

# **CRIMINAL LAW UPDATE 2022**

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## ***COVID-19 Overview***

### ***Sentence Appeals***

- 1. General Sentencing*
- 2. Mitigating Factors*
- 3. Aggravating Factors*
- 4. Discounts: Plea of guilty*
- 5. Discounts: Assistance to authorities*
- 6. Particular Offences*
- 7. Appeals*

### ***Conviction Appeals and Other Cases***

- 1. Evidence*
- 2. Defences*
- 3. Directions*
- 4. Jury*
- 5. Particular offences*
- 6. Procedure*
- 7. Appeals*
- 8. Other cases*
- 9. Bail*

### ***Annexures***

- A. High Court Cases 2022-2023*
- B. Supreme Court Cases 2022*
- C. Legislation 2022-2023*

## **CONTENTS**

### **COVID-19**

*Fail to take into account Covid-19 pandemic renders conditions of imprisonment more onerous - SF v The Queen* [\[2022\] NSWCCA 216](#)

*Whether error in finding risk of widespread COVID-19 infection in prison system diminished - Wass v R* [\[2022\] NSWCCA 143](#)

### **SENTENCE APPEALS**

#### **1. GENERAL SENTENCING**

*Commonwealth mandatory minimum penalties – ss 16AAB, 16AAC Crimes Act 1914 (Cth) - Rex v Taylor* [\[2022\] NSWCCA 256](#)

*s 25AA(2) CSPA (repealed, see now s 21B) – SNPP at time of offence applies – where earlier transitional provisions provided retrospectivity of increased 8 year SNPP for s 61M(2) - GL v R* [\[2022\] NSWCCA 202](#)

*Uncertainty when offending occurred - s 80AF Crimes Act - error applying standard non-parole period (SNPP) for s 61M(2) offence – Smith v R* [\[2022\] NSWCCA 88](#)

*Principles – challenging aggregate sentence - Burke v R* [\[2022\] NSWCCA 6](#)

*Aspects of indicative sentences resulted in manifestly excessive aggregate sentence - Stevenson v R* [\[2022\] NSWCCA 133](#)

*Comparison between undiscounted aggregate sentence and other sentences contrary to principle - Sharma v R* [\[2022\] NSWCCA 190](#)

*Whether aggregate sentence can be imposed for Commonwealth offences - Patel v R* [\[2022\] NSWCCA 93](#); *Delzotto v R* [\[2022\] NSWCCA 117](#)

*Applicant did not give instructions to enter pleas of guilty – miscarriage of justice - Stuart v R* [\[2022\] NSWCCA 182](#)

*Intensive Correction Order (ICO) - failure to take pre-sentence custody into account – re-sentencing: burden of further shorter ICO - Shavali v R* [\[2022\] NSWCCA 178](#)

*s 58 CSPA Crimes (Sentencing Procedure) Act 1999 – Stated Case - R v Perrin* [\[2022\] NSWCCA 170](#)  
*“a convicted inmate of a correctional centre” - error applying s 56 CSPA 1999 - Hraichie v R* [\[2022\] NSWCCA 155](#)

*Crown appeal - additional offending after offender served earlier gaol sentence for similar offending committed at around the same time - R v Obbens* [\[2022\] NSWCCA 109](#)

*Denial of procedural fairness - judge rejected applicant’s evidence in psychological report – no indication that issue was to be taken - Edmonds v R* [\[2022\] NSWCCA 103](#)

*Parity – where co-offender sentenced for multiple other offences - Wood v R* [\[2022\] NSWCCA 84](#)

*Failure to exercise jurisdiction to vary automatic period of driving disqualification - Pearce v R* [\[2022\] NSWCCA 68](#)

*Crimes (High Risk Offenders) Act 2006, s 12 - breaches of extended supervision order - Monteiro v R* [\[2022\] NSWCCA 37](#)

#### **2. MITIGATING FACTORS**

*Remorse - conflated with inability to explain offending, rehabilitation and risk of re-offending – no separate finding made despite unchallenged evidence – s 21A(3)(i) CSPA - Pritchard* [\[2022\] NSWCCA 130](#)

*Remorse –error not to take into account - s 21A(3)(i) CSPA - Care v R* [\[2022\] NSWCCA 101](#)

*Personality disorders fall within De La Rosa (2010) 79 NSWLR 1 – error to find that lack of criminal convictions assumes less significance in context of domestic violence offending - R v Wornes* [\[2022\] NSWCCA 184](#)

*Delay – lost opportunity of being sentenced in Children’s Court – childhood offending - Young (a pseudonym) v R* [\[2022\] NSWCCA 111](#)

*Application of Bugmy principles in domestic violence matters - Kennedy v R* [\[2022\] NSWCCA 215](#)

*Bugmy v The Queen - no evidence of causal link - no error failing to find moral culpability reduced - DR v R* [\[2022\] NSWCCA 151](#)

*Sentencing judge accepted Bugmy principles enlivened but failed to give proper consideration - Lloyd v R* [\[2022\] NSWCCA 18](#)

*Bugmy v The Queen properly applied - but, given psychiatric evidence, error in not reducing moral culpability in accordance with Muldrock and De La Rosa -* [\[2022\] NSWCCA 15](#)

*Five judge bench - Crimes Act 1914 (Cth), s 16A(2)(p) - hardship to family and dependants must be taken into account - previous authorities stating hardship be “exceptional” are plainly wrong - Totaan v R* [\[2022\] NSWCCA 75](#)

*Good character - not deliberately used to obtain trusted position for purpose of committing offences - school teacher – sexual intercourse with young person under special care - Fenner v R* [\[2022\] NSWCCA 48](#)

### 3. AGGRAVATING FACTORS

*Applicant told victim not to tell anyone about sexual assault – words constituted a threat and therefore an aggravating factor - Baker v R* [\[2022\] NSWCCA 195](#)

*Unfair to have regard to ammunition as aggravating factor where no evidence ammunition could be used with firearm - Barnes v R* [\[2022\] NSWCCA 40](#)

*Error to find previous conviction an aggravating factor in absence of reasoned explanation – whether previous conviction an aggravating factor (s 21A(2)(d)) or applicant an offender with no or no significant previous convictions (s 21A(3)(e)) - Meis v R* [\[2022\] NSWCCA 118](#)

*In company - s 21A(2)(e) CSPA - joint criminal enterprise did not form basis of applicant’s liability, such that “company” was not an element of offending - R v Chandler* [\[2022\] NSWCCA 124](#)

*Where victim of offence a child – error to find offence aggravated because it occurred in ‘presence of child’ - s 21A(2)(ea) CSPA - Arvinthan v R* [\[2022\] NSWCCA 44](#)

*No error taking ‘abuse of trust’ into account - s 66C(2) offence (under authority) - s 21A(2)(k) CSPA - PC v R* [\[2022\] NSWCCA 107](#)

*Offence committed on parole - s 21A(2)(j) CSPA - Ahmad v R* [\[2022\] NSWCCA 144](#)

### 4. DISCOUNTS – PLEA OF GUILTY

*ss 25E(2), (3) CSPA – early guilty pleas - discount where offer later accepted - manslaughter a ‘different offence’ not the subject of proceedings – 25% discount applied - re-sentence not required; mathematical correction sufficient - Black v R* [\[2022\] NSWCCA 17](#)

*Utilitarian value of a guilty plea - requires separate consideration from remorse and willingness to facilitate course of justice - Doyle v R* [\[2022\] NSWCCA 81](#)

*Disputed facts, s 25F(4) – discount not reduced – care in exercise of discretion -R v Burns (No 2)* [\[2022\] NSWSC 140](#)

*Discount for guilty plea – ‘first day of the trial’ - vacated - non-attendance by offender – s 25C CSPA - Gurin v R* [\[2022\] NSWCCA 193](#)

*Fail to arrange timely entry of guilty plea – miscarriage of justice - strictly only 5% discount available – CCA must sentence afresh (cf. Black v R) - Green v R* [\[2022\] NSWCCA 230](#)

*Magistrate erred in not ascertaining whether plaintiff pleading guilty - s 95(4) Criminal Procedure Act 1986 - potentially deprived plaintiff of 25% discount for an early plea - Coles v DPP* [\[2022\] NSWSC 960](#)

### 5. DISCOUNTS – ASSISTANCE TO AUTHORITIES

*Meaning of ‘undertaking to assist’ - absence of a concluded agreement - s 23 CSPA - fail to specify discount within s 23(4) - Vaiusu v R* [\[2022\] NSWCCA 283](#)

*Assistance to authorities – Ellis discount – insufficient discount applied - McKinley v R* [\[2022\] NSWCCA 14](#)

### 6. PARTICULAR OFFENCES

*Wounding with intent to cause grievous bodily harm - Finding that injuries amounted to grievous bodily harm did not breach The Queen v De Simoni (1981) 147 CLR 383 - Maybury v R* [\[2022\] NSWCCA 233](#)

Use offensive weapon to avoid lawful apprehension, s 33B Crimes Act – no error to find offending aggravated by fact that victims were police officers - Courtney v R [\[2022\] NSWCCA 223](#)

Manslaughter on basis of excessive self-defence - events leading up to confrontation not relevant to assessment of the objective seriousness - Newburn v R [\[2022\] NSWCCA 139](#)

Commonwealth child sex offender rehabilitation – failure to refer to mandatory considerations in s 16A(2AAA), Crimes Act 1914 (Cth) - Darke v R [\[2022\] NSWCCA 52](#)

Importing border controlled drug - recklessness – applicant “turned his mind” to the possibility he was importing drugs – ss 5.4, 307.1(1) Criminal Code (Cth) - Kemal v R [\[2022\] NSWCCA 83](#)

Maintain unlawful sexual relationship with child - s 66EA Crimes Act - fact finding by sentencing judge after jury verdict - R v RB [\[2022\] NSWCCA 142](#)

Extent to which undercover operation and role of an undercover operative operate to reduce culpability - Ibrahim v R [\[2022\] NSWCCA 161](#)

## 7. APPEALS

Fresh evidence – applicant with mental health issues refused lawyers to access medical records - Barnes v R [\[2022\] NSWCCA 140](#)

## CONVICTION AND OTHER APPEALS

### 1. EVIDENCE

Evidence Amendment (Tendency and Coincidence) Act 2020 – transitional provisions - Bektasovski v R [\[2022\] NSWCCA 246](#); JW v R [\[2022\] NSWCCA 206](#)

Interpreter’s evidence that “male voice” in phone conversations was the same voice – “ad hoc” expert opinion evidence - s 79 Evidence Act 1995 - Ali v R [\[2022\] NSWCCA 199](#)

‘Opinion’ evidence - expert evidence on behavioural responses of child sexual abuse victims - conclusions drawn from research by others - ss 79, 109C Evidence Act 1995 - Aziz (a pseudonym) v R [\[2022\] NSWCCA 76](#)

Expert not qualified to give evidence of the behaviour of child sex offenders generally - ss 79, 109C Evidence Act 1995 – Decision Restricted [\[2022\] NSWCCA 136](#)

Interlocutory appeal by DPP - exclusion of parts of ERISP - accused had lack of memory due to cognitive impairment from alcohol consumption – s 90 Evidence Act - DPP (NSW) v Sullivan [\[2022\] NSWCCA 183](#)

Tendency direction – cross-admissibility – error to group all alleged tendency together in relation to both complainants - Kanbut v R [\[2022\] NSWCCA 259](#)

Tendency direction – cross-admissible charged acts need not be proved beyond reasonable doubt before use as tendency evidence - s 161A Criminal Procedure Act 1986 - JS v R [\[2022\] NSWCCA 145](#)

Child sexual assault complainant – unfavourable witness – error to admit complainant’s statement – silence or unresponsiveness insufficient to establish denial or failure to agree or admit to substance of evidence, s 106 Evidence Act – witness not “unavailable” where “all reasonable steps” not taken by the Crown Prosecutor to compel witness to give evidence, s 65 Evidence Act - RC v R [\[2022\] NSWCCA 281](#)

Prior sexual activity /experience - s 293 Criminal Procedure Act 1986 (now s 294CB) - No error in refusal to allow evidence of prior sexual activity five years earlier – Elsworth v R [\[2022\] NSWCCA 275](#); No error in refusal to allow evidence of prior sexual activity/experience 18 months earlier - Cook (a pseudonym) v R [\[2022\] NSWCCA 282](#)

Prior sexual experience or sexual activity - s 293(4)(c) Criminal Procedure Act 1986 - evidence of complainant’s pregnancy test admissible - failure of trial counsel to seek to have evidence admitted of possibility that complainant had been raped by another male – WS v R [\[2022\] NSWCCA 77](#)

### 2. DEFENCES

Wrong test in determining appellant had not established he was mentally ill at time of alleged offence - special verdict of act proven but not criminally responsible entered - Mental Health (Forensic Provisions) Act 1990, s 38 (rep) - Masters v R [\[2022\] NSWCCA 228](#)

*Crown appeal against acquittals - whether sexsomnia a 'mental health impairment' - s 4 Mental Health (Forensic Provisions) Act 2020 – whether Act codifies or alters common law concerning the mental illness defence - R v DB* [\[2022\] NSWCCA 87](#)

### 3. DIRECTIONS

*Error to direct jury they could use any doubt about a victim's evidence on one count in considering their evidence on other counts involving that victim but not in addressing any count concerning the other victim – child sexual assault - R v Markuleski (2001) 52 NSWLR 82 - Sita v R* [\[2022\] NSWCCA 90](#)

*Jury directed to “choose” between accounts by accused and principal Crown witness – failure to give Liberato direction – Decision Restricted* [\[2022\] NSWCCA 71](#)

### 4. JURY

*Fail to discharge jury – inference views of discharged juror at odds with majority - incomplete Black direction – deliberations without all jurors present constituted a material irregularity - Decision Restricted* [\[2022\] NSWCCA 71](#)

*Trial continued after juror discharged – inference juror in favour of acquittal - substantial miscarriage of justice - Jury Act 1977, s 53C(1)- Addo v R* [\[2022\] NSWCCA 141](#)

*Appeal against discharge of whole jury - s 53C(1)(a) Jury Act 1977 - Watson v R* [\[2022\] NSWCCA 208](#)

*Whether evidence produced by Sheriff investigation inadmissible by reason of exclusionary rule concerning evidence of jury deliberations – s 73A Jury Act 1977 - Vella v R* [\[2022\] NSWCCA 204](#)

### 5. PARTICULAR OFFENCES

*s 66(C)(1) prosecutions not statute-barred – s 78K prosecutions statute-barred - limitation periods repealed – Clause 82, Schedule 11 Crimes Act - Madden v R* [\[2022\] NSWCCA 196](#)

*Intentionally carrying out a sexual act “towards” a child - s 66DC(a) Crimes Act - DPP (NSW) v Presnell* [\[2022\] NSWCCA 146](#)

*“Intentionally chokes” - Crimes Act 1900, s 37(1A) - GS v R; DPP (NSW) v GS* [\[2022\] NSWCCA 65](#)

### 6. PROCEDURE

*Application for leave to withdraw a guilty plea before conviction - White v R* [\[2022\] NSWCCA 241](#)

*Application for trial by a judge alone less than 28 days prior to date fixed for trial - Alemeddine v R* [\[2022\] NSWCCA 219](#)

### 7. APPEALS

*'Miscarriage of justice' for the purposes of third limb of s 6(1) Criminal Appeal Act – error must have material effect on outcome of trial - Saunders v R* [\[2022\] NSWCCA 273](#)

*Appellate review of judge-alone finding of grievous bodily harm - Reyne (a pseudonym) v R* [\[2022\] NSWCCA 201](#)

*Crown appeal against acquittal by judge alone – error established - discretion to order retrial not exercised – acquittals affirmed – s 107 Crimes (Appeal and Review Act) 2001 - R v BK* [\[2022\] NSWCCA 51](#)

*District Court judge after correction on appeal declined for a second time to state a case - Franklin v DPP (NSW)* [\[2022\] NSWCCA 58](#)

### 8. OTHER CASES

*State law governing committal proceedings constitutionally valid - Landrey v DPP (NSW)* [\[2022\] NSWCCA 211](#)

*Prisoners – extreme high risk restricted inmate - supervision of visits and telephone calls with legal practitioners – requirement to communicate in English – validity of Commissioner's monitoring policy - Hamzy v Commissioner of Corrective Services NSW* [\[2022\] NSWCA 16](#)

### 9. BAIL

*Section 22B Bail Act 2013 - DPP v Day* [\[2022\] NSWCCA 173](#) at [20], [23]; *DPP v Van Gestal* [\[2022\] NSWCCA 171](#); *DPP v Duncan* [\[2022\] NSWSC 927](#); *R v Isaac* [\[2023\] NSWSC 22](#)

*Jurisdiction of CCA to hear bail application – no substantive proceedings pending - Dedeoglu v R* [\[2022\] NSWCCA 74](#)

## **A. HIGH COURT CASES**

*Intensive correction order - Whether sentencing judge undertook assessment of community safety in accordance with s 66 CSPA - failure to comply with s 66(2) amounted to jurisdictional error - Stanley v Director of Public Prosecutions (NSW)* [\[2023\] HCA 3](#)

*Internet inquiries by juror - juror misconduct, s 53A(1)(c) Jury Act 1977 (NSW) – inquiry for purpose of obtaining information about matters relevant to trial, s 68C(1) Jury Act – trial judge took verdicts which jury indicated they had reached unanimous verdict on before discharging juror - Hoang v The Queen* [\[2022\] HCA 14](#)

*Function of Court of Criminal Appeal - appeal against conviction on unreasonableness ground following trial by judge alone - Dansie v The Queen* [\[2022\] HCA 25; 96 ALJR 728](#)

*s 80AF Crimes Act 1900 (NSW) - uncertainty about time when child sexual offence occurred - s 80AF did not operate with respect to trials that had already commenced when the provision came into force and it could not be invoked after the commencement of a trial - Stephens v The Queen* [\[2022\] HCA 31; 96 ALJR 871](#)

*ss 97, 101 Evidence Act 1995 – murder - tendency evidence of prior harm of deceased and victim’s complaints of harm admissible - no general rule that requires ‘close similarity’ between conduct evidencing tendency and the offence - TL v The King* [\[2022\] HCA 35; 96 ALJR 1072](#)

## **B. SUPREME COURT CASES**

*Defence of mental health impairment - Exception to defence if impairment caused solely by temporary effect of ingesting substance or substance use disorder - Onus and burden of proof - Onus on Crown to prove exception to defence on balance of probabilities - Mental Health and Cognitive Impairment Forensic Provisions Act 2020, ss 4(3), 28 - R v Miller* [\[2022\] NSWSC 802](#); *R v Sheridan* [\[2022\] NSWSC 1669](#)

*Fitness for trial – “will not become fit” for trial - s 20 Mental Health and Cognitive Impairment Forensic Provisions Act 2020 - R v Woodham* [\[2022\] NSWSC 1154](#)

*Meaning of “reasonably necessary” in s 230 Law Enforcement (Powers and Responsibilities) Act 2002 - DPP (NSW) v Greenhalgh* [\[2022\] NSWSC 980](#)

*Appeal against new non-parole period (NPP) following Commonwealth parole revocation - Tran v DPP (Cth)* [\[2022\] NSWSC 778](#) (Rothman J)

*Procedural fairness – conviction in absence of prosecutor - DPP (NSW) v Peckham* [\[2022\] NSWSC 713](#)

## **C. LEGISLATION**

[Confiscation of Proceeds of Crime Legislation Amendment Act 2022](#)

[Law Enforcement \(Powers and Responsibilities\) Amendment \(Digital Evidence Access Orders\) Act 2022](#)

[Dedicated Encrypted Criminal Communication Device Prohibition Orders Act 2022](#)

[Crimes Amendment \(Protection of Criminal Defence Lawyers\) Act 2022](#)

[Criminal Procedure Legislation Amendment \(Prosecution of Indictable Offences\) Act 2022](#)

[Crimes \(Administration of Sentences\) Amendment \(No Body, No Parole\) Act 2022](#)

[Crimes Legislation Amendment \(Assaults on Frontline Emergency and Health Workers\) Act 2022](#)

[Crimes \(Sentencing Procedure\) Amendment Act 2022](#)

[Crimes Amendment \(Prohibition on Display of Nazi Symbols\) Act 2022](#)

[Bail Amendment Act 2022](#)

[Crimes Legislation Amendment \(Sexual Consent Reforms\) Act 2021](#)

[Crimes Legislation Amendment \(Loss of Foetus\) Act 2021](#)

[Modern Slavery Act 2018](#) - amended before commencement by [Modern Slavery Amendment Act 2021](#)

## SENTENCE APPEALS

### COVID-19

#### ***Fail to take into account Covid-19 pandemic – reasons handed down two months after sentence hearing***

***SF v The Queen*** [\[2022\] NSWCCA 216](#) (7 October 2022)

The CCA allowed the applicant's appeal where the sentencing judge indicated his intention to take into account the likely impact of the Covid-19 pandemic on the applicant's conditions of imprisonment and intended to give it "significant weight" but it could not be inferred from Remarks that the judge did so.

The fact that the sentence was handed down two months after the hearing was relevant to whether it could reasonably be assumed that the judge had taken that factor into account: at [81]; *Church v R* [2012] NSWCCA 149 per Button J at [35], [36].

The CCA said the relevant circumstances are that the sentence was handed down two months after the sentence hearing, the Remarks make no reference to the applicant's likely conditions of imprisonment, either generally or consequent to the impact of the Covid-19 pandemic on the prison system and, in particular, it is not one of the bases that were identified in finding special circumstances: at [92].

#### ***Whether error in finding risk of widespread COVID-19 infection in prison system diminished***

***Wass v R*** [\[2022\] NSWCCA 143](#) (29 June 2022)

The sentencing judge stated COVID-19 was "a complication that had gone away with the effluxion of time." The applicant submitted the judge erred in finding the risk of widespread COVID-19 infection in the prison system had diminished.

The CCA dismissed the appeal. The judge's comment was not referable to the COVID-19 pandemic itself but to the prospect of widespread infection in prisons, and was a statement of the generally known position, not a factual finding on evidence: at [66]-[68].

Neither party placed evidence before the sentencing court as to the incidence or absence of infection amongst prisoners. The position regarding the pandemic is not unchanging. There must be current and reliable evidence of any adverse consequence; it is not enough to point to the existence of the virus generally: at [71].

## 1. GENERAL SENTENCING

#### ***Commonwealth mandatory minimum penalties – ss 16AAB, 16AAC Crimes Act 1914 (Cth)***

***Rex v Taylor*** [\[2022\] NSWCCA 256](#)

Section 16AAB *Crimes Act 1914* (Cth), subject to s 16AAC, prescribes a mandatory minimum sentence of imprisonment where a person is convicted of a Commonwealth child sexual abuse offence and has been convicted previously of a child sexual abuse offence.

The Crown appealed the respondent's sentence of imprisonment for 3 years with recognizance release order after 18 months for Commonwealth child sexual abuse offences. The respondent had prior child sexual abuse offence convictions.

The Crown submitted, inter alia, that the sentencing judge erred by imposing a sentence that did not reflect the sentencing principle that the mandatory minimum head sentence of 4 years' imprisonment was for the least serious category of offending as set out in ***Delzotto v R*** [\[2022\] NSWCCA 117](#); and by imposing a sentence that was only available for the least serious category of offending when the judge did not find the offending was in the least serious category, which finding was not open on the facts found by the judge.

The CCA dismissed the appeal.

- Nothing in ***Delzotto v R*** [\[2022\] NSWCCA 117](#) adopts the proposition that unless an offence is found to be within the least serious category of offending that the mandatory minimum term or higher must – as a matter of law – be imposed. There is no legislative prescription that the mandatory minimum penalty can only be imposed where the offence is characterised as "within

the least serious category of offending”: at [54]-[56]; [67]-[70]; [72]; [78]; *Bahar v The Queen* (2011) 45 WAR 100 at [58].

- The mandatory minimum is observed as part of the sentencing process, from the outset. It does not operate as a check after an assessment of a “just and appropriate sentence”. The prescription of a mandatory minimum term imports an additional constraint into the evaluation of proportionality, but it does not eliminate proportionality as an important sentencing consideration. The prescribed sentence does more than fix a boundary above or below which the sentence imposed may not go; it operates as a guide to the seriousness with which the legislature views the offences: at [61]-[66]; [71]; *Bahar v The Queen* at [54]; *R v Delzotto* at [32].
- It does not follow, however, that, unless an offence is found to be “within the least serious category of offending”, the minimum term can never be imposed. That will be a matter within the discretion of the sentencing judge determined on established principles: at [67].

In *Delzotto v R* [2022] NSWCCA 117 the CCA allowed the Crown sentence appeal. The sentencing judge failed to approach mandatory minimum terms in accordance with *Bahar v R* [2011] WASCA 249.

### ***s 25AA(2) CSPA (repealed, see now s 21B)<sup>1</sup> – SNPP at time of offence applies – where earlier transitional provisions provided retrospectivity of increased 8 year SNPP for s 61M(2)***

#### ***GL v R* [2022] NSWCCA 202**

The applicant was sentenced in 2019 for offences committed in 2007 under s 61M(2) (aggravated indecent assault, repealed).

