

RECENT DEVELOPMENTS IN SENTENCING

2007 - 2

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1. Introduction

Sir Gerard Brennan, former Chief Justice of the High Court of Australia, made a statement about sentencing that is unarguable. He said:

“The responsibility for determining an appropriate sentence rests squarely and solely on the sentencing judge”.¹

Notwithstanding the truth and the force of that remark, the Crown (and the defence where legal representation is retained) remains obliged to provide the court with the fullest assistance possible in the conduct of sentence proceedings. With this in mind, and in the time available today, I propose to comment on some significant legislative developments and selected NSW Court of Criminal Appeal decisions in the last year. I will also touch on one or two other matters which confirm (if that needs confirming) the complex and continually changing nature of sentencing and its importance in the criminal justice system and in our community.

2. Significant Legislative Change

Parliament responded to community concern, judicial expressions of bewilderment and perceived deficiencies in the law by enacting significant legislative changes in 2006.

¹ Sir Gerard Brennan AC KBE, “The High Court and the Sentencing Environment”, Conference Paper, **Sentencing: Principles, Perspectives and Possibilities**, 10-12 February 2006, Canberra at p 6.

Considerations of community safety prompted legislation relating to the continuing detention of serious sex offenders and to the sentencing of offenders convicted of offences against victims in vulnerable occupations. Judicial statements highlighting deficiencies in existing legislation² led to legislative amendments governing the imposition of limiting terms on persons found unfit to be tried who have committed multiple offences and clarifying appeals from suspended sentences.

Some legislative changes were met with opposition, with the continuing detention legislation being strongly criticised by the NSW Law Society and defence barristers, among others. Some commentators regarded as abhorrent legislation which provided for the continuing detention of offenders beyond the expiration of their terms of imprisonment, solely on the basis of predictions of future dangerousness. Such legislative provisions, it was argued, ran contrary to the fundamental principle of punishing persons for the crimes they have committed.³ I shall return to this.

(a) Mental Health (Criminal Procedure) Act 1990

The **Mental Health (Criminal Procedure) Act 1990** was amended⁴ in response to the judgment in **R v RTI** [2005] NSWCCA 337. In that case two special hearings under the **Mental Health (Criminal Procedure) Act 1990** were conducted in respect of multiple charges of sexual assault and assault alleged against the appellant. This Act provides for the conduct of special hearings once a person charged with a criminal offence is found unfit to be tried. Following the completion of the second special hearing the judge reserved his decision and subsequently nominated limiting terms; that is, terms of imprisonment that would have been imposed following the normal trial of a person who had been found fit to be tried. The judge made these limiting terms partly cumulative, resulting in an aggregate

² **R v RTI** [2005] NSWCCA 337; **Barrett v Director of Public Prosecutions** [2006] NSWCCA 210.

³ See Patrick Keyzer and Suzanne O'Toole, "Time, Delay and Nonfeasance: The Dangerous Prisoners (Sexual Offenders) Act 2003 (Queensland)" in (2006) 31(4) **Alternative Law Journal** 183 at 198-202. The article includes an examination of recent Queensland cases and the references cited in relation to accurate prediction of future offending and whether the legislative regime inflicts double punishment and is inconsistent with Australia's obligations under Art 14(7) of the **International Covenant on Civil and Political Rights**.

⁴ **Mental Health (Criminal Procedure) Amendment Act 2005** (No 109). Assent 7/12/2005, Gaz 157, 16/12/2005, p 10874. Commencement 1/1/2006, Gaz 158, 16/12/2005, p 11190.

limiting term of 11 years. Some of these cumulative limiting terms were nominated to commence after the date of their imposition.

In the course of quashing determinations that the appellant committed the offences and ordering new special hearings on the basis that no enquiry had been made of the appellant's competence to make an election that he be tried by judge alone, Giles JA, with whom Hislop J and Smart AJ agreed, made some observations about s 23 of the Act and the imposition of cumulative limiting terms. His Honour said at [43] —

*“Section 23(5) directs that the limiting term takes effect from the time when it is nominated. It and s 23(4) authorise only a back-dated commencement of a limiting term having regard to the periods of the person’s custody or detention before, during and after the special hearing, being periods related to the offence. Further, as was pointed out in **R v AN** [2005] NSWCCA 239 at [14], s 23(5) does not authorise the commencement of a limiting term on a date after its imposition.”*

The sentencing process miscarried as the sentencing judge had, after considering the issue of accumulation, imposed some limiting terms commencing after the date on which they were imposed, contrary to s 23(5).

