].

The applicant further submitted the evidence lacked probative value due to the risk of concoction between some of the child complainants. Reliance was placed on the statement by Hodgson JA (with whom Price and Fullerton JJ agreed) in ***BP*** [2010] NSWCCA 303:

"[110] One matter that powerfully affects both the probative value of tendency evidence and the possibility of prejudicial effect is the risk of concoction or contamination of evidence. If the evidence of tendency from different witnesses is reasonably capable of explanation on the basis of concoction, then it will not have the necessary probative value ... However, this will be so only if there is a real chance rather than a merely speculative chance of concoction... The onus is on the Crown to negate the "real chance" of concoction ..."

Hoeben CJ at CL said that the appellant's reliance upon the observation of Hodgson JA in ***BP*** is problematic. In ***BJS*** [2011] NSWCCA 239 at [27] Basten J identified the difficulties with that statement of principle and concluded that it was "inconsistent with ***Ellis*** and should not be applied as a general rule": at [65]. The submissions on the issue of contamination go very close to requiring the trial judge to usurp the function of the jury by making a ruling as to admissibility which go considerably beyond the evaluative process required by ss97 and 101 ***Evidence Act*****.** The judge was aware of the risk of contamination and had excluded some of the proposed tendency evidence on that basis: at [66]. The evidence did no more than establish a merely speculative chance of concoction, rather than a "real chance": at [67]. Each of the witnesses had also seen some media reporting of the appellant being charged before they made their police statements. However, such publicity did not give rise to a risk of contamination: at [67]-[68]; ***BJS***.

Expert opinion evidence - s 79 Evidence Act - expert evidence of comparisons of CCTV images of offender and images of appellant - common anatomical features identified

In ***Honeysett*** [2013] NSWCCA 135 (armed robbery) Professor H, a professor of anatomy, compared the offenders who were filmed during a robbery wearing a pillow case or T-shirt wrapped around their heads, and videos and photographs of the offender taken later at the police station. Professor H identified eight features in common between the first offender in the CCTV footage and the appellant. The appellant submitted the evidence was opinion evidence and ought to have been excluded because it did not conform with s 79 ***Evidence Act.***

The CCA dismissed the appeal. Professor H has specialist knowledge based on his training, study and experience and his evidence was based on that specialised knowledge: s 79(1).

Evidence of similarities between persons, falling short of identification of the persons as the same, is admissible: at [38]; ***Festa*** (2001) 208 CLR 593). A jury may draw conclusions about similarities between an accused and an offender depicted in, for example, security camera photographs (see ***Smith*** (2001) 206 CLR 650). It may be assisted in its interpretation of such footage by expert evidence but, as ***Smith*** demonstrates, the evidence of a witness, such as a police officer who is no more qualified to undertake a comparison than members of the jury is not admissible: at [39]. In ***Tang*** (2006) 65 NSWLR 681 a distinction was drawn between evidence of points of similarity in facial anatomy and evidence of identity.

In addition to specialised knowledge based upon training, study or experience, Professor H's detailed consideration over a lengthy period of the CCTV footage rendered him an *ad hoc* expert of the type described in ***Tang*** and other decisions. His individual and detailed examination of the footage put him in a superior position to the jury which would have had a collective viewing over a far shorter time. Professor H's prior training, study and experience added to that advantage. Professor H's evidence was not simply of obvious matters that the jury could have necessarily have discerned for itself: at [60]. Evidence of similarity is relevant and admissible as part of a circumstantial case. Professor H offered an expertly trained eye for observation of anatomical features, an expert capacity to compare a feature in one set of images with the cognate feature in another set of images and to describe them, insofar as anatomical considerations permit, as similar or dissimilar: at [61] citing ***Dastagir*** [2013] SASC 26.

Note**:** ***Special Leave to Appeal to the High Court was granted in this matter on 14.3.2014.***

MA [2013] VSCA 20 - Admissibility of expert evidence as to the general behaviour of child victims of sexual abuse - evidence concerning common parental reactions – Relevance of evidence concerning counter-intuitive behaviour – s 108C Evidence Act 2008 (Vic)

Under s 108C ***Evidence Act 2008 (Vic)*** (and s 108C ***Evidence Act 1995 (NSW)***) a party may call "credibility evidence" from a witness who has specialised knowledge based on their training, study or experience concerning the evidence of another witness' credibility. (This is known as an exception to the 'credibility rule' in s 102). The evidence must be evidence of an opinion of the person that is wholly or substantially based on that knowledge; and must substantially affect the assessment of the credibility of the witness. Specialised knowledge includes a reference to specialised knowledge of child development and child behaviour, including specialised knowledge of the impact of sexual abuse on children and their behaviour during and following the abuse.

In ***MA*** [2013] VSCA 20 the appellant was convicted of sexual offences against his daughter. The appellant submitted it was an error to allow the Crown to call a psychiatrist to give expert evidence with respect to the behavioural framework within which the evidence of the complainant's reactions to the alleged abuse should be assessed and understood: at [2]. In particular, evidence that: (a) the failure of the complainant to cry out during the sexual assaults when other members of the family were nearby was not an unusual behavioural reaction; (b) the failure of the complainant's mother to accept the truth of a complaint made to her by the complainant was not an unusual behavioural reaction and could be regarded as relevant to the complainant's behaviour thereafter; and (c) that the

complainant maintained an ongoing relationship with her father for many years after the alleged abuse, despite both its occurrence and the failure of her mother to accept her complaint, was not demonstrative of an unusual behavioural reaction: at [3].

The VSCA dismissed the appeal. The expert witness' evidence as to patterns of victims' behaviour was relevant to rebut the defence case as to counter-intuitive behaviour on the complainant's behalf. The evidence bore upon the complainant's credibility as contemplated by s 55 in the specific manner contemplated by s 108C(2). It was capable of substantially affecting the assessment of the complainant's credibility as required by s 108C(1): at [34]. The evidence relating to parental response and, in particular, maternal response to complaints by a child of sexual abuse was sufficiently interrelated with and directly relevant to the evidence of potential responses by a victim of sexual abuse as to fall within s 108C ***Evidence Act*** (and s 388 ***Criminal Procedure Act*** – which provides an alternate basis for the admission of such evidence): at [51].

MR [2013] NSW CCA 236 – Co-incidence evidence - Evidence Act 1995 (NSW) s 98

The respondent was charged with four armed robberies. The trial Judge rejected an application by the Crown to lead co-incidence evidence as to the involvement of the respondent in each robbery and ordered separate trials. On an interlocutory appeal against the order the CCA ruled the evidence of each count should be admissible as co-incidence evidence in relation to the other counts and the order for separate trials set aside. In its judgement the CCA considered the differences between the old s.98 and the amended wording concluding the threshold test of 'striking similarities' no longer applies. The Court must consider the combined effect of all the evidence and the suggested similarities. In this case the evidence was capable of establishing the same offenders were involved in all offences and capable of establishing the involvement of MR in the offences.

2. Particular Offences

No inconsistency between s 25(2) Drug Misuse and Trafficking Act 1985 (NSW) and s 233B Customs Act 1901 (Cth) - Gedeon [2013] NSWCCA 257 [Five judge bench]

In ***Gedeon*** [2013] NSWCCA 257 a five judge bench was convened to consider the correctness of ***Stevens*** (1991) 23 NSWLR 75 which had held that the ***DMTA*** and ***Customs Act*** were not inconsistent under s 109 of the Constitution as each had different purposes. The ***DMTA*** concerned offences of possession and supply while the ***Customs Act*** concerned the control of drug importation. The appellant argued that s 25(2) of the ***Drug Misuse and Trafficking Act 1985 (NSW)*** was inconsistent with ***s 233B Customs Act 1901 (Cth).***

The CCA held that ***Stevens*** was correctly decided: at [72]. The language of s 233B relates to imported goods: at [56]. The fact that the section is concerned with imported goods can also be shown from the fact that in passing the legislation Parliament invoked its constitutional authority over external trade and commerce. As Spigelman CJ pointed out in ***Campbell*** (2008) 73 NSWLR 272 at [107], the entire focus of the section is on imports and exports: at [57]. To establish an offence under s 233B the prosecution must prove beyond reasonable doubt that the accused knew he or she had the prohibited import in their possession: ***He Kaw Teh*** (1984) 157 CLR 523 at 545, 584, 589 and 603: at [58]

By contrast, s 25(1) ***DMTA*** deals with the supply of drugs whether imported or otherwise. The relevant mental element is the intent to supply or to do any of the other acts contained in the extended definition of supply in s 3: at [59].

Inconsistency does not arise merely because the relevant federal and State statutes deal with the same matters in different terms, unless the language of the federal statute indicates an intention that its law be the only law on the subject matter: at [61]; ***McWaters v Day*** (1989) 168 CLR 289; ***Momcilovic*** (2011) 245 CLR 1.

See also ***Buckman*** [2013] NSWCCA 258 and ***Ratcliff*** [2013] NSWCCA 259.

s 195(1)(a) Crimes Act – "damage" property – spitting on seat did not amount to "damage" - meaning of "damages" in s 195.

In ***Hammond*** [2013] NSWCCA 93 the appellant spat on a stainless steel seat in the police dock and was convicted of damaging property under s 195(1)(a) ***Crimes Act***. By way of stated case, the CCA held that the element that a "person damages" property was not proven under s 195: at [70], [77]. Interference with functionality of property alone, even without physical harm to the property is sufficient to establish damage: at [42]-[69] (disapproving ***DPP v Fraser & O'Donnell*** [2008] NSWSC 244). However, the spitting did not establish any physical damage or functional interference with the usefulness of the seat, so as to show the seat was rendered imperfect or inoperative: at [70], [77].

ss 35(3), 35(4)) Reckless wounding – Blackwell (2011) 80 NSWLR 119 does not apply – effect of legislative amendments – ss 35(3), (4) no longer requires foresight of the possibility of wounding, only foresight of the possibility of actual bodily harm which may or may not be a wound

In ***Chen*** [2013] NSWCCA 116 the applicant was charged under the old s 35(3) 'Reckless wounding'. The judge found that the applicant "*intended* to cause some injury". The applicant submitted this was in conflict with the definition of "recklessness" in ***Blackwell*** (2011) 80 NSWLR 119. In ***Blackwell v R*** [2011] NSWCCA 93 the CCA held that the offence of 'Recklessly inflicting grievous bodily harm' (ss 35(1), (2)) required foresight of the possibility of grievous bodily harm, not just some physical harm.

Held: The applicant's appeal was dismissed. The CCA (Button J; Hoeben J agreeing) found that ***Blackwell*** does not apply to s 35(3) 'Maliciously or reckless wounding' (as it then was). ***Blackwell*** had no effect on the mental element of 'malicious wounding' or 'reckless wounding' as there was never a "lesser" mental element for malicious wounding. That was because the physical element of the offence was, unlike grievous bodily harm, not founded on a gradation of seriousness: either a wound had been inflicted or it had not: at [65]. To prove recklessness, the prosecution needed to prove that, at the time of the wounding, the applicant foresaw the possibility of a wound being inflicted: at [34].