In 2007, the SNPP for s 61M(2) was 5 years.

In 2008, the SNPP for s 61M(2) was increased to 8 years with retrospective effect, pursuant to Schedule 1, clause [16] of the *Crimes (Sentencing Procedure) Amendment Act 2007*.

In 2018, s 25AA CSPA commenced. Section 25AA(2) requires an offender for a child sexual offence to be sentenced “in accordance with sentencing patterns and practices at the time of sentencing.” However, s 25AA(2) provides the SNPP to be applied is the SNPP at the time of the offence, not sentencing. The transitional provisions for the 2018 amendments provide that the SNPP as in force prior to the 2018 amendment continued to apply in respect of offences against s 61M(1)-(2) committed before the 2018 amendment: cl 91 of Sch 2 CSPA; *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018*.

The CCA held the sentencing Judge erred in applying the SNPP of 8 years. The applicable SNPP was 5 years.

It is more appropriate to apply the plain language in the critical provisions of the amending legislation (s 25AA), rather than to apply a clause of the transitional provisions: at [208].

In the absence of clear statutory language, the construction of penal statutes should favour the liberty of the subject. The fact that s 25AA was enacted later than the 2007 amendment means s 25AA should prevail: at [209].

### ***Uncertainty when offending occurred - s 80AF Crimes Act - error applying standard non-parole period (SNPP) for s 61M(2) offence***

#### ***Smith v R* [2022] NSWCCA 88**

New sexual assault provisions and amendments commenced on 1 December 2018:

- s 66DB (sexual touching of a child) replaced s 61M(2) (aggravated indecent assault). Both offences have a maximum penalty of 10 years imprisonment.

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<sup>1</sup> Sub-sections 25AA(1), (2) and (4) were repealed and replaced by [s 21B](#) on 18.10.2022 (by the *Crimes (Sentencing Procedure) Amendment Act 2022*). The main change was that s 25AA was limited to *child sexual offences*, whilst s 21B applies to *all offences*. Like s 25AA, ss 21B requires a court to sentence an offender according to sentencing patterns and practices at the time of sentencing, not the time of the offence (s 21B(1)), and that the standard non-parole period is the one that applied at the time of the offence, not sentencing (s 21B(2)).



- s 61M(2) had a SNPP of 8 years; s 66DB has no SNPP. Schedule 2, cl 91 *CSP Act* 1999 provides that the 8 year SNPP continues to apply to s 61M(2) offences committed “before that amendment” i.e. 1 December 2018. Section 25AA(2) *CSPA* (repealed; see now s 21B(2))<sup>2</sup> provided that the SNPP for a child sexual offence is the SNPP that applied “at the time of the offence”, not sentence.
- Section 80AF(1), (2) *Crimes Act* provides that if it is uncertain as to when sexual conduct has occurred, and because of a change in the law the alleged conduct would have constituted more than one offence, then a person may be prosecuted under “*whichever of those sexual offences has the lesser maximum penalty.*”

The applicant was convicted of s 61M(2). There was uncertainty as to when the alleged conduct constituting the offence occurred. The offence was charged as having been committed between 15 October 2018 and 19 December 2018.

The CCA held the sentencing judge erred in applying the SNPP for the s 61M(2) offence. The SNPP could not be made applicable by either:

- Sch 2, cl 91 *CSPA* - given that the prosecution was unable to show the offence was “committed before that amendment”, that is, before 1 December 2018; nor
- s 25AA(2) *CSPA* - given that the prosecution did not prove whether “the time of the offence” was prior to or after the amendment.

Thus where the conduct has been charged under s 61M(2) in reliance upon s 80AF and may have been committed on either side of the date from which the SNPP was removed, neither cl 91 of Sch 2 nor s 25AA(2) is engaged in a way that would make that SNPP applicable: at [70]-[71].

#### s 80AF

By s 80AF(2), it was open to the Crown to prosecute the conduct charged under either s 61M(2) or s 66DB. The two provisions prescribe the same maximum penalty. The words in s 80AF, “*whichever of those sexual offences has the lesser maximum penalty*”, should be interpreted as referring equally to both offences where the maximum penalties are the same: at [65]-[66].

### **Principles – challenging aggregate sentence**

#### **Burke v R [2022] NSWCCA 6**

The applicant submitted that his aggregate sentence was unreasonable and unjust, as opposed to relying on any patent error in the appointment of the aggregate sentence or in sentencing reasons, including any error in application of totality principles. The applicant put his submission on two bases: (1) the sentences indicated for various counts were excessive relative to other counts; and (2) findings of objective seriousness resulted in an unjust sentence.

The CCA dismissed the appeal. After setting out the principles regarding an appeal based on manifest excess (at [30]), Fullerton J (McCallum JA and Walton J agreeing) added:

- In an appeal alleging manifest excess in the aggregate sentence, the focus is whether the sentence fairly reflects the totality of the criminality, that is, whether the aggregate sentence can be shown to be unreasonable and plainly unfair having regard to the totality of the criminality comprehended by the sentence, after taking into consideration all factors bearing upon the ultimate imposition of sentence (authorities referred to).
- Where an aggregate sentence is challenged as manifestly excessive, and the Court’s attention is directed to alleged severity of the indicative sentences, the focus will not be on whether one or more of the indicative sentences is excessive per se, but whether the applicant has established that after principles of totality are applied the aggregate sentence is

<sup>2</sup> Sub-sections 25AA(1), (2) and (4) were repealed and replaced by [s 21B](#) on 18.10.2022 (by the [Crimes \(Sentencing Procedure\) Amendment Act 2022](#)). The main change was that s 25AA was limited to *child sexual offences*, whilst s 21B applies to *all offences*. Like s 25AA, ss 21B requires a court to sentence an offender according to sentencing patterns and practices at the time of sentencing, not the time of the offence (s 21B(1)), and that the standard non-parole period is the one that applied at the time of the offence, not sentencing (s 21B(2)).

unreasonable or plainly unjust (*JM v R* (2014) 246 A Crim R 528 at [40]; *Chaouk v R* [2017] NSWCCA 295). It is only where nomination of an indicative sentence(s) suggests error in the appointment of the aggregate sentence that a ground of manifest excess may be made out. Where that argument has been successful, it is because the Court is satisfied that the relative severity of the individual sentences called for a greater degree of notional concurrency in the imposition of the aggregate sentence: at [31]-[33].

In the present case, the sentencing judge correctly made a degree of accumulation in each “cluster” of robberies with notional concurrency between offences committed against different people at the same premises. Thus even were the applicant be able to show that one or more of the sentences indicated is excessive by applying comparative analysis, that would not inevitably support the conclusion that the aggregate sentence is excessive. As a matter of principle, even if there might be a lack of uniformity in the indicative sentences for similar offences of the same objective seriousness, that will not necessarily lead to the conclusion that the aggregate sentence is manifestly excessive: at [34].

### ***Aspects of indicative sentences resulted in manifestly excessive aggregate sentence***

#### ***Stevenson v R* [\[2022\] NSWCCA 133](#)**

The CCA allowed the appellant’s appeal on the ground of error in the nomination of an indicative sentence which “served to infect the aggregate sentence”: at [124]. The sentencing judge nominated an indicative sentence of imprisonment for 8 years on a count of sexual touching of a child aged 10-16 (Maximum penalty 10 years’ imprisonment). The CCA found error in that the conclusion was discordant with the finding of objective seriousness of that offence and the complete absence of a standard non-parole period to operate as a guidepost on sentence: at [123]; ***Burke v R* [\[2022\] NSWCCA 6](#); *Noonan v R* [2021] NSWCCA 35; *Lee v R* [2020] NSWCCA 244.**

### ***Comparison between undiscounted aggregate sentence and other sentences***

#### ***Sharma v R* [\[2022\] NSWCCA 190](#)**

The sentencing judge applied a discount of 25% to the applicant’s indicative sentences and imposed an aggregate sentence.

The CCA stated that the applicant’s submission that manifest excess was demonstrated by considering the undiscounted aggregate sentence and sentences imposed in other similar cases is contrary to principle: at [72].

The applicant relied on *Chartres-Abbott v R* [2021] NSWCCA 239 where Brereton JA acknowledged that while a discount for a plea of guilty is applied to the indicative (not aggregate) sentence, it did not follow that, for case comparison purposes, consideration of an undiscounted aggregate sentence was impermissible. However, in *BB v R* [2021] NSWCCA 283, Wilson J observed that it is difficult to see how such an approach could be useful in sentencing appeals: at [72]-[73].

The CCA said it is not necessary to resolve these two approaches. Even if the applicant’s approach were permissible, it is of no utility given the comparative cases relied upon were distinguishable from the present case on various bases: at [72]-[74].

Beech-Jones CJ at CL observed that it was difficult to see the relevance of comparing aggregate sentences, especially where they included different offences. Even if there were a pool of aggregate sentences, a comparison would at most only reveal how the totality principle was applied in another case: at [6].

### ***Whether aggregate sentence can be imposed for Commonwealth offences***

#### ***Patel v R* [\[2022\] NSWCCA 93](#)**

The applicant was sentenced to an aggregate sentence with non-parole period for Commonwealth drug offences. The CCA (Brereton JA, N Adams J agreeing with additional comments, Lonergan agreeing with Brereton JA) allowed his appeal in relation to a sentencing error.

On re-sentence, the CCA expressed doubt as to whether an aggregate sentence under State sentencing law (s 53 *CSPA*) can be imposed for Commonwealth offences based on whether s 53A was “picked up” by s 68 *Judiciary Act* 1903 (Cth). Given these doubts, the CCA determined to impose separate terms of imprisonment, on the basis prescribed by s 19(2) *Crimes Act 1914* (Cth) (where person convicted of two or more federal offences at the same sitting and is sentenced to imprisonment

for more than one, the court must direct when each sentence commences, but so that no sentence commences later than the end of the sentences the commencement of which has already been fixed or of the last to end of those sentences).

In *Delzotto v R* [2022] NSWCCA 117 at [2] Beech-Jones CJ at CL, referring to *Patel v R*, observed that existing authority in *DPP (Cth) v Beattie* [2017] NSWCCA 301 has held that an aggregate sentence can be imposed for Commonwealth offences, and that this Court is entitled to act on what was found in *Beattie* until the contrary is held either by the High Court or this Court: at [2]. See also *Ibrahim v R* [2022] NSWCCA 161 at [121].

### ***Applicant did not give instructions to enter pleas of guilty – miscarriage of justice***

#### ***Stuart v R* [2022] NSWCCA 182**

The CCA found a miscarriage of justice where the applicant's solicitor entered guilty pleas in the Local Court on the applicant's behalf without instructions. The pleas were not a true admission of guilt and integrity of the plea was affected: at [91]; *Maxwell v The Queen* (1996) 184 CLR 501, *Sagiv v R* (1986) 22 A Crim R 73, applied.

The applicant was not asked in the Local Court or District Court (on sentence) personally to confirm his pleas. The charges were not read out to him prior to the sentencing judgment. Nothing in the *Criminal Procedure Act 1986* or *Criminal Procedure Regulation 2017* expressly requires charges to be read to the accused. However, the model explanation required by Regulation 9A includes that: "[t]he Magistrate will ask you whether you plead guilty or not guilty to *each* offence proceeding" (emphasis added). That looks forward to what will occur before a magistrate after a case conference. It is difficult to see how a magistrate could ask an accused whether they pleaded guilty or not guilty to each offence proceeding without identifying each offence: at [9].

A court is entitled to rely on what is said by a legal practitioner for their client. Requiring public acknowledgement by the accused reflects solemnity of what is occurring and may assist avoiding claims a plea was not properly entered: at [15].

The solicitor communicated to the prosecution that the applicant would be pleading guilty, undermining the applicant's statutory ability to negotiate pleas: at [35]; *CPA* case conference provisions, ss 70(2), 75(1)(b)-(d), 77.

### ***Intensive Correction Order (ICO) - failure to take pre-sentence custody into account – re-sentencing: burden of further shorter ICO***

#### ***Shavali v R* [2022] NSWCCA 178**

The applicant was sentenced to an aggregate sentence of 3 years' imprisonment to be served by way of ICO for firearms offences. On appeal, the Crown conceded that the sentencing judge failed to take into account pre-sentence custody of 438 days.

The CCA found re-sentencing posed difficulties as the applicant had completed the community service component of the ICO and supervision. The applicant was warned that, even if a lesser sentence was imposed, he could be subject to greater restrictions on his liberties than those presently applying: at [69]; *Parker v DPP* (1992) 28 NSWLR 282.

Difficulties on resentencing were:

- An ICO must commence on the date on which it is made (s 71(1) *CSPA*). An ICO by the CCA on resentencing must date from the date on which the new sentence is imposed. The term of an ICO can be reduced, but not backdated, to take account of pre-sentence custody: at [6], [57]; *Mandranis v R* (2021) 298 A Crim R 260.
- An aggregate sentence of imprisonment, taking into account time served in custody and spent subject to an ICO, would require the applicant to enter into full-time custody, albeit for a short period: at [71].
- An ICO must be made subject to the "standard conditions" including to submit to supervision (s 73(2)(b) *CSPA*). As the applicant has already completed supervision, a further ICO will have subject him to constraints on liberty that do not presently apply: at [75].
- s 10A *CSPA* is not properly available as the offences are too serious: at [70].

The CCA concluded that no other sentence is warranted in law. To impose a meaningful, less severe sentence would involve imposition of restrictions on the applicant's liberty that he does not presently face. The appeal was dismissed: at [79].

### **s 58 CSPA Crimes (Sentencing Procedure) Act 1999 – Stated Case**

#### ***R v Perrin* [2022] NSWCCA 170**

Section 58 CSPA provides that: The Local Court, or District Court on appeal, may not impose a “new sentence” to be served consecutively or part-consecutively with an “existing sentence” if the “new sentence” ends more than 5 years after the “existing sentence” began.

“Existing sentence” is defined in s 58(4).

The applicant had served two expired sentences of imprisonment for two offences. He remained in custody on remand for a third offence. For that third offence, he was sentenced to imprisonment part-cumulative with the two expired sentences. The total sentence for all three offences was 5 years 11 months. The applicant appealed his third sentence to the District Court. To comply with s 58, the District Court appeal judge reduced the third sentence and commenced it from an earlier date so that the total sentence for all three offences was 5 years.

The DPP requested the judge state the following two questions:

Does s 58 CSPA constrain the length of a sentence of imprisonment that may be imposed by the Local Court, or District Court on appeal, if the offender is not serving any sentence of imprisonment:

- (1) at the time of sentencing?; or
- (2) at the time of sentencing but the sentence to be imposed is made cumulative or partly cumulative on a sentence that has been served?

The CCA answered “No” to both questions. Section 58 did not apply. The sentence was quashed and the matter remitted to be dealt with according to law.

Section 58 only operates if there was an earlier sentence that was “existing”, in the sense of unexpired, at the time the Court imposes the new sentence. Whether there is an “existing sentence” is to be determined as at the date of imposition of the new sentence, not at the time the “new sentence” commences: at [80]-[81].

Section 58 does not constrain the length of the new sentence if the sentence on which the new sentence is made wholly or part-cumulative has expired at the date of imposition of the new sentence because it is not an “unexpired sentence” and thus not an “existing sentence” for the purposes of the section: [83].

### ***“a convicted inmate of a correctional centre” - error applying s 56 Crimes (Sentencing Procedure) Act 1999***

#### ***Hraichie v R* [2022] NSWCCA 155**

Sections 56(1)-(2) CSPA provide that for a sentence of imprisonment imposed for an assault offence committed while the offender is a “convicted inmate of a correctional centre” and subject to another sentence that is yet to expire, the sentence is to be served consecutively with the other sentence.

The applicant had become entitled to release on parole for unrelated sentences but continued to be held in custody on remand (bail refused) in respect of the index assault offences.

The CCA held the applicant was not a “convicted inmate of a correctional centre” within s 56(2). The sentencing judge erred in applying s 56.

The applicable definition in this case of “convicted inmate” (in 4(1)(a) *Crimes (Administration of Sentences) Act*) does not apply to “a person who is on release on parole”: at [132]-[133], [144]-[146].

The CCA imposed a revised aggregate sentence for the index assault offences to commence 12 months prior to the expiry of the last non-parole period for the unrelated sentences.

### ***Crown appeal - additional offending after offender served earlier gaol sentence for similar offending committed at around the same time***

#### ***R v Obbens* [2022] NSWCCA 109**

The sentencing judge imposed an 18-month CCO for indecently assault child under authority (s 61E(1A) (rep)) committed in 1989. The reason the sentencing judge imposed this ‘lenient disposition’ was that

the respondent had already served 3 years full-time imprisonment imposed in 2016 by Judge F for similar offences committed between 1987-1989, around the same time as the subject offences. The subject offences were unknown at the time of the 2016 sentence.

The Crown appealed, submitting the sentencing judge failed to properly apply the totality principle and that the sentence is manifestly inadequate.

The CCA dismissed the Crown appeal. The real question, which might be more a question of proportionality rather than totality, is whether the total sentencing outcome (that is the 3-year full-time sentence imposed by Judge F together with the 18-month CCO under appeal) could encompass the whole of the criminality: at [18]; authorities cited.

In cases of undisclosed sexual offending, delay will not automatically operate in mitigation (*R v Cattell* [2019] NSWCCA 297). However, it is different where additional offending comes to light after imprisonment, as the delay is unlikely to be a period in which the offender went about life freely. Further, a subsequent prosecution is an additional disruption, and return to prison likely to involve greater punishment than if the first term of imprisonment had been longer if all offences had been dealt with together: at [20].

The question in this case was whether, having regard to the option of a CCO and the whole of the circumstances, the only appropriate sentence was imprisonment. A CCO is lenient in a case such as this but there are times when such an order is in the best interests of all (*Boulton v R* (2014) 46 VR 308 at [113]-[115]). Given the punishment of the 2016 sentence, the respondent's experiences in gaol, personal circumstances, rehabilitation, and extensive period of not offending, this was such a case. The CCO represented a "flexibility of approach" (*Mill v The Queen* (1988) 166 CLR 59): at [25]-[26].

***Denial of procedural fairness - judge rejected applicant's evidence in psychological report – no indication that issue was to be taken***

***Edmonds v R* [2022] NSWCCA 103**

The applicant was denied procedural fairness where the sentencing judge indicated that defence counsel was not required to address on the psychological report relating to the offender's deprived background, however, subsequently made adverse findings that he did not accept the report because of an absence of independent and supporting evidence.

The judge foreclosed defence counsel from making submissions as to why the applicant's account to the psychologist should be accepted or reconsidering his decision not to call the applicant: at [28].

Where the report of a mental health professional is admitted without objection, no principle of law requires the sentencing judge to exercise "very considerable caution" before relying on it absent evidence from the offender: at [27]; citing *Lloyd v R* [2022] NSWCCA 18 at [47].

***Parity – where co-offender sentenced for multiple other offences***

***Wood v R* [2022] NSWCCA 84**

The applicant was sentenced to 4 years imprisonment, NPP 2 years 6 months for robbery in company armed with an offensive weapon (s 97(1) *Crimes Act*). The applicant and co-offender, L, attended a brothel each armed with machetes and L also carried an axe. They obtained \$1500 from staff and \$15k from the business safe forced open by L. L pleaded guilty to the common armed robbery offence, a further armed robbery and police pursuit, with ten offences on a Form 1. The same sentencing judge imposed an aggregate sentence of 5 years 3 months, NPP 3 years 2 months. L's indicative sentence for the common offence was 4 years 3 months. L was serving a sentence for other robbery and firearms offences. L's total effective sentence was 6 years 1 months, NPP 4 yrs.

The CCA allowed the appeal. The applicant had a justifiable sense of grievance when compared against L's aggregate sentence. L's total effective sentence encompasses the criminality involved in numerous offences. Although the applicant does not have a justifiable grievance simply based on L's indicative sentence for the common offence, the application of the totality principle resulted in significant leniency being extended to L with no corresponding amelioration of the sentence imposed on the applicant: at [43]-[45], [56]; *Postiglione v The Queen* (1997) 189 CLR 295.

### ***Failure to exercise jurisdiction to vary automatic period of driving disqualification***

#### ***Pearce v R*** [\[2022\] NSWCCA 68](#)

The applicant was sentenced to 6 years' imprisonment for aggravated driving causing GBH (s 52A(4) *Crimes Act*) and disqualified from holding a driver's licence for 5 years - the automatic disqualification period for the offence: s 205(3)(d)(i) *Road Transport Act 2013*.

The CCA allowed the appeal on the ground that the sentencing judge failed to exercise jurisdiction to consider whether or not to vary the automatic disqualification period under s 205(3)(d)(ii) which allows variation of the automatic disqualification period to not less than 2 years. The judge was not aware of the power to do so and made no determination. If the judge had turned his mind to the question of whether or not to depart from the automatic 5 years, a significant consideration would have been that, upon doing so, the applicant would by s 206B(4) have received credit for the 11 months and 16 days of suspension that had already run, towards the minimum period of 2 years. The sentence was not manifestly excessive but is at the high end. Reduction of the automatic period of 5 years disqualification is justified to avoid double or super-added punishment: at [56]-[61].

### ***Crimes (High Risk Offenders) Act 2006, s 12 - breaches of extended supervision order***

#### ***Monteiro v R*** [\[2022\] NSWCCA 37](#)

The applicant was sentenced to imprisonment for failing to comply with an extended supervision order (ESO) and an interim supervision order contrary to s 12 *Crimes (High Risk Offenders) Act 2006*.

The extended and interim supervision orders included restrictions on social media accounts and/or aliases. The applicant's offences involved using unregistered phones, laptop, false names, emails and text messages.

The CCA allowed the appeal and reduced the applicant's sentence. The sentencing judge may have implicitly considered the seriousness of the index offences which gave rise to the supervision orders, instead of only considering the breach of the supervision order itself. The judge erred in assessment of the breaches as mid-range or just below mid-range. The offending was well below mid-range: at [41].

The CCA noted:

- The important distinction between ESO breaches pointing to planning or commission of serious sexual or violence offences, and other types of breaches: at [36].
- Here, the breaches are breaches of conditions that facilitate supervision (use of different name, electronic equipment etc). Compliance with conditions is important, but where breaches were not related to serious offending, the breach may be assessed as mid-range, but that will be uncommon: at [39]-[40].
- If the breach gave rise to an increased risk of the commission of a serious offence of the kind for which the ESO was imposed, that would impact upon objective seriousness: at [42].
- Sentences for a breach of an ESO range from fines to imprisonment. *As the applicant is subject of an ESO, a Community Services Order or an Intensive Corrections Order is not appropriate as it may not result in any punishment. A fine may be far more effective than a non-full-time prison sentence. However, because the offences in question go to the heart of the supervision process, no penalty other than imprisonment is appropriate (s 5 CSP Act): at [43]-[44].*

## **2. MITIGATING FACTORS**

### ***Remorse - conflated with inability to explain offending, rehabilitation and risk of re-offending – no separate finding made despite unchallenged evidence – s 21A(3)(i) CSP Act***

#### ***Pritchard*** [\[2022\] NSWCCA 130](#)

The judge erred in failing to make an express separate finding of remorse under s 21A(3)(i), but rather dealt compendiously with remorse, risk of re-offending, and rehabilitation: at [95], [102].

The judge had misgivings about remorse given the applicant's inability to remember or explain his conduct. It was open to the judge to have such doubts, however, failure to remember or explain one's

conduct is not mutually exclusive with a finding of genuine remorse: at [97]. At sentence, remorse was put forward by the applicant by letter of apology to the court, psychologist report and giving evidence. That evidence was unchallenged and the Crown had conceded remorse was a mitigating factor: at [91]-[94], [100]-[102].

### **Remorse – error not to take into account - s 21A(3)(i) CSPA**

#### ***Care v R* [2022] NSWCCA 101**

Section 21A(3)(i) CSPA states that remorse is a mitigating factor if the offender (i) has provided evidence that s/he has accepted responsibility for their actions, and (ii) has acknowledged any injury, loss or damage caused or made reparation. Precondition (ii) had been met in this case.

As to precondition (i), the CCA held it was an error not to take into account remorse where the judge accepted the applicant's remorse contained in an affidavit which was unchallenged and uncontroverted. There was also the unchallenged psychologist's evidence regarding remorse and acceptance of responsibility: at [97]-[101]. The judge was required to give the offender the benefit of remorse if the offender provided evidence of acceptance of responsibility, and acknowledged injury, loss or damage, or made reparation.

Precondition (i) does not require the Court to accept the evidence, or require evidence of all of the particulars of the offender's role or co-offenders, that evidence be in any particular form, from any particular source, nor deal with any particular aspect of the criminal conduct (*Butters v R* [2010] NSWCCA 1). However, a Court may determine that remorse has not been shown as a consequence of limited evidence of responsibility: at [76], [94]-[95].

### **Personality disorders fall within *De La Rosa* (2010) 79 NSWLR 1 – error to find that lack of criminal convictions assumes less significance in context of domestic violence offending**

#### ***R v Wornes* [2022] NSWCCA 184**

The applicant was sentenced for wounding with intent to cause GBH and other Form 1 offences, in the context of serious domestic violence.