Giles JA went on to state at [45] —

“It is difficult to see that the legislature intended that the range of sentencing options available on a trial in accordance with normal procedures should not be available: s 23(1)(b) of the Act is to the contrary. Yet that is so when there are multiple offences calling for consideration of cumulation. There is a defect in the legislation, which deserves further attention.”

Subsequently, the **Mental Health (Criminal Procedure) Act 1990**, s 23(5)(a) and (b) were amended as follows; ⁵

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

⁵ Ibid.

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

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

(b) Crimes (Serious Sex Offenders) Act 2006

The legislature addressed the dangerousness of serious sex offenders by enacting the **Crimes (Serious Sex Offenders) Act 2006**.⁶ This Act makes provision for the Attorney General to apply to the Supreme Court for an "extended supervision order" or a "continuing detention order" against an offender serving a term of imprisonment for a "serious sex offence" or an "offence of a sexual nature". The Act reflects perceived community concern about releasing serious sexual offenders after their sentences have expired and where they continued to pose an "unacceptable risk" to society of future serious sexual re-offending. In his Second Reading Speech, the Minister expressed the concern in these terms:

*"...These offenders make up a very small percentage of the prison population, yet their behaviour poses a very real threat to the public. These concerns are compounded where the offender never qualifies for parole and is released at the end of their sentence totally unsupervised. The bill addresses this problem by allowing this small group of high-risk offenders to be placed on extended supervision, or, in only the very worst cases, kept in custody. The Department of Corrective Services has advised that only a small number of offenders would fall into this very high-risk category."*⁷

⁶ **Crimes (Serious Sex Offenders) Act 2006** (NSW) (No 7). Assent 3/4/2006, Gaz 52, 13/4/2006, p 2101. Commencement on assent.

⁷ The Honourable Carl Scully, on behalf of the Attorney General, the Honourable Bob Debus, NSW Hansard, Second Reading Speech, 29 March 2006, p 21730.

In **Fardon v Attorney-General for the State of Queensland** (2004) 78 ALJR 1519 the High Court, by majority, upheld the validity of the Queensland counterpart of this legislation as being not incompatible with the principle in **Kable v Director of Public Prosecutions (NSW)** (1996) 189 CLR 51. In **Fardon** Gleeson CJ said at [15]:

*“The decision in **Kable** established the principle that, since the Constitution established an integrated Australian court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role as a repository of federal jurisdiction, is invalid.”*

Starkly contrasting views of the Queensland legislation were expressed by members of the court in **Fardon**. Kirby J at [176] described the legislation as “...*inconsistent with the traditional judicial process*” and as adding “...*to the effective punishment of those individuals by exposing them to continued detention beyond the sentence judicially imposed by earlier final orders.*”

Callinan and Heydon JJ, on the other hand, stated at [217]:

“In our opinion, the Act... is intended to protect the community from predatory sexual offenders. It is a protective law authorizing involuntary detention in the interests of public safety. Its proper characterization is as a protective rather than a punitive enactment. It is not unique in this respect. Other categories of non-punitive, involuntary detention include: by reason of mental infirmity; public safety concerning chemical, biological and radiological emergencies; migration; indefinite sentencing; contagious diseases and drug treatment... This is not to say however that this Court should not be vigilant in ensuring that the occasions for non-punitive detention are not abused or extended for illegitimate purposes”.

(c) Amendments in Response to the Cronulla Riots

Amendments to the **Crimes (Sentencing Procedure) Act 1999**⁸ concerning the sentencing of offenders for crimes committed against public transport workers and community and volunteer workers such as lifesavers recognised the increasing number of assaults on these persons in 2005. The Cronulla riots in December 2005 caused the emergency recall of Parliament to enact this and related legislation. The amendments were effected by clarifying that s 21A(2) of the **Crimes (Sentencing Procedure) Act 1999**, which provides a list of aggravating factors to be taken into account on sentence, includes within that list of aggravating factors an extended s 21A(2)(a) providing that:

“the victim was a police officer, emergency services worker, correctional officer, judicial officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim’s occupation or voluntary work.”