Button J (Hoeben J agreeing) noted that ***Blackwell*** has now been reversed by amendments made to s 35 by the ***Crimes Amendment (Reckless Infliction of Harm) Act 2012.*** The effect of the amendments is that only recklessness as to causing bodily harm is required, not grievous bodily harm. The amendments did not apply to this case. (The amendments apply to offences committed on or after 21 June 2012).

Note that Button J said that the new form of ss 35(3) and 35(4) posit the broader state of mind of recklessness as to actual bodily harm. The result is that the offence of maliciously or recklessly wounding no longer requires foresight of the possibility of wounding. All it requires is foresight of the possibility of actual bodily harm which may or may not be a wound: at [60], [66].

s 52B Dangerous navigation occasioning death - 'navigate' includes controlling helm of boat at time of impact

In ***Small*** [2013] NSWCCA 165 the applicant was convicted of 6 counts of 'Dangerous navigation occasioning death' (s 52B ***Crimes Act***). The applicant drove a workboat at the instruction of R, the master of the vessel, when it collided with a trawler. Dismissing the appeal, the CCA held that s 52B is clearly directed at persons driving, steering or helming vessels. '**Navigate**' and '**navigation**' are not defined in the ***Crimes Act*** but, as a matter of ordinary English, there is no basis for concluding that navigating a vessel would not include being in control of the helm and thereby being in a position to direct a vessel's course: at [39]. There is no reason to confine '**navigation**' to the person with overall responsibility for the management of a vessel: at [43].

People smuggling – elements of offence - not necessary to establish the appellant knew immediate destination, only the ultimate destination

In ***Taru Ali*** [2013] NSWCCA 211 the appellant was convicted of people smuggling (s 233C ***Migration Act (Cth).*** An element of s 233C is that the offender intended to facilitate the bringing of unlawful passengers into Australia. The boat was bound for Ashmore Reef from Indonesia. There was evidence the appellant knew the boat was destined for Australia. The trial judge directed that the necessary intention was that by steering to Ashmore Reef the appellant was facilitating the entry of the passengers into Australia.

The appellant submitted the judge erred in that the direction regarding the accused's knowledge as to the ultimate destination (Australia) was not sufficient, and needed to address the appellant having knowledge that Ashmore Reef was part of Australia. The appellant relied on ***PJ*** [2012] VSCA 146; 268 FLR 99; ***Sunada*****;** ***Jaru*** [2012] NSWCCA 187; and ***Alomalu*** [2012] NSWCCA 255.

Held: The appeal was dismissed. The statutory provisions are only concerned with people who facilitate the bringing of unlawful non-citizens to Australia. Simply because there is mention of a particular destination does not create an additional element of the offence, or necessarily require directions beyond those that were given in the present case: at [48]. There was no evidence to show the appellant knew the boat was going to Ashmore Reef and that there was, as a result, a question as to whether he knew that Ashmore Reef was a part of Australia. The question for the jury was whether the appellant knew the boat was destined for Australia. This was not a case where "the most that can be established from the evidence is that the appellant was told that the passengers would be taken to Ashmore Reef": at [60]-[61] citing ***Alomalu*** at [37].

Sexual intercourse without consent – Crown not required to prove that penetration was not for "proper medical purposes"

In ***Zhu*** [2013] NSWCCA 163 the appellant, a Chinese medicine practitioner, was convicted of sexual intercourse without consent (s 61I ***Crimes Act***) upon a patient. Section 61H(1) defines "sexual intercourse" to include sexual connection occasioned by the penetration of genitalia except where the "penetration is carried out for proper medical purposes." The applicant submitted that the jury should have been directed that the Crown was required to prove that penetration was not carried out for proper medical purposes: at [59]. Dismissing the appeal, the CCA held that such a direction would only be required if raised by the evidence: ***Zaidi*** (1991) 57 A Crim R 189. It was not raised either by the defence or Crown in this case, and there was no evidence to give rise to this issue: at [78]-[79].

3. Defences

s 421 Crimes Act – excessive self-defence – whether self-defence may apply to a principal in the second degree not present at scene of crime

In ***Ryan; Coulter*** [2013] NSWCCA 175 C and R were convicted of murder. R hired a hit man to murder V, her estranged husband. C (R's mother) helped pay the hitman. C believed that R had been the abused by V. In a covertly recorded conversation C spoke about how V abused R and was going to have R killed, and of the mistreatment of R's daughter. C submitted on appeal that the partial defence of excessive self-defence under s 421 ***Crimes Act*** should have been left to the jury - which would have left C to be convicted for manslaughter instead of murder. There was no evidence given by C of any belief that it was necessary for her to do what she did in order to defend R. The s 421 issue was not raised at C's trial.

The appeal was dismissed. In C's case, there was no evidence that would have supported leaving excessive self-defence to the jury: at [25].

Simpson J went on to consider how s 421 might be relied upon by a person other than the person who uses actual force:

. If the relevant conditions in s 421(2) are met, then a person who would otherwise be convicted of murder, is to be convicted of manslaughter. The relevant conditions are: *(a) that the person accused used force that caused death; (b) that that use of force was not a reasonable response in the circumstances as the accused person perceived them:* at [27].

. If those two facts are proved beyond reasonable doubt by the prosecution then, ordinarily (absent the availability of some other defence or partial defence, such as mental illness, provocation, or substantial impairment), s 421 appears to provide for the reduction of the offence from murder to manslaughter in circumstances where: "*(c) the person accused believed that the use of force was necessary for one of the purposes specified in sub-para (c) and (d) — to defend himself or herself or another person (against what is not stated) or to prevent or terminate unlawful detention. It is of some note that there is no requirement that any such belief be reasonable, or be held on reasonable grounds*": at [28].

. Section 419 is an important provision in understanding s 421. Section 419 provides:

> *"Self-defence-onus of proof*
>
> *In any criminal proceedings in which the application of this Division is raised, the prosecution has the onus of proving, beyond reasonable doubt, that the person did not carry out the conduct in self-defence."*

. Accordingly, the third necessary condition for s 421(2) to operate is that the Crown fails to prove that the person did not (subjectively) hold the relevant belief: at [29]. It is, therefore, a misnomer to call the protection afforded by s 421(2) a "defence" or "partial defence". Disproof that the accused person held the belief is an essential element in the Crown case: at [30].

Simpson J then said:

> "[42] The notion that a court might be called upon to direct a jury that a contract killing, if motivated by a (subjective) belief in its necessity for defensive purposes, ought to result in a conviction for manslaughter rather than murder is both repugnant and abhorrent. Yet the language of s 421 appears to comprehend just that — provided that its benefit can fall upon a person other than the person who uses actual force. Subject to that question, if [C] had given evidence that she held the requisite belief, or if there had been evidence in the Crown case that she held that belief, [the trial judge] would have been obliged to leave the question to the jury."

However, in this case it was not necessary to deal with the implications of s 421 as there was no evidence that would have supported leaving the s 421 issue to the jury. That, no doubt, is why the question was not raised at trial: at [43].

4. Practice and procedure

Temporary stay refused - prosecution witness / complainant heavily pregnant and to give evidence via video link

In ***JD*** [2013] NSWCCA 198 the applicant was charged with sexual assault offences. The complainant was heavily pregnant and had been advised not to travel by plane to attend the trial. It was indicated that she would give evidence via video link from South Australia. The CCA held that the judge did not err in refusing the applicant's application for a temporary stay of proceedings. There was no error in the exercise of the judge's discretion or in the application of the relevant test for the purposes of the Crown's application under s 7 ***Evidence (Audio and Audio Visual Links) Act 1998***: at [23].

The applicant submitted that he could not receive a fair trial as the complainant's "vulnerable condition" would necessarily constrain counsel in cross-examination (citing s 41 ***Evidence Act 1995***, and the ***NSW Bar Association Rules***); and that the jury would feel a "heightened level of sympathy" for the complainant, and anger at counsel's cross-examination of a pregnant woman: at [18]-[19]. However, the CCA said that a trial judge has broad powers to manage the trial process. The complainant is capable of being viewed during the trial in a manner that does not disclose her pregnancy; and there is no basis for concluding that experienced counsel cannot effectively cross examine a pregnant complainant without falling foul of s 41 ***Evidence Act***. The complainant's pregnancy has no relationship with the issues at trial: at [20].

Costs – District Court has no power to order costs upon subpoena being set aside

In ***Stanizzo v Complainant*** [2013] NSWCCA 295 the applicant issued a subpoena to the respondent in criminal proceedings. The subpoena was subsequently set aside and an order was made that the applicant pay the respondent's costs. The applicant sought leave to appeal against the costs order. *Held*: Leave granted and costs order quashed.

The District Court, as an inferior statutory court, has no inherent jurisdiction. It has only such powers as are expressly conferred upon it or as are necessarily implied: ***John Fairfax Publications Pty Ltd v District Court NSW*** (2004) 61 NSWLR 344. There is no express conferral on, or implied power for, the District Court of a power to order costs in criminal proceedings as a consequence of the setting aside of a subpoena: ***Mosely*** (1992) 28 NSWLR 735. No general power exists in the District Court to make an order imposing on the Crown (or its manifestation the DPP) or, for that matter, on the accused or any other person an obligation to pay professional costs: ***DPP v Deeks*** (1994) 34 NSWLR 523 at 533; at [12]-[15].

5. Appeals

Appeals - "one indictment, one jury" rule. - indictment containing multiple counts - one appeal from an indictment - whether appeal in respect of certain counts on indictment may be abandoned.

In ***Morgan (No 2)*** [2013] NSWCCA 80 the applicant was convicted of one count of Receiving, two counts of Robbery and two counts relating to Proceeds of Crime. An appeal against conviction was allowed in part: ***Morgan*** (2011) 215 A Crim R 33. The Receiving conviction was quashed and verdict of acquittal entered; the Robbery convictions were quashed and a new trial ordered. At the conclusion of that appeal hearing, counsel indicated he did not seek to appeal against the Proceeds of Crime convictions. The DPP then directed no further proceedings for the Robbery offences. The applicant sought leave to appeal against his convictions for the Proceeds of Crime offences. Alternatively, he submitted that he had abandoned his appeal for those offences and that the CCA had a discretion to allow him to withdraw his abandonment and proceed to hear an appeal.

Held: Beazley P (Hidden and Harrison JJ agreeing) dismissed the application. The court does not have jurisdiction to hear and determine a second appeal in respect of the Proceeds of Crime offences.