The CCA held that the sentencing judge erred in finding that as a "matter of law" the applicant's personality disorder fell outside the scope of the principles in *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 and was not relevant to moral culpability. Personality disorders can be taken into account on sentence in the manner described in *De La Rosa*, in the same way as other mental or psychiatric conditions: at [25]-[30]; *DPP (Cth) v De La Rosa*; *Brown v R* (2020) 62 VR 491, applied.

The sentencing judge's alternative approach that personality disorder did not reduce moral culpability was not supported by unchallenged expert evidence that the applicant's disorder and personality style led to distorted views of relationships and impaired emotional responses. This evidence was to be considered in the light of a childhood marred by dysfunction. The evidence was relevant to assessment of moral culpability and weight given to personal and general deterrence: at [31]-[32].

The judge erred in finding that lack of prior convictions "assumes less significance in the context of domestic violence offending" thus denying the applicant the leniency to which she was entitled. The absence of criminal history was a significant factor and mitigating feature under s 21A(3)(e) CSPA: at [34]-[37].

### **Delay – lost opportunity of being sentenced in Children's Court – childhood offending**

#### ***Young (a pseudonym) v R* [2022] NSWCCA 111**

The CCA allowed the applicant's appeal against sentence for historical child sexual assault offences committed in 2003-2004 when aged 14-16 against his niece, aged 9-11.

The sentence imposed was unreasonable and plainly unjust having regard to:

- the numerous ways in which delay resulted in lost opportunities for the applicant;
- he was 14 when offending commenced;
- the context in which the offences were committed;
- *Bugmy v The Queen* (2013) 249 CLR 571 factors; and
- that he was also a victim at the time (raised in a dysfunctional environment and abused).

Not only was the *fact* of delay relevant, so too was the *extent* of it: at [35]. The applicant lost the opportunity of being dealt with in the Children’s Court. This meant that:

- Being sentenced as an adult in the District Court meant rehabilitation was no longer the primary sentencing principle and sentencing options were limited: at [38].
- He did not have a criminal history at the time of the offences, a mitigating factor, but had a criminal history by the time of sentence. Although unable to demonstrate progress towards rehabilitation, he was also denied the opportunity to come before the court as a person of good character: at [45].
- If he had been sentenced before the 2018 sexual offences legislative amendments, he would have been able to be sentenced more leniently based on two factors:
  - (i) being sentenced according to principles and patterns at the time of offending (*MPB v R* [2013] NSWCCA 213; cf s 25AA *CSPA*); and
  - (ii) it would have been open to the judge to impose a suspended sentence or an ICO: at [46]–[49].

### ***Application of Bugmy principles in domestic violence matters***

#### ***Kennedy v R* [\[2022\] NSWCCA 215](#)**

The applicant was sentenced for detaining and assaulting his female partner (s 86(2)(b) *Crimes Act*).

The sentencing judge found ‘*Bugmy* issues and *Fernando* type issues’ were established to a significant degree; and that, in accordance with ‘*Munda*’, sentencing for domestic violence must take general deterrence into account in a “significant way” and there was a real need for specific deterrence given it was not an isolated occasion involving the same victim: at [32]–[33]; *Bugmy v The Queen* (2013) 249 CLR 571; *R v Fernando* (1992) 76 A Crim R 58; *Munda v State of WA* (2013) 249 CLR 600.

The CCA rejected the applicant’s submission that the judge erred by confining consideration of *Bugmy* and *Fernando* issues to the finding of special circumstances when these factors were relevant to the sentence as a whole.

The judge properly found that the applicant had suffered significant childhood deprivation which had contributed to offending, and that general and specific deterrence were entitled to significant weight: at [45]. The reference to *Munda* was sufficient to explain why although *Bugmy* factors may lessen the significance of general deterrence, they did not have that effect in this case. The judge took into account childhood deprivation (*Bugmy* and *Fernando* factors) in a number of respects: that it contributed to the offending conduct and when addressing general deterrence, specific deterrence, the need for rehabilitation, the risk of re-offending and special circumstances: at [42]–[44].

The submission implied that had *Bugmy* factors been taken into account on general deterrence, the judge would have regarded general deterrence as of lesser weight. Although childhood deprivation *may* lead to a reduction in moral culpability and *may* make the offender an unsuitable vehicle for general deterrence, it will not necessarily do so. *Bugmy* factors do not mitigate a sentence such that victims of domestic violence at the hands of offenders who themselves have suffered childhood deprivation are less worthy of protection. General deterrence is a signal to potential offenders but also maintains public confidence in the administration of justice: at [43]; *Munda* at [54]; *Markarian v The Queen* (2005) 228 CLR 357 at [82].

### ***Bugmy v The Queen - no evidence of causal link - no error failing to find moral culpability reduced***

#### ***DR v R* [\[2022\] NSWCCA 151](#)**

The CCA held the sentencing judge did not err by failing to find moral culpability reduced by deprived upbringing (*Bugmy v The Queen* (2013) 249 CLR 571) where the applicant’s psychiatrist did not express any opinion as to a causal nexus between deprived upbringing and offending. Applicant’s counsel had submitted to the sentencing judge that whilst disadvantaged upbringing did not reduce moral culpability, it remained a matter to be taken into account as part of the subjective case: at [38].

The CCA stated that the authorities establish that:

- (1) A causal link between disadvantaged background and offending will inevitably support a finding that moral culpability is reduced.



(2) Even where there is no such causal link, and thus no reduction in moral culpability, a disadvantaged background remains a factor which must be given full weight in the process of instinctive synthesis: at [37]; *Bugmy v The Queen*; *Dungay v R* [2020] NSWCCA 209.

The judge's conclusion that, in the absence of evidence of the necessary nexus between upbringing and offending, the *Bugmy* principles had no application was open and consistent with the authorities. Importantly, it is clear the judge took into account disadvantaged background as part of the instinctive synthesis: at [39]-[40].

***Sentencing judge accepted Bugmy principles enlivened but failed to give proper consideration***  
***Lloyd v R*** [\[2022\] NSWCCA 18](#)

The CCA allowed the applicant's appeal where the sentencing judge found the *Bugmy* principles were enlivened thereby accepting that a background of childhood deprivation was established on the evidence, but then failed to consider whether the applicant's deprived upbringing contributed to the cause of his offending or otherwise reduced moral culpability: at [48]. The judge did not discuss the effects of childhood deprivation, moral culpability and made no reference to the parts of the expert report of a mental health professional regarding impact of background. That report was not challenged by the prosecutor and had been accepted by the judge: at [36]-[48].

***Bugmy v The Queen properly applied - given psychiatric evidence, error in not reducing moral culpability in accordance with Muldrock v The Queen and DPP (Cth) v De La Rosa***

***Williams v R*** [\[2022\] NSWCCA 15](#)

The CCA allowed the applicant's appeal (rob in company) on the ground the sentencing judge failed to determine how the applicant's mental condition should be reflected in his sentence.

The judge properly applied *Bugmy* principles but - given the uncontested evidence of psychiatric disorders - erred by rejecting any diminution in moral culpability or reduction in sentence by the principles in *Muldrock* and *De La Rosa*: at [130]; *Muldrock* (2011) 244 CLR 120; *DPP v De La Rosa* (2010) 79 NSWLR 1. Even if the psychiatric conditions were not causative of offending, they were relevant to reducing the sentence (*Benitez v R* (2006) 160 A Crim R 166): at [131].

It is necessary to ensure that there is no double counting for the same factor. Often childhood deprivation will be the cause of the psychiatric disorder, but not always, and usually not wholly. Nevertheless, the deprivation to which *Bugmy* refers does not require or necessarily involve psychiatric disorder: at [131].

***Five judge bench - Crimes Act 1914 (Cth), s 16A(2)(p) - hardship to family and dependants must be taken into account - previous authorities stating hardship be "exceptional" are plainly wrong***  
***Totaan v R*** [\[2022\] NSWCCA 75](#)

Section 16A(2)(p) *Crimes Act* 1914 (Cth) provides that the court "must" take into account "the probable effect ... any sentence ... would have on any of the person's family or dependants."

Allowing the appeal, a five-judge bench held that the judge erred by failing to take the hardship to third parties into account at all because it was not of an 'exceptional' kind: at [36]-[38], [93].

Previous authority that any such hardship had to be "exceptional" before it could be taken into account was "plainly wrong" and should not be followed: at [77] (see *R v Sinclair* (1990) 51 A Crim R 418; *R v Togiias* [2001] NSWCCA 522; *R v Hinton* [2002] NSWCCA 405).

Section 16A(2)(p) should be applied according to its terms. There is no textual support for 'exceptional circumstances' to be shown before hardship may be taken into account in s 16A or the *Crimes Act* generally: at [78], [82], [93]; *DPP v Ip* [2005] ACTCA 24, *R v Zerafa* [2013] NSWCCA 222 at [139]-[141]; *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194 at [49]-[60] approved.

***Good character - not deliberately used to obtain trusted position for purpose of committing offences - school teacher – sexual intercourse with young person under special care***

***Fenner v R*** [\[2022\] NSWCCA 48](#): The CCA held the sentencing judge erred in not taking the applicant's good character into account in sentencing for sexual intercourse with young person under special care (s 73 *Crimes Act*). The applicant was a teacher of the 17 year old female student-complainant.

Note that as s 73 is not a 'child sexual offence' under s 21A(6) CSPA, that s 21A(5A) does not operate to prevent good character being taken into account.

On the appeal, the Crown sought to rely on *Stanton v R* [2017] NSWCCA 250 at [118]:

“...The fact that good character was a condition precedent to him holding the position of a school teacher with access to young children makes it difficult for the Applicant to rely in any meaningful way upon evidence of what is said to be his otherwise good character.”

The CCA distinguished the present case from *Stanton* on the basis that good character was put forward at the sentence hearing and 25 references showed that for 10 years the applicant had been a school teacher who demonstrated actual good character (*Ryan v The Queen* (2001) 206 CLR 267). This was not an offender who deliberately set out to use apparent good character to obtain a trusted position with the specific purpose of committing the offences: at [49]-[50].

'Good character' ought to have been taken into account under s 21A(3) and by reason of *Ryan v The Queen* (at [36]) which held that a judge is always bound to consider the 'otherwise good character' of the offender. In so doing the judge does not take into account the offences for which the offender is being sentenced, although weight given to good character will vary according to circumstances of the case: at [47]-[48]; *SD v R* (2013) 39 VR 487; *Wakim v R* [2016] VSCA 301.

The CCA reduced the applicant's term of imprisonment.

### 3. AGGRAVATING FACTORS

#### ***Applicant told victim not to tell anyone about sexual assault – words constituted a threat and therefore an aggravating factor***

***Baker v R*** [\[2022\] NSWCCA 195](#)

The CCA held the sentencing judge did not err in finding sexual assault offences aggravated by the applicant's "threats" that the victim not tell anybody what happened. On appeal, the applicant submitted it was not open to characterise his conduct as a "threat" since he did not express that failure to comply would have any consequence.

The CCA said that whether a form of words amounts to a threat depends not only on the words but on the surrounding circumstances. In the context of the sexual assault, the edict that the complainant not tell anyone, including her father and the police, is capable of being regarded as a threat that there would be consequences if she told anyone in authority. Because the applicant's conduct was criminal, the statement carried the implication of adverse consequences if he she told anyone. For a statement to amount to a threat, it is not necessary for precise consequences to be spelled out, or the words "or else" to be added. All that is necessary is that there be something to indicate that non-compliance will bring adverse consequences: at [59]-[61].

#### ***Unfair to have regard to ammunition as aggravating factor where no evidence ammunition could be used with firearm***

***Barnes v R*** [\[2022\] NSWCCA 40](#)

The applicant was sentenced for possess shortened firearm. The CCA held the sentencing judge erred by stating the firearm was not loaded but the offence was aggravated by "rounds of ammunition found with it" where there was no evidence the firearm was working and thus no basis to find the ammunition could be used with the weapon.

That the weapon was not loaded meant the offence was not as serious as the converse case. However, ammunition will ordinarily increase seriousness of the offending. Where the firearm was in possession of the police, and having regard to capacity of the police to test the item, there is particular unfairness in having regard to ammunition as an aggravating factor when there was no evidence the ammunition could be used with the firearm. The judge erred in taking this matter into account in a manner that elevated assessment of objective seriousness: at [59]-[60]; (see *Blatch v Archer* (1774) 1 Cowp 63 at 65; 98 ER 969 at 970; *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at [36]).

**Error to find previous conviction an aggravating factor in absence of reasoned explanation – whether previous conviction an aggravating factor (s 21A(2)(d)) or applicant an offender with no or no significant previous convictions (s 21A(3)(e))**

**Meis v R [2022] NSWCCA 118**

The applicant was sentenced for manufacturing drug and supplying the same drug. The sentencing judge treated as an aggravating factor under s 21A(2)(d) (previous convictions) a 10 year old drug supply conviction for which the applicant had received a good behaviour bond.

The CCA allowed the appeal. Although use of the previous conviction was not erroneous, the judge failed to give a reasoned explanation for treating the previous offence as an aggravating factor, particularly bearing in mind that s 21A(2)(d) is to be proved beyond reasonable doubt: at [47]-[48].

An issue arose as to whether the previous conviction was an aggravating factor under s 21A(2)(d) or whether the applicant was an offender with no, or no significant, previous convictions under s 21A(3)(e). A factual issue may therefore arise: is a record of previous convictions to be treated as significant?: at [30], [37], [47].

On resentencing, the CCA treated the applicant's criminal history as neutral: at [52]. The significance of the conviction must be assessed in the context of its relevance for present sentencing purposes. Even if the previous conviction is "not insignificant", s 21A(2)(d) construed in accordance with the principles in *Veen (No 2)* is inapplicable. A continuing attitude of disobedience of the law is established by the present manufacturing offence being committed over a period of time, not the previous conviction. Nor does the previous conviction illuminate moral culpability, show a dangerous propensity or need to impose punishment for the purposes of specific or general deterrence: at [51]; *Veen v The Queen (No 2)* (1988) 164 CLR 465.

This does not mean that s 21A(3)(e) applies. The applicant is not to be treated as having no (or no significant) record of previous convictions (in the sense that such a finding might point to a reduction in any sentence that otherwise would be imposed). Rather, his criminal history is to be treated as neutral: at [52].

***In company - s 21A(2)(e) - joint criminal enterprise did not form basis of applicant's liability, such that "company" was not an element of offending***

**R v Chandler [2022] NSWCCA 124**

The applicant pleaded guilty to discharge firearm with intent to cause grievous bodily harm (s 33A *Crimes Act*). He committed the offence with his co-offender who pleaded guilty to fire firearm in manner likely to injure (s 93G(1)(c)) on the basis of a joint criminal enterprise.

The CCA held the judge did not err in finding the applicant's offence aggravated by being committed "in company" pursuant to s 21A(2)(e) *CSPA*.

The applicant submitted both he and his co-offender were participating in a joint criminal enterprise to shoot and injure the victim, and the fact that the applicant was in company could not constitute an additional aggravating factor as it was integral to the offence (*Tabbah* [2019] NSWCCA 324): at [26].

However, unlike the co-offender (who lured the victim to a position where the applicant could shoot him), principles of joint criminal enterprise did not form the basis of the applicant's liability. He harboured animosity towards the victim, arranged the meeting where the victim was shot, brought the rifle and called out to the victim and shot him. It was open to find that his conduct was aggravated by being "in company" of his co-offender: at [27]-[28].

***Victim of offence a child – error to find offence aggravated because it occurred in 'presence of child' - s 21A(2)(ea) CSPA***

**Arvinthan v R [2022] NSWCCA 44**

The applicant was sentenced for aggravated BE and commit serious indictable offence, namely, sexual touching (s 112(2) *Crimes Act* 1900). The victim of the sexual touching was 17.

The judge erred in finding the offence aggravated by being committed in the 'presence of a child' under s 21A(2)(ea) *CSPA*. The purpose of s 21A(2)(ea) is to protect against the deleterious effects upon a child who is a witness to the crime, rather than the victim. That a person is a child may be a factor that increases moral culpability and, accordingly, objective seriousness: at [36]-[39].

**No error taking 'abuse of trust' into account for s 66C(2) offence (under authority) - s 21A(2)(k) CSPA**

**PC v R [2022] NSWCCA 107**

The applicant was sentenced for aggravated sexual intercourse of a child 10-14, his daughter, under s 66C(2) *Crimes Act*, the aggravating circumstance being the complainant was 'under authority' (s 61H(2)).

Section 21A(2)(k) CSPA provides that it is an aggravating factor if the offender abused a position of 'trust or authority.'

Section 21A(2) provides the court is not to have additional regard to an aggravating factor if it is an element of the offence.

The applicant submitted the sentencing judge erred in determining that the offences were aggravated by an 'abuse of trust' (s 21A(2)(k) CSPA) where an element of the s 66C(2) offence is that it occurred 'under authority'.

The CCA dismissed the appeal.

In a sexual assault of a child by a father, the position of authority will have been abused, but this does not make 'abuse of authority' an element of the offence in the strict sense. There is a distinction between 'abuse of authority' and 'abuse of trust'. The concepts are treated distinctly in s 21A(2)(k), although they will often overlap, hence caution is needed that a person is not punished twice: at [72]-[73]; *MRW v R* [2011] NSWCCA 260.

An abuse of trust is not prevented from being taken into account as an aggravating factor where under authority is an element of the offence. Each case will depend on the relationship between offender and child and circumstances of offending. "Abuse of trust" is not an element of s 66C(2) and is not precluded from being taken into account by s 21A(2): at [76].

The judge placed express emphasis on breach of trust and the particular circumstances of the daughter's age and innocence that aggravated the offending committed by the father in a position of authority: at [81]-[83].

**Offence committed on parole - s 21A(2)(j) CSPA**

**Ahmad v R [2022] NSWCCA 144**

The applicant was on parole at the time he committed offences for which he was sentenced. The CCA held the sentencing judge did not err in finding the offence aggravated by the applicant being 'on conditional liberty' (s 21A(2)(j) CSPA).

The CCA rejected the applicant's submission that he was 'unlawfully at large', under s 171(4) *Crimes (Administration of Sentences) Act* 1999 which provides that an offender's sentence is extended by the number of days they were at large after a parole revocation order took effect and before they were taken into custody (ss 171 (2), (4)). "At large" in s 171(4) is "simply a reference to the person not being in custody". Section 17(4) extends the term of a sentence prospectively, by reference to the number of days the offender was at large after the revocation order takes effect. It does not operate to alter, retrospectively, the status of the offender who is in the community on conditional liberty at a time before the revocation order is made: at [30]-[31].

**4. DISCOUNTS – PLEA OF GUILTY**

**ss 25E(2), (3) CSPA – early guilty pleas - discount where offer later accepted - manslaughter a 'different offence' not the subject of proceedings – 25% discount applied - re-sentence not required; mathematical correction sufficient**

**Black v R [2022] NSWCCA 17**

Section 25E CSPA provides for a discount where a guilty plea offer is made for a 'different offence' and refused.

Section 25E(2) provides, relevantly, that for an offer which is later accepted, a discount applies where:  
(a) the offender made an offer recorded in a negotiations document, and

(b) that offence (the *different offence*) was not the offence the subject of the proceedings when the offer was made.....

Section 25E(3)(a) provides that for an offer to plead guilty to a 'different offence', a 25% discount applies if made before the offender was committed for trial.

The applicant was charged with murder. He offered to plead guilty to manslaughter before committal. The offer was rejected but later accepted by the Crown during negotiations before trial.

The CCA held the sentencing judge erred in applying a 10% discount (s 25D(2)(b)(ii)) on the basis that, because manslaughter was identified in the charge certificate and the case conference certificate as an alternative to murder, it was 'the subject of the proceedings when the offer was made' (s 25E(2)(b)): at [26]-[27].

The CCA held the correct discount is 25% within s 25E(3)(a). Manslaughter was a "different offence" - it was 'not the offence the subject of the proceedings when the offer was made' within s 25E(2)(b). The 'offence the subject of the proceedings' was murder: at [31]-[36]; *R v Holmes (No 7)* [2021] NSWSC 570, followed.

The discounts in s 25E(3) are intended to operate as an incentive to offer realistic pleas of guilty. To deny a reduction because the alternative charge is specified in the charge certificate or case conference certificate would undermine that purpose and be potentially unfair. The legislation does not require alternatives be so specified. It is unlikely that the legislature intended that a prescribed reduction be dependent on whether the Crown chooses to so specify the alternatives: at [41]-[42].

#### Resentence not required; mathematical correction sufficient

The error can be addressed by simple mathematical correction. The error does not affect exercise of the sentencing discretion (*Kentwell v The Queen* (2014) 252 CLR 601; *Lehn v R* (2016) 93 NSWLR 205). No complaint was made by the parties of the approach by the sentencing judge or that the sentence, before discounting, was affected by error: at [53].

#### ***Utilitarian value of a guilty plea - requires separate consideration from remorse and willingness to facilitate course of justice***

##### ***Doyle v R* [2022] NSWCCA 81**

Section 25D provides for a mandatory sentencing discount for the "utilitarian value of a guilty plea."

The sentencing judge erred by dealing in a "rolled up way" the considerations of utilitarian value, remorse and willingness to facilitate the course of justice - attributing the s 25D discount to the applicant's "*acceptance of responsibility and... willingness to facilitate the course of justice*". Rather, the utilitarian value of the guilty plea alone entitled the applicant to a 25% discount, and acceptance of responsibility and willingness to facilitate the course of justice ought to have formed part of the process of instinctive synthesis: at [18].

The CSPA now explicitly differentiates between utilitarian value of a guilty plea (s 25D), remorse (a mitigating factor under 21A(3)(i)) and/or a willingness to facilitate the administration of justice (s 22A). The two latter considerations are to be taken into account separately from the utilitarian value of an early guilty plea: at [16]-[17].

#### ***Disputed facts, s 25F(4) CSPA – discount not reduced – care in exercise of discretion***

##### ***R v Burns (No 2)* [2022] NSWSC 140**

Section 25F(4) CSPA provides that the court may determine not to apply a sentencing discount because the utilitarian value of the plea of guilty has been eroded by a dispute as to facts that was not determined in favour of the offender.

In the contested facts hearing, the applicant failed to establish he stabbed the victim accidentally but did establish he armed himself with a smaller pocketknife and not a large hunting knife.

The Court did not consider it appropriate to reduce the discount in accordance with s 25F(4).

The Court observed that while there will be cases in which s 25F(4) has work to do, care must be taken not to exercise the discretion it confers to introduce unfairness or subvert the object of the EAGP scheme to reduce delays. A contested fact hearing will often produce a small delay compared with a

trial. If all contested fact hearings were taken too readily to erode utilitarian value of a plea of guilty, there would be a risk of eliminating incentive for some to plead guilty at all: at [38].

***Discount for guilty plea – ‘first day of the trial’ – vacated - non-attendance by offender – s 25C CSPA***

***Gurin v R*** [\[2022\] NSWCCA 193](#)

25C(1) CSPA provides that the ‘first day of the trial of an offender’ means the first day fixed for trial or, if that day is vacated, the next day fixed for the trial.

A 10% discount applies where the offender pleaded guilty at least 14 days before the first day of the trial: s 25D(2)(b)(i).

The applicant failed to appear on his adjourned trial date in accordance with his bail undertaking. The trial was aborted. He was re-arrested nine months later and entered a plea of guilty. No new date for trial had yet been fixed. The sentencing judge allowed a 5% discount in accordance with s 25D(2)(c).

On appeal, the applicant submitted the 10% discount under s 25D(2)(b)(i) should have applied.

The CCA dismissed the appeal. The term “vacated” within s 25C(1) means adjourned before the commencement of the trial, and is not applicable in circumstances where the trial was aborted because the applicant absconded: at [27], [32]; *R v A2*; *R v Magennis*; *R v Vaziri* (2019) 269 CLR 507.

Where the first day of trial is properly vacated, the clock is reset. Section 25C provides an offender another opportunity to enter a plea of guilty 14 days *before* the next day fixed for trial. But once a trial commences, the opportunity for a 10% reduction is lost. A plea of guilty entered after the commencement of a trial attracts the reduction of 5% (s 25D(2)(c)). This is so whether the trial is aborted before empanelment, the jury is discharged after empanelment, a new trial is necessary because the jury are unable to reach a verdict, or even after a successful conviction appeal to the CCA where a guilty verdict is set aside and a new trial directed: at [29].

***Fail to arrange timely entry of guilty plea – miscarriage of justice - strictly only 5% discount available – CCA must sentence afresh (cf. Black v R)***

***Green v R*** [\[2022\] NSWCCA 230](#)

The CCA found a miscarriage of justice where the applicant gave instructions to plead guilty well in advance of trial, but the District Court was only notified of the plea one day after the 14 day cut off for a larger sentencing discount and gave a 5% discount (s 25D(2)(c)).

The CCA found that a 10% discount is available only once the plea is entered or a formal notice is provided 14 days before the trial date (s 25C(2) CSPA). The applicant both at first instance and on appeal, is only entitled to the 5% discount under s 25D(2)(c): at [45]-[48].