The term “*occupation*” was broadened to include “*voluntary work*”.

Section 21A(2)(l)⁹ was amended to include all front-line public transport workers in the examples of vulnerable occupations. The table of standard non-parole periods was amended in relation to the standard non-parole period of 25 years for murder, to extend the wording: “*where the offence arose because of the victim’s occupation*” to include “*voluntary work*”.

(d) Availability of Appeals against the Revocation of a Suspended Sentence

During 2006, two issues continued to vex sentencing judges and the parties who appeared before them. The first was whether an appeal lay against the revocation of a bond attached to a suspended sentence. The second was whether the **Crimes (Sentencing Procedure) Act** required the imposition of a non-parole period when imposing a suspended sentence or at some later time if the good behaviour bond was breached and revoked. Difficulties with the manner and timing of the revocation of a good behaviour bond were commented on in **R v Tolley** [2004] NSWCCA 165 and **R v Graham** [2004] NSWCCA 420. The availability of an

⁸ **Crimes (Sentencing Procedure) Amendment Act 2006** (No 27). Assent and commencement 26/5/2006.

⁹ *Ibid.*

appeal also arose in **Barrett v Director of Public Prosecutions** [2006] NSWCCA 210, **Wise v Regina** [2006] NSWCCA 264 and **Muir v Director of Public Prosecutions** (unrep, 11/8/2006, NSWDC).

Barrett was a stated case arising from an appeal against the revocation of a s 12 bond in circumstances where the sentence originally imposed in the Local Court was contrary to law. Although the NSWCCA considered that the stated questions did not arise for determination,¹⁰ comments by way of *obiter* included that an appeal against the revocation of a suspended sentence did not lie to the District Court under to s 11 of the **Crimes (Local Courts Appeal and Review) Act 2001** (as it was then called). This was because the revocation of the bond was not “... *either the effect or the result of the conviction.*” The conviction was in fact “...*no more than a sine qua non of the revocation.*”¹¹ The dilemma therefore remained and applied to appeals from the District Court to the Court of Criminal Appeal because the definition of sentence in s 2 of the **Criminal Appeal Act 1912** was the same.

Clarification was made in November 2006 with the **Crimes and Courts Legislation Amendment Act 2006**, a lengthy omnibus statute that amended the **Crimes (Sentencing Procedure) Act 1999**, the **Crimes (Local Courts Appeal and Review) Act 2001** and the **Criminal Appeal Act 1912**, among others.

The clarifications and changes include, but are not limited to, the following.¹²

(1) An amendment to the definition of “*sentence*” in s 3 of the **Crimes (Local Courts Appeal and Review) Act 2001** and s 2 of the **Criminal Appeal Act 1912** to include an order

10 The questions stated were: (1) Where a Local Court has reopened proceedings (s 43 **Crimes (Sentencing Procedure) Act**) and then imposed a penalty, is that penalty able to be appealed pursuant to s 11 **Crimes (Local Courts Appeal and Review) Act**. (2) Where a Local Court has revoked a s 12 **Crimes (Sentencing Procedure) Act** bond, is the decision to revoke and any consequent order able to be appealed against under s 11 **Crimes (Local Courts Appeal and Review) Act**.

11 **Barrett** at [15]. This meant that the appellant could have the initial sentence reopened under s 43 of the **Crimes (Sentencing Procedure) Act** and the magistrate could impose a penalty according to law. An appeal would then be available pursuant to s 43(4) of the Act to the District Court: [13] and [37] of the judgment.

12 For further information see Laura Wells, “Crimes and Courts Legislation Amendment Act 2006” in (2006) 18(11) **Judicial Officers Bulletin**, Judicial Commission of New South Wales.

revoking a good behaviour bond after conviction and any order made as a result of that revocation. This enables an appeal against such an order to be dealt with in the same manner as other sentences. The new definition applies to all appeals in progress but not finally disposed of.

(2) Amendment to ss 12(3) and 99 of the **Crimes (Sentencing Procedure) Act** to remove a court's obligation to set a non-parole period when suspending a sentence. A court is now required to set a non-parole period if and when it revokes the good behaviour bond. The sentence now takes effect at this time, rather than when the suspended sentence was imposed.