First, a jury trial must proceed upon a single indictment even where there are multiple counts: ***Swansson*** (2007) 69 NSWLR 406: at [27]-[30], [37].

Second, there cannot be more than one appeal from an indictment containing multiple counts, referring to ***Swansson*** and the principle of finality of litigation: at [73]; citing authorities at [61]-[75]. If more than one appeal was allowed from convictions of different counts on an indictment, there may be an overlapping of issues in the different appeals. A determination in one appeal could conflict with the determination in a second appeal: at [76].

Third, there cannot be an abandonment of a portion of the appeal leaving open a further or fresh appeal in respect of the abandoned part. If a convicted person decides not to pursue part of the appeal so as not to contest a conviction on some counts, then there has been a determination of the appeal: at [82]. They will not be the subject of a specific order of the Court but those convictions are final otherwise the finality principle would be offended: at [83].

Listening to a recording of judge's summing-up

In ***Versi*** [2013] NSWCCA 206 the CCA was asked to listen to a recording of the trial judge's summing-up to determine whether the jury would have understood the judge's directions. The CCA said that this was not an appropriate case to take such a course. Such a course should only be adopted with great caution for various reasons outlined at [7]. It might be appropriate where material words are omitted from the transcript: at [6].

6. Other cases

Constructive / felony murder

Directions - "during or immediately after the commission of a crime"

In ***Hudd*** [2013] NSWCCA 57 the CCA held it is a question of fact for the jury whether a killing occurred 'immediately after' the commission of a crime**.** The applicant and coffender robbed three victims in a store and left. Around 1-3 minutes later, one of the victims freed himself and armed with a machete caught the applicant. In an ensuing struggle the victim was shot. The appellant was convicted of constructive / felony murder: where the act causing death was done during or immediately after the commission of a crime punishable by imprisonment for 25 years being armed robbery: s 18(1)(a) ***Crimes Act***.

The applicant submitted that the robbery was complete and therefore the shooting did not occur "during or immediately after" the robbery. Dismissing this ground, Hoeben JA (Adams and Beech-Jones JJ agreeing) held that the issue of whether or not the act was done "during or immediately after" the armed robbery is a question of fact for the jury. It is a question of fact in the same way that "grievous bodily harm" has no fixed legal meaning and should be left to the jury. The shooting occurred in close proximity to the robbery and was part of the immediate aftermath of that event. The jury could have found that the shooting and the armed robbery were so closely linked in point of time, place and circumstance that it could scarcely be doubted that one occurred immediately after the other: at [101]-[102]; ***Attard*** (NSWCCA, unreported. 20.4.1993).

Directions - trial judge must direct jury that an act causing death must be a voluntary or willed act of the accused or his accomplice

In ***Penza and Di Maria*** [2013] NSWCCA 21 the appellants had been charged with murder after the occupant of a house they broke into was fatally shot. The CCA found that the directions in relation to felony murder had erroneously removed consideration of the issue of voluntariness from the jury. Following ***Ryan*** (1967) 121 CLR 205 the Court concluded that a trial judge must direct the jury that an act causing death must be a voluntary or willed act of the accused or his accomplice and that the identification of the act causing death was a question of fact for the jury. In this case the directions erroneously suggested to the jury that they could convict on the basis of felony murder regardless of how the gun was discharged. Further, manslaughter by unlawful and dangerous act ought to have been left to the jury on the bases set out at [171]-[176].

Murder / Manslaughter

In ***Lane*** [2013] NSWCCA 317 (murder) the appellant submitted that the trial judge erred in failing to leave the alternative verdict of manslaughter. The CCA dismissed the appeal. It is well established that, where a person is on trial for murder, *and where the evidence in the trial is capable of supporting a verdict of guilty of the lesser offence of manslaughter*, it is the duty of the trial judge to direct the jury of its entitlement to acquit the accused of murder and return a verdict of guilty of manslaughter. That is so even if the accused person does not seek such a direction, and even where the accused person actively opposes the direction: at [39]. In this case, no direction was required as there was no evidentiary basis for manslaughter by unlawful and dangerous act or criminal negligence.

The CCA discusses in some detail the law of homicide, murder, manslaughter and provides a table setting out the ingredients of these offences.

False imprisonment where person kept in prison not mental health facility as ordered under limiting term - State of NSW v TD [2013] NSWCA 32 [Five judge bench]

In ***State of NSW v TD*** [2013] NSWCA 32, at a special hearing under the ***Mental Health (Criminal Procedures) Act*** (now ***Mental Health (Forensic Procedures) Act***) the respondent was found guilty of an offence and a limiting term of twenty months set under s.23(1). Under s.24(2) the Mental Health Review Tribunal found the respondent suffered from a mental illness, and under s.27 Woods DCJ ordered the respondent detained in a mental health facility. The respondent was subsequently detained in a section of Long Bay Prison that was not gazetted as a hospital.

The Court of Appeal held that the respondent had been unlawfully detained while being held in the cell contrary to the orders of the court, and was entitled to damages for false imprisonment. The Court of Appeal held that once a limiting term is set under the Act the court has no discretion to release a person from custody and that person is deprived of their liberty. The only discretion lies in choosing whether the person is to be detained in a mental health facility or not. The Court further held that an order entitling the State to detain a person under s.27 did not entitle the State to detain the person anywhere – the lawfulness of the detention depended upon compliance with the terms of the order.

Drug proceeds order under 29(1) Confiscation of Proceeds of Crimes Act 1989 - A court must undertake three tasks to determine whether order should be made

In ***Hall*** [2013] NSWCCA 47 an application for a drug proceeds order under s 13 of the ***Confiscation of Proceeds of Crimes Act 1989*** had been refused due to a lack of "more precise information" about the money obtained and drugs supplied by the respondent. The respondent had made admissions that he sold cannabis for about $70 per day for 12 months. *Held*: The appeal was allowed and the respondent was ordered to pay the State of NSW $18,990.

McClellan CJ at CL (Bellew and Button JJ agreeing) said that in determining whether to make a drug proceeds order under the Act , a court ***must*** undertake the three tasks set out in s 29(1)(a)-(c). Section 29 provides:

> *"Section 29 Drug proceeds orders*
>
> *(1) If an application is made for a drug proceeds order against a person (in this Division called the* ***"***defendant***")*** *convicted of a drug trafficking offence, the court* ***must****:*
>
> *(a) determine whether the defendant has derived any benefit in connection with drug trafficking at any time, and*
> *(b) if the court believes the defendant has so benefited, assess the value of any such benefit, and*
> *(c) order the defendant to pay to the State a pecuniary penalty equal to the amount so assessed."*
> *[Emphasis added]*

The Act had been drafted to provide that if an application is made the court ***must*** undertake three tasks: (a) determine whether the defendant has derived any benefit; (b) assess its value; and (c) make an order. It is not possible to conclude that the court is not obliged to exercise the power in subsections (1)(a) and (b) in which case it must be obliged, if subsections (a) and (b) are satisfied, to make an order pursuant to subsection (1)(c): at [33]. The words of obligation in the preamble can only be understood as obliging an order to be made in accordance with s 29(1)(c) provided that the assessment contemplated by s 29(1)(b) has been made: at [35].

A court will have to rely on material which is "far less satisfactory" as there will be no audited records and evidence may be unreliable: at [37]-[39]. In this case, the information did not enable the precise amount of the benefit to the respondent from his drug trafficking to be assessed. However, the admissions made by the respondent, clearly provided information from which an assessment could be made and the judge should have made that assessment: at [41]. The CCA concluded on the balance of probabilities from the available information that the respondent was trafficking at least $70 per day for nearly twelve months and made its order accordingly: at [43].

STATISTICS

The Judicial Commission Statistics for the Court of Criminal Appeal for 2011 sentencing and Crown appeals are available. The statistics for 2012 - 2013 are not.

Severity appeals

Table 1 — Severity appeals (2000–2011)

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
	3213	**1332**	**41.5**
Source: Judicial Commission NSW Court of Criminal Appeal database			

Table 3 — Crown appeals (2000–2011)

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
	791	**452**	**57.1**
Source: Judicial Commission NSW Court of Criminal Appeal database			

ANNEXURE A

HIGH COURT CASES

1. Monis; Droudis [2013] HCA 4; (2013) 295 ALR 259. Appeal from NSW CCA.
Appeal against judgment of NSW CCA that s 471.12 of the Criminal Code (Cth) is valid insofar as it makes it a crime to use a postal or similar service in a way that reasonable persons would regard as offensive. Held: Appeal dismissed.

The appellants sent letters to family of Australian soldiers killed in Afghanistan criticising the deceased. Section 471.12 makes it a crime for a person to use a postal or similar service "in a way ... that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive". The High Court unanimously held that s 471.12 restricted political communication, but divided evenly as to the purpose of s 471.12. Crennan, Kiefel and Bell JJ would have dismissed the appeals: – s 471.12 protects against the misuse of the postal service to deliver seriously offensive material in a manner which is compatible with the system of representative and responsible government established by the Constitution: at [348]-[349]. French CJ, Hayne and Heydon JJ would have allowed the appeals:- the end pursued by s 47.12 is neither legitimate nor implemented in a manner that is compatible with the constitutional system of government: at [73], [214], [236]. Where the High Court is equally divided, the decision appealed from shall be affirmed: s 23(2)(a) *Judiciary Act* 1903. Thus the High Court ordered the appeal be dismissed.

2. Huynh & Ors [2013] HCA 6; (2013) 295 ALR 624. Appeal from SA CCA.
Appeal against judgment of SA CCA upholding appellants' conviction for murder (joint criminal enterprise). Held: Appeal dismissed.

The victim was stabbed during a fight. The appellants were convicted on the basis that they were participants in a joint criminal enterprise to kill or to cause really serious bodily harm using a knife or such weapon. The appellants submitted the trial judge erred in not directing the jury it was necessary for the prosecution to prove each appellant had *participated* in the joint criminal enterprise. The High Court said there was no error because the appellants' participation was not a live issue at trial. The real issue at trial was whether the prosecution had proved the accused had come to an arrangement with others to use a knife or bladed weapon to kill or cause really serious harm to a person. If the agreement was proved, then it necessarily proved the appellant's participation in that agreement: at [32], [35]. The appellants also submitted the trial judge failed to address each appellant's case separately in his summing-up. The High Court said it was not necessary for the judge to address each case separately where almost all the evidence in the trial was admissible against each appellant. The evidence relevant to the determination of the issues in each case and the criticisms each appellant had made of that evidence was properly identified: [47]-[51].

3. Yates [2013] HCA 8; (2013) 247 CLR 328. Appeal from WA.
Appeal against indefinite detention order made under s 662 Criminal Code (WA). Held: Appeal allowed.