Accordingly, the CCA could not remedy the miscarriage by simply increasing the level of discount and was required to sentence afresh. This case is to be distinguished from cases where the mathematical error has been corrected without re-exercising the sentencing discretion (cf. ***Black v R*** [\[2022\] NSWCCA 17](#)). The sentencing Judge may have taken a different approach to relevant sentencing consideration had he known of the applicant’s earlier instructions to plead guilty. Further, evidence tendered “on the usual basis” was significant in the re-sentencing exercise: at [49]-[61].

***Magistrate erred in not ascertaining whether plaintiff pleading guilty - s 95(4) Criminal Procedure Act 1986 - potentially deprived plaintiff of 25% discount for an early plea of guilty***

***Coles v DPP*** [\[2022\] NSWSC 960](#)

The Court held that the Local Court Magistrate erred in not ascertaining whether the plaintiff was pleading guilty to the offences - as mandated by s 95(4) *Criminal Procedure Act 1986* - before committing the plaintiff to trial.

Committal for trial to the District Court impacts upon the sentencing discount available. Failure to undertake the inquiry under s 95(4) *Criminal Procedure Act* potentially deprived the plaintiff of a 25% discount for an early plea of guilty, as the discount available is mandatorily reduced by s 25D(2)(b) CSPA once the matter is committed to the District Court for trial: at [26]-[29].

## 5. DISCOUNTS – ASSISTANCE TO AUTHORITIES

### ***Meaning of ‘undertaking to assist’ - absence of a concluded agreement - s 23 CSPA - fail to specify discount within s 23(4)***

*Vaiusu v R* [2022] NSWCCA 283

#### Meaning of ‘undertaking to assist’

The CCA considered whether there was an ‘undertaking to assist’ authorities within s 23 CSPA. The applicant, sentenced for possess firearms and other offences, stated he was only in possession of items for the purposes of surrendering them to police in exchange for favourable treatment to his brother in custody. The sentencing judge found that there was no undertaking as there was no concluded arrangement or agreement between the applicant and police for the handover of anything.

The CCA held the judge was correct to find that in the absence of a concluded agreement the applicant was not entitled to a discount for assistance. What is required is an inference that the applicant had unequivocally indicated his intention to surrender items to police. There was never any suggestion of an unconditional surrender. Rather, surrender was contingent on resolution of negotiations acceptable to the applicant. While an undertaking may not be an agreement, the applicant sought an agreement as a contingency for the making of any undertaking. Even on a broad view of the meaning of “undertaken to assist” in s 23, the applicant had not undertaken to assist authorities: at [67]-[68].

#### Failure to specify discount within s 23(4) CSPA

The sentencing judge did give a discount for other assistance but failed to specify the discount in accordance with s 23(4) CSPA. The judge indicated that the matter had been taken into account, but there is a lack of transparency as to the significance given to what matters impacted on the discount, and quantum of any discount: at [85]; *CC v R*; *R v CC* (2021) 289 A Crim R 453, distinguished.

The CCA dismissed the appeal as no lesser sentence was warranted.

### ***Assistance to authorities – Ellis discount – insufficient discount applied***

*McKinley v R* [2022] NSWCCA 14

Section 23 CSPA 1999 provides for the power to reduce penalties for assistance to authorities. *R v Ellis* (1986) 6 NSWLR 603 (the *Ellis* discount) recognised that voluntary disclosure of unknown guilt merits “a significant added element of leniency” and falls within the scope of s 23 (see *CMB v The Attorney General of NSW* (2015) 256 CLR 346).

The applicant pleaded guilty to armed robbery and four other offences. When arrested for unrelated matters, the applicant disclosed his involvement in four out of the five offences in a police interview.

The CCA allowed the appeal. The judge erred in applying a 40% combined discount for the early pleas of guilty and assistance relating to four offences, and a 35% combined discount for the remaining offence. The CCA applied a 55% combined discount.

The judge applied a discount for the plea of guilty and assistance to authorities more in line with the usual assistance provided from time to time, not the rare circumstances associated with the *Ellis* discount. Insufficient discount was provided, particularly as law enforcement agencies assessed the assistance as of high value, and was in relation to offences which law enforcement agencies investigating but were unaware of the applicant’s involvement: at [61]-[62].

In the past, when a more arithmetic and prescriptive approach was taken to the sentencing discretion, it had been held that percentages for plea of guilty and assistance ought not ordinarily exceed 40%; and it would be a rare case where more than a 60% discount would not result in a manifestly inadequate sentence (*SZ v R* [2007] NSWCCA 19; *FS v R* [2009] NSWCCA 301.) This view probably does not withstand later authority criticising an arithmetic approach to sentencing (*Hili & Jones v The Queen* (2010) 242 CLR 520). This is not to suggest that too great a discount for assistance should be given such that the sentence is unreasonably disproportionate to the offence and offender. The determination of reduction for assistance pursuant to s 23 depends on assessment of the mandatory considerations in s 23(2): at [48]-[50].

## 6. PARTICULAR OFFENCES

### ***Wounding with intent to cause grievous bodily harm - Finding that injuries amounted to grievous bodily harm did not breach The Queen v De Simoni (1981) 147 CLR 383***

#### ***Maybury v R*** [\[2022\] NSWCCA 233](#)

The applicant was originally charged with causing grievous bodily harm with intent to cause grievous bodily harm (s 33(1)(b) *Crimes Act*). This charge was not proceeded with and the applicant was convicted by a jury of wound with intent to cause grievous bodily harm (s 33(1)(a)).

The CCA held that, in sentencing for the s 33(1)(a) offence, the sentencing judge did not breach the *De Simoni* principle by finding the victim's injuries amounted to grievous bodily harm. The sentencing judge's finding that "the nature and extent of the injuries clearly amount[ed] to grievous bodily harm" did not mean that the applicant was erroneously sentenced for s 33(1)(b): at [123].

The seriousness of an offence of wounding with intent to cause grievous bodily harm will depend upon the nature and extent of the wounding and related injuries, the manner and intention with which the wounding was inflicted and other circumstances surrounding the wounding. The sentencing judge was required to make findings of fact on those matters, provided they were consistent with the jury's verdict and, if findings against the offender, established beyond reasonable doubt. The sentencing judge's findings were consistent with the jury's verdict and open on the evidence: at [130]-[134].

### ***Use offensive weapon to avoid lawful apprehension, s 33B Crimes Act – no error to find offending aggravated by fact that victims were police officers***

#### ***Courtney v R*** [\[2022\] NSWCCA 223](#)

The CCA held that for an offence of use offensive weapon with intent to prevent lawful apprehension pursuant to s 33B *Crimes Act*, the sentencing judge did not double count by taking into account that the offence involved a police officer.

In enacting s 33B, Parliament did not intend to specifically protect the police: at [44]; authorities cited.

Conduct covered by s 33B is the use of an offensive weapon to avoid apprehension or detention. The exercise of the power to apprehend or detain is not limited to police officers. A person can be lawfully apprehended or detained by a range of persons other than police: at [51]-[52], [56]; *Sharpe v R* [2006] NSWCCA 255.

That the offending involved police officers was not an inherent characteristic of s 33B: at [57]; *R v Yildiz* [2006] NSWCCA 97.

### ***Manslaughter on basis of excessive self-defence - events leading up to confrontation not relevant to assessment of the objective seriousness***

#### ***Newburn v R*** [\[2022\] NSWCCA 139](#)

The CCA allowed the applicant's appeal against sentence for manslaughter on the basis of excessive self-defence.

Section 421(1) *Crimes Act* applies if the person's conduct is not a reasonable response in the circumstances as they perceive them, but the person believes the conduct is necessary to defend themselves or another person.

After an earlier altercation, the deceased approached the applicant's house with a broken golf club making threats. The applicant stabbed the deceased. The sentencing judge found the applicant's response to the threat he perceived "very significantly exceeded a reasonable response".

The CCA held the judge erred in consideration of objective criminality. The events which led to the confrontation were relevant only insofar as they provided context to the actual offence. By contrast, those events formed the basis of the judge's assessment of the seriousness of the offending as "objectively grave": at [40]-[41]; *Patel v R* [2019] NSWCCA 170.

The unchallenged evidence was that when the deceased returned to the house, the applicant was afraid he and the householder would be hurt. In that state of mind, he took the weapon and a fight ensued. Having regard to medical and behavioural issues and drug addiction, his emotional deficits made it likely he was more sensitive to the real or perceived threats and had a diminished capacity to think of alternative courses of action. Having regard to the fear he felt and the perceived threat and,



that the Judge found the intention was not to kill but to cause grievous bodily harm, it was not open to find that the response was one which “*very significantly exceeded a reasonable response*”: at [43]-[47].

#### Sentencing principles for manslaughter by excessive self-defence

The CCA summarised relevant principles:

1. Manslaughter based on a finding of excessive self-defence carries the implication that the offender perceived it was necessary that they act in order to defend themselves: *Smith v R* [2015] NSWCCA 193 at [44]; *Patel v R* [2019] NSWCCA 170 at [14];
2. Central to the sentencing exercise is the identification of:
  1. the circumstances as the offender (rightly or wrongly) perceived them to be; and
  2. what, precisely, the conduct was that the offender believed was necessary in order to defend themselves: *Smith* at [44]-[45]; *Patel* at [14];
3. The offender’s perception of the circumstances is relevant to the determination of what they believed was necessary: s 421(1)(c) *Crimes Act* 1900; *Smith* at [45];
4. An offender’s perception is also integral to reasonableness of their conduct: s 421(1)(b) *Crimes Act*; *Smith* at [45], [56], [58];
5. Both questions are assessed by reference to the offender’s subjective perception regardless of whether that was objectively reasonable, taking into account any intoxication: *Smith* at [45]; and
6. The anterior conduct of the offender, including reasons for attendance at the scene of the crime and for entering into a confrontation, forms no part of the actual offence and is not directly relevant to the assessment of the gravity of the offending: *Patel* at [14].

#### ***Commonwealth child sex offender rehabilitation – failure to refer to mandatory considerations in s 16A(2AAA), Crimes Act 1914 (Cth)***

##### ***Darke v R* [2022] NSWCCA 52**

Section 16A(2AAA) *Crimes Act* (Cth) provides that in determining the sentence for a Commonwealth child sex offence the court *must* have regard to the objective of rehabilitating the person considering:

- (a) when making an order – to impose any conditions about rehabilitation or treatment options;
- (b) in determining the length of any sentence or non-parole period – to include sufficient time to undertake a rehabilitation program.

The CCA allowed the applicant’s sentence appeal for procuring a child to engage in sexual activity outside Australia (*Criminal Code* (Cth), s 272.14(1)). The judge erred in failing to take into account the mandatory consideration in s 16A(2AAA), making no reference to s 16A(2AAA) and there being nothing in remarks on sentence to suggest rehabilitation and such conditions was considered: at [35].

The applicant’s original sentence was 3 years imprisonment, with conditional release after 2 years, to be of good behaviour for 3 years.

The CCA resented to 3 years imprisonment with release on 1 year recognisance after 2 years. Given the applicant was not provided with any custody-based programs, and lack of clarity as to success of past counselling in terms of rehabilitation, rehabilitation is furthered by conditions to undertake programs to assist in addressing offending behaviour and alcohol misuse. Conditions included to undertake treatment or rehabilitation including psychological counselling, EQUIPS (Addiction) or similar program and specific sex offender treatment programs: at [70]-[73].

#### ***Import border-controlled drug - recklessness – applicant “turned his mind” to possibility he was importing drugs – ss 5.4, 307.1(1) Criminal Code (Cth)***

##### ***Kemal v R* [2022] NSWCCA 83**

The CCA dismissed the applicant’s appeal against sentence for importing a border-controlled drug (methamphetamine) contrary to s 307.1(1) *Criminal Code* (Cth).

It was accepted at sentence that the applicant acted recklessly. Section 5.4(1)(a) *Criminal Code* (Cth) defines recklessness as a person being aware of a substantial risk the substance was a border-controlled drug, and that, having regard to the circumstances known to him, it was unjustifiable to take the risk.

At sentence, the applicant gave evidence that he was told the suitcase he was bringing into Australia contained concealed documents and money and, while he wanted to believe this, he thought there “could” be drugs inside it.

The CCA held the judge did not misapply the test for recklessness by stating the evidence established the applicant had “turned his mind” to the possibility he was carrying a border-controlled drug but went ahead. The applicant’s plea of guilty constituted an admission to all elements of the offence, including that he had acted recklessly according to the Code definition: at [10], [60]. The judge was required to assess criminality, and level of recklessness. The judge was paraphrasing, for the purposes of her assessment of criminality, what the applicant had said about his state of mind: at [62]-[63].

Simpson AJA: Where recklessness was admitted by the guilty plea, and a given, the judge was not required to determine whether the applicant was reckless (and thus to apply a “test for recklessness”). The judge’s task was to determine, for the purposes of the assessment of objective gravity, the degree of recklessness in the applicant’s conduct: at [10]-[11].

### ***Maintain unlawful sexual relationship with child - s 66EA Crimes Act - fact finding by sentencing judge after jury verdict***

#### ***R v RB [2022] NSWCCA 142***

The CCA allowed the Crown appeal against sentence for an offence of persistent sexual abuse of a child under s 66EA *Crimes Act* (in force from 1 December 2018).

The CCA held that the sentencing judge erred in determining the respondent should be sentenced on the basis of the two least serious (i.e. the most favourable) unlawful sexual acts, applying *Chiro v The Queen* (2017) 260 CLR 425. *Chiro* is inapplicable to s 66EA. (*Chiro* held, under the then South Australian provision, that the jury must reach unanimity as to the same two or more sexual acts and that it could be taken from a guilty verdict that two or more such acts were the subject of findings made unanimously): at [42], [78].

Section 66EA provides, relevantly:

- An unlawful sexual relationship is defined as a “a relationship in which an adult engages in 2 or more unlawful sexual acts with or towards a child over any period”: s 66EA(2).
- The prosecution is not required to allege the particulars of any unlawful sexual act that would be necessary if the act were charged as a separate offence, but must “allege the particulars of the period of time over which the unlawful sexual relationship existed”: s 66EA(4).
- The jury must be satisfied beyond reasonable doubt that the evidence establishes an unlawful sexual relationship existed but “is not required to be satisfied of the particulars of any unlawful sexual act ...”: s 66EA(5).

The CCA held that s 66EA does not require the jury to find unanimously that the same unlawful sexual acts took place to constitute the maintained relationship. All jurors had to be individually satisfied that at least two acts had been committed but did not have to agree upon which acts those were (s 66EA(5)(c)). The guilty verdict on s 66EA does not reflect a unanimous finding upon any of the large number of unlawful sexual acts particularised, or any findings that any one of the alleged acts was committed: at [42]-[45].

Section 66EA requires a jury would have to be satisfied that (at [62]-[63]):

- for some duration the accused committed multiple unlawful sexual acts with a degree of continuity and habituality as to constitute an ongoing association or connection with respect to sexual activity: at [62]; *R v CAZ* [2011] QCA 231.
- the accused maintained the relationship, inferred from the inherent nature of adult sexual activity with a child, the recurrence of sexual acts and from the imbalance of influence.

#### Sentencing judge’s task

As the jury needs to be only unanimous as to the maintenance of a sexual relationship, and not any specific sexual acts, there has been no determination of the facts of what the offender is to be punished for. A sentencing judge must decide where the case stands on a scale up to the worst category. A judge will be required to determine the facts of the offending, applying the principles in *The Queen v Olbrich* (1999) 199 CLR 270, *Cheung v The Queen* (2001) 209 CLR 1 and *R v Isaacs* (1997) 41 NSWLR 374: at [66], [72].

The CCA observed that s 66EA leaves everything of substance to be decided by judge alone at sentence. The only prerequisite is a guilty verdict that is obscure as to scope of the wrongful conduct that constituted the relationship and lacking unanimous jury acceptance of even one or two specific alleged acts: at [77].

The present case does not demonstrate any practical utility in the laying of a charge under s 66EA. It illustrates how the section has worked a less than transparent shift of decision-making, on very significant questions of criminal culpability, from jury to judge: at [75].

The matter was remitted to the District Court for sentence.

### ***Extent to which undercover operation and role of an undercover operative operate to reduce culpability***

#### ***Ibrahim v R*** [\[2022\] NSWCCA 161](#)

The applicant was sentenced for Commonwealth offences involving tobacco importation and conspiracy to import MDMA.

The sentencing judge found that the applicant would not have committed the offences without the undercover operative (UCO); and that culpability was diminished but “*not substantially*” because, although there was a degree of encouragement and enticement by the UCO, no coercion or pressure was applied. The applicant was not a reluctant or unwilling participant: at [44], [54]-[58], [65].

The CCA held the judge did not err in his findings.

To challenge a sentencing judge’s assessment of culpability, it is necessary to point to an error in the *House v The King* sense. Assessment of culpability is part of the instinctive synthesis. There are inherent problems with a ground that can only challenge the weight given to culpability: at [45]-[47], [49]; authorities cited.

The applicant sought to identify specific error by asserting that the judge created a dichotomy between coercive and non-coercive behaviour, and that the conclusion that diminution was not substantial derives from the finding of non-coercive behaviour: at [46].

The judge had been assisted by *Haval Kada* [2017] VSCA 339. The Victorian Court of Appeal did not consider there is any dichotomy between coercive behaviour and encouragement or inducement. Rather, there was a “spectrum along which that impact is to be assessed”. Coercion or pressure would be an additional factor, but the authorities do not require pressure or coercion for the principles associated with police involvement to apply. The judge did not adopt a different approach by creating the asserted dichotomy: at [59], [61]-[64]; *Haval Kada*, applied.

The finding that diminution was “not substantial” was open on the judge’s analysis of the applicant’s involvement and relationship with the UCO: at [53], [61]-[63]. (The CCA allowed the appeal on the ground of manifest excess).

## **7. APPEALS**

### ***Fresh evidence – applicant with mental health issues refused lawyers to access medical records***

#### ***Barnes v R*** [\[2022\] NSWCCA 140](#)

The CCA allowed the applicant’s sentence appeal (strangling being reckless, s 37(1) *Crimes Act*) where the applicant, who had mental health issues, had not allowed his lawyers to access his Justice Health records and a psychiatric report stating he was assaulted in custody. The sentencing judge concluded that a custodial sentence would not weigh more heavily as a result of his mental health.

The CCA held the circumstances were exceptional for the evidence to be admissible as fresh evidence. The judge’s conclusion could not have been reached if the medical evidence had been admitted. “Unique psychological factors” and unusual circumstances led the applicant to refuse access to the health records. No deliberate or forensic decision was made not to review and use the health records. Evidence of a similar nature has been admitted in previous cases: at [44].

Contrary to the judge’s findings, the applicant’s experience in custody is more onerous than inmates without such mental illnesses (schizoaffective/schizophrenic illnesses). The sentence proceedings miscarried and a less severe sentence is warranted: at [70]-[73].

## CONVICTION AND OTHER APPEALS

### 1. EVIDENCE

#### ***Evidence Amendment (Tendency and Coincidence) Act 2020 – Transitional provisions***

The *Evidence Amendment (Tendency and Coincidence) Act 2020* commenced on 1 July 2020. The amending Act made the test for admissibility for tendency evidence *less* stringent under new ss 97 and 101 *Evidence Act 1995*.

The transitional provisions in cl 28, Schedule 2, *Evidence Act*, provide that the amendments do not apply to “*proceedings the hearing of which began before the commencement of the amendment*”.

#### ***Bektasovski v R* [2022] NSWCCA 246**

The CCA held that “*proceedings the hearing of which began before the commencement of the amendment*” refers to proceedings on indictment from the time an accused is first arraigned in the court which goes on to hear the substantive trial of the accused: at [51]; *Stephens v The Queen* [2022] HCA 31; *R v Adamcik* (NSWCCA, 22.11.1996, unreported).

The Crown had argued the hearing of the proceedings began when the trial commenced on 18 January 2021, when the applicant was arraigned for a second time, so that the amended s 101 applies.

However, the CCA accepted the applicant’s argument that the hearing of the proceedings commenced when first arraigned on 16 March 2020, thus the previous version of s 101 applied: at [40].

#### ***JW v R* [2022] NSWCCA 206**

The 2020 amending Act commenced after the appellant had been committed for trial but before the commencement of his ‘special hearing’ under the *Mental Health (Forensic Provisions) Act 1990* (NSW) (repealed).

The CCA held that the 2020 amending Act applied.

- Where application of the transitional provisions is in issue, it will be necessary to identify the relevant “hearing” of the proceedings, and to determine when it began: at [54]; *GG v R* (2010) 79 NSWLR 194.
- The “special hearing” (s 19 *MHFPA 1990*) is the relevant “hearing”. At the time of the commencement of the 2020 amending Act, the special hearing had not yet begun. Thus the 2020 amendments applied: at [60]; *GG v R* (2010) 79 NSWLR 194; other authorities cited.

The appeal was dismissed as the error was favourable to the applicant and did not give rise to a “substantial miscarriage of justice”: at [61]; s 6(1) *Criminal Appeal Act*.

#### ***Interpreter’s evidence that “male voice” in phone conversations was the same voice – “ad hoc” expert opinion evidence - s 79 Evidence Act 1995***

#### ***Ali v R* [2022] NSWCCA 199**

An interpreter’s evidence that a “male voice”, spoken in Hindi on intercepted phone conversations, was *the same voice* was admissible as expert opinion evidence (s 79 *Evidence Act 1995*). It was the Crown case that the “male voice” belonged to the accused.

The evidence was admissible as that of a “ad hoc” expert. The CCA emphasised aspects of the interpreter’s unchallenged evidence:

- particular familiarity with the Hindi language, in which the calls were made
- reliance on pitch, tone and accent specific to the Hindi language
- the interpreter’s highly specialised evidence taking into account volume, pitch and modulation, accent and speed of speech: at [53]-[56]; *R v Leung* (1999) 47 NSWLR 405.

It is not the case that the interpreter was in no better position than the jury to make her determination - she was familiar with the language to a sufficient degree to bring a greater understanding to voice comparison than a person without that skill. Not being qualified or formally trained in voice recognition is not to the point: at [57]; *R v Leung*.

The trial judge also gave a lengthy direction on identification evidence, including suggestions of shortcomings in the interpreter's evidence, and the jury being told the interpreter was "no more or less qualified" than the jury to express an opinion as to whether the male voice was the same: at [59].

That the evidence was admitted without objection infers absence of any objection was a deliberate forensic decision by trial counsel: at [58].

***'Opinion' evidence - expert evidence on behavioural responses of child sexual abuse victims - conclusions drawn from research by others - ss 79, 109C Evidence Act 1995***

***Aziz (a pseudonym) v R*** [\[2022\] NSWCCA 76](#)

The applicant was convicted of child sexual assault offences. The CCA (Simpson AJA; Lonergan J agreeing; Adamson J declining to express a view and refusing leave to appeal) held there was no miscarriage of justice by the admission of expert evidence led by the Crown, without objection, from Dr Rita Shackel regarding behavioural responses of child sexual abuse victims.

Dr Shackel has qualifications in law and psychology, and expertise on trauma responses of children to sexual assault. Her evidence was based on her report containing her assertions supported by referencing articles or research by others, not her own clinical research.

The CCA held that in the circumstances of this case, Dr Shackel's evidence met the requirements of ss 79(1) and 108C(1) *Evidence Act 1995* as opinion evidence based wholly or substantially on her specialised knowledge based on her training, study or experience. Each assertion is an 'opinion', being a conclusion or an inference drawn from "observed and communicable data". The essence of "specialised knowledge based on ... training, study or experience" is that it draws on accumulated sources of information and the product of others' research recorded in professional publications: at [64]-[72], [79]; authorities cited.

This does not mean Dr Shackel's evidence will meet the admissibility test in every case. Seeking a ruling on admissibility of evidence by reference to a 57-page report places a trial judge in an impossible position. If not done by the parties, it would be wise that a judge require the Crown to identify parts for which it seeks to adduce oral evidence: at [93]-[94].

***Expert not qualified to give evidence of the behaviour of child sex offenders generally - ss 79, 109C Evidence Act 1995***

***Decision Restricted*** [\[2022\] NSWCCA 136](#)

The CCA held that evidence by the prosecution "expert" with tertiary qualifications in psychology and law about "patterns of offending behaviour" by perpetrators of child sexual assault should not have been admitted as opinion evidence pursuant to ss 79(1) and 108C(1) *Evidence Act 1995*.

Based on review of various studies, the expert gave evidence as to what the "research" indicated was the typical response of child victims to sexual assault. The expert also gave evidence that child sexual abuse "often occurs" in a "brazen" setting.

The CCA held the expert was qualified by reason of her study to give evidence of responses of child victims but was not qualified to give evidence of the behaviour of child sex offenders generally.

***Interlocutory appeal by DPP - exclusion of parts of ERISP - accused had lack of memory due to cognitive impairment from alcohol consumption – s 90 Evidence Act***

***DPP (NSW) v Sullivan*** [\[2022\] NSWCCA 183](#)

The CCA allowed, in part, the DPP interlocutory appeal against the trial judge's exclusion of parts of the accused's ERISP and entire walkthrough pursuant to s 90 *Evidence Act 1995*.