(3) Removal of the court's obligation under s 99(2) of the **Crimes (Sentencing Procedure) Act 1999** to ignore any portion of the sentence already served when it orders a revoked suspended sentence to be served by periodic detention. This constraint had previously been described by Howie J in **R v Tolley** [2004] NSWCCA 165 as "... *incomprehensible both as to its meaning and the policy behind it...*"¹³

(4) Amendment to s 99 to spell out that the sentencing procedures for imprisonment in Part 4 of the **Crimes (Sentencing Procedure) Act** apply to a suspended sentence, where the good behaviour bond is revoked, as if the suspended sentence had been imposed after the revocation of the bond. Section 99 makes it clear that the custodial sentence commences to run after the bond is revoked and a non-parole period is imposed.

(5) A new s 10A of the **Crimes (Sentencing Procedure) Act** provides a new sentencing option for judicial officers of conviction without imposing any further penalty. This alternative does not affect the existing option of being sentenced to the rising of the court. Nor does it negate periods of licence disqualification which apply automatically on an offender's conviction for various driving offences.

13 At [40].

(e) New Sentencing Option for the NSW Drug Court

On 21 July 2006 the **Compulsory Drug Treatment Correctional Centre Act 2004** commenced. This Act provides for the creation of a Compulsory Drug Treatment Correctional Centre to which eligible and suitable convicted offenders may be sent by the Drug Court to serve their sentence of imprisonment. The centre, located in the Parklea Correctional Complex, was officially opened on 23 August 2006¹⁴ and can house 70 inmates in addition to 30 offenders being supervised in the community.¹⁵ An offender subject to compulsory drug treatment detention completes three stages under the program, namely closed detention (full time custody), semi-open detention (full-time custody with release, for example to attend employment or training) and community custody (residing in the community at approved accommodation).¹⁶

To be an eligible convicted offender for the purposes of s 5A of the **Drug Court Act 1998** the person must:

(a) have been convicted of an offence related to the person's long-term drug dependency and associated lifestyle¹⁷;

(b) have been sentenced to a term of full-time imprisonment with an unexpired non-parole period of at least 18 months at the time of sentence and a non-parole period of no more than three years at the time of assessment by the Drug Court¹⁸; and

(c) have at least two prior convictions in the previous five years that resulted in a sentence of imprisonment (including a suspended sentence), or a Community Service Order or a good behaviour bond or recognizance.¹⁹

14 **Department of Corrective Services Bulletin**, Issue 599, September 2006
<<http://www.dcs.nsw.gov.au/information/Bulletin/index.asp>> accessed on 31/1/2007.

15 **Department of Corrective Services website**
<http://www.dcs.nsw.gov.au/offender_management/offender_management_in_custody/correctional_centres/parklea.asp> accessed on 31/1/2007.

16 **Crimes (Administration of Sentences) Act 1999**, s 106D.

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

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

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

Clause 4A of the **Drug Court Regulation 2005** prescribes the additional eligibility criteria (pursuant to s 5A(1)(f) of the Act); namely that (a) the person's usual place of residence must be within one of the specified local government areas; (b) the person must be 18 years of age or over; (c) the offence for which the person was convicted must not be one which is within the jurisdiction of the Children's Court; and the person must be male.

A person is not an "*eligible convicted offender*" if he has been convicted at any time of murder, attempted murder, manslaughter, sexual assault of an adult or child, a sexual offence involving a child, any offence using a firearm, any offence involving a commercial quantity or large commercial quantity of a prohibited plant or drug or any offence prescribed by the regulations.²⁰

A person is also not an "*eligible convicted offender*" if he suffers from a mental condition, illness or disorder that is serious or leads to the person being violent and that could prevent or restrict active participation in a drug treatment program.²¹

The objects of compulsory drug treatment as set out in s 106B of the **Crimes (Administration of Sentences) Act 1999 (NSW)** are:

"a) to provide a comprehensive program of compulsory treatment and rehabilitation under judicial supervision for drug dependent persons who repeatedly resort to criminal activity to support that dependency, and

(b) to effectively treat those persons for drug dependency, eliminating their illicit drug use while in the program and reducing the likelihood of relapse on release, and

(c) to promote the re-integration of those persons into the community, and

(d) to prevent and reduce crime by reducing those persons' need to resort to criminal activity to support their dependency."