The High Court allowed an appeal by a man with an intellectual disability who was subject to an order in 1987 that he be detained in prison indefinitely under s 662 *Criminal Code* (WA). The applicant's term of imprisonment ended in 1993. He remained in prison for six years longer than the maximum sentence that could have been imposed upon him. The High Court said that in 1987, orders for indefinite detention were not authorised other than on acceptable evidence proving demonstrable necessity for the order. The evidence was not capable of demonstrating that the applicant was so likely to commit further crimes of violence, including sexual offences, that he constituted a constant danger to the community: at [34]-[36].

4. Keating [2013] HCA 20; (2013) 248 CLR 459.
Determination on reserved questions.

The defendant was charged under s 135.2(1) *Criminal Code (Cth)* of engaging in conduct to obtain a financial advantage from a Commonwealth entity. From 2007-2009, the defendant allegedly failed to tell the Department of changes to income while receiving social security payments. Centrelink issued a number of notices under ss 67(2) and 68(2) *Social Security (Administration) Act* 1999 requiring the defendant to inform Centrelink of any changes. In 2011, the High Court gave judgment in *DPP (Cth) v Poniatowska* (2011) 244 CLR 408 holding that for a person to breach s 135.2(1) by omitting to do something, the omission must be an act that the person was under a legal duty to perform. To address the issues in *Poniatowska*, s 66A was inserted into the *Administration Act*. Section 66A(2) imposes a duty upon a recipient of a social security payment to inform the Department within 14 days of a change of circumstances which might affect the payment. Section 66A commenced on 20 March 2000. The High Court was asked whether a person could commit an offence under s 135.2(1) either by failing to comply with the duty imposed by s 66A *Administration A*ct at a time before the amendment commenced, or by failing to comply with a notice issued under ss 67(2) and 68(2). The High Court held that: (1) notices issued under ss 67 or 68 were capable of creating a

legal duty which, if omitted, would amount to an offence under s 135.2; and (2) in cases before s 66A commenced, the section could not be said to be a legal duty applying at the time of omission and so did not amount to "engaging in conduct" in s 135.2.

5. Agius [2013] HCA 27; (2013) 298 ALR 165. Appeal from NSW SC.
Appeal against conviction for conspiring to dishonestly cause a loss to the Commonwealth under s 135.4(5) Criminal Code (Cth). Held: Appeal dismissed.

A was charged with two counts of conspiracy arising from a scheme to defraud the Commonwealth of taxation revenue from 1997 - 2006. The first count was charged under ss 86(1), 29D *Crimes Act* 1914 for conduct between 1997 - 23 May 2001. The second count was charged under 135.4(5) *Criminal Code* for conduct between 24 May 2001 - 2006. There were two separate counts as the relevant provision of the *Crimes Act* was repealed from 24 May 2001 and the offence of conspiracy to defraud the Commonwealth was henceforth contained in s 135.4. A submitted he should not have been convicted on the second count because he did not enter into a second agreement after s 135.4(5) commenced. But the High Court said that s 135.4(5) required the existence of, and participation in, an agreement which did not need to be formed after s 135.4(5) commenced. A's continued participation in the agreement was capable of constituting the offence. This also meant that s 135.4 did not operate retrospectively.

6. Kable [2013] HCA 26; (2013) 298 ALR 144. Appeal by the State of NSW.
Appeal by State of NSW from judgment of NSW Court of Appeal held that K should have judgment against the State for damages for false imprisonment after wrongful detention under Community Protection Act 1994. Held: Appeal allowed.

K was detained in custody for six months in 1995 under s 9 *Community Protection Act* 1994. In *Kable* (1996) 189 CLR 51 (*Kable (No 1)*) the High Court had ordered that the detention order be set aside on the basis that the *Community Protection Act* was unconstitutional and therefore invalid. Following unsuccessful proceedings by K in the Supreme Court, the Court of Appeal held that K should have judgment against the State for damages for false imprisonment. The State of NSW appealed to the High Court. Allowing the appeal, the High Court held that the detention order was valid until set aside and had therefore provided lawful authority for K's detention.

7. Elias and Issa [2013] HCA 31; (2013) 248 CLR 483. Appeal from Vic CA.
Appeal against sentence. Held: Appeals dismissed.

The appellants pleaded guilty to 'attempting to pervert the course of justice' – a common law offence which carries a maximum penalty of imprisonment for 25 years in the ***Crimes Act 1958 (Vic)***. The appellants received sentences of eight years' imprisonment. Under Commonwealth law, 'attempt to pervert the course of justice' carries a lower maximum penalty of imprisonment for 5 years: s 43 ***Crimes Act 1914 (Cth).*** The appellants argued the VSCA erred in refusing to apply the ***Liang*** "principle", as stated by the VSCA in ***R v Liang*** (1995) 124 FLR 351, which requires a sentencing judge to take into account in mitigation that there is a "less punitive offence" on which the prosecution could have proceeded and which is "as appropriate or even more appropriate" to the facts than the charge for which the offender is being sentenced: at [1]. Dismissing the appeals, the High Court said that the ***Liang*** "principle" does not state a principle known to law. There is no warrant under the common law of sentencing for a judge to take into account the lesser maximum penalty for an offence for which the offender could have been, but has not been, convicted: at [37].

Note as to the position in NSW:- As noted by the HCA at [18], the NSW CCA has rejected a contention that in sentencing for a NSW offence the Court should take into account the lesser penalty for a Commonwealth offence for which the appellant could have been, but was not, charged. It rejected the invitation to consider the lesser maximum penalty for the Commonwealth offence as a matter of principle: ***R v El Helou*** [2010] NSWCCA 111; (2010) 267 ALR 734 at [90]; ***Standen v Cth DPP*** (2011) 254 FLR 467 at 478.

8. Beckett v NSW [2013] HCA 17; (2013) 248 CLR 432. Appeal from NSW CA.
Proof of innocence not required on suit for malicious prosecution where nolle prosequi entered or where DPP directs no further proceedings - Davis v Gell (1924) 35 CLR 275) not good law. *Held: Appeal allowed.*

The High Court considered whether it remained good law that in an action for malicious prosecution the plaintiff must prove innocence of the criminal charge where the prosecution was terminated by a nolle prosequi by the Attorney-General (***Davis v Gell*** (1924) 35 CLR 275); and, if so, whether the a No Further Proceedings direction by the NSW DPP fell within the principle. The High Court held there is no principled reason to distinguish a prosecution terminated by the entry of a nolle prosequi by the Attorney-General or a direction by the DPP under a statutory power from other forms of termination falling short of acquittal. The ***Davis*** exception is no longer good law: at [46]-[55], [58]-[63]. The statutory power under s 7(2)(b) ***DPP Act 1986*** to terminate the prosecution of proceedings on indictment is in substance and effect the same as the power to enter a nolle prosequi: at [35]-[45].

9. Bugmy v R [2013] HCA 37; (2013) 87 ALJR 1035. Appeal from NSW CCA.

Crown appeal: CCA erred in not making express finding sentence manifestly inadequate and not considering exercise of residual discretion – Sentencing Aboriginal offenders: the effects of profound childhood deprivation do not diminish with time and repeated offending. Held: Appeal allowed.

Crown appeal issue. The CCA had allowed a Crown appeal against the applicant's sentence and had imposed a more severe sentence. Here, the CCA did not decide that the sentence for the offence was manifestly inadequate, and did not consider the exercise of the residual discretion as required: at [24]. The High Court set aside the order of the CCA and remitted the Crown appeal to the CCA.

Aboriginal offenders. The CCA erred in holding that the extent to which the deprived background of an Aboriginal offender could be taken into account in sentencing diminished with time and repeat offending. The High Court discussed the 'Fernando principles': ***Fernando*** (1992) 76 A Crim R 58: at [37]-[40]. The circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way: at [40], Growing up in an environment of alcohol abuse and violence may leave its mark on a person throughout life. It is a feature of the person's make-up and remains relevant to sentence, notwithstanding a long history of offending: at [43]. Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to give "full weight" to an offender's deprived background in every sentencing decision. This is not to suggest that an offender's deprived background has the same (mitigatory) relevance for all of the purposes of punishment: at [44].

9. Munda v WA [2013] HCA 38; (2013) 302 ALR 207. Appeal from WA.
Sentencing Aborginal offenders. Held: Appeal dismissed.

The High Court upheld the decision by the WA CCA in allowing the Crown appeal against the applicant's sentence. The High Court again considered sentencing principles relating to Aboriginal offenders. Severe social disadvantage of an offender is relevant. However, the same sentencing principles must be applied in every case regardless of an offender's identity or membership of an ethnic or other group: at [50]-[60], citing ***Neal*** (1982) 149 CLR 305 at 326. Mitigating factors must be given appropriate weight, but must not be allowed "to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence." It would be contrary to the principle in ***Neal*** to accept that Aboriginal offending is to be viewed systemically as less serious than offending by other persons. To accept that Aboriginal offenders are in general less responsible for their actions than others would be to deny Aboriginal people their full measure of human dignity. Further, it would be wrong to accept that a victim of violence by an Aboriginal offender is less in need, or deserving, of protection and vindication: at [53].

10. Magaming v The Queen [2013] HCA 40; (2013) 302 ALR 461. Appeal from NSW CCA.
People smuggling – ss 233A, 233C, 236B – mandatory minimum sentences – provisions valid Held: Appeal dismissed.

The Applicant submitted the mandatory minimum sentence provisions were invalid as "incompatible with the separation of judicial and prosecutorial functions", as "incompatible with the institutional integrity of the courts" or as requiring "the court to impose sentences that are arbitrary and non-judicial": at [23]. The High Court said that it is for the prosecuting authorities (not the courts) to decide who will be prosecuted and for what offences: ***Palling v Corfield*** (1970) 123 CLR 52. The availability or exercise of a choice between charging with the aggravated offence under s 233C, rather than the simple offence under s 233A, is not incompatible with the separation of judicial and prosecutorial functions nor with the institutional integrity of the courts: at [40]. Mandatory sentences (including, at 1901, sentence of death and, since, sentence of life imprisonment) were and are known forms of legislative prescription of penalty for crime: at [49]. The mandatory minimum sentence did not involve the imposition of an arbitrary sentence: at [42]-[52].

11. Lee v NSW Crime Commission [2013] HCA 39; (2013) 302 ALR 363. Appeal from NSW CA.
Order for examination of person regarding confiscation order where matter overlaps with pending criminal proceedings. Held: Appeal dismissed.

The NSW Court of Appeal ordered the appellants be compulsorily examined under oath in the Supreme Court pursuant to s 31D ***Criminal Assets Recovery Act*** **1990 (NSW)** which allows examination in relation to a confiscation order under the Act. At the time, the appellants had been convicted of drug and firearm offences and had lodged appeals. The first appellant had a trial listed for money laundering offences. The appellants argued s 31D did not confer power where criminal proceedings had not been completed, to the extent that the subject matter of the examination would overlap with the criminal proceedings. Dismissing the appeal (by majority), the High Court held that s 31D permits the Supreme Court to order such an examination notwithstanding overlap of the subject-matter of the proceedings.