The respondent was charged with manslaughter. The trial judge ruled it would be unfair to allow the Crown to use parts of the respondent's ERISP as admissions because, due to cognitive impairment from alcohol consumption on the evening of his alleged fight with the deceased, the respondent was "not fully capable of recalling everything at the time of the ERISP". The trial judge also excluded the walkthrough in its entirety.

The CCA held the judge did not err in excluding parts of the ERISP, however, set aside the order regarding the walkthrough and remitted for determination admissibility of the walkthrough.

## Parts of ERISP

It was open to the trial judge pursuant to s 90 to conclude that, having regard to the circumstances in which the admission was made, it would be unfair to the respondent to “use” the evidence of his admissions. The respondent’s answers were unreliable because the respondent was only hypothesising about certain aspects of his alleged fight with the deceased. The unfairness arises from the combination of an actual finding of a lack of recollection, an indication by the respondent during the ERISP of that lack of recollection, and the use which the prosecution sought to make of the admission: at [49]-[54].

## The walkthrough

The trial judge did not address s 90 which was the principal basis of the respondent’s application. Exclusion of the entire walkthrough was inconsistent with exclusion of parts of the ERISP: at [63]-[65].

## ***Tendency direction – cross-admissibility – error to group all alleged tendency together in relation to both complainants***

### ***Kanbut v R*** [\[2022\] NSWCCA 259](#)

The CCA allowed the applicant’s conviction appeal against four Commonwealth slavery offences (s 270.3(1)(a) *Criminal Code*) and money laundering, involving two Thai nationals, X and Y. A retrial was ordered.

The trial judge’s tendency directions were erroneous. The direction identified every particular of the conduct of the applicant said to satisfy the definition of slavery and the four slavery offences in relation to both complainants and no other conduct. It grouped the various particulars of conduct together in relation to both complainants: at [61]-[63].

For example, the direction stated that there was evidence that “the accused required [X] and [Y] to work at various brothels for long hours on most days of the week” and that this could show the “accused ha[d] a tendency to act in a particular way, namely... to require [X] and [Y] to work at various brothels in Sydney for long hours on most days of the week”. The judge stated that “[i]f you find that none of the acts occurred then you must put aside any suggestion that the accused had the tendency advanced by the Crown.”

A proper tendency direction in a case such as this enables the jury to utilise its acceptance of the evidence of one of the complainants to accept the evidence of the other. But by grouping the conduct engaged in against X and Y together and then formulating the alleged tendency in a manner specific to both, the direction wholly failed to achieve that purpose: at [65].

The tendency direction was misleading. It meant that, unless the jury were satisfied of each of the precise acts relied on in relation to both complainants, then they could not be satisfied that the corresponding tendency has been established. If the jury could not find that any of those acts occurred, they would not just dismiss tendency reasoning, they were obliged to find the applicant not guilty: at [66]-[68].

Other statements by the judge were confusing: see at [69]-[71].

The tendency direction gave rise to a miscarriage of justice. The tendency direction failed to give the jury a pathway of reasoning from accepting the evidence of one of the complainants to accepting the other; and was capable of misleading the jury about what use could be made of their evidence and otherwise most likely confused as to tendency reasoning. There is the very real possibility that it affected the jury’s acceptance of the complainants’ evidence: at [76].

## ***Tendency – direction that cross-admissible charged acts need not be proved beyond reasonable doubt before use as tendency evidence – s 161A Criminal Procedure Act 1986***

### ***JS v R*** [\[2022\] NSWCCA 145](#)

The CCA dismissed the applicant’s appeal against convictions on two counts of sexual intercourse with a single complainant, his nephew, aged 4 – 6 years.

The Crown adduced as tendency evidence:

- each charged act in support of the other charged act (cross-admissibility); and
- an uncharged act of sexual touching against the complainant.

The trial judge directed the jury that they did not need to be satisfied beyond reasonable doubt as to each of the three items of tendency evidence before being entitled to take it into account in determining whether, with respect to each count, they were satisfied beyond reasonable doubt of guilt: at [35].

The CCA held that the jury was properly directed on the use of the charged and uncharged acts as tendency evidence: at [50]-[51].

A jury should not ordinarily be directed that, before they may act on evidence of *uncharged* acts, they must be satisfied of the proof of the uncharged acts beyond reasonable doubt (*The Queen v Bauer* (2018) 266 CLR 56 at [86]). In principle, the same reasoning applies to cross-admissible evidence of charged acts: at [36]-[39].

However, as such a direction could undermine general directions concerning proof beyond reasonable doubt in respect of each charge, the judge should stress that the jury cannot find the accused guilty of any charged offence unless satisfied of guilt for that offence beyond reasonable doubt (*Bauer* at [86]). To similar effect, such a direction may be necessary in relation to cross-admissible charged acts: at [40]-[42].

The proper approach is to have regard to all evidence relied on in proof of the tendency as evidence of the tendency alleged. To the extent a jury is satisfied of the existence of the tendency, the tendency may be relied on in proof of the charge. Thus, it is preferable not to direct a jury to make findings as to the conduct relied on in proof of a charge. Rather the jury should be directed with respect to finding the alleged tendency: at [43].

#### s 161A Criminal Procedure Act 1986

Section 161A *Criminal Procedure Act* 1986 now provides that a jury must not be directed that evidence needs to be proved beyond reasonable doubt to the extent it is adduced as tendency evidence or coincidence evidence. Although this provision was not referred to at trial, the direction given by the judge conformed with s 161A: at [146].

#### ***Child sexual assault complainant – unfavourable witness – error to admit complainant’s statement – silence or unresponsiveness insufficient to establish denial or failure to agree or admit to substance of evidence, s 106 Evidence Act – witness not “unavailable” where “all reasonable steps” not taken by the Crown Prosecutor to compel witness to give evidence, s 65 Evidence Act***

#### ***RC v R* [2022] NSWCCA 281**

The applicant was convicted of sexual assault offences against his nieces and nephews.

The CCA held the trial judge erred in admitting the police statement of complainant CG under s 106 *Evidence Act* as a prior inconsistent statement and under s 65 on the basis CG was an “unavailable witness” because CG was silent or unresponsive when questioned by the Crown as an unfavourable witness (s 38). The CCA quashed the applicant’s convictions and ordered a new trial.

#### Section 106 – exception to credibility rule

Section 106(1)(a) provides an exception to the credibility rule if in cross-examination

- (i) the substance of the evidence was put to the witness, and
- (ii) the witness denied, or did not admit or agree to, the substance of the evidence.

Section 106(1)(a)(i) requires the substance of the evidence to be put to the witness in cross-examination. Although portions of the statement were read to CG, certain crucial parts of it were not put to CG at all: at [61].

Regarding s 106(1)(a)(ii), it is not accepted that CG denied, or did not admit or agree to, the substance of the evidence in respect of the alleged sexual misconduct. CG remained silent or became argumentative when contents of the statement relating to the sexual allegations were put to her. CG did not deny the contents of the statement insofar as the contents dealt with the specific allegations, did not give an inconsistent account, nor say that she could not remember. CG gave no account at all in the trial about the specific alleged acts. It cannot be inferred that CG, by her silence or unresponsiveness, was denying, or failing to admit or agree to, the substance of the evidence. The only proper inference was that she was reluctant to give evidence because she wanted to re-establish contact with family and feared giving evidence would strain relationships: at [84]-[104]; *Col v R* [2013] NSWCCA 302; *Lee v The Queen* (1998) 195 CLR 594; *R v Rose* [2002] NSWCCA 455 considered.

### s 65 – exception to hearsay rule

CG's statement was not admissible under s 65 because she was not an "unavailable witness". A person is taken not to be available to give evidence about a fact if "all reasonable steps" have been taken by the party seeking to prove the person is not available to compel the person to give the evidence, but without success (see pt 2, cl 4(g) *Evidence Act*): at [108]. There was no evidence as to the steps taken by the Crown Prosecutor to compel CG to give evidence. The mere fact that a witness refuses to answer questions, without more, will not always satisfy the requirements of cl 4(g). While attempts had been made to cross-examine CG, there was no evidence of attempts to talk to CG about her concerns in the luncheon adjournment, to warn CG of the risk that she may become subject to contempt proceedings, or to give opportunity to speak to a Witness Assistance Officer: at [105]-[120].

### ***Prior sexual activity /experience - s 293 Criminal Procedure Act 1986 (now s 294CB)***

Section 293(3) provided that evidence that discloses or implies (a) that the complainant has or may have had sexual experience or a lack of sexual experience, or (b) has or may have taken part or not taken part in any sexual activity, is inadmissible.

Section 293(3) does not apply if, inter alia, the evidence:

- is of sexual experience or sexual activity, or lack thereof, at or about the time of the commission of the alleged sexual offence (s 293(4)(a)(i)); and is of events alleged to form part of a connected set of circumstances in which the alleged sexual offence was committed (s 293(4)(a)(ii)); or
- if the relevant evidence relates to a relationship that was existing or recent at the time of the offence, being a relationship between the accused and complainant (s 293(4)(b)).

### ***Elsworth v R [2022] NSWCCA 275: No error in refusal to allow evidence of prior sexual activity five years earlier***

The CCA upheld the trial judge's decision refusing the applicant's application to admit evidence regarding the complainant's "prior sexual activity /experience" five years earlier.

The applicant sought to lead evidence including the complainant's statement to police that she suffered post traumatic stress disorder (PTSD) since a sexual assault five years earlier, and a conversation in which the complainant told him she had engaged in sexual conduct with others to "escape" the earlier sexual assault.

The evidence of what had happened to the complainant five years previously, or of what she said about it, did not fall within the exception to s 293(3); nor was it relevant to the issues the jury had to decide: at [127].

The "sexual experience" and "sexual activity", or lack thereof, cannot encompass a complainant's memory of some past experience or activity, because the memory is held at or about the time of the charged act, or is connected to the charged act because past experience informed present conduct: at [119].

An experience of five years prior cannot be regarded as having occurred "at or about the time of" the incident because it was part of the complainant's continuing sexual experience. It is not an available construction: at [117]-[118]; *Jackmain (a pseudonym) v R* [2020] NSWCCA 150.

The distinction between "sexual experience" and "sexual activity" is an issue here. In the conversation that the applicant said the complainant had with him, she supposedly recounted an activity of five years before. Such evidence could not meet the temporal element in s 293(4)(a)(ii): at [123]; *GEH v R* (2012) 228 A Crim R 32 at [63]-[65].

The supposed conversation took place after the offence, not before it. The conversation could have had no bearing on the commission of the sexual act by the applicant, or upon the applicant's knowledge or belief as to whether or not the complainant consented. It was not relevant to the facts in issue and not admissible pursuant to s 55 *Evidence Act 1995*, even as s 293 also excluded it: at [124]; *Decision Restricted* [2021] NSWCCA 51.



***Cook (a pseudonym) v R* [\[2022\] NSWCCA 282](#): *No error in refusal to allow evidence of prior sexual activity/experience 18 months earlier in Queensland***

The applicant was convicted of child sexual offences against the victim when she was aged 9-11 in 2011-2014. The CCA (Adamson J; Bellew J agreeing, Beech-Jones CJ at CL dissenting) upheld the trial judge's ruling as inadmissible the victim's disclosures to the applicant in 2009 (and later to police and courts) that she was sexually abused when aged 6-7 in 2008-2009 by another family member in Queensland.

The time period of approximately 18 months between the Queensland offences and subject offences does not fall within the statutory wording, "at or about the time" (s 293(4)(a)(i)): at [115], [137]. "Connected set of circumstances" in s 293(4)(a)(ii) does not include the reporting of the Queensland offences or the administration of justice in Queensland in respect of those offences - otherwise, circumstances could be "connected" merely because proceedings relating to previous circumstances were still on foot: at [117], [138].

The CCA majority also rejected the applicant's submission that the complainant's evidence of the Queensland offences *related to* her relationship with the applicant (s 293(4)(b)) because she chose to confide in / disclose to him the Queensland offences and he became a prosecution complaint witness in the Queensland proceedings. Although the words "relate to" are wide, the disclosure cannot be said to "relate to" the relationship between the complainant and applicant: at [119]-[121].

The appeal was allowed on a separate ground.

***Prior sexual experience or sexual activity - s 293(4)(c) Criminal Procedure Act 1986 - evidence of complainant's pregnancy test admissible - failure of trial counsel to seek to have evidence admitted of possibility that complainant had been raped by another male***

***WS v R* [\[2022\] NSWCCA 77](#)**

Section 293(4)(c) CPA 1986 provides that the rule against admitting evidence relating to a complainant's sexual experience or sexual activity does not apply if

- (i) the accused does not concede the alleged sexual intercourse occurred, and
- (ii) the evidence is relevant to whether the presence of semen, pregnancy, disease or injury is attributable to the sexual intercourse alleged;

*and* the probative value of the evidence outweighs any distress, humiliation or embarrassment the complainant might suffer.

Evidence the complainant underwent a pregnancy test was admitted at trial. Evidence that she had been raped by another man at a similar time was not admitted.

The CCA quashed the applicant's convictions for sexual intercourse without consent and indecent assault and entered verdicts of acquittal.

The Crown case asserted the pregnancy test corroborated the complainant's evidence that she had been sexually assaulted by the applicant. In light of the central role of the pregnancy test in the Crown case, a miscarriage of justice occurred by reason of the applicant's counsel not seeking to rely at trial on s 293(4)(c) and the material concerning the complainant's rape by the other man. Presence of semen may be inferred from Medicare records indicating the complainant had undergone a pregnancy test: at [80], [96]. Evidence regarding rape by another man, depending on when it occurred, gave an alternative explanation for the pregnancy test. The evidence was of significant probative value sufficient to outweigh "distress, humiliation and embarrassment" to the complainant: at [63], [84]-[87], [92]-[94].

It follows the trial judge did not err in declining to exclude evidence of the pregnancy test (s 137 *Evidence Act* 1995) because the applicant should have been permitted to explore in cross-examination the possibility that the complainant had the pregnancy test because of her rape by the other male and there would not therefore have been any unfair prejudice to the applicant: at [92].

## 2. DEFENCES

### ***Wrong test in determining appellant had not established he was mentally ill at time of alleged offence - special verdict of act proven but not criminally responsible entered - Mental Health (Forensic Provisions) Act 1990, s 38 (rep)***

#### ***Masters v R*** [\[2022\] NSWCCA 228](#)

The CCA quashed the applicant's convictions by judge-alone for culpable driving offences, substituting special verdicts of acts proven but not criminally responsible under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*.

The issue at trial was whether the appellant should be found not guilty by reason of mental illness pursuant to then s 38 *Mental Health (Forensic Provisions) Act 1990* (rep), which then applied.

The CCA found that the trial judge applied the wrong test in determining that the appellant had not established that he was mentally ill at the time of the alleged offence. The trial judge had found that "the accused was disabled or incapable or quite incapable or that it was impossible for him to reason or consider with some degree of composure and reason or with some moderate degree of calmness that what he was doing was wrong". The trial judge overstated the rigour of the test, which does not require that the accused be "disabled" or "quite incapable". It suffices that by reason of the disease of the mind the accused cannot reason with some moderate degree of calmness in relation to the moral quality of what he is doing so that he does not know that what he is doing is wrong. This involves a lack of ability to reason with moderate composure, not a total incapacity to recognise that the conduct is wrong: at [146]; *R v M'Naughten* (1843) 10 CL & Fin 200; 8 ER 718; *R v Porter* (1933) 55 CLR 182; *Sodeman v R* (1936) 55 CLR 192.

The CCA found, in accordance with s 7(4) *Criminal Appeal Act 1912*, that the applicant was mentally ill so as not to be responsible, according to law, for his actions and special verdicts of not guilty by reason of mental illness should have been entered. Two experts gave evidence that the applicant's schizophrenia symptoms of persecutory delusions, thought disorder, disorganised behaviour and distress affected him so that he was not able to reason with a moderate degree of sense and composure that his act of driving into the victim's car was morally wrong at [16]-[163].

The CCA allowed the appeal, quashed the convictions, substituted special verdicts of acts proven but not criminally responsible under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (Sch 2, cl 5(3)). The appellant was discharged on condition he comply with his Community Treatment Order.

### ***Crown appeal against acquittals - whether sexsomnia a 'mental health impairment' - s 4 Mental Health (Forensic Provisions) Act 2020 (rep) – whether Act codifies or alters common law concerning the mental illness defence – 'sane automatism'***

#### ***R v DB*** [\[2022\] NSWCCA 87](#)

Section 4(1) *Mental Health (Forensic Provisions) Act 2020* (MHFPA) (rep) provides:

##### s.4 Mental health impairment

(1) For the purposes of this Act, a *person has a mental health impairment* if—

- (a) the person has a temporary or ongoing disturbance of thought, mood, volition, perception or memory, and
- (b) the disturbance would be regarded as significant for clinical diagnostic purposes, and
- (c) the disturbance impairs the emotional wellbeing, judgment or behaviour of the person.

The Crown appealed against the respondent's acquittals at a judge-alone trial of two counts of sexual touching of his daughter because he was asleep (having 'sexsomnia') and therefore acting involuntarily.

The issue was whether the respondent ought have been the subject of a special verdict of "act proven but not criminally responsible" under s 30 *MHFPA 2020*. The larger question was whether the effect of the 2020 Act is effectively to abolish the "defence" of "sane automatism", by providing that a person who lacks volition by reason of being asleep at the time of the charged act has a mental health impairment.

The Crown appealed on grounds that the trial judge erred:

1. in failing to find that the respondent's sexsomnia was a 'mental health impairment' pursuant to s 4;

2. in finding that “disturbance of ... volition” in s 4(1) does not include an absence of volition; and
3. in finding, if at the time of carrying out the act constituting the offence the person had a mental health impairment pursuant to s 4(1), that unconscious and/or involuntary acts cannot fall within s 28.

The CCA by majority (Brereton JA, Ierace J agreeing; Wilson J dissenting) dismissed the appeal.

The trial judge was right to hold that the respondent did not have a mental health impairment, because his lack of volition while asleep was not a disturbance of volition within s 4(1)(a) and was of no clinical significance for the purposes of s 4(1)(b). The respondent was entitled to the outright acquittal. Ground 3 could not result in a different outcome: at [71].

Per Brereton J:

*“Conclusion – no mental health impairment*

[64] No “disturbance” of volition is involved in the absence of volition that is a universal incident of being asleep. In the context of this case, the judge did not err in finding that a somnambulist’s absence of volition is not a “disturbance of ... volition” within s 4(1). It follows that his Honour was right to hold that the respondent did not have a mental health impairment, because he did not have a disturbance of volition within s 4(1)(a), and his lack of volition while asleep was of no clinical significance for the purposes of s 4(1)(b). Grounds 1 and 2 fail.

[65] I do not regard this outcome as inconsistent with the purposes of the 2020 Act, which were to contemporise and codify the law relating to the defence of mental illness, but did not include resolving any questions about the “defence” of sane automatism. Nor do I consider that the interpretation of s 4, contained in Part 1 (Preliminary) is informed by the objects of Part 5 (Forensic patients and correctional patients) stated in s 69.

### 3. DIRECTIONS

***Error to direct jury they could not use doubt about a victim’s evidence in addressing any count concerning other victim – child sexual assault - R v Markuleski (2001) 52 NSWLR 82***

***Sita v R [2022] NSWCCA 90***

The CCA allowed the applicant’s appeal against conviction for child sexual assault offences. Of ten counts involving two different victims, the applicant was acquitted of nine counts. He was convicted on one count (count 8) involving one victim, supported by evidence from the other victim.

The judge gave a *Markuleski* direction:- in cases of multiple counts of sexual offences concerning the one complainant, it was appropriate to supplement the usual direction to treat each count separately to indicate that, if the jury has a reasonable doubt about the complainant’s credibility in relation to one count, it might believe it difficult to see how the evidence of the complainant could be accepted in relation to other counts: at [36]-[37]; *Markuleski* (2001) 52 NSWLR 82 at [90]-[91].

The judge directed the jury that if they had a doubt about the reliability of either victims’ evidence on a count pertaining to themselves, that doubt could be used regarding the other counts relating to them, but that any doubt “*could not... affect your assessment of a count that involves the other... complainant.*”

The direction was erroneous. The general direction about how the jury should use any doubts about a complainant’s evidence on a particular count was contradicted by a very specific direction that precluded using any such doubt in the assessment of that complainant’s evidence that related to a count concerning the other victim: at [40]. The direction had a “real chance” of affecting the verdict: at [42]; *Hofer v The Queen* (2021) 95 ALJR 937.

***Jury directed to “choose” between accounts by accused and principal Crown witness – failure to give Liberato direction***

***Decision Restricted v R*** [\[2022\] NSWCCA 71](#)

The CCA quashed the applicant’s murder conviction and remitted the matter for retrial.

*Liberato direction*

The judge erred by giving repeated directions in terms of the jury having to “choose” or “decide” between the accounts by the accused and principal Crown witness, creating a clear risk the jury may have understood they were required to choose between the competing accounts.

The judge further erred in refusing to give a *Liberato v The Queen* (1985) 159 CLR 507 direction in terms that:

- (i) a preference for the evidence led by the Crown is not a sufficient basis for a finding of guilt;
- (ii) the jury must not convict the accused unless satisfied, beyond reasonable doubt, of the truth of the evidence relied upon by the Crown;
- (iii) if the accused’s account is accepted, a verdict of not guilty must follow;
- (iv) if the accused’s account is not accepted, but the jury consider that it might be true, a verdict of not guilty must follow;
- (v) if the accused’s account is not accepted, it should be put to one side, and the question will remain whether the Crown, on the basis of the evidence that is accepted, has proved the guilt of the accused beyond reasonable doubt; and
- (vi) even if evidence given by an accused is not positively believed, the jury must nevertheless acquit the accused if that evidence gives rise to a reasonable doubt about his or her guilt.

#### **4. JURY**

***Fail to discharge jury – inference views of discharged juror at odds with majority - incomplete Black direction – deliberations without all jurors present constituted a material irregularity***

***Decision Restricted v R*** [\[2022\] NSWCCA 71](#)

The CCA quashed the applicant’s murder conviction and remitted the matter for retrial.

*Fail to discharge whole jury*

The trial judge discharged a juror at a relatively early stage of the appellant’s trial. The trial judge subsequently discharged two other jurors on the basis of the stress and anxiety associated with the trial. The trial judge then refused an application to discharge the whole jury following the discharge of the third juror. A verdict of guilty followed virtually immediately following the discharge of the third juror. The CCA held there was a clear inference that the views of the third juror were at odds with the majority and that there was a risk of miscarriage of justice arising from the refusal of the trial judge to discharge the jury (*BG v R* (2012) 221 A Crim R 225).

The CCA further held that the trial judge, in giving an “adaptation” of a *Black* direction to the jury, departed from the model direction and omitted a material part. The judge’s direction contributed to the miscarriage of justice which arose from the subsequent failure to discharge the jury.

*Irregular jury deliberations where not all jurors present*

Two periods of separation where the jury deliberated without all members present constituted a material irregularity which materially contributed to the risk of a miscarriage of justice.

The trial judge had not made any order for separation of the jury. The CCA made observations as to the importance of making orders allowing a jury to separate during deliberations, and directing juries at the commencement of, and during, the trial that deliberations must only be undertaken when all members of the jury are present.

***Trial continued after juror discharged – inference juror in favour of acquittal - substantial miscarriage of justice - Jury Act 1977, s 53C(1)***

***Addo v R*** [\[2022\] NSWCCA 141](#)

The CCA allowed the applicant’s appeal where the trial continued with 11 jurors and it could later be inferred that the juror who was earlier discharged (Juror G) was in favour of acquittal.

The case fell within the category of case where it can be inferred, but only with the benefit of hindsight, that the juror who was discharged would have voted for an acquittal – thus giving rise to a risk, if the trial continues with the remaining jurors, of a substantial miscarriage of justice: at [144]-[147]; *BG v R* (2012) 221 A Crim R 225.

After the jury had indicated to the trial judge they were unable to reach unanimous verdicts and would consider majority verdicts, Juror G sent a note to the judge that his blood pressure was increasing to dangerous levels. Juror G failed to attend court the next day and could not be contacted. The trial judge discharged Juror G and determined the trial continue with 11 jurors (pursuant to s 53C(1) *Jury Act*), rejecting the applicant's application to discharge the jury. Guilty verdicts were returned shortly after.

There was little doubt Juror G was a "dissenting juror". First, the jury had indicated they were unable to reach unanimous verdicts. Second, the judge, shortly after, received a note from Juror G regarding the stress he was under. The overwhelming inference is that the stress was due to Juror G dissenting from the majority: at [149].