Although it is too early to assess the success of such a program, the Centre has received its first participants.²²

20 **Drug Court Act 1998**, s 5A(2).

21 **Drug Court Act 1998**, s 5A(3).

22 The first participants were received on 4 September 2006.

Department of Corrective Services website

<http://www.dcs.nsw.gov.au/offender_management/offender_management_in_custody/correctional_centres/compdrug.asp> accessed on 3/02/2007.

3. NSW Court of Criminal Appeal Decisions

In 2006 the NSW Court of Criminal Appeal dealt with approximately 300 sentence appeals. On the basis of decisions available for 2007, that court has already dealt with some 97 sentence matters. This figure includes 65 severity appeals, 21 conviction and severity appeals and 11 Crown appeals.²³

(a) Charge Agreements

The five fundamental principles which govern charge (known as plea in Victoria) agreements were set out by the High Court in **GAS v The Queen; SJK v The Queen** (2004) 217 CLR 198 at [27] – [32]. In **GAS** the portion of the plea agreement “... *that each offender should receive a lesser sentence than a principal*”²⁴ was held to constitute an erroneous legal submission that led the sentencing judge into error. The court held that a plea agreement on the subject of penalty was inappropriate and impermissibly trespassed on the sentencing judge’s discretion. It was a matter for the sentencing judge alone to decide on the penalty that was to be imposed.²⁵ Charge agreements are dealt with in **DPP Prosecution Guideline** 28.

GAS was applied in **Ahmad v R** [2006] NSWCCA 177. This was an appeal against the alleged severity of sentences imposed for guilty pleas to a number of serious, violent offences (including manslaughter) that arose from the deceased’s nephew and two others being refused entry to a Sydney nightclub. The Crown Prosecutor and the applicant’s counsel agreed to and submitted on sentence that a 25 per cent discount should be allowed for the utilitarian value of the guilty pleas and that a non-parole period of between four and five years was appropriate for the manslaughter offence.

The NSWCCA applied **GAS** to hold that a plea agreement cannot bind a judge “*and in effect can only extend to an understanding of the facts to be placed before the Court*” and the Crown submissions. No greater weight is to be given to a plea agreement than any other Crown submission made on sentence.

²³ Based on decisions published on Lawlink and accessed on 26 April 2007.

²⁴ **GAS v The Queen; SJK v The Queen** (2004) 217 CLR 198 at [33].

²⁵ **GAS v The Queen; SJK v The Queen** (2004) 217 CLR 198 at [39].

Accordingly, the sentencing judge was found to have made no error in rejecting the joint submission of the Crown Prosecutor and the applicant's counsel. In addition the court held, on the basis of the objective criminality involved in the manslaughter offence, that "... a non-parole period of four to five years was entirely outside the available range."

(b) s 21A(2)(d) Prior criminal record

Among the aggravating factors provided for by s 21A(2)(d) of the **Crimes (Sentencing Procedure) Act** is that "*the offender has a record of previous convictions.*" In 2006 a five judge bench of the NSW Court of Criminal Appeal was convened in **Regina v McNaughton** [2006] NSWCCA 24226 to determine how an offender's prior record should be used on sentence in the context of s 21A(2)(d) and the common law. The court was asked, in effect, to determine whether prior offending is an objective circumstance for the purposes of applying the proportionality principle of sentencing.

The applicant Darrell McNaughton had numerous previous convictions and had been imprisoned on four previous occasions. At the sentence hearing the presiding judge impermissibly referred to the applicant's criminal history as an aggravating factor that he was obliged to consider under s 21A(2)(d) of the **Crimes (Sentencing Procedure) Act**. The offender appealed.