12. Diehm v DPP (Nauru) [2013] HCA 42; (2013) 203 ALR 42. Appeal from Nauru Supreme Court.
Duty of prosecutor to call all material witnesses – Duty of trial judge to call witness of own motion only enlivened where evidence of uncalled witness is "essential to the just decision of the case". Held: Appeal dismissed.

The applicant was convicted of rape following a judge alone trial. The prosecution called the first police officer but not the second police officer. The High Court unanimously dismissed the appeal. The failure to call the second officer did not give rise to a miscarriage of justice, having regard to other evidence which strengthened the prosecution case. Further, the statutory obligation of the judge to call a witness under s 100(1) ***Criminal Procedure Act*** **1972 (Nauru)** was not enlivened because the evidence was not "essential to the just decision of the case".

13. Reeves v R [2013] HCA 57; (2013) 88 ALJR 215. Appeal from NSW CCA.
Maliciously inflict GBH – medical procedure - consent. Held: Conviction appeal dismissed; sentence appeal upheld.

R, a gynaecologist, was convicted of maliciously inflict GBH with intent to inflict GBH (s 33 ***Crimes Act***). V (R's patient) believed R was performing a simple operation to remove a lesion from her vulva. R however removed V's entire vulva. Dismissing R's conviction appeal, the High Court held that the CCA identified the correct test for consent to surgery, that a patient be informed in broad terms of the nature of the procedure: at [35]. The CCA had said that an accused will not be guilty of assault unless the Crown proves beyond reasonable doubt that the complainant has not consented to *the nature and extent* of the procedure and that the doctor does not honestly believe that she has so consented: at [37]. R submitted on appeal that this was a more stringent test. But the High Court found there is no distinction between consent to the "nature and extent of the procedure" and whether V was informed "in broad terms of the nature of the procedure": at [38]. Further, an error by the trial judge in directing the jury with regard to "informed consent" did not occasion a substantial miscarriage of justice: at [58]. R's sentence appeal was allowed on the basis the CCA had failed to consider the exercise of its residual discretion to dismiss the appeal; and the matter was remitted to the CCA.

14. Nguyen v R [2013] HCA 32; (2013) 298 ALR 165. Appeal from Vic CCA.
Manslaughter must be left to the jury as an alternative charge to murder where it is open on the evidence. Held: Appeal allowed. Conviction quashed. New trial ordered

The appellant, in company with Q and BH attended premises to collect a drug debt. BH shot at two of the occupants, killing one and wounding another. The appellant and Q were convicted of murder and attempted murder on the basis of their complicity in BH's offences. The High Court upheld the appellant's appeal. The trial judge erred by failing to direct the jury that it was open to them to conclude that the appellant was guilty of manslaughter, even if they were satisfied that BH was guilty of murder: at [23]. The misdirection constituted a substantial miscarriage of justice.

15. BCM v R [2013] HCA 48; (2013) 303 ALR 387. Appeal from Qld CA.
Appellate court to give sufficient reasons – Appellate court must disclose assessment of capacity of evidence to support verdict Held: Appeal dismissed.

The appellant was convicted of child sexual assault matters. The QCA rejected the appellant's submission that the verdicts were unreasonable or unsupported by the evidence. The High Court stated that it is well-established that the appellate court's reasons must disclose its assessment of the capacity of the evidence to support the verdict: ***SKA*** (2011) 243 CLR 400 at [11]-[14]**.** The High Court held that the QCA failed to discharge this burden by observing that the jury was entitled to accept the victim's evidence and act upon it. However, it is not in the interests of justice to remit the proceeding to the QCA for it to determine afresh the reasonableness of the verdicts. This was a short trial and the evidence was in short compass. The High Court conducted its own analysis of the evidence before the jury and concluded the verdicts were not unreasonable or unsupported by the evidence.

16. X7 v R [2013] HCA 29
Stated case - Australian Crime Commission Act 2002 does not authorise an examiner to require a person charged with an indictable Commonwealth offence to answer questions before his or her trial about the subject matter of the offence.

The plaintiff was charged with indictable Commonwealth offences. The plaintiff was served with a summons, requiring him to answer questions before an examiner for the purposes of a special investigation by the Australian Crime Commission (ACC). The plaintiff sought an injunction to prevent the ACC from examination in relation to the subject matter of the charged offences; and a declaration that the examination provisions were beyond the power of the Commonwealth Parliament to the extent that they permitted the compulsory examination of a person charged with an indictable offence about the subject matter of that offence. *Held*: By majority, the High Court held that the examination provisions of the Act did not permit an examiner of the ACC to require a person charged with an indictable Commonwealth offence to answer questions about the subject matter of the offence. To allow the examination provisions of the Act to be interpreted as permitting compulsory examination would effect a fundamental alteration to the accusatorial and adversarial process of criminal justice. Such an alteration could only be effected by express statutory language or by necessary implication. The Act did not, expressly or impliedly, effect such an alteration.

ANNEXURE B

LEGISLATION 2013

1. *Crimes (Sentencing Procedure) Amendment (Standard Non-Parole Periods) Act 2013*
Commenced 29.10.2013

The Act is discussed above under "Sentence – SNPP Periods".

2. *Evidence Amendment (Evidence of Silence) Act 2013*
Commenced 1.9.2013

The Act inserts s 89A into the ***Evidence Act 1995 (NSW)*** to allow an unfavourable inference to be drawn where the defendant fails to mention during official questioning a fact which is later relied on in proceedings.

The amendments apply to offences committed prior to the commencement date but not to hearings that have already commenced, or to a failure or refusal to mention a fact before the commencement date.

Section 89A provides that**:**

. In proceedings for a serious indictable offence (punishable by imprisonment for 5 years or more), an unfavourable inference may be drawn from the defendant's failure or refusal to mention a fact during official questioning that the defendant could reasonably have been expected to mention and that is later relied on by the defence in the proceedings: s 89A(1)

. Such an inference will not be drawn unless before questioning, a special caution was given to the defendant. The special caution must be given in the presence of a legal practitioner with whom the defendant had a reasonable opportunity to consult: s 89A(2)(a)-(d).

. A special caution must not be given unless the offence is a serious indictable offence: s 89A(4).

. The section does NOT apply:

- If evidence of the failure or refusal to mention the fact is the only evidence that the defendant is guilty of the offence: s 89A(5).

- Where the defendant is under 18 or is incapable of understanding the nature of the special caution: s 89A(5).

. Giving a special caution does not of itself make evidence obtained inadmissible in proceedings for any other offence: s 89A(8).

Special caution defined in s 89A(9)
Section 89A(9) provides that "'special caution' means a caution to the effect that:

(a) the person does not have to say or do anything, but it may harm the person's defence if the person does not mention when questioned something the person relies on in court; and
(b) anything the person does say or do may be used in evidence."

It is not necessary that a particular form of words be used in giving a special caution: s 89A(3).

No amendment made to Commonwealth Evidence Act
Section 89A is inserted into the NSW ***Evidence Act*** but not the Commonwealth ***Evidence Act.*** (In Commonwealth matters, an investigating official gives a caution under s 23F *Crimes Act 1914* (Cth) to an arrested person).

3. *Criminal Mandatory pre-Trial Defence Disclosure Act 2013*
Commenced 1.9.2013

The Act amends the ***Criminal Procedure Act 1986***. It is cognate with the ***Evidence Amendment (Evidence of Silence) Act 2013*** (above). The Act:

. expands the matters that must be disclosed by the defence and the prosecution before trial;
. enables the court and others to make comment at trial where the accused fails to comply with pre-trial disclosure requirements; and
. enables the court or jury to then draw such unfavourable inferences as are proper.

The amendments apply in proceedings in which the indictment was presented or filed on or after the commencement date of 1.9.2013.

Directions for conduct of proceedings
. s 136: The trial judge gives directions at the first mention. Section 136 is amended so that a judge is no longer required to direct the time by which the parties must comply with the disclosure as Court Practice Notes nominate the time frames.
. s 139: Pre-trial hearings. Section 139(3)(c) is amended to omit the court option to order pre-trial disclosure by the prosecution or the accused. This is in light of the new mandatory obligations that the court only sets a timetable under s 141.

Mandatory pre-trial disclosure – new ss 141 - 143
. s 141(1): The prosecution gives notice of the prosecution case; the accused then gives notice of the defence response; the prosecution gives notice of the prosecution response.
. s 141(2) Disclosure must take place before the date set for trial and in accordance with the court timetable
. s 142 lists the matters to be contained in the Prosecution's notice,
. s. 143 lists the matters to be contained in the Defence response, including now the disclosure of the nature of the accused's defence including particular defences to be relied on (s 143(1)(b)) and points of law that the accused intends to raise (s 143(1)(d)).

Drawing of inferences in certain circumstances – new s 146A
s 146A states that if the accused fails to comply with the requirements for mandatory pre-trial disclosure or fails to give notice of an alibi, the court or any other party with the leave of the court may make such comment as appears proper and the court or jury may then draw such unfavourable inferences as appear proper.
s 146A(3) states, however, that a person must not be found guilty of an offence solely on such an inference.
. 146A(4) states that a comment cannot be made or an unfavourable inference drawn unless the prosecution has complied with the requirements for pre-trial disclosure.

Waiving requirements
s 148(1) still enables the court to waive any of the pre-trial disclosure requirements, but an amendment now adds "but only if the court is of the opinion that it would be in the interests of the administration of justice to do so".
. new s 148(4) states that, when considering whether to make an order to waive the requirements, the court is to take into account whether the accused person is represented by an Australian legal practitioner.
. s 148(5) requires a court to now give reasons for making an order to waiving requirements.

4. *Firearms and Criminal Groups Legislation Amendment Act 2013*
Commenced on 1.11.2013

The Act makes amendments to the ***Firearms Act* 1996**, ***Restricted Premises Act* 1943,** the **Crime Commission Act 1912** and the ***Criminal Procedure Act* 1986**. The main amendments are:-

(i) Firearms Act 1996
. It is now an offence to 'Attempt' an offence under the Act: new s 51CA.
. Reverses the order of the expression *"prohibited firearm or pistol"* throughout the Act with *"pistol or prohibited firearm"* to make clear the expression covers all pistols, not just prohibited pistols.

Supply, acquisition or possession offences
. Offences concerning the sale or purchase of firearms, parts and ammunition are modified to apply to the *supply* or *acquisition* of same. "*Supply*" means "transfer ownership of", whether by sale, gift, barter, exchange or otherwise.. Thus supply covers selling but also transferring ownership by gift or otherwise. "*Acquire*" means "accept or receive supply of": s 4(1).