Because the circumstances which may give rise to a substantial miscarriage of justice are difficult to define, it is similarly difficult to formulate rigid rules governing the circumstances in which it may be necessary to discharge a jury because the risk of a substantial miscarriage of justice has arisen (**Decision Restricted** [\[2022\] NSWCCA 71](#)). By 'substantial miscarriage of justice' what is meant is that the possibility cannot be excluded beyond reasonable doubt that the appellant has been denied a chance of acquittal, which was fairly open to him or her or that there was some other departure from a trial according to law that warrants that description (*Filippou v The Queen* (2015) 256 CLR 47 at [15]). This definition applies to a determination under s 53C(1) *Jury Act*, the overriding consideration being the parties' entitlement to a fair trial: at [144]-[145]; *Phan v R* [2018] NSWCCA 225 at [128].

### ***Appeal against discharge of whole jury - s 53C(1)(a) Jury Act 1977***

#### ***Watson v R*** [\[2022\] NSWCCA 208](#)

The CCA allowed the applicant's appeal (pursuant to s 5G *Criminal Appeal Act* 1912) against the trial judge's decision to discharge the whole jury in his murder trial.

Section 53C(1)(a) *Jury Act 1977* provides that, if a juror is discharged in the course of a criminal trial, the trial judge must discharge the remainder of the jury if they are "of the opinion that to continue the trial ... would give rise to the risk of a substantial miscarriage of justice".

The trial judge granted the Crown's application for discharge of a juror ('the witness juror'), and for discharge of the whole jury pursuant to s 53C(1)(a). The witness juror had communicated to the Court by note concerns about his mental health and alleged conduct of other jurors. The judge found that the allegations, particularly that a number of jurors laughed about the evidence of a Crown witness, impermissibly disclosed an aspect of jury deliberations to the parties, and there was "a real risk that counsel may tailor their submissions to the jury in a manner consistent with or responsive to" the jury note. Further, that a number of jurors had disregarded his directions.

Irregularities must be "material" and there should be a "high degree of necessity" before a jury will be discharged. But not every irregularity or departure from the ideal conduct of a jury trial will result in discharge. An inquiry into whether there is a risk of a substantial miscarriage of justice focuses principally upon the impact of any irregularity on an accused person's ability to obtain a fair trial: [68]–[69], [36]–[41]; authorities cited.

There was no high degree of necessity for the jury to be discharged in this case. The matters relied upon by the Crown were either not breaches of any directions by the trial judge or not of any materiality: at [77].

### ***Whether evidence produced by Sheriff investigation inadmissible by reason of exclusionary rule concerning evidence of jury deliberations – s 73A Jury Act 1977***

#### ***Vella v R*** [\[2022\] NSWCCA 204](#)

The applicant, convicted of child sexual offences convictions, submitted a miscarriage of justice occurred due to (a) reasonable apprehension of bias by one juror; and (b) a juror's consideration of irrelevant material. The applicant sought to rely on the Sheriff's investigation Report conducted under s 73A *Jury Act* 1977. The Sheriff's Report indicated one juror was influenced by their own sexual assault experience, and that some jurors considered that a juror had "made up their mind on the first day."

The CCA dismissed the appeal. The following issues were addressed:

(i) Whether notes of juror interviews prepared by the Sheriff for a s 73A investigation were inadmissible because they disclosed juror deliberations?

The 'exclusionary rule' as stated in *Smith v Western Australia* (2014) 250 CLR 473 is that "evidence of a juror or jurors as to the deliberations of the jury is not admissible to impugn the verdict". That rule is not abrogated or modified where evidence of deliberations is obtained from a Sheriff investigation under s 73A *Jury Act*; although material produced by s 73A investigation can in some circumstances be admitted and relied on as part of a challenge to a conviction without infringing the exclusionary rule. *Smith* confirms that evidence of most, if not all, forms of improper misconduct will not be rendered inadmissible by the operation of the exclusionary rule: at [101]-[104]; *Smith v WA*; *Petroulias v The Honourable Justice McClellan* [2013] NSWCA 434 applied.

(ii) Whether evidence that one juror relied on their own experience of sexual assault and disclosed that to other jurors was admissible?

The evidence is rendered inadmissible by the exclusionary rule. The process by which jurors disclose to other jurors their "individual experience" and their assessment of the evidence "in that light" is at the very heart of jury deliberations: at [105]-[106].

(iii) Whether evidence that one juror perceived another juror to have "made up their own mind from day one" was admissible?

The evidence was rendered inadmissible by the exclusionary rule. The exclusion of such material preserves the secrecy of jury deliberations to ensure deliberations are free and frank. The evidence discloses juror communications about the effect of the evidence adduced at trial: at [107], [138].

(iv) Whether there was a reasonable apprehension of bias on the part of one juror in utilising experience of being sexually assaulted in her deliberations and disclosing it to other jurors?

There was no evidence to support a reasonable apprehension of bias. Even if there were evidence that they had relied on that experience it would not give rise to an apprehension of bias. Jurors are entitled to evaluate evidence by reference to their own experiences: at [109], [116], [137]-[138].

(vii) Whether there was a reasonable apprehension of bias on the part of one juror by reason of a perception held by another juror that they had "made up their mind on day one"?

The perception of one juror that another juror had made up their mind on the first day of the trial falls far short of giving rise to a reasonable apprehension that a juror had not discharged their task impartially and had pre-judged the case: at [133]-[136], [110], [138].

## 5. PARTICULAR OFFENCES

***s 66(C)(1) prosecutions not statute-barred – s 78K prosecutions statute-barred - limitation periods repealed – Clause 82, Schedule 11 Crimes Act***

***Madden v R* [2022] NSWCCA 196**

The applicant challenged his convictions under s 78K (rep) and s 66C(1) *Crimes Act* on the ground the charges were statute-barred by s 78T (rep) and s 78 (rep), respectively.

Sections 78 and 78K were repealed in 1992 by the *Criminal Legislation (Amendment) Act 1992*.

Until 2 May 1992, s 78T provided a 12-month limitation period on the prosecution of an offence under s 78K (rep) (homosexual intercourse male 10-18) where the complainant was aged 16-18.

From 23 March 1986 - 2 May 1992, s 78 provided a 12-month limitation period on the prosecution of an offence under s 66C(1) (sexual intercourse child 10-16) where the complainant was aged 14-16.

On 1 December 2018, clause 82 was inserted into Schedule 11 *Crimes Act* by the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018*. Clause 82 provides:

"Retrospective operation of repeal of section 78 limitation period

The repeal of section 78 by the *Criminal Legislation (Amendment) Act 1992* is taken to have repealed that section retrospectively as if that section had never been enacted and

consequently that section cannot be relied on to prevent any prosecution for an offence even if the offence occurred before that repeal.”

#### s 78K convictions quashed

The CCA quashed the applicant’s three convictions under s 78K. The s 78K counts were statute-barred by s 78T. The repeal of s 78T was not retrospective: at [245].

#### s 66C(1) convictions not statute-barred

The prosecution of the three s 66C(1) counts were commenced after the 12 month limitation period and one complainant was over 14.

The applicant’s three convictions under s 66C were not statute-barred under s 78.

The presumption against retrospectivity of a penal statute and the principle of fairness is subject to the legislative intention of Parliament that a statute operate retrospectively: at [265]-[267]; *Rodway v R* (1990) 169 CLR 515; *Siganto v R* (1998) 194 CLR 656; *Xerri v R* [2021] NSWCCA 268 at [80]-[82].

Clause 82 makes clear the retrospective legislative intent of the new provision and unambiguously displaces the presumption. The words “as if that section had never been enacted” means s 78 must be treated as if that provision had never been included in the principal Act. The words “that section cannot be relied on to prevent any prosecution for an offence” are of wide ambit. There is no reason to interpret those words as not applying to a prosecution commenced prior to the introduction of the amending 2018 Act. Further, the NSW Government has articulated an intention to address shortcomings identified by the Royal Commission into Institutional Responses to Child Sexual Abuse: at [270]-[272]; *Explanatory Memorandum to Criminal Legislation Amendment (Child Sexual Abuse) Act 2018*.

#### ***Intentionally carrying out a sexual act “towards” a child - s 66DC(a) Crimes Act***

##### ***DPP (NSW) v Presnell* [2022] NSWCCA 146**

An offence of intentionally carrying out a sexual act “towards” a child under s 66DC(a) *Crimes Act* could not be established where the child was lying on a bed fully clothed facing the wall, unaware of the respondent sitting on a chair beside the bed and masturbating in a direction away from the child.

The CCA held:

(1) s 66DC(a) creates two separate offences of committing a sexual act “with” or “towards” a child (rather than one offence of committing a sexual act “with or towards” a child).

(2) (By majority) For a sexual act to be “towards” another, there must be an intention to engage the other person. An act may be “towards” another where the other person is engaged by being made aware of the act; or where unaware of the act, the first person physically engages the other person. While physical proximity is relevant, the question is not answered by physical proximity alone.

The act was not “towards” the child given the child’s lack of awareness, physical positions of the parties and the directions they were facing supported the judge’s conclusion that the respondent was hiding his act from the child.

#### ***“Intentionally chokes” - Crimes Act 1900, s 37(1A)***

##### ***GS v R; DPP (NSW) v GS* [2022] NSWCCA 65**

The CCA held that “intentionally chokes” in s 37(1A) *Crimes Act* means “intentionally apply pressure to the neck so as to be capable of affecting the breath or the flow of blood to or from the head”.

The CCA allowed the Crown appeal against a directed acquittal for an offence under s 37(1A). The trial judge erred by defining “choking” to mean application of pressure that “at least, result[ed] in a restriction in the victim’s breathing”.

Despite the “broad range of conduct” prohibited by s 37(1A), the CCA did not accept that any manual pressure on the neck, no matter how slight, and no matter where on the neck applied, may amount to “intentional choking”. “Intentionally chokes” should not be ascribed a narrow meaning. Section 37(1A) does not require proof of injury or other outcome as a result of the choking. Nevertheless, the conduct prohibited must still be capable of being described as “intentional choking”: at [60]-[63].

In a case involving s 37(1A), it would be prudent for the Crown to call medical evidence addressing this question: at [64].

## 6. PROCEDURE

### ***Application for leave to withdraw a guilty plea before conviction***

#### ***White v R*** [\[2022\] NSWCCA 241](#)

The applicant repeatedly instructed his legal representatives that he intended to plead not guilty to murder. At arraignment, he unexpectedly entered a guilty plea. His application for leave to withdraw the guilty plea shortly after it was entered was refused by the primary judge. The accused was convicted and sentenced.

The CCA held that the primary judge applied the wrong legal test to the applicant's application to withdraw his guilty plea *prior to conviction*. The test to be applied where an accused seeks leave to withdraw a guilty plea prior to conviction is whether the "interests of justice" require that course to be taken. The test where an applicant seeks to go behind a guilty plea for the first time on appeal, following conviction and sentence, is whether a miscarriage of justice would occur if the guilty plea was not permitted to be withdrawn: at [60]–[63]; *Maxwell v The Queen* (1996) 184 CLR 501; *Hura v R* (2001) 121 A Crim R 472; [2001] NSWCCA 61; *R v Chiron* [1980] 1 NSWLR 218.

The "interests of justice" test is broader than the "miscarriage of justice" test. The former may focus on matters beyond the integrity of the plea. A non-exhaustive list of factors affecting the interests of justice is set out at [65]; *R v Martin* (1904) 21 WN (NSW) 233; *Maxwell v The Queen* (1996) 184 CLR 501.

The accused's onus of persuading a judge to permit the withdrawal of a plea of guilty is not a "substantial" or "heavy onus". There is no principled basis for this Court to treat that onus as any "heavier" than in other circumstances where a party seeks to persuade a court to exercise a discretion in the interests of justice: at [69].

The CCA set aside the applicant's conviction and sentence, remitting the matter to the Common Law Division.

### ***Application for trial by judge alone less than 28 days prior to date fixed for trial***

#### ***Alemeddine v R*** [\[2022\] NSWCCA 219](#)

Section 132A *Criminal Procedure Act* 1986 provides that an application for an order under s 132 for a Judge alone trial must be made not less than 28 days before trial, except with the leave of the court.

Section 132(2) provides that the court must order a judge alone trial if both the accused and prosecution agree to the application.

The CCA allowed the appeal (s 5F(3) *Criminal Appeal Act*) by the two co-accused against the judge's refusal to grant leave pursuant to s 132A. The judge refused leave because of the need to avoid any "appearance" of judge shopping. However, the judge failed to consider that one of the accused could not apply earlier because the other accused did not consent, whilst also accepting that the trial judge was unknown at the time of the application. The judge failed to take into account a "material consideration" to the exercise of power to grant leave under s 132A (*House v King* (1936) 55 CLR 499): at [28].

The CCA further held that even where the Crown consents to the making of an order under s 132, a grant of leave under s 132A(1) is still required if the application is made less than 28 days before the trial date: at [23], [27].

## 7. APPEALS

### ***'Miscarriage of justice' for the purposes of third limb of s 6(1) Criminal Appeal Act – error must have material effect on outcome of trial***

#### ***Saunders v R*** [\[2022\] NSWCCA 273](#)

The CCA (Simpson AJA; Hamill J agreeing with additional reasons; Ierace J agreeing) considered what constitutes a 'miscarriage of justice' for the purposes of the third limb of s 6(1) *Criminal Appeal Act*.

The third limb of s 6(1) provides that in a conviction appeal under s 5(1) the court shall allow the appeal if satisfied "that on any other ground whatsoever there was a miscarriage of justice, and in any other



case shall dismiss the appeal; provided that ... it considers that no substantial miscarriage of justice has actually occurred.”

*Weiss v The Queen* (2005) 224 CLR 300 at [18] stated that a “miscarriage of justice” for the purposes of the third limb of s 6(1) is: “... any departure from trial according to law, regardless of the nature or importance of that departure.”

However, the blanket rule that any departure, no matter how inconsequential, from rules of law, evidence or procedure, will constitute a miscarriage of justice for the third limb of s 6(1) (and before resort to the proviso) is no longer applicable. To establish a miscarriage of justice for the purposes of the third limb of s 6(1), it is necessary that an appellant establish, not only error, but also that the error was prejudicial in the sense that it “had the meaningful potential or tendency to have affected the result of the trial”; that the error did, or might have had, a prejudicial effect on the accused’s prospects of acquittal: at [83]-[93]; *Hofer v The Queen* (2021) 95 ALJR 937 at [41], [118], [123]; ***AK v R* [2022] NSWCCA 175** per Beech-Jones CJ at CL at [2]; ***Tomlinson v R* [2022] NSWCCA 16** per N Adams J at [122]-[140]; *Zhou v R* [2021] NSWCCA 278 per Beech-Jones CJ at CL (with whom Davies and Wilson JJ agreed) at [22].

In this case, the applicant appealed his sexual assault convictions on the ground that the trial judge erred in giving a direction that there was evidence of a tendency by the applicant to assault his domestic partners when intoxicated.

The CCA dismissed the appeal, refusing leave under Rule 4 (no objection taken at trial). But even if leave was given, the ground was also rejected under the third limb of s 6(1).

The mistaken reference by the trial judge to intoxication of the applicant in the context of the tendency evidence could not have had any material effect on the outcome of the trial: at [94]-[95].

### ***Appellate review of judge-alone finding of grievous bodily harm***

#### ***Reyne (a pseudonym) v R* [2022] NSWCCA 201**

The CCA quashed the applicant’s conviction by judge alone for recklessly causing grievous bodily harm and entered a verdict of acquittal on the ground that the evidence did not establish that the victim’s skull fracture was occasioned in the essential timeframe.

The CCA rejected a second appeal ground that the skull fracture suffered by the victim was not grievous bodily harm because the injury healed and no serious harm eventuated.

The CCA discussed appellate review of a judge-alone finding of grievous bodily harm.

A judge-alone finding is “treated as if it were the same as a jury’s finding of guilt” and reviewed by an appellate court in the same manner as a jury’s finding of guilt: at [112]-[113]; *Filippou v The Queen* (2015) 256 CLR 47; *Dansie v The Queen* (2022) 96 ALJR 728

The question whether an injury is grievous bodily harm is within the province of the jury. That determination is subject to review by this Court, but a different view would only be taken where the jury verdict was “unreasonable”. This Court is to determine whether it was “open to the jury to be satisfied beyond reasonable doubt that the accused was guilty” by forming our own view as to whether the injury amounted to grievous bodily harm and then determining whether it was open to the jury to come to a different view. This does not mean open as a matter of law but open in the sense used in *M v The Queen*: at [99]-[113]; *The Queen v Baden-Clay* (2016) 258 CLR 308; *M v The Queen* (1994) 181 CLR 487.

There was no contest as to the injury or its effects, and the trial judge had no (or at best, only slight) advantage in assessing the injury: at [100]. The fact the victim’s skull fracture subsequently healed does not mean that at the time of admission to hospital it was not a “really serious injury”. It was open to the judge to find the skull fracture amounted to grievous bodily harm despite the fact that some potential, more long-term serious harm did not eventuate: at [132]-[139].

### ***Crown appeal against acquittal by judge alone – error established - discretion to order new trial not exercised – acquittals affirmed – s 107 Crimes (Appeal and Review Act) 2001***

#### ***R v BK* [2022] NSWCCA 51**

The CCA (by majority) dismissed the Crown appeal pursuant to s 107 CARA against BK’s acquittal by trial judge alone of child sexual abuse offences. Although the trial judge erred by failing to explain what use was made of tendency evidence in reaching his verdict, because of his clear finding that he was

not satisfied beyond reasonable doubt of BK's guilt, the CCA held that discretion not be exercised to direct that the acquittals be quashed, and that a new trial not be ordered.

Section 107 does not provide any automatic consequence from the appellant (either the DPP or the Attorney General) establishing an error of law in the judgment leading to an acquittal. Sub-sections 107(5) and (6) provide respectively this Court "may affirm or quash the acquittal" and "may order a retrial" (cf. ss 6(1), (2) *Criminal Appeal Act 1912*). The discretion in s 107(6) whether to order a new trial is "unconstrained by specific wording" (*R v BA* [2021] NSWCCA 191 at [69]): at [278], [281].

Here, the "public interest" in prosecution of offenders and the strong case against the respondent are weighty considerations in favour of quashing the acquittal and ordering a retrial. On the other hand, the alleged offences were committed over 35 years ago, and since acquitted, the respondent has moved interstate, suffers deteriorating health and is attempting to move on with his life. Those matters are entitled to some weight but would not outweigh the public interest in the respondent being tried according to law for very serious offences. The critical factor in the exercise of the discretion is that the trial Judge, on the trial evidence, was left with a reasonable doubt as to guilt. While the trial Judge erred by failed to expose his approach to the tendency evidence, his finding on the critical issue was quite clear. In the light of that finding, and the nature of the error established, it would be wrong to put the respondent to trial again. The appropriate order is to affirm the verdict of not guilty: at [285]-[289]; s 107(5) *CARA*; *R v BA* at [31]-[32]; *Lazarus v R* (2017) 270 A Crim R 378 per Bellew J at [157].

***District Court judge after correction on appeal declined for a second time to state a case***  
***Franklin v DPP (NSW)*** [2022] NSWCA 58

The applicant was convicted in the Local Court of common assault. On appeal, the District Court Judge refused the applicant leave to tender a case note report, dismissed the appeal and refused the applicant's request to state a case (under s 5B *Criminal Appeal Act 1912*). The Court of Appeal in *Franklin No 1* [2021] NSWCA 83 found that admissibility of the case note report was a question of law, set aside the Judge's decision and remitted the matter to the District Court to be dealt with according to law.

The Judge declined for a second time to state a case to the Court, finding that admission of the report would have made no difference to the outcome of the applicant's conviction appeal. The applicant sought judicial review of the Judge's second decision under s 69 *Supreme Court Act 1970*. There is no right to judicial review of a determination of the District Court on an appeal from the Local Court unless jurisdictional error is shown (*District Court Act 1973*, s 176). The issue on appeal was whether the Judge fell into jurisdictional error by denying procedural fairness or in declining to exercise the function of a District Court judge under s 5B *Criminal Appeal Act 1912*.

By majority, (Basten JA and Macfarlan JA; Brereton JA dissenting) the Court dismissed the appeal.

Basten JA: Section 5B does not confer a statutory right of appeal: at [3]-[4]. The statute confers on the appeal judge the determination of materiality, it is not a matter for the reviewing court: at [17]. The Judge did not misconceive his function. There is no legal basis upon which to reject the Judge's finding. No jurisdictional error has been established: at [19]-[20].

Macfarlan JA: The Judge did not deny procedural fairness. The fair-minded lay observer would not have any reasonable apprehension that the Judge would not reconsider the application on its merits, as directed by the Court of Appeal; nor any reasonable basis for thinking that the Judge refused the second stated case application 'for the purpose of avoiding the Court of Criminal Appeal having the opportunity to determine whether he had erred in law on the principle of admissibility of business records': at [32]-[35].

No jurisdictional error was established: at [46]. The words "may submit" in s 5B confers discretion to be exercised as part of the court's jurisdiction. If the judge is assumed to have made an error, he had jurisdiction to do so and judicial review of his decision is not available. For an error to be a jurisdictional error, there must be some further factor present, e.g. that an inferior court must take into account or to disregard some matter, as an "essential condition of the existence of [its] jurisdiction with respect to a particular matter": at [40], [45]-[46].

## 8. OTHER CASES

### **State law governing committal proceedings constitutionally valid**

#### ***Landrey v DPP (NSW)* [\[2022\] NSWCCA 211](#)**

The Court of Appeal dismissed the applicant's proceedings challenging the constitutional validity of Ch 3, Pt 2 *Criminal Procedure Act 1986*, which govern the procedures and powers of the Local Court in conducting committal proceedings for offences to be prosecuted on indictment.

Ch 3, Pt 2 was amended by the *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* introducing a new scheme for committal proceedings. The applicant submitted that a magistrate is required to rubber-stamp the assessment of the merits of the prosecution case, with the magistrate's traditional function of assessing evidence now conferred on the prosecutor. The main issue was whether Ch 3, Pt 2 thus contravenes the constraint imposed on State legislative power by Ch III of the Commonwealth Constitution by substantially impairing the institutional integrity of the Local Court: *Kable v Director for Public Prosecutions (NSW)* (1996) 189 CLR 51.

The CCA held that Ch 3, Pt 2 does not infringe the *Kable* doctrine and is constitutionally valid. The 2017 Amendment Act removed a key element of the traditional function of committals so that there is now no assessment of the merits of the prosecution case made by the magistrate. The present purpose of committal proceedings is to ensure proper case management of charges for indictable offences. Committal proceedings are an administrative process and do not involve exercise of judicial power. It is well-established that powers of case management are ancillary to the judicial function and, accordingly, are constitutionally valid when exercised by the trial court. Committal proceedings do not substantially impair the institutional integrity of the Local Court: at [32], [38], [61]-[73].

### **Prisoners – extreme high risk restricted inmate - supervision of visits and telephone calls with legal practitioners – requirement to communicate in English – validity of Commissioner's monitoring policy**

#### ***Hamzy v Commissioner of Corrective Services NSW* [\[2022\] NSWCA 16](#)**

Mr Hamzy - an "extreme high risk restricted inmate" (EHRR inmate) - brought proceedings against the Commissioner of Corrective Services NSW challenging the lawfulness of aspects of conditions of imprisonment:-

- Clause 94 *Crimes (Administration of Sentences) Regulation 2014* (NSW) ("*CAS Regulation*") purported to empower the Commissioner to refuse visits to EHRR inmates by any person, including lawyers, "on the basis of a criminal record check or for any other reason."
- Pursuant to a "drop-in policy" by the Commissioner, Corrective Services officers randomly monitored telephone and AVL calls made by EHRR inmates, including calls with legal practitioners, to check whether they were in English and with the approved recipient.
- cl 101, 116 and 119(6) of the *CAS Regulation* purported to require most communications by EHRR inmates to be in English which contravened ss 9, 10 of the *Racial Discrimination Act*.

The Court of Appeal held:

- (i) The Commissioner was not authorised to refuse to permit visits by lawyers to EHRR inmates 'for any reason' - Clause 94 was invalid for this purpose: [206]-[212], [220]-[238]. The power to require a criminal record check was authorised: [202]-[205], [220]-[238].
- (ii) The Commissioner's "drop-in" policy of periodically monitoring telephone calls and AVL access to check whether (i) an EHRR inmate and the other person are speaking English and (ii) the other person is the approved recipient of the call, *does not apply and is invalid in its application to communications between an EHRR inmate and that inmate's legal practitioner*: [239]-[252]; [255].
- (iii) Having regard to the manner in which the case was conducted, there was no contravention of the *Racial Discrimination Act* - there was nothing to suggest that the purpose of the requirement to use English in the *CAS Regulation* had anything to do with discrimination: at [274].

## 9. BAIL

### Section 22B *Bail Act* 2013 (commenced 27 June 2022)

Section 22B *Bail Act* 2013 provides that for a detention application made following a conviction but before sentencing “for an offence for which the accused person will be sentenced to imprisonment to be served by full-time detention”, a court must not grant bail unless special or exceptional circumstances exist.

Clause 45 *Bail Regulation* 2021 provides that s 22B applies to any bail decision made after its commencement.