In dismissing the appeal and finding that the sentencing judge's reference to the applicant's prior convictions was not made for any purpose inconsistent with the proportionality principle, the court made a number of findings. It held that the common law principle of proportionality set down in **Veen v The Queen (No 2)** (1988) 164 CLR 465 and approved in **Hoare v The Queen** (1989) 167 CLR 348 at 354 requires that a sentence "*...should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime, considered in light of its objective circumstances...*"²⁷

The court said that the principle of proportionality calls for the upper boundary of a proportionate sentence to be set by the objective circumstances of the offence and those

²⁶ Mr McNaughton pleaded guilty to one count of entering a building with intent to commit an indictable offence (s 114(1)(d) **Crimes Act**) and one count of assault occasioning actual bodily harm. ²⁷ **Hoare v the Queen** (1989) 167 CLR 348.

circumstances do not include a prior record of convictions.²⁸ This principle had been previously confirmed in **Baumer v The Queen** (1988) 166 CLR 51 at 57-58 and nothing in that case suggested to the NSWCCA that the joint judgment in **Veen (No 2)** was intended to be qualified.

An offender's previous record is relevant in determining "... where within the boundary set by the objective circumstances of the case, a sentence should lie."²⁹

In **McNaughton**, Spigelman CJ³⁰ specifically referred to the reference in **Veen (No 2)** to an "attitude of disobedience to the law", and the "increased weight to be given to 'retribution', 'deterrence' (relevantly personal deterrence) and 'the protection of society'." His Honour cited the joint judgment in **Weininger v The Queen** (2003) 212 CLR 629³¹ which says that imposing a heavier sentence on a person who has been convicted of or admits to the commission of other offences is:

"... to do no more than give effect to the well established principle (in this case by statute) that the character and antecedents of the offender are, to the extent that they are relevant and known to the sentencing court, to be taken into account in fixing the sentence to be passed."

The court in **McNaughton** concluded that the reference to prior convictions in s 21A(2)(d) of the **Crimes (Sentencing Procedure) Act** should not be interpreted as indicating that a prior record is an aggravating factor. Rather it should be considered in a way that is consistent with the proportionality principle in **Veen (No 2)**. Spigelman CJ cited with approval a common law distinction identified by Callinan J in **Weininger** between "... a matter that cannot be used as a circumstance of aggravation, and a matter adverse to an offender."³²

The Chief Justice took the view that "aggravation" in s 21A(2)(d) is not used by the legislature in its common law sense. Further it should not be assumed that the words

28 **McNaughton** at [24].

29 Spigelman CJ at [26] citing Howie J in **R v Wickham** [2004] NSWCCA 193 who refers to **Veen (No 2)**.

30 **McNaughton** at [26].

31 **Weininger v The Queen** (2003) 212 CLR 629 at [32].

32 At [30] citing **Weininger v The Queen** (2003) 212 CLR 629 at [116].

“aggravating factors” in s 21A should be interpreted as if they referred only to “objective considerations.” Section 21A(1)(c) refers to “any other objective or subjective factor” which clearly indicates that the list of aggravating and mitigating factors in s 21A(2) and (3) encompasses both kinds of matters.

The manner in which prior convictions are to be taken into account on sentence also arose in the severity appeal in **Ghazi v R** [2006] NSWCCA 320.³³ Here the sentencing judge at first instance erred in finding the applicant’s “limited” prior convictions could be considered on sentence because they were interpreted as being of a “similar nature.” The applicant had many summary convictions but “no prior offences involving significant violence” nor “offences of the kind for which he appeared before the court.” The sentencing judge’s description of the previous offences as including an act of violence incorrectly referred to a common assault, the elements of which do not include actual bodily harm.

Error also occurred in the sentencing judge’s application of **Veen v The Queen (No 2)** to make the finding that the offender’s prior offences of common assault and possession of a knife in a public place manifested “a continuing attitude of disobedience to the law”, instead of amounting to “an uncharacteristic aberration.”³⁴ The previous convictions did not fulfil the requirements in **Veen (No 2)** and should not have been used to “illuminate the moral culpability of the offender” or to show a “dangerous propensity” or a need for “condign punishment” to deter the applicant from committing similar offences³⁵.

(c) s 21A(2)(i) Offence committed without regard for public safety

Under s 21A(2)(i) of the **Crimes (Sentencing Procedure) Act** the commission of an offence without regard for public safety is an aggravating factor which may be taken into account on sentence. In **Clinton Ward v R** [2007] NSWCCA 22 the applicant pleaded guilty to three counts of knowingly take part in the supply of a prohibited drug (cannabis and methylamphetamine) contrary to s 25(1) of the **Drug Misuse and Trafficking Act**. The

33 Mohammed Ghazi pleaded guilty to one count of malicious wounding with intent to do grievous bodily harm. A discount of 20 per cent was allowed for the utilitarian value of the plea. A sentence of six years, with a balance of term of four years, six months was imposed. On appeal this was reduced to a non parole period of five years, with the balance of term of four years, seven months.