. New offence ss 50B(1), (2): '*Giving possession* (which would include lending) *of a firearm or firearm part to an unauthorised person'* (penalty - 14 years where pistol or prohibited firearm, or firearm part related to; 5 years in any other case). [Offences against ss 50B are Table 2 offences under the ***Criminal Procedure Act 1996***]

Firearms prohibition orders

Part 7 allows the Commissioner of Police to make an order prohibiting a person from possessing or using a firearm. Section 74, Part 7, is substituted and applies to firearms prohibition orders in force before 1.11.2013. These offences are created:

. Offences prohibiting a person subject to a firearms prohibition order to acquire, possess or use a firearm, or firearm part: ss 74(1)-(2). Maximum penalty increased from 10 to 14 years. In any other case, 5 years: s 74(3).
. Supply or give possession of a firearm or firearm part to a person, knowing that person is subject to a firearms prohibition order; or to supply or give possession of ammunition: ss 74 (4), (5.).
[Offences against ss 74(1)-(5) are Table 2 offences under the ***Criminal Procedure Act 1996***]
. A person subject to a firearms prohibition order commits an offence if a firearm, firearm part or ammunition is kept or found on premises where they reside or they attend a shooting range or firearms club. (Penalty – 12 months and/or 50 penalty units.): ss 74(6), (8).
. New s 74A - Powers of police to search for firearms in possession of person subject to firearms prohibition order. For the purposes of determining whether a person has committed an offence under ss 74 (1), (2) or (3) a police officer may detain and search the person, premises or vehicle associated with such person for firearms.

(ii) Restricted Premises Act 1943

The Supreme and District Court can make a '*reputed criminal declaration'* in relation to premises, and to introduce offences relating to "*reputed criminals*" attending such premises.

"Reputed criminal declaration": The Supreme and District Court, in declaring premises to which Part 2 of the Act applies ('disorderly houses'), can make a "reputed criminal declaration" – that: (a) reputed criminals have attended or are likely to attend the premises, or (b) a reputed criminal has, or takes part or assists in, the control or management of the premises: s 3(3). "Reputed criminal" is defined in s 2 to include a person who: (a) has been convicted of an indictable offence; (b) is engaged in an organised criminal activity within the meaning of s 46AA *Law Enforcement (Powers and Responsibilities) Act 2002*, or; (c) is a controlled member of a declared organisation within the meaning of the *Crimes (Criminal Organisations Control) Act 2012*.

Offence by owner or occupier of premises - ss 8(2A), 9(3). After the service of a notice on the owner / occupier of premises of a reputed criminal declaration, the owner / occupier is guilty of an offence if a reputed criminal attends the premises, or has, takes part or assists in, the control or management of the premises. (Penalty: 150 penalty units or 3 years, or both). [Offences under ss 8(2A), 9(3) are Table 2 offences under the ***Criminal Procedure Act 1996***]

(iii) Crime Commission Act 2012

This Act is amended so that the Crime Commission Management Committee may refer to the Crime Commission matters relating to the criminal activities of a specified criminal group (within the meaning of s 93S ***Crimes Act 1900***) without having to identify the actual offences and individuals to be investigated.

5. The Courts and Other Legislation Further Amendment Act 2013.

Commenced 28.2.2013

The main amendements are:-

. Supreme Court can now determine an appeal against costs order made by the Local Court against the prosecutor in summary proceedings: s 59(2) ***Crimes (Appeal and Review) Act 2001***
. A person subject to an interim control order within the meaning of the ***Crimes (Criminal Organisations) Control Act 2012*** is excluded from jury service: cl 4(2)(f) Sch 1 ***Jury Amendment Act 2010***
. Makes it an offence to use a device to transmit counds, images or information forming part of the proceedings from a court room: s 9A(1) ***Court Security Act 2005***

6. Crimes (Serious Sex Offenders) Amendment Act 2013

Commenced 19.3.2013

The main amendments are:

. renames the ***Crimes (Serious Sex Offenders) Act 2006*** to ***Crimes (High Risk Offenders) Act 2006***

- New s 25C: "Violent offenders to be warned about application of Act." A court sentencing a person for a serious violence offence must advise the person of the Act and its application to the offence
- The statutory scheme now applies to high risk violent offenders. A violent offender is a person over 18 and has at any time been imprisoned for a serious violence offence: s 4. Offences committed when the offender was a child are excluded.

7. Crimes (Sentencing Procedure) Amendment (Provisional Sentencing for Children) Act 2013
Commenced 25.3.2013

The Act amends the **Crimes (Sentencing Procedure) Act** by inserting ss 60A-60I. The new provisions allow a court sentencing a person aged under 18 years for murder to impose a sentence of imprisonment on a provisional basis if:

- The offender was under 16 at the time of the offence, and the court cannot satisfactorily assess the offender's prospects of rehabilitation or likelihood of re-offending, because it is not clear at the time of the sentence whether the offender has or is likely to develop a serious personality or psychiatric disorder or a serious cognitive impairment.
- A provisional sentence must be reviewed at least once every 2 years after it is imposed to determine whether it is appropriate to impose a final sentence on the offender. A report on the offender's psychiatric, cognitive and psychological development must be considered as part of each review.
- A final sentence must be imposed within 5 years of the date on which the provisional sentence was imposed, and at least one year before the end of the non-parole period for the provisional sentence.
- A final sentence cannot exceed the length of the provisional sentence.
- Both provisional sentences and final sentences are subject to appeal under the *Criminal Appeal Act 1912.* On appeal against a provisional sentence, a court may substitute a new provisional sentence or a final sentence.

***8. Crimes (Criminal Organisations Control) Amendment Act* 2013**
Commenced 3.4.2013.

Amends the ***Crimes (Criminal Organisations Control) Act 2012*** to:

(a) adopt the model in the Queensland Act for the Supreme Court to make declarations that organisations are criminal organisations (in place of declarations by eligible Judges): ss 5, 7

(b) adopt the model in the Queensland Act for the Supreme Court (in place of the Police Commissioner) to make a determination whether information is criminal intelligence, and appointing a monitor to assist the Court

(c) provide for the recognition and enforcement in New South Wales of comparable declarations and orders made in other States and Territories in relation to criminal organisations and their members

(d) elaborate on the facts about which the Supreme Court must be satisfied before making a declaration of a criminal organisation

(e) redefine 'serious criminal activity' consistently with the definition of serious criminal offence within the meaning of the ***Criminal Assets Recovery Act 1990***

(f) to provide for declarations of criminal organisations to be in force for 5 (instead of 3) years.

9. Law Enforcement (Controlled Operations) Amendment Act 2013
Commenced 3.4.2013.

The main amendments are:-

- amends the ***Law Enforcement (Controlled Operations) Act 1997*** to allow for the role of a secondary law enforcement officer in controlled operations.
- amends the ***Surveillance Devices Act 2007*** so that civilian participants are permitted in controlled operations to wear surveillance devices to record a conversation to which they are a party without obtaining a warrant. (Previously, only law enforcement officers could do so).

10. Criminal Procedure Amendment (Court Costs Levy) Act 2013
Commenced 13.5.2013

Section 215 ***Criminal Procedure Act 1986*** enables the Local Court to make an order that the defendant pay court costs, generally in the amount of the filing fee, if the defendant is convicted. The Act amends the ***Criminal Procedure Act*** to replace this existing discretion with a statutory court costs levy, which would apply to most defendants found guilty of an offence in summary proceedings before the Local Court. The levy would attach to most

convictions in the Local Court. The levy would align with the filing fee in the Local Court, which is currently $83. The amendment was considered necessary as court costs orders under s 215 were being applied inconsistently. The Government also believes that a proportion of the costs of conducting criminal proceedings should be borne by those found guilty of an offence (see *Second Reading Speech, Hansard, 28.2.2013, p.18292).*

However, the levy will NOT be payable under the following matters outlined under s 211A(2):-

(a) a conviction resulting in imprisonment (unless the execution of the sentence is suspended)
(b) an order under section 10(1)(a) ***Crimes (Sentencing Procedure) Act 1999***
(c) traffic offences when dealing with the accused person under Division 4 of Part 3 ***Children (Criminal Proceedings) Act 1987***,
(d) a conviction in proceedings before the Drug Court,
(e) a conviction that the regulations exempt from liability to pay the levy.

11. Crimes (Administration of Sentences)Amendment Regulation 2013
Commenced 17 May 2013

The main amendments are:-

. amends the ***Crimes (Administration of Sentences) Regulation 2008*** to prescribe as a mandatory condition of intensive corrective orders that an offender submit to medical examination as directed in relation to capacity to perform community service or comply with obligations under the ICO: cl 175(r).
. various amendments to other conditions regarding inmates including searching of cells.

12. Victims Rights Support Act 2013
Commenced 3 June 2013.

The Act establishes a new statutory scheme. The Act repeals and replaces the ***Victims Support and Rehabilitation Act 1996***, the regulations and the ***Victims Rights Act 1996***. The main provisions include:-

. A compensation and levy scheme allows a court to direct that where a person is convicted of an offence, that a sum not more than $50,000 be paid out of their property to an aggrieved person by way of compensation: ss 91-108.
. The victims support levy is available: ss 105-106. It does not apply to certain offences:– engaging in offensive conduct, offensive language, travelling on public transport without a ticket, parking or standing of a vehicle: s 105(2).
. The Commissioner of Victims Rights functions and powers are set out in ss 9-13.
. Support available to victims is outlined in ss 26-30 and includes approved counselling, financial assistances, funeral expenses and recognition payments for certain offences: ss 26-29.
. The Victims Compensation Tribunal is abolished and replaced by a "Victims Support Division" which has been added to the Administrative Decisions Tribunal.

13. Courts and Other Miscellaneous Legislation Amendment Act 2013
Commenced 21.6.2013.

The main amendments are:

Evidence (Audio and Audio Visual Links) Act 1998:- Accused detainees must appear in person in court in bail proceedings (and other types of proceedings in s 3) subject to limited exceptions. A new s 5BA(2) expands the occasions on which an accused detainee is permitted to appear in bail proceedings via audio visual link. These are the Christmas/New Year period and the Local Court Annual Conference period.

Fines Act 1996:- Section 11 allows for applications for further time to pay fines. A new s 11(8) permits registrars of the District, Local and Children's Courts to authorise employees of the Department of Attorney General & Justice to consider applications for further time to pay a court-imposed fine.

14. Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012 (CTH)
Commenced 28.5.2013.

The Act makes amendments to the Commonwealth's serious drug offences framework to allow it to be updated more quickly to list new substances. The Act moves the existing lists of illicit substances from the ***Criminal Code 1995*** to the ***Criminal Code Regulations 2002***, and allows for the future listing of substances to be done by regulation. The aim is to make it substantially quicker to update the lists in response to new threats and make them more responsive to law enforcement needs. (See *Second Reading Speech. Hansard, House Reps, 10.10.2012, p 11764)*.