#### “will be sentenced to imprisonment to be served by full-time detention”

- “*Will*” means “realistically inevitable” not “state of absolute certainty”. “*Will*” be sentenced to full-time imprisonment involves a *state of satisfaction*, as opposed to the *fact*. As this is an evaluative judgment of a future matter and not a fact to be proved, proof on the balance of probabilities is not the relevant standard: *DPP v Day* [2022] NSWCCA 173 at [20], [23]; *DPP v Van Gestal* [2022] NSWCCA 171 at [13]-[19], [43]-[45]. Section 22B sets a high bar for the degree of satisfaction to be reached by the Court to engage the limitation on the power to make a bail decision under this provision: *DPP v Van Gestal* [2022] NSWCCA 171 at [42].
- In its assessment, the Court will have regard to:
  - (i) offence(s) for which the accused is convicted, bearing in mind sentencing principles and laws, including alternatives to full-time imprisonment;
  - (ii) materials and submissions relevant to the future disposition of the sentence; and
  - (iii) abbreviated nature of the application, especially, that the application is not a pseudo or abridged sentencing hearing: *DPP v Day* at [23]; *DPP v Van Gestal* [2022] NSWCCA 171 at [45].
- Notwithstanding the theoretical availability of an alternative to full-time imprisonment, the Court could reach the degree of satisfaction required by s 22B(1) if satisfied that no other sentence than full-time imprisonment could realistically be imposed by the sentencing court: *DPP v Day* at [23]; *DPP v Van Gestal* [2022] NSWCCA 171 at [47].
- The Court, as a bail authority, should avoid expressing a view as to the merits of foreshadowed arguments on sentence: at *DPP v Day* at [31].

#### “special or exceptional circumstances”

- There is no reason that “special or exceptional circumstances” means different things in different parts of the *Bail Act*: *DPP v Van Gestal* [2022] NSWSC 973 (Garling J); *R v Isaac* [2023] NSWSC 22 (Yehia J) at [10]-[11] citing *Bobbi v R* [2021] NSWCCA 44 “there was ‘.... no fetter on the things that might constitute ‘special or exceptional circumstances’” (Bail granted on the basis of ‘special and exceptional circumstances’).

#### Application

- s 22B applies notwithstanding that it became operative after an offender’s release. Section 22B does not operate retrospectively and therefore does not offend the common law presumption against retrospectivity: *DPP v Duncan* [2022] NSWSC 927 at [36]; *DPP (NSW) v Van Gestal* [2022] NSWCCA 171 at [40]; Cl 45 *Bail Regulation* 2021.

### ***Jurisdiction of CCA to hear bail application – no substantive proceedings pending***

#### ***Dedeoglu v R* [2022] NSWCCA 74**

The CCA did not have jurisdiction to hear the applicant’s release application prior to the hearing of his application for leave to appeal where the applicant had filed a Notice of Intention to Appeal his conviction but the Notice had lapsed, and a subsequent application for leave to appeal and appeal grounds and submissions were filed out of time. The Court has power to hear a release application where proceedings for an offence are “pending in the Court”, being ‘substantive proceedings’ (ss 61, 59 *Bail*

Act 2013). A notice of appeal must be filed within 28 days of conviction or sentence (s 10 *Criminal Appeal Act* 1912). The life of the applicant's future proceedings depends on, at some future time, the Court granting him leave to file his appeal out of time. That decision should be made by the court hearing the appeal: at [21]-[23]; *Mashayekhi v R* [2021] NSWCA 55 at [18].

## **A. HIGH COURT CASES**

***Intensive correction order - Whether sentencing judge undertook assessment of community safety in accordance with s 66 CSPA - failure to comply with s 66(2) amounted to jurisdictional error***

**[Stanley v Director of Public Prosecutions \(NSW\) \[2023\] HCA 3](#)**

Appeal from NSW.

The appellant was sentenced in the Local Court to aggregate sentence of 3 years imprisonment, NPP 2 years for firearms offences. On sentence appeal in the District Court, the appellant asked that her sentence be served by way of ICO. Section 66(1) *CSPA* provides that community safety must be the "paramount consideration" when deciding whether to make an ICO. Section 66(2) provides that, when considering community safety, the court is to assess whether making the ICO or serving the sentence by way of full-time detention is more likely to address the risk of reoffending. The District Court dismissed the appeal, making no express reference or findings as to an assessment under s 66(2). The appellant appealed to the Court of Appeal. By majority, the Court of Appeal held that non-compliance with s 66(2) was not a jurisdictional error of law and dismissed the application for review (*Stanley v Director of Public Prosecutions (NSW)* (2021) 107 NSWLR 1).

**Held:** By majority, appeal allowed. Set aside order of District Court dismissing the appellant's appeal, and order the District Court to determine the appeal according to law.

- Three steps are to be undertaken by a sentencing court prior to the final order by which a sentence of imprisonment is imposed under the *CSPA*, or confirmed or varied on a sentencing appeal: first, a determination that the threshold in s 5(1) is met; second, determination of the appropriate term of the sentence of imprisonment; and third, where the issue arises, consideration of whether or not to make an ICO: at [59].
- s 66 imposes specific mandatory considerations upon the decision maker to make, or refuse to make, an ICO: at [72]ff.
- While aspects of community safety underpin some of the general purposes of sentencing, such as specific and general deterrence and protection of the community from the offender, those aspects will have been considered in deciding whether to impose a sentence of imprisonment (ie, before considering an ICO). Community safety is required to be considered *again* and in a different manner under s 66 when considering whether to make an ICO. At this third step, community safety in s 66(1) is given its principal content by s 66(2), namely, the safety of the community from harms that might result if the offender reoffends, whether while serving the term of imprisonment that has been imposed or after serving that term of imprisonment: at [77].
- The jurisdiction to make an ICO calls for a subsequent and separate decision to be made *after* a sentence of imprisonment is imposed: at [82].
- The failure to consider the paramount consideration in s 66(1) by reference to the assessment of community safety in s 66(2) demonstrates a misconception of the function being performed when deciding whether to make an ICO by failing to ask the right question within jurisdiction: at [88].
- The District Court failed to undertake the assessment required by s 66(2) and thereby fell into jurisdictional error. As there is a duty to consider whether to grant an ICO in cases where the power is engaged, this duty remains unperformed: [116]-[117].
- Failure to undertake the assessment in s 66(2) did not invalidate the sentence of imprisonment: at [98].

***Jury - internet inquiries by juror - juror misconduct, s 53A(1)(c) Jury Act 1977 (NSW) – inquiry for purpose of obtaining information about matters relevant to trial, s 68C(1) Jury Act – judge took verdicts before discharging juror***

[Hoang v The Queen \[2022\] HCA 14; 96 ALJR 453](#)

Appeal from NSW.

The appellant, a maths tutor, was convicted by jury of child sexual offences. At trial, evidence was given that he had not undergone a 'Working with Children Check'.

The jury indicated they had reached verdicts on eight of twelve counts. The next day the judge received a note from the foreperson that a juror had looked at the internet for 'Working with Children Checks' legislation because she was a retired school-teacher and curious about why she never had one. The judge took guilty verdicts on the eight counts from the previous day, and not guilty verdicts on two counts. The juror who searched the internet was discharged for misconduct under s 53A(1)(c) *Jury Act 1977*. The remaining jurors later returned guilty verdicts for the two final counts.

The appellant's appeal to the NSWCCA was dismissed by majority.

**Held:** Appeal allowed in part. Set aside the eight guilty verdicts entered before the juror was discharged and new trial ordered on these counts. Matter remitted to the CCA to determine whether to affirm or vary sentence for remaining two counts.

- The judge erred in taking the ten verdicts before discharging that juror. Section 68C(1) *Jury Act* (Inquiries by juror about trial matters prohibited) read with s 53A(1)(c) (Mandatory discharge of juror for misconduct) meant the juror engaged in misconduct by making an inquiry for the purpose of obtaining information about a matter relevant to the trial: at [11].
- The question prescribed by s 68C(1) is whether the juror's inquiry was "for the purpose of obtaining information about...any matters relevant to the trial". What is a "matter relevant to the trial" will vary from trial to trial. It includes a juror acquiring information about matters of evidence given or addresses to the jury: at [32]-[34].
- The mental element is not concerned with the juror's motive for making the inquiry. It is the fact of the inquiry, and that the *purpose* of the inquiry was to obtain information about a particular matter relevant to the trial, which is prohibited. Evidence was given about the Working with Children Check, defence counsel made submissions about that evidence, and referred to in the judge's summing up. It was irrelevant the juror had been a teacher and was curious about why they did not have a Working with Children Check: at [33]-[38].
- From the trial record, the judge was satisfied there had been misconduct and was required to immediately discharge the juror before taking the verdicts: at [41].
- **Inadvertent searching:** Section 68C(1), read with s 68C(5)(b), does not extend to what might be called 'inadvertent searching'. Section 68C(1) is directed to a juror making an inquiry *for the purpose* of obtaining information about a matter relevant to trial. Any concern for the safety and propriety of a jury trial arising from an inadvertent search undertaken by a juror may be addressed by the trial judge under s 53A(1)(c) read with sub-s (2)(b) or, alternatively, s 53B: at [35].

***Function of Court of Criminal Appeal - appeal against conviction on unreasonableness ground following trial by judge alone***

[Dansie v The Queen \[2022\] HCA 25; 96 ALJR 728](#)

Appeal from SA.

The appellant was convicted of murder by judge alone. The SA CCA (by majority) dismissed his conviction appeal, applying *M v The Queen* (1994) 181 CLR 487, reasoning that the inferences drawn, and the weight to be given to those inferences, were primarily matters for the trial judge as the trier of fact. In the High Court, the appellant argued that the majority in the SA CCA misinterpreted and misapplied the approach required to be taken to the unreasonable verdict ground under the *Criminal Procedure Act 1921* (SA), s 158(1)(a).

**Held:** Appeal allowed. The matter was remitted to the SA CCA.

- The SA CCA misapplied the test in *M v The Queen*. Each member of the Court of Criminal Appeal, in order to apply the test in *M v The Queen* in the circumstances of this case, needed

to ask whether he was independently satisfied as a result of his own assessment of the whole of the evidence adduced at trial that the only rational inference was that the appellant deliberately pushed the wheelchair into the pond with intent to drown his wife and, if not, whether the satisfaction arrived at by [the trial judge] could be attributed to some identified advantage which [the trial judge] had over [the appeal judge] in assessment of the evidence: at [38].

- Undue attention to the factual findings on which the trial judge relied in returning a verdict of guilty can distract the Court of Criminal Appeal from the proper assessment required by s 158(1)(a): at [7]. Where the trial was by judge alone, their reasons must be approached by the court of criminal appeal with circumspection lest findings of fact by the trial judge divert the court from undertaking requisite independent assessment of the evidence. The question for the court will remain whether the court's assessment of the totality of the evidence leaves the court with a reasonable doubt as to guilt which the court cannot assuage by having regard to advantage the trial judge had by having seen and heard the evidence at trial: at [16].

***s 80AF Crimes Act 1900 (NSW) - uncertainty about time when child sexual offence occurred - s 80AF did not operate with respect to trials that had already commenced when the provision came into force and it could not be invoked after the commencement of a trial.***

[Stephens v The Queen \[2022\] HCA 31: 96 ALJR 871](#)

Appeal from NSW.

The appellant was convicted at trial of multiple sexual assault offences. At the appellant's first arraignment, 3 counts were brought under alternative, historical offences (ss 81, 78K *Crimes Act*, repealed) due to uncertainty as to dates of some offences and which provision applied.

On 1 December 2018, two days after the first arraignment, s 80AF *Crimes Act* commenced without transitional provisions.

Section 80AF provides that where there is uncertainty about the offence date, the prosecution can rely on the offence carrying the lesser maximum penalty (in this case, s 81) for the entire charge period.

The Crown sought to take benefit of s 80AF and was granted leave to amend the indictment and substitute the alternative counts with three amended counts under s 81.

Section 81 had been repealed at a time during the relevant charge period. A practical effect of s 80AF was to enlarge the period during which s 81 was in force. The Crown thus removed uncertainty about whether the appellant could be convicted of an offence under s 81 or s 78K if it could not prove beyond reasonable doubt when the alleged conduct occurred: at [9].

The NSWCCA, by majority, held there was no error in granting the prosecution leave to amend the indictment, and allowing the trial to proceed, for the three counts against s 81. Section 80AF applied and did not offend the principles concerning retrospectivity: *Stephens v R* [2021] NSWCCA 152.

The appellant appealed to the High Court.

**Held:** By majority, appeal allowed. Convictions for the three counts against s 81 quashed and acquittals entered.

- s 80AF does not operate with respect to trials that had already commenced when the section came into force. On its terms, s 80AF may be invoked only at the commencement of a trial, not after the trial has already commenced: at [45]-[46].
- The underlying principle concerning how to interpret the temporal operation of legislation is based on reasonable expectations of the public, giving rise to a presumption against interpreting enactments of Parliament to conflict with recognised principles that Parliament would be prima facie expected to respect. The more fundamental the rights and the greater the extent to which they would be infringed, the less likely it is that such an intention will be ascribed to Parliament: at [33]-[34].
- To construe s 80AF as being *completely* retroactive would significantly disturb reasonable expectations about the manner in which the law is implemented. It would not only mean that the law concerning s 81 was altered retroactively for future trials. It would have the effect of

changing that law for extant proceedings, including those that commenced before s 80AF came into force such as the appellant's trial, where forensic decisions including a plea of guilty or not guilty or the scope of cross-examination of witnesses may have been made in reliance upon the previous law. And without any indication in the text, context, or purpose of s 80AF that this was intended: at [38].

- It is likely that there will be such uncertainty in many historic sex offence prosecutions and it may be that prosecution reliance upon s 80AF will become an almost invariable approach. But an interpretation of s 80AF which restricts its retroactive effect, by requiring that the Crown elect to take advantage of a provision making a change in the law before the trial commences, is supported by textual indications as well as reasonable expectations: at [47].

***ss 97, 101 Evidence Act 1995 – murder - tendency evidence of prior harm of deceased and victim's complaints of harm admissible - no general rule that requires 'close similarity' between conduct evidencing tendency and the offence***

[TL v The King \[2022\] HCA 35; 96 ALJR 1072](#)

Appeal from NSW.

The appellant was convicted of the murder of his two year old daughter by blunt force trauma to the abdomen. The appellant's case was that the Crown could not exclude the reasonable possibility that the victim was killed by the victim's mother or his nephew.

The trial judge admitted the following tendency evidence pursuant to ss 97 and 101 *Evidence Act*:

- Ten days before her death, the victim had burns after being bathed by the appellant which the appellant claimed were an accident ("the burns evidence")
- The victim complained on three occasions to family the appellant had harmed her ("the complaints evidence")

The NSW CCA dismissed the applicant's appeal.

The appellant appealed to the High Court on the sole ground that the NSW CCA erred in failing to hold that the tendency evidence lacked sufficient probative value, not having a "close similarity" between the conduct evidencing the tendency and the offence.

Held: Appeal dismissed.

- There is no general rule that demands or requires close similarity between the conduct evidencing the tendency and the offence. Such a rule is not required by the text of s 97: at [3], [29]; *Hughes v The Queen* (2017) 263 CLR 338.
- The observation in *Hughes* as to the general requirement for "close similarity" where identity is the relevant fact in issue should be understood as postulating a situation in which there is little or no other evidence of identity apart from the tendency evidence, and the identity of the perpetrator is "at large". Here, there was important evidence of identity, including that the appellant was one of only three persons who had opportunity to inflict the fatal injuries and evidence pointing against likelihood that the mother or nephew was the perpetrator. It could not be assumed that "close similarity" between the conduct evidencing the tendency and the offence was required to meet the threshold of significant probative value: at [30].
- In this case, the issue is whether the tendency evidence could rationally make it more likely, to a significant extent, that the appellant inflicted the blunt force trauma (or that the mother and nephew did not). That question requires consideration of: (1) the extent to which the evidence supports the asserted tendency; and (2) the extent to which the asserted tendency makes more likely the fact or facts sought to be proved by the evidence: at [31]; *Hughes v The Queen* at [41]; *McPhillamy v The Queen* (2018) 92 ALJR 1045 at [26], [34].
- The tendency was sufficiently striking and capable of being important to a conclusion that the appellant was the perpetrator and, accordingly, the burns and complaint evidence had requisite significant probative value for admissibility under s 97(1)(b). First, the tendency to deliberately and violently inflict serious physical harm on the victim concerned acts directed to a single



person, suggesting hostility by the appellant to the victim. Secondly, that tendency in relation to a young child is abnormal and unlikely to be shared by others with opportunity to inflict the injuries. Thirdly, the probative value of the evidence was increased by the close proximity in time (one month) of the charged offence, burns incident and complaints: at [37].

- The threshold of significant probative value was capable of being met without the close similarity insisted on by the appellant. Apart from the burns and complaint evidence, there was strong evidence identifying the appellant as the perpetrator: at [38].
- The tendency asserted in the notice was too general. Reformulation of a tendency without providing a notice under s 97(1)(a) may render evidence inadmissible. The insufficient particularisation of the asserted tendency in the amended notice, subsequent reformulation of that tendency absent formal amendment, absence of a separate tendency notice for the complaint evidence, and resulting non-compliance with s 97(1)(a) should not be condoned: at [33]; *Parkinson v Alexander* [2017] ACTSC 201, referred to.

## **B. SUPREME COURT CASES**

### ***Defence of mental health impairment - Exception to defence if impairment caused solely by temporary effect of ingesting substance or substance use disorder - Onus and burden of proof - Onus on Crown to prove exception to defence on balance of probabilities - Mental Health and Cognitive Impairment Forensic Provisions Act 2020, ss 4(3), 28***

*R v Miller* [2022] NSWSC 802 (Cavanagh J); *R v Sheridan* [2022] NSWSC 1669 (Garling J)

A defence of mental health impairment may be raised under s 28 *MHCIFPA* 2020:

s 28 Defence of mental health impairment or cognitive impairment

(1) A person is not criminally responsible for an offence if, at the time of carrying out the act constituting the offence, the person had a mental health impairment or a cognitive impairment, or both, that had the effect that the person—

- (a) did not know the nature and quality of the act, or
- (b) did not know that the act was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the act, as perceived by reasonable people, was wrong).

(2) The question of whether a defendant had a mental health impairment or a cognitive impairment, or both, that had that effect is a question of fact and is to be determined by the jury on the balance of probabilities.

(3) Until the contrary is proved, it is presumed that a defendant did not have a mental health impairment or cognitive impairment, or both, that had that effect.

(4) .....

The meaning of mental health impairment is set out in s 4:

s 4 Mental health impairment

(1) For the purposes of this Act, a

"person has a mental health impairment" if--

- (a) the person has a temporary or ongoing disturbance of thought, mood, volition, perception or memory, and
- (b) the disturbance would be regarded as significant for clinical diagnostic purposes, and
- (c) the disturbance impairs the emotional wellbeing, judgment or behaviour of the person.

(2) A mental health impairment may arise from any of the following disorders but may also arise for other reasons--

- (a) an anxiety disorder,
- (b) an affective disorder, including clinical depression and bipolar disorder,
- (c) a psychotic disorder,
- (d) a substance induced mental disorder that is not temporary.

(3) A person does not have a mental health impairment for the purposes of this Act if the person's impairment is caused solely by--

- (a) the temporary effect of ingesting a substance, or
- (b) a substance use disorder.

In these cases, the accused were charged with murder. In general terms, each accused sought to establish a mental health impairment under ss 4(1)-(2). The Crown case was that impairment of the accused was caused by the *temporary* effect of drug-taking within s 4(3).

The issue was whether s 4(3) provides an exclusion or exception such that if the Crown seeks to rely upon that exception, it bears the onus of proving the facts which give rise to that exclusion and, if so, the standard of proof. The latter point arises due to s 28(2) which provides that the question of whether a defendant had a mental health impairment is a question of fact to be determined by the jury on the balance of probabilities: **R v Sheridan** at [11]-[12].

Both cases held that where the Crown seeks to prove that the facts required for the operation of s 4(3) are present, it is the Crown who bears the onus of establishing those facts for the purpose of the application of s 4(3) on the balance of probabilities. The onus of proof is not beyond reasonable doubt as submitted by the accused: **R v Miller** at [61]; **R v Sheridan** at [20]-[27].

The accused must establish the matters referred to in ss 4(1)(a), (b) and (c) and that the mental health impairment arises out any of the disorders (or for other reasons) as set out in s 4(2). However, the Crown is to establish on the balance of probabilities that despite any satisfaction in respect of ss 4(1) and (2), the accused's mental health impairment was caused solely by one of the matters referred to in ss 4(3)(a) or (b): **R v Miller** at [62].

### ***“Will not become fit” for trial - s 20 Mental Health and Cognitive Impairment Forensic Provisions Act 2020***

**R v Woodham** [2022] NSWSC 1154 (Hamill J)

The Court considered the meaning of “will” in “will not become fit to be tried” in s 47(1)(b) *MHCIFPA*.

In *R v Risi* [2021] NSWSC 769 Beech-Jones CJ at CL (as his Honour then was) found that s 47(1)(a) - “may become fit to be tried” - is cast in terms of a possibility (“may”) whereas s 47(1)(b) is cast in terms of something akin to near certainty (“will”): at [20].

Recent CCA cases on s 22B *Bail Act* 2013 provide useful analysis of “will” (“will not be sentenced to imprisonment) and confirm that s 47(1)(b) does not require a state of “absolute certainty”.

It is a very high standard of satisfaction whether one applies the language of Beech-Jones CJ at CL (“real certainty”) or the CCA (“realistically inevitable”): at [20]-[23]; cases on s 22B - *DPP v Day* [2022] NSWCCA 173; *DPP v Van Gestel* [2022] NSWCCA 171.

### ***Meaning of “reasonably necessary” in s 230 Law Enforcement (Powers and Responsibilities) Act 2002***

**DPP (NSW) v Greenhalgh** [2022] NSWSC 980 (Ierace J)

Section 230 *LEPRA* provides it is lawful for a police officer exercising a function under the Act to use such force as is “reasonably necessary” to exercise the function.

The Court allowed the DPP appeal against the Magistrate’s dismissal of a charge under s 230 *LEPRA*. The first defendant police officer tasered and struck with a baton 18 times the unarmed teen complainant, who was acting bizarrely, naked, pacing the street under the influence of drugs.

The Court held that for the purposes of s 230, the objective test is: whether a reasonable person in the position of the police officer would not consider the use of force by the police officer to be disproportionate to the risk or danger sought to be prevented: at [186]; *R v Turner* [1962] VR 30; *Woodley v Boyd* [2001] NSWCA 35.

The Magistrate erred by failing to consider whether the defendant’s use of force was “reasonably necessary” by an objective standard. No mention was made of what a reasonable person in the defendant’s position would think of the proportionality of the contested baton strikes to the level of threat posed by the complainant: at [189]. The matter was remitted to the Local Court.

### ***Appeal against new non-parole period (NPP) following Commonwealth parole revocation***

**Tran v DPP (Cth)** [2022] NSWSC 778 (Rothman J)

The Court allowed the applicant’s appeal against a new NPP imposed by the Local Court following Commonwealth parole revocation. The NPP was manifestly excessive given additional evidence regarding the applicant suffering a mental illness or disorder. The nature of such an appeal is by way

of rehearing, with regard to other evidence (s 19AY(3) *Crimes Act* 1914 (Cth)). It is unnecessary to establish error at first instance in this case. It is necessary only for the Court to form the view that the additional evidence would produce a different result had it been available at trial (*CDJ v VAJ* (1998) 197 CLR 172): at [25].

### ***Procedural fairness - conviction in absence of prosecutor***

***DPP (NSW) v Peckham*** [2022] NSWSC 713 (Hamill J)

There was a denial of procedural fairness where, in the absence of the prosecutor and an explicit statement by the defendant he was entering a guilty plea, the Magistrate convicted the defendant and imposed no penalty under s 10A *CSPA* for breach of an apprehend domestic violence order. The Magistrate also erred by providing no reasons on sentence. The Court allowed the DPP's application for judicial review under s 69 *Supreme Court Act* 1970, quashed the order and remitted the matter to the Local Court to be dealt with according to law.

## **C. LEGISLATION**

### **[Confiscation of Proceeds of Crime Legislation Amendment Act 2022](#)**

**Commenced 1.2.2023**

**Allows a 'drug trafficker declaration' to be made against person convicted of serious drug offence; forfeiture order over unlawfully acquired property of person with declaration; restraining order over property of person with declaration.**

*Confiscation of Proceeds of Crime Act* 1989

s 34 - Drug trafficker declaration

The Director of Public Prosecutions or a police prosecutor may apply to an appropriate court for a declaration against a person convicted of a serious drug offence. The application may be made - (a) during sentencing proceedings for the serious drug offence, or (b) at another time: s 34(2).

The court must make a drug trafficker declaration if satisfied the person has been convicted of:

- (a) at least 3 serious drug offences in the previous 10 years, or
- (b) a serious drug offence involving a commercial quantity of prohibited drug or plant, or
- (c) a serious drug offence and the person is / was a member of a criminal group: s 34(3).