34 At [23].

35 Rothman J at [23] citing **Veen v The Queen (No 2)** (1998) 164 CLR 465 at 477.

sentencing judge found that the offences were committed, inter alia, without regard for public safety. In reaching this conclusion, his Honour did not identify what “public safety” actually means, or how it applied to this case.

On appeal, the NSW CCA concluded that disregarding public safety was “necessarily” inherent in the description of the offence because the concept of “the commercial or trafficable quantity” implied that distribution has occurred or is intended.³⁶ Consequently endangering public safety is part of the objective seriousness of the offence and therefore cannot be a basis for further aggravation under s 21A(2)(i). After considering **R v Way** (2004) 60 NSWLR 168 and **R v Ancuta** [2005] NSWCCA 275, Adams J found that disregarding public safety can be considered “as either part of the general assessment of objective seriousness” or specifically as an aggravating feature providing double counting does not occur. A consideration of this factor is part of the instinctive synthesis process undertaken by a judge to arrive at an appropriate sentence. **Way** said that whether disregard for public safety is an aggravating feature³⁷ depends on whether the relevant scale of drug dealing “increased the objective seriousness and moral culpability of this offending over and above that integral to the offences charged.”³⁸

The CCA found that a sentencing error had occurred because the applicant’s disregard for public safety was “inextricably involved” with his efforts to obtain the quantities of the drug with which he was charged. The planning involved in the offence did not justify “public safety” being separated out as an aggravating factor. Although double counting occurred, it was held that it did not adversely affect the exercise of his Honour’s sentencing discretion and the ground of appeal was dismissed.

Lawler v R [2007] NSWCCA 85 is a recent example of driving offences committed with a gross lack of regard for public safety. The applicant, who was the owner of the vehicle, drove an unregistered, uninsured semi-trailer laden with 18 tonnes of cargo from Sydney to Newcastle one Friday evening. The vehicle’s brakes were defective and its tyres worn. The applicant knew this. On reaching the Mooney Mooney Bridge, Mr Lawler was unable to slow down as other traffic slowed, and he collided with a sedan completely destroying the vehicle. It immediately burst into flames, incinerating the driver. The truck continued for approximately

36 **Clinton Ward v R** [2007] NSWCCA 22 at [15].
37 At [107]-[107].

350 metres before colliding with a further 34 vehicles. As a result, two drivers sustained grievous injuries and many other drivers and passengers received minor injuries. Mr Lawler pleaded guilty to one count of manslaughter and two counts of dangerous driving occasioning grievous bodily harm. A number of charges were included on a s 166 certificate.³⁹ A total effective sentence of 10 years, 8 months with a non-parole period of eight years was imposed at first instance and confirmed on appeal.

On sentence the judge said that the applicant chose to drive the vehicle “with full knowledge of the braking defects... and knowledge of the condition of the tyres.” On appeal the defence argued that this was an error which produced an incorrect assessment of high moral culpability on the part of the applicant.

The NSWCCA held that the District Court’s assessment of the offender’s moral culpability was not based solely on his knowledge of the prime mover’s mechanical shortcomings. Mr Lawler had also made admissions in an ERISP concerning the condition of the vehicle’s brakes and tyres. On that basis, the court found that use of the words “full knowledge” did not mean the applicant had complete knowledge of the vehicle’s mechanical shortcomings. Rather it also reflected the extent of his knowledge as admitted in a record of interview.

The sentencing judge’s finding as to moral culpability was further reinforced by the offender’s “complete disregard for the safety of other people whom he knew would at the time be travelling on the road.”⁴⁰ This disregard was based on factors which included that the driver entered into a commercial contract to transport timber and building materials over long distances. In doing so he knew that his increased load would reduce the vehicle’s capacity to stop, that there were “significant variations in the gradient of the F3 freeway” and that vehicles which used that road travelled at high speed. He was aware of the “steep descent to the Mooney Mooney Bridge” and that traffic on a Friday afternoon would be heavy. Yet, “[h]e deliberately disregarded the safety of other road users in circumstances which involved a high risk that death or grievous bodily harm would follow.”⁴¹

38 Adams J at [20] in Ward.

39 These included using an unregistered and uninsured vehicle; using an unauthorised number plate; goods in custody (registration plates); displaying a misleading registration label and unauthorised use of a number plate on a trailer.