15. Crimes and Courts Legislation Amendment Act 2013
Commenced 29.10.2013

The Act makes minor amendments to several Acts.

Crimes (Forensic Procedures) Act 2000
Section 3 - Definition of *'non-intimate forensic procedure'*. A new para (j) states: "(j) the taking of measurement of a person's body or any part of a person's body (other than the person's private parts) whether or not involving the marking of the person's body." The amendment removes the requirement that the taking of such measurements must be for the purposes of "biomechanical analysis" only. The amendment addresses the decisions in ***Coffen v Goodhart*** [2013] NSWSC 1018 and ***ACP v Munro*** [2012] NSWSC 1510 where it has been held that the measuring of a person's height is not a 'non-intimate forensic procedure' under the Act.

Drug Misuse and Trafficking Act 1985
Section 3 Definitions **–** These new definitions are inserted**:**

> ***drug encapsulator*** means a device that is capable of being used to produce a prohibited drug in a capsule or similar form, and includes a unique part of any such device.
> ***tablet press*** means a device that is capable of being used to produce a prohibited drug in a pill, tablet or other similar form, and includes a unique part of such a device.

Corresponding amendments are made to **s 11B Possession of tablet press or drug encapsulator.**

Evidence Act 1995
A new s 19 ('Compellability of spouses and others in certain criminal proceedings') makes clear that s 18 ('Compellability of spouses and others in criminal proceedings') does not apply where the spouse or defacto partner is compellable to give evidence in proceedings for a domestic violence offence or child assault offence under s 279 ***Criminal Procedure Act 1986***. The amendment addresses ***LS v DPP*** [2011] NSWSC 1016 where it was suggested that s 19 be amended to state clearly the exceptions to s 18.

Oaths Act 1990
Sections 24A and 27A are amended to allow those provisions (which relate to statutory declarations and affidavits by persons who are blind or illiterate) apply to persons who are unable to read written English.

16. Mental Health (Forensic Provisions) Amendment Act 2013
Commenced 27.11.2013

The Act introduces a new scheme into the ***Mental Health (Forensic Provisions) Act*** **1990** to permit the Supreme Court to extend a person's status as a forensic patient after they have served their limiting term, thus continuing the Mental Health Review Tribunal's jurisdiction for up to five years after expiration of a limiting term. The MHRT may also make a detention order, following the making of such an extension order. The main amendments are:

. new s 76AA states that at least 6 months before the expiry of a limiting term or extension order, the MHRT must inform the Ministers of the date on which the limiting term (or extension order) is due to expire.
. New Schedule 1 "Extension of status as a forensic patient" outlines out the matters for the Supreme Court to make an order for extension. The court must be satisfied to a high degree of probability that: (a) the forensic patient poses an unacceptable risk of causing serious harm to others; and (b) the risk cannot be managed by less restrictive means (including classification as an involuntary patient under s 53): cl 2(1). A court is not required to determine that the risk of a person causing serious harm to others is more likely than not in order to determine that the person poses an unacceptable risk of causing serious harm: cl 2(2). Matters to be considered by the court are set out in cl 7(2). An extension order must not exceed 5 years: cl 8. Second or subsequent extension orders against the same forensic patient are permitted: cl 8(2).
. An appeal can be made to the Court of Appeal: cl 14.

17. Law Enforcement (Powera and Responsibilities) Amendment (Arrest without Warrant) Act 2013
Commenced 16.12.2013

The Act amends s 99 of the ***Law Enforcement (Powers and Responsibilities) Act* 2002** to extend and clarify police powers to arrest without a warrant. The main amendments are:

. A police officer can arrest without a warrant if the officer suspects on reasonable grounds that the person is committing or has committed an offence: s 99(1)(a). In respect of previously committed offences, s 99(1)(a) is amended so that the power is no longer restricted to serious indictable offences.
. The officer must be satisfied the arrest is reasonably necessary on the basis of factors set out in s 99(1)(b). New reasons are: To stop the person fleeing: s 99(1)(b)(ii); to enable inquiries to be made to establish the person's identity: s 99(1)(b)(iii); to obtain property in the possession of the person connected with the offence: s 99(1)(b)(v); to protect the safety or welfare of any person: s 99(1)(b)(viii); the nature and seriousness of the offence: s 99(1)(b)(ix).
. New s 99(2) provides that an officer may arrest a person without warrant if directed to do so by another officer provided the latter may lawfully arrest without a warrant: s 99(2).
. New s 99(4) provides a person lawfully arrested under s 99 may be detained for the purpose of investigating whether they committed the offence, or for any other purpose under Part 9.

18. Surveillance Devices Amendment (Mutual Recognition) Act 2013
Commenced 27.11.2013

The Act amends the ***Surveillance Devices Act 2007*** to facilitate mutual recognition of surveillance warrants and authorisations between NSW and other jurisdictions. The requirements relating to warrants issued by NSW courts for surveillance devices used in other jurisdictions are to accord with model laws. However, for warrants issued for devices used only in NSW the pre-existing regime still applies. The main amendments are:

. Emergency authorisations issued in NSW allowing the use of a surveillance device in a participating jurisdiction without a warrant can no longer be granted in relation to imminent threats of serious narcotic offences. These authorisations can only be granted for offences of serious personal violence or substantial property damage: s 32(5).
. Communication of protected information obtained from a surveillance device used in a participating jurisdiction is now only permitted if necessary to prevent or reduce the threat of serious violence or substantial damage to property: s 40(3)(b). If the protected information is obtained from the use of a device in NSW, such information can be communicated if necessary to prevent or reduce the risk of the commission of a serious narcotics offence: s 40(3)(b1).

ANNEXURE C

SUPREME COURT CASES

D-G Dept Family and Community Services v FEW [2013] NSWSC 1448 – production of reports in child victim murder trial under s.29 Children and Young Persons (Care and Protection) Act 1998

The offender made application for unredacted files, reports and risks assessment made to the Department relating to the two year old victim for a murder trial. The Department resisted production on basis of s.29 ***Children and Young Persons (Care and Protection) Act 1998*** ("Protection of persons who make reports or provide certain information"). Section 29(1)(e) states that: *"If, in relation to a child or young person or a class of children or young persons, a person makes a report in good faith to the Director-General …. (e) a person cannot be compelled in any proceedings to produce the report or a copy of or extract from it or to disclose or give evidence of any of its contents, …."*

Held: Fullerton J ordered the documents be produced. The purpose of s 29 is to afford protection to reporters of the risk of harm to children or young people. However, the general words of s 29(1)(e), must be construed subject to the overriding principle of the right of an accused person to a fair trial, with all of the substantive and procedural protections that are inherent in achieving that objective in the public interest - including the right to require production of material that is material to his defence: at [29]. Amendments to s 29(1)(d), which commenced on 1.1.2011, extend the list of proceedings in which a report might be admitted. The only proceedings in which a report was previously admissible were care proceedings in the Children's Court, or an appeal from such proceedings. Section 29(1)(d)(iii) now refers to *"(iii) proceedings in relation to a child or young person before the Supreme Court.."*. "In relation to" are words of particularly wide import and should be treated as including proceedings in this Court where the child is the named victim in a murder: at [25].

FE [2013] NSWSC 1692 – Records of interview – vulnerable person – child – ss.90, 138, 139 Evidence Act

In ***FE*** [2013] NSWSC 1692 a 15 year old female was on trial for the stabbing murder of a male during a street confrontation. The accused had unexpectedly attended a police station in response to news report, was interviewed in the presence of her mother but no caution was given. Several days later the accused was arrested in relation to the confrontation and taken to the police station. The accused spoke to a solicitor by phone and was advised not to give an interview. The solicitor communicated this refusal to a Detective and faxed written instructions. Neither the communication nor the fax was passed on to the interviewing police officers. The accused was taken to an interview room and gave an interview.

Adamson J excluded the evidence of both interviews. In relation to the first interview he ruled the police had sufficient information at the time the accused first attended the police station to treat her as a suspect under s.139(5)(a) ***Evidence Act***. Moreover the accused was given reasonable grounds to believe she could not leave the station under s.139(5)(c). Since no caution was given s.138 ***Evidence Act*** applied. The improprieties were very grave and resulted in a vulnerable young girl being deprived of her right to silence. The first interview was also excluded under s.90 ***Evidence Act***. The second interview was also excluded under s.138 and 90. The police ignored the accused's right to silence.

Phanekham (No.2) [2013] NSWSC 1738 – Murder – Admissibility of evidence of violent computer game

At a trial for murder the accused was alleged to have stabbed a neighbour during an angry confrontation on the street. The Crown sought to lead evidence that immediately prior to the confrontation the accused was playing a violent computer game. The Crown argued such evidence could be probative of the state of mind of the accused at the time of the killing and that 'the participation of the accused in a violent 'slashing and hacking' game for a period of several hours was part of the building up of the anger and frustration and his decision to arm himself and go outside and confront the source of his annoyance'. Beech-Jones J refused to admit the evidence ruling it had no probative effect under s.55 ***Evidence Act***. He concluded that the argument of the Crown was speculative, there being no direct evidence of the state of mind of the accused at the time of playing the game, and no evidence the accused shared in any alleged anger, frustration or violent intent of the character that he was said to be controlling. In addition Beech-Jones J found under s.137 that there was very significant potential for prejudice to the accused if this evidence was adduced.

Ravindran (No.2) [2013] NSWSC 1056 – Evidence of a person's opinion of the way another person behaved – ss.78, 79 Evidence Act

At a trial for murder the Crown sought to ask a paramedic whether he made observations as to the way the accused was speaking to him. Campbell J concluded the evidence was relevant as to the emotional state of the accused. He further concluded the evidence was admissible despite being hearsay. The answer did not constitute expert evidence under s.79 ***Evidence Act*** despite the experience and training of the witness as a paramedic. The evidence, was however, admissible as a lay opinion under s.78 ***Evidence Act***. Per Campbell J:

> "[5] On the other hand, I think any mature, sober adult is able to express opinions about the observed emotional state of other human beings. This type of evidence was always admissible at common law, and such matters were taken to be, in an old-fashioned phrase, within the ken of ordinary folk. Section 78

Evidence Act, it seems to me, does much the same work, and in my view an opinion of the type that the Crown will seek to elicit from the witness is admissible by way of that exception to the hearsay rule."

DPP (NSW) v Soliman [2013] NSWSC 346 - judgment pertaining to an application to dismiss charges pursuant to s 32 Mental Health (Forensic Provisions) Act 1990

Button J outlined what is required in a judgment pertaining to an application to dismiss charges pursuant to s 32 ***Mental Health (Forensic Provisions) Act 1990*** ('Persons suffering from mental illness or condition'). It would be appropriate for a Magistrate to:

. express very briefly his or her finding as to whether a defendant falls within s 32(1)(a). It will also often be appropriate to indicate within which subparagraph a defendant falls: at [57].
. indicate that s/he has considered the balancing test contained in s 32(1)(b): at [58]
. indicate in a judgment that refers to that balancing exercise that the seriousness of the offence has been taken into account: at [59].
. discuss, albeit briefly, what is proposed by way of assistance and treatment with regard to a defendant, and the reason why such a course is to be adopted or rejected: at [60].