A drug trafficker declaration expires 5 years after the day on which the declaration is made: s 34(5).

s 34A - Forfeiture order: An appropriate officer may apply to the court for a forfeiture order in relation to the property belonging to, or in the effective control of, a person against whom a drug trafficker declaration is made.

s 43A(1) - Restraining Order: An officer or member of the Police Force may apply to Supreme Court for a restraining order in relation to property if reasonably suspects belongs to / is in effective control of, a person (a) against whom a declaration has been made, or (b) charged with a serious drug offence and against whom an application for declaration may be made if the person were to be convicted.

s 71A (replaces s 72) - Giving notices to financial institutions:

The Commissioner of Police may give notice to a financial institution requiring information or documents relevant to one or more of the following-

- (a) account held by a specified person with the financial institution,
- (b) whether a person is / was a signatory to an account,
- (c) balance of the account,
- (d) transactions over a specified period of up to 6 months,
- (e) accounts held by a specified person, including name of other person who held the accounts,
- (f) accounts for which a specified person is an authorised signatory,
- (g) transaction conducted by the financial institution on behalf of a specified person,
- (h) name of the person who holds a safety deposit box and dates accessed.

**[Law Enforcement \(Powers and Responsibilities\) Amendment \(Digital Evidence Access Orders\) Act 2022](#)**

**Commenced 1.2.2023**

**'Digital evidence access orders' will authorise law enforcement officers to issue directions requiring a person to assist the officer to access a device, such as by providing passwords or other access codes, found in execution of search or crime scene warrant.**

**[Law Enforcement \(Powers and Responsibilities\) Act 2002](#)**

New Pt 5 Div 4A (ss 76AA-76AQ)

s 76AB: An eligible applicant may apply for a DEAO in relation to a computer that may be found, or has been found, in the execution of a search or crime scene warrant.

s 76AM: The executing officer for a digital evidence access order may direct the specified person to-

(a) give information or assistance reasonable and necessary to enable the officer to access data from a computer specified in the order, or

(b) give the officer any information or assistance reasonable and necessary to allow the officer to—  
(i) copy data from a computer to another computer, or (ii) convert the data into a documentary form or another form intelligible to a computer used by the officer.

s 76O: An offence will apply if a person does not comply with such a direction.

A specified person for a digital evidence access order must not, without reasonable excuse

(a) fail to comply with a direction; or

(b) give the executing officer information that is false or misleading

Maximum penalty—100 penalty units or imprisonment for 5 years, or both.

It is not a reasonable excuse to fail to comply with the order on the ground that complying would tend to incriminate the person or expose the person to a penalty.

**[Dedicated Encrypted Criminal Communication Device Prohibition Orders Act 2022](#)**

**Commenced 1.2.2023**

**A scheme aimed at dedicated encrypted criminal communication devices (DECCDs) specifically developed for use by organised crime groups with high-level encryption and closed-network features. A police officer may apply to an authorised magistrate for a DECCD prohibition order.**

s 12: An authorised magistrate may make a DECCD prohibition order.

s 13: Matters to be taken into account include any matter the magistrate considers relevant. The magistrate may consider:

(a) potential risk to public safety presented by the eligible person,

(b) whether associates with persons suspected to be involved in serious criminal activity,

(c) intelligence about suspected involvement in serious criminal activity or drug-related crime,

(d) whether a member of, or associates with, a criminal group,

(e) information from registered sources,

(f) surveillance reports,

(g) whether person has cash or assets significantly out of proportion to income.

**[Crimes Act 1900](#)**

New s 192P: Offence of possess DECCD where there are reasonable grounds to suspect the possession was to commit or facilitate "serious criminal activity". Maximum penalty 3 years imprisonment. "Serious criminal activity" (defined in s 192N) includes committing an offence punishable by 5 years or more.

**[Law Enforcement \(Powers and Responsibilities\) Act 2002](#)**

New Part 5A: DECCD Access Orders can be made by a magistrate to authorise a police officer to examine a device and data.

s 80M: The officer may direct the relevant person to give information or assistance that is reasonable and necessary.

s 80O: Fail to comply with a DECCD access order without reasonable excuse is an offence. Maximum penalty 100 penalty units and/or 5 years.

### **Crimes Amendment (Protection of Criminal Defence Lawyers) Act 2022**

**Commenced 25.11.2022**

**Extends offences protecting judges and persons connected with judicial proceedings from threats, intimidation and reprisals to also protect an Australian legal practitioner who acts— (a) for a defendant in a criminal matter, or (b) in connection with criminal proceedings.**

*Crimes Act 1900*

s 322(e): an offence, without reasonable excuse, to threaten to do or cause, or do or cause, an injury or detriment to a person intending to influence the person's conduct as an Australian legal practitioner acting for a defendant in a criminal matter or in connection with criminal proceedings. Maximum penalty 10 years.

s 326(1)(d): an offence, without reasonable excuse, to threaten to do or cause, or do or cause, an injury or detriment to a person on account of anything lawfully done by the person as an Australian legal practitioner acting for a defendant in a criminal matter or in connection with criminal proceedings. Maximum penalty 10 years.

A 'reasonable excuse' includes making a complaint about a person to a person or body acting in an official capacity, e.g Judicial Commission of NSW; or ending, or threatening to end, a retainer.

### **Criminal Procedure Legislation Amendment (Prosecution of Indictable Offences) Act 2022**

**Commenced 18.10. 2022**

**Amends definition of law enforcement or investigating officers and introduces new provisions outlining their duties of disclosure to prosecutors.**

*Criminal Procedure Act 1986*

s 3(1): Definition of 'law enforcement or investigating officer' - a police officer, or another officer or a member of staff of an agency created by or under an Act, who is responsible for an investigation into a matter involving the suspected commission of the alleged offence.

s 36B: Duties of disclosure by law enforcement or investigating officers:

- duty to disclose to prosecutors all relevant information, documents or other things obtained during the investigation that might reasonably be expected to assist the case for the prosecution or the case for the accused person: s 36B(1).
- duty of disclosure continues until prosecutor decides accused will not be prosecuted for the offence, the prosecution is terminated, or accused is convicted or acquitted: s 36B(2).
- duty to keep the documents subject of s 36B(1) for as long as the duty to disclose them continues: s 36B(3).
- This duty is subject to a claim of privilege, public interest immunity, statutory immunity, or statutory publication restriction: s 36B(7). The officer must inform the prosecutor of the existence and nature of material including the claim or publication restriction relating to it: s 36B(8). The officer must provide the protected material if requested by the prosecutor: s 36B(9).
- No duty imposed if the prosecutor is the Director of Public Prosecutions: s 36B(10).
- s 66(2)(b): a prosecutor must certify in a charge certificate they have received and considered verification of compliance with disclosure duties for an alleged offence for which there are such duties under s 15A *Director of Public Prosecutions Act 1986*, and s 36B CPA.

*Transitional provisions*

Sch 2, pt 48: amendments extend to proceedings commenced, but not yet committed for trial or sentence, before 18 October 2022. An existing DPP disclosure certificate may be used as verification of compliance disclosure for the new s 66(2)(b) relating to the offence in the proceedings.

### [Crimes \(Administration of Sentences\) Amendment \(No Body, No Parole\) Act 2022](#)

Commenced 18.10.2022

**Prevents homicide offender from receiving parole if fail to disclose location of victim's remains.**

Crimes (Administration of Sentences) Act 1999

s 135A applies to offenders serving term of imprisonment for a homicide offence (defined in s 135A(8)) and—

- (a) the body or remains of the victim have not been located, or
- (b) because of an act or omission of the offender or another person, part of the body or remains of the victim has not been located: s 135A(1).

The State Parole Authority must not make a parole order directing release of an offender to whom s 135A applies unless satisfied the offender has cooperated satisfactorily in police investigations or other actions to identify the victim's location, whether before or after sentencing: ss 135A(2), (3).

s 160(3): s 135A applies to the making of special parole orders where an offender is dying or for other exceptional extenuating circumstances.

Commissioner of Police must provide the Authority a written report evaluating any cooperation provided by the offender, including extent, truthfulness and utility of the cooperation: s 135A(4).

Retrospective application

s 139: s 135A applies to the making of a parole order –

- (a) whether the offender was convicted or sentenced before or after 18 October 2022, and
- (b) whether or not application for the parole order made before 18 October 2022.

### [Crimes Legislation Amendment \(Assaults on Frontline Emergency and Health Workers\) Act 2022](#)

Commenced 18.10. 2022

**Amends Crimes Act 1900 to create new offences for assaults and other actions in relation to law enforcement officers, frontline emergency and health workers and persons who come to aid of law enforcement officers.**

Crimes Act 1900

s 4 Definitions: "public disorder" includes a riot or civil disturbance at a correctional or detention centre.

s 60AA: news definitions of "frontline emergency worker" and "frontline health worker" for Pt 3; definition of "law enforcement officer" to include a person employed or engaged to provide education, health or rehabilitation services to inmates or detainees in a correctional or detention centre.

s 58: Amended to remove that part of the offence relating to officers. It now provides only for the offences of assault with intent to commit a serious indictable offence, and assault with intent to resist or prevent the lawful apprehension or detainer of any person for an offence.

The new offences are inserted into 'Division 8A Assaults etc against law enforcement officers and frontline emergency and health workers.' New offences include: Hinder or resist, or incite another to hinder or resist, in the execution/course of their duty; Assault, throw missile at, stalk, harass or intimidate, in the course of their duty; Assault causing actual bodily harm in the execution/course of their duty during a public disorder; Recklessly wound or cause grievous bodily harm in the course of their duty.

### [Crimes \(Sentencing Procedure\) Amendment Act 2022](#)

Commenced 18.10. 2022

**Repeals ss 25AA(1), (2), (4) CSPA which required court to impose sentences for child sexual offences according to sentencing patterns and practices at the time of sentencing.**

**Replaces those provisions with s 21B. The main change was that s 25AA was limited to child sexual offences, whilst s 21B applies to all offences. Like s 25AA, ss 21B requires a court to sentence an offender according to sentencing patterns and practices at the time of sentencing,**

**not the time of the offence (s 21B(1)), and that the SNPP is the one that applied at the time of the offence, not sentencing (s 21B(2)).**

Crimes (Sentencing Procedure) Act 1999

s 25AA(3) (court, when sentencing for a child sexual offence, to have regard to trauma of sexual abuse on children as understood at time of sentencing) and s 25AA(5) (definition of child sexual offence) are retained.

*Section 21B*

New ss 21B(1) and (2): Court must sentence an offender according to sentencing patterns and practices at the time of sentencing. The standard non-parole period for an offence is the one that applied at the time of the offence.

s 21B(3): Court may sentence an offender for an offence in accordance with the sentencing patterns and practices at the time the offence was committed if:

- (a) The offence is not a child sexual offence; and
- (b) The offender establishes that there are exceptional circumstances.

s 21B(4): Court, when varying or substituting a sentence, must do so in accordance with the sentencing patterns and practices at the time of the original sentencing.

*Intensive Corrections Orders*

s 67(2)(h) CSPA: definition of 'prescribed sexual offence' to include offences under a previous enactment that are substantially similar to an offence referred to in s 67(2)(a)-(g) so that an ICO under s 67(1) cannot be made for certain sexual offences regardless of when offence committed or under what provision charged.

*Application*

The amendments will not apply to proceedings commenced prior to 18 October 2022.

**Crimes Amendment (Prohibition on Display of Nazi Symbols) Act 2022**

**Commenced 19.9. 2022**

Crimes Act 1900

s 93ZA in new Division 9 of Part 3A: an offence to knowingly display, by public act and without reasonable excuse, a Nazi symbol. Maximum penalty: 100 penalty units and/or 12 months imprisonment (individual); 500 penalty units (corporation).

"Public act" has the same meaning as in s 93Z: s 93ZA(4).

Display of a swastika in connection with Buddhism, Hinduism or Jainism does not constitute the display of a Nazi symbol: s 93ZA(2).

"Reasonable excuse" includes, but is not limited to, the display of a Nazi symbol done reasonably and in good faith for an academic, artistic or educational purpose, or for a purpose in the public interest: s 93ZA(3).

Section 584: Div 9 to be reviewed 3 years 6 months after its commencement, then not more than 5 years for subsequent reviews.

**Bail Amendment Act 2022**

**Commenced 27.6.2022**

Bail Act 2013

s 22B: For a release or detention application made during the period following conviction and before sentencing for an offence for which the accused will be sentenced to full-time imprisonment, a court must not grant or dispense with bail unless special or exceptional circumstances exist: s 22B(1).

If the offence is a show cause offence, the special or exceptional circumstances test applies instead of the show cause test. If established, the unacceptable risk test will then apply: s 22B(2), (3).

A 'conviction' includes a plea of guilty: s 22B(5).

s 30A: if bail conditions require electronic monitoring, the bail condition must meet any monitoring standard prescribed in the Regulations, and the bail authority must be satisfied that the monitoring meets standards.

#### *Application*

Amendments by the *Bail Amendment Act 2022* apply to bail decisions made after 27 June 2022 (cl 45).

### **[Crimes Legislation Amendment \(Sexual Consent Reforms\) Act 2021](#)**

Commenced 1.6.2022. [Second Reading Speech](#).

#### **Crimes Act 1900**

#### **New 'Subdivision 1A Consent and knowledge of consent' – ss 61HF - 61HK**

s 61HF provides an objective of this Subdivision is to recognise—

- (a) every person has a right to choose whether or not to participate in a sexual activity,*
- (b) consent to a sexual activity is not to be presumed,*
- (c) consensual sexual activity involves ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity.*

The Subdivision applies to ss 61I, 61J, 61JA, 61KC, 61KD, 61KE and 61KF: s 61HG.

#### **Definition of consent – s 61HI**, set out below.

Consistent with current law, under s 61H(1) the core definition of consent is a "free and voluntary agreement." Consent must be present at the time of the sexual activity, and different acts along a sexual continuum require consent.

The legislation does not require every small increment along a sexual continuum to have consent sought and obtained. A principal aim of the reforms is to recognise and deal with misconceptions that consent to one sexual activity is consent to all or any other sexual activity.

Consent can also be withdrawn by words or conduct—see s 61HI (2). "This requirement serves to provide fairness to an accused because it precludes an internal—that is, in their own mind—withdrawal of consent to, for example, penetration when that withdrawal is not communicated" (*Second Reading Speech*).

s 61HI further provides a set of universal statements to support the definition of "consent" in s 61HI(1).

##### *s 61HI Consent generally*

- (1) A person consents to a sexual activity if, at the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity.*
- (2) A person may, by words or conduct, withdraw consent to a sexual activity at any time.*
- (3) Sexual activity that occurs after consent has been withdrawn occurs without consent.*
- (4) A person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity.*
- (5) A person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity. Example— A person who consents to a sexual activity using a condom is not, by reason only of that fact, to be taken to consent to a sexual activity without using a condom.*
- (6) A person who consents to a sexual activity with a person on one occasion is not, by reason only of that fact, to be taken to consent to a sexual activity with—*
  - (a) that person on another occasion, or*
  - (b) another person on that or another occasion.*

#### **Circumstances in which there is no consent – s 61HJ**

s 61HJ sets out a non-exhaustive list of circumstances in which there is no consent, including if the person:

- does not say or do anything to communicate consent (addresses the "freeze" response)
- does not have capacity to consent
- is so affected by alcohol or drug as to be incapable of consenting
- is unconscious or asleep
- participates because of force, fear of serious harm of any kind to the person, another person, an animal or property; because of coercion, blackmail or intimidation; is unlawfully detained;



overborne by abuse of a relationship of authority, trust or dependence; or because of fraudulent inducement

- is mistaken about the nature or purpose of the sexual activity, identity of the other person, or being married to the other person.

### **Knowledge about consent - 61HK**

*Second Reading Speech:* Sections 61HK(1)(a)-(c) retains the three states of mind by which knowledge of non-consent may be established: actual knowledge of non-consent, recklessness, and a hybrid subjective/objective test of no reasonable grounds for believing the other person was consenting.

Section 61HK(1)(c) updates the current test of 'no reasonable grounds' to a 'no reasonable belief' test. The focus is on the reasonableness of any belief an accused has in light of all relevant circumstances, rather than on the narrow question of whether there existed any single ground or grounds on which the accused may have held that belief. A fact finder is to consider whether the accused's belief was objectively reasonable. Specifically, the subjective belief must be as to whether there exists consent in the form of a free and voluntary agreement. The definition of consent, and purpose of the legislation to reinforce a communicative model of consent, limit the extent to which misogynistic beliefs can be taken into account in determining subjective reasonableness of a belief.

Section 61HK(2) reinforces the important principle that consent can never be assumed. It introduces an affirmative consent requirement, meaning the accused must have sought consent by saying or doing something in order to have a reasonable belief that the other person consented. The onus remains on the Crown to prove each element of the sexual offence beyond reasonable doubt.

#### *61HK Knowledge about consent*

*(1) A person (the accused person) is taken to know that another person does not consent to a sexual activity if*

*(a) the accused person actually knows the other person does not consent to the sexual activity, or*

*(b) the accused person is reckless as to whether the other person consents to the sexual activity, or*

*(c) any belief that the accused person has, or may have, that the other person consents to the sexual activity is not reasonable in the circumstances.*

*(2) Without limiting subsection (1)(c), a belief that the other person consents to sexual activity is not reasonable if the accused person did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consents to the sexual activity.*

*(3) Subsection (2) does not apply if the accused person shows that—*

*(a) the accused person had at the time of the sexual activity—*

*(i) a cognitive impairment within the meaning of section 23A(8) and (9), or*

*(ii) a mental health impairment, and*

*(b) the impairment was a substantial cause of the accused person not saying or doing anything.*

*(4) The onus of establishing a matter referred to in subsection (3) lies with the accused person on the balance of probabilities.*

*(5) For the purposes of making any finding under this section, the trier of fact—*

*(a) must consider all the circumstances of the case, including what, if anything, the accused person said or did, and*

*(b) must not consider any self-induced intoxication of the accused person.*

**Updating of language** - Amendments are made to update and clarify the definitions of sexual intercourse, sexual touching and sexual act, including: it is not relevant whether a body part is 'surgically constructed' for the purposes of a sexual offence; provisions concerning sexual intercourse and sexual touching apply regardless of gender or sex; sexual activities are described in appropriate language (for example, s 61HA(c) describes oral sex on a female as "the application of the mouth or tongue to the female genitalia"); the term 'complainant' replaces 'victim.'

### **Criminal Procedure Act 1986**

#### **New jury directions about consent – ss 292A-292E**

Five new jury directions about consent seek to address common misconceptions about consent and to ensure a complainant's evidence is assessed fairly and impartially by the tribunal of fact.

*Section 292 Directions in relation to consent* – provides that the judge must give any one or more of the directions in ss 292A - 292E if there is good reason to do so, or if requested by a party to the proceedings, unless there is good reason not to do so. A judge may give a consent direction at any time during a trial and on more than one occasion; and is not required to use a particular form of words in giving a direction.

*Section 292A Circumstances in which non-consensual sexual activity occurs* – clarifies that non-consensual sexual activity can occur in different circumstances and between different kinds of people including people who know each other, are married or in an established relationship. The list is non-exhaustive.

*Section 292B Responses to non-consensual sexual activity* - direction regarding responses to non-consensual sexual activity, including that there is no normal response, people respond in different ways, including by freezing and that the jury must avoid making assessments based on preconceived ideas about responses to non-consensual sexual activity.

*Section 292C Lack of physical injury, violence or threats* - direction that people who do not consent may not be physically injured, subjected to violence, or threatened with injury or violence; and absence of such evidence does not necessarily mean that a person is not telling the truth.

*Section 292D Responses to giving evidence* - direction on responses people may have to giving evidence, including that trauma may affect people differently and that the presence or absence of emotion or distress does not necessarily mean that a person is not telling the truth.

*Section 292E Behaviour and appearance of complainant* - direction that it should not be assumed a person consented because of their behaviour, including having worn particular clothing, consumed drugs or alcohol, or being at a particular location.

## **Crimes Legislation Amendment (Loss of Foetus) Act 2021**

**Commenced 29.3.2022**

### **Crimes Act 1900 - new ss 54A and 54B**

ss 54A and 54B create offences in relation to causing the loss of a foetus of a pregnant woman. The offences apply only to an offence alleged to have been committed on or after commencement.

Foetus is defined as a foetus - (a) of at least 20 weeks' gestation, or (b) where not possible to reliably establish period of gestation - has a body mass of at least 400 grams.

#### **s 54A Offence of causing loss of a foetus**

- An offence is committed if the person's act or omission constitutes an offence involving physical elements of causing GBH to a person and the act or omission causes the loss of a foetus of a pregnant woman.
- Maximum penalty is the total of the maximum penalty for (a) the relevant GBH provision and (b) 3 years' imprisonment (the total maximum penalty).
- The prosecution is not required to prove the defendant knew, or ought reasonably to have known, the woman was pregnant, unless the knowledge is an element of the relevant GBH provision.
- In addition to s 54A, the person may be charged and convicted of another offence under the *Crimes Act* if the act or omission caused other injuries to the pregnant woman.
- A court, in sentencing under s 54A and another offence, may take into account any other injuries caused to the pregnant woman, but may not impose a sentence more than the total maximum penalty.

#### **s. 54B Offence of causing loss of a foetus (death of pregnant woman)**

- It is an offence where (a) the act or omission constitutes an offence under certain sections of the *Crimes Act* 1900 relating to homicide (see s 54(6)), and (b) the victim is a pregnant woman, and (c) the act or omission includes causing the loss of the foetus.
- A person can only be charged under s 54B if also charged with an offence under a specified homicide provision in relation to the same act or omission.
- Maximum penalty: 3 years' imprisonment.
- The prosecution is not required to prove the defendant knew, or ought reasonably to have known, the woman was pregnant.

ss 54A and 54B do not apply to:

- (a) termination of a pregnancy under *Abortion Law Reform Act 2019*, or
- (b) an act or omission of a pregnant woman that results in the loss of the woman's foetus.

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

s 26 - amended definition of 'family victim' to include an immediate family member of a pregnant woman to extend provisions relating to victim impact statements.

#### *Criminal Procedure Act 1986*

New s 16(1)(d) provides that stating the name of a foetus does not affect an indictment for an offence under the *Crimes Act 1900* relating to the destruction or loss of the foetus.

#### [Modern Slavery Act 2018 \(NSW\)](#)

Amended before commencement by [Modern Slavery Amendment Act 2021 \(NSW\)](#)

#### **Commenced 1.1.2022**

The Act:

- Aims to combat modern slavery
- Appoints an Anti-slavery Commissioner whose functions include to advocate for and promote action to combat modern slavery; to identify and provide support for victims of modern slavery.
- Introduces certain offences into the *Crimes Act 1900* [Modern Slavery Act 2018](#)

#### Definitions – s 5(1)

*“Modern slavery”*: includes any conduct—

- (a) constituting a modern slavery offence,
- (b) involving the use of any form of slavery, servitude or forced labour to exploit children or persons taking place in the supply chains of organisations.

*“Modern slavery offence”* means—

- (a) an offence described in Schedule 2
- (b) an offence of attempting, or of incitement, to commit an offence described in Schedule 2
- (c) conduct engaged in elsewhere than in NSW that, if it occurred in NSW, would constitute a modern slavery offence under (a) or (b).

Offences in Sch 2 include:

- Causing sexual servitude; conduct of business: *Crimes Act*, ss 80D, 80E
- Use child for production of child abuse material; Production, dissemination or possession of child abuse material: *Crimes Act*, ss 91G, 91H
- Slavery and slavery-like offences: *Crimes Act*, ss 93AA-93AC; *Criminal Code (Cth)*, Div 270;
- Trafficking in persons offences: *Criminal Code (Cth)*, ss 271.2-271.7
- Organ trafficking offences: *Criminal Code (Cth)*, ss 271.7B-271.7E

#### *Crimes Act 1900 – new offences*

##### *Aggravated offence of use child for production of child abuse material*

s 91G(3)-(3A) - aggravated form of ss 91G(1) and (2) of using a child under 14 years, or 14 years or above, for production of child abuse material. Maximum penalty: 20 years imprisonment.

##### *Offences of digital platforms dealing with child abuse material*

s 91HAA(1) - Administering a digital platform used to deal with child abuse material.

s 91HAB(1) - Encouraging use of a digital platform to deal with child abuse material.

s 91HAC - Providing information about avoiding detection of, or prosecution for, conduct that involves an offence against ss 91HAA or 91HAB.

Maximum penalty for each: 14 years imprisonment.

##### *Slavery and slavery-like offences*

s 93AB - Slavery, servitude and child forced labour - maximum penalty 25 years imprisonment.

s 93AC - Child forced marriage - maximum penalty 9 years imprisonment.

Crimes (Domestic and Personal Violence) Act 2007

A "personal violence offence" in s 4 is amended to include offences of-

- child forced marriage (s 93AC *Crimes Act*)
- forced marriage offences (*Criminal Code* (Cth), s 270.7B)

"intimidation" in s 7 is amended to include conduct amounting to coercion of, or threats to, a child to enter a forced marriage.

Crimes (High Risk Offenders) Act 2006

"serious sex offence" and "offence of a sexual nature" in s 5 is amended to include an offence of sexual servitude under the *Crimes Act*, Pt 3, Div 10A.