The usual judgment would be measured in several sentences, not several paragraphs or pages: at [61].

DPP (NSW) v Lopez-Aguilar [2013] NSWSC 1019 – dismissal of charges under s 32 Mental Health (Forensic Provisions) Act 1990 – balancing exercise

L committed serious driving offences. There was psychiatric evidence that L suffered from a mental illness. The magistrate dismissed the charge pursuant to s 32 ***Mental Health (Forensic Provisions) Act 1990***. The DPP appealed. *Held*: Harrison J allowed the appeal. At [20]-[21]: Section 32 requires a magistrate to determine why it was more appropriate to deal with the matter under s 32 rather than according to law. That decision calls for the exercise of a value judgment in which no single consideration or combination of considerations would necessarily be determinative: ***DPP v El Mawas*** [2006] NSWCA 154. The balancing exercise must weigh up competing considerations of the purposes of punishment and the public interest in diverting a mentally disordered offender from the criminal justice system: see ***Confos v DPP*** [2004] NSWSC 1159 at [17]. In order to carry out such an exercise, the magistrate ought to have had regard to:- the charges, surrounding facts and circumstances, L's mental illness and the public interest. It is not apparent from the transcript of proceedings this balancing exercise was carried out: at [24].

A-G (NSW) v X [2013] NSWSC 1392 – mental health – s 39 Mental Health (Forensic Provisions) Act 1990 – conditional release

X was found not guilty by reason of mental illness of Attempted robbery. Under s 39 ***Mental Health (Forensic Provisions) Act 1990***, the judge ordered X's immediate release but that X be subject to a conditional release order for 2 years and to specific conditions for treatment. The Mental Health Review Tribunal (MHRT) subsequently made orders that X reside at a hospital extending beyond the 2 year period. X challenged the validity of the MHRT's order. *Held*: Johnson J granted the claim for declaratory relief by the Attorney General. There is no express provision in s 39 permitting a court to place a time limit for the operation of conditional release. Upon proper construction of s 39, the MHRT has continuing power to exercise its powers and functions under Pt 5 of the Act. Section 39 served as interim measure and the 2 year time limit set by the trial judge was superseded by the MHRT's subsequent orders. The judge's order did not bind the MHRT to any particular course or period of care or treatment for X.

Gittany (No 3) [2013] SC 1670 – client legal privilege not waived by defence service of tendency notice

At his murder trial, G proposed to call witnesses to give evidence about the deceased's tendency to partake in dangerous behaviour. The defence served a tendency notice (s 97 ***Evidence Act***). McCallum J rejected the Crown's call for witness statements or notes relating to the witnesses. McCallum J held that client legal privilege had not been lost under s 119 ***Evidence Act***. The service of the tendency notice, nor the calling of a witness, does not disclose the substance of confidential communications with lawyers and is thus protected by client legal privilege: at [17]-[22].

Aouad; El-Zayet [2013] NSWSC 760 – Client legal privilege not waived where confidential legal advice report of DPP handed to judge by Crown Prosecutor

The applicants were indicted for murder. Before the trial commenced, the DPP directed there be no further proceedings. The Crown Prosecutor handed up a portion of a legal advice Report containing reasons for the Director's decision to "No Bill" the matter. During the ensuing costs application, the applicant sought access to the Report on the basis that privilege had been waived. The Deputy Director stated that he would not be waiving privilege. *Held*: Motion dismissed. Client legal privilege applied and was not waived by the Crown Prosecutor's

actions in handing up the DPP's 'No Bill" legal advice Report: ss 118, 119, 122 ***Evidence Act 1995.*** Price J said the Crown Prosecutor was not permitted to waive client legal privilege for any part of the document. He neither had the express nor implied consent of the Director to disclose the document. The privilege could only be waived by the Director: at [44-[46].

Gaudie v NSW & Anor [2013] NSWSC 1425 – apprehended bias

The plaintiff, an Aboriginal person, was charged with breach of an apprehended domestic violence order. A newspaper published comments by the Magistrate on domestic violence in Aboriginal communities and the plea of not guilty rate by persons represented by the Aboriginal Legal Service. The plaintiff made application that the Magistrate be disqualified on the ground of apprehended bias.

Held: The Magistrate is precluded from hearing the case. Given the unusual accumulated statements and events, and the strength of the Magistrate's language, the conclusion is that the bystander might reasonably apprehend that the Magistrate might not bring an impartial mind: at [79]. Johnson J outlined the principles: at [78]-[79]. A judicial officer is disqualified if a fair-minded lay bystander might reasonably apprehend the Judge might not bring an impartial mind to the resolution of questions the Judge is required to decide. The question is one of *"possibility (real and not remote), not probability"*: ***Ebner v Official Trustee in Bankruptcy*** (2000) 205 CLR 337 at 344- 345. The party seeking disqualification must: (a) identify what it is that might lead the judicial officer to decide the case other than on its legal and factual merits; (b) articulate the logical connection between the matter suggesting bias and the feared deviation from the course of deciding the case on its merits. The party must then establish there is an ensuing apprehension of bias and that that apprehension is reasonable: ***Ebner*** at 345 [8].

DPP (NSW) v Gardner [2013] NSWSC 557 – duplicity

The defendant was charged with negligent driving occasioning grievous bodily harm to two passengers under s 42(1)(b) ***Road Transport (Safety & Traffic Management) Act 1999***. The Magistrate held the charge was bad for duplicity. The plaintiff (the DPP) sought prerogative relief in respect of the Magistrate's decision. *Held*: Hidden J held the Magistrate's decision involved an error of law and remitted the matter to the Local Court. Section 42(1)(b) penalises negligent driving cause grievous bodily harm whether to one or more persons. It is the act of driving that is penalised. It is different to s 52A C***rimes Act*** which is a distinct offence of dangerous driving causing death or grievous bodily harm to *a person*: at [32]-[35].

CB v DPP [***2013] NSWSC 93*** - ***s 195(1)(b) Crimes Act – recklessly damage property by fire***

A was convicted in the Local Court of recklessly damage property by fire under s 195(1) ***Crimes Act***. A had entered an unoccupied house and singed a couch with a cigarette lighter. When the couch caught fire, A tried to put it out but the house burnt down. *Held*: Appeal dismissed. The Magistrate was correct in holding that the prosecution was not required to prove A foresaw the possibility of the house being destroyed. It was sufficient to prove A realised the particular kind of harm occasioned might occur, that is, that he was reckless as to whether the relevant property would be damaged: at [25]-[30]; ***Blackwell*** (2011) 81 NSWLR 119.

Konneh v State of NSW [2013] NSWSC 1424 – no police power of arrest for failure to comply with bail undertaking where D not subject to bail

K was arrested by police for breach of bail but was not subject to any bail at that time. K instigated proceedings against the State of NSW seeking damages for wrongful arrest and false imprisonment. The State relied on as a defence s 50 ***Bail Act*** which gives police the power to arrest a person where a police officer believes on reasonable grounds that a person who has been released on bail has failed to comply with the bail undertaking. Garling J held that s 50(1) applies only where bail has been granted and therefore the State could not rely upon it as a defence to the claim. It would be a significant abrogation of a person's fundamental right to be at liberty if a police officer was entitled to arrest on the mistaken belief they were the subject of bail, unless there is a clear indication in the ***Bail Act***: at [59]-[59].

ANNEXURE D
STOP PRESS 2014

A. CCA CASES

HJ [2014] NSWCCA 21 – offender a mother of young baby at time of sentence

The CCA allowed the applicant's appeal against sentence holding that the judge had erred in failing to have proper regard to the fact the applicant was a mother of a young baby. First, it was a matter of relevance that the applicant was the mother of a young baby. The effect of separation from her baby needed to be considered. Secondly, if exceptional circumstances could have been shown (for example, evidence of adverse effect of child due to separation), the judge should have considered any effect on the applicant's child. Thirdly, given that there were no facilities for the applicant to be with her baby while in juvenile custody, consideration should have been given to declining to make an order that she serve her term of imprisonment in juvenile detention: at [76].

DPP v Khoury [2014] NSWCA 15 [Five judge Bench] - 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*** 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*.

B. HIGH COURT CASES

1. Barbaro; Zirilli [2014] HCA 2; (2014) 88 ALJR 372. 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 applicants submitted the judge erred in refusing to accept submissions from the prosecutor as to the range of available sentences resulting in an unfair hearing. The High Court held, by majority, that the prosecution is not required, and should not be permitted, to make such a statement of bounds 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].

2. Smith v WA [2014] HCA 3; (2014) 88 ALJR 384. Appeal from WA CA.

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

The jury returned a guilty verdict and was discharged. An anonymous note was found in the jury room suggesting one 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].

3. Milne v R [2014] HCA 4; (2014) 88 ALJR 395. 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].

4. James v R [2014] HCA 6. Appeal from Vic CCA.
Whether failure to instruct jury as to lesser alternative verdicts occasioned substantial miscarriage of justice - Role of trial judge. 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 with respect to instruction on alternative verdicts is to be understood as an aspect of the duty to secure a fair trial. 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 particular 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 [38]. In this case, fairness did not require that alternative verdicts be left. To have instructed the jury on the alternative verdicts might have jeopardised the appellant's chances of acquittal. The central issue – had the prosecution excluded the reasonable possibility that the appellant struck the victim inadvertently as he manoeuvred his vehicle – may have been blurred in a summing-up which introduced additional, uncharged, pathways to conviction: at [48].

Special leave granted

Lee v R [2013] HCATrans 314 - Appeal against conviction - ***Lee*** [2013] NSWCCA 68 – *Criminal Appeal Act 1912* (NSW)– Proper characterisation of "miscarriage of justice" limb of s 6(1) - Whether limb requires a causal connection be established between an irregularity and conviction at trial – Whether applicant bears onus to prove both miscarriage of justice and application of proviso.

Honeysett v R - Expert opinion evidence - s 79 *Evidence Act* - expert evidence of comparisons of CCTV images of offender and images of appellant - common anatomical features identified - ***Honeysett*** [2013] NSWCCA 135

C. LEGISLATION 2014

1. Crimes and other Legislation Amendment (Assault and Intoxication) Act 2014
Commenced 31.1.2014.

The Act inserts new offences into the ***Crimes Act 1900 (NSW)***. The main points are:

(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***.

2. *Jury Amendment Act 2010*
Commenced 31.1.2013

The 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.