40 at [25].

In response to the submission that the sentence for manslaughter⁴² was excessive, the court said that the applicant's premeditated conduct and the high degree of criminality in the offences militated against the sentence being too severe notwithstanding the pleas of guilty.

(d) s 21A(2)(m) Offence involved “multiple victims or a series of criminal acts”

Section 21A(2)(m) of the **Crimes (Sentencing Procedure) Act** provides that on sentence the court can consider the fact that the offence involved “*multiple victims or a series of criminal acts.*” **R v Hamid** [2006] NSWCCA 302 is a case which involved both factors. The respondent pleaded guilty to many offences of violence committed against three domestic partners over a period of eight years. Commission of the crimes involved “*repeated acts of gratuitous cruelty*”⁴³ and the use of weapons including a knife, a meat tenderiser, boiling coffee, scissors and a metal pipe. A non-parole period of two years and six months was imposed with a balance of term of two years. The Crown appealed.

In allowing the appeal⁴⁴ the court held that the original sentence failed to reflect the overall criminality of a series of domestic violence offences committed against several victims. In relation to some of the offences the sentence imposed amounted to almost no penalty at all. Committing a series of offences against more than one victim calls for care to ensure “...*that concurrency of sentence does not gloss over that feature.*” In **R v KM** [2004] NSWCCA 65⁴⁵ Johnson J, with whom Hunt AJ and Latham J agreed, found that the principle of totality applies to penalties imposed for multiple offences. **R v Weldon** (2002) 136 A Crim R 55 at 62.

On appeal, Mr Hamid argued that his mental illness was a material contributing factor to his commission of the offences. If accepted, this argument would have operated to reduce his level of moral culpability and in doing so diminish the need for denunciation and punishment. **R v Israil** [2002] NSWCCA 225 at [23]; **R v Hemsley** [2004] NSWCCA 228 at [33]. The court said that the relevance of mental illness to sentence should be considered in light of four factors which have overlapping considerations. These factors are moral

41 at [40] per Price J.

42 Imprisonment, non-parole period 8 years, balance of terms 2 years, 8 months.

43 **R v Hamid** [2006] NSWCCA 302 at [143].

44 New sentence of non-parole period four years, three months, balance of term one year, nine months.

45 [2006] NSWCCA 302 at [133].

culpability, general deterrence, whether imprisonment would be more onerous for the offender and the degree of danger posed by release of the offender into the community. These factors are well examined in the judgment and provide a helpful framework for addressing the issue of mental illness on sentence. Ultimately, the court concluded that there was no evidence to warrant a finding of reduced moral culpability based on psychiatric illness⁴⁶ and that the respondent was therefore an appropriate vehicle for the application of the principles of general deterrence.

R v Hamze [2006] NSWCCA 36 also concerned, among other things⁴⁷, the erroneous application of s 21A(2)(m). In this case the “*undiscriminating recitation*” by the judge of a checklist of aggravating factors contributed to his Honour’s failure to properly explain how the aggravating factors had been taken into account. The importance of such an explanation had been previously emphasised in **R v Tadrosse** [2005] NSWCCA 145.⁴⁸ In taking account of s 21A(2)(m), the sentencing judge had said that in light of the Form 1 offences (which included robbery armed with a dangerous weapon and in company), the offence the subject of count 1 (also robbery armed with a dangerous weapon and being in company) should be regarded as one of a series of criminal acts. In doing so his Honour omitted to consider the Form 1 matters pursuant to the **Attorney General’s Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002** (2002) 56 NSWLR 146 and instead double counted them by considering them as aggravating the offence charged in count 1. It was not a relevant aggravating factor that the applicant committed other offences unless the offence charged in count 1 involved the criminal acts the subject of the other offences.

The issue of multiple victims also arose in **Stanford v Regina** [2007] NSWCCA 73, **R v Veatufunga** [2007] NSWCCA 54 and **Lawler v Regina** [2007] NSWCCA 85.

46 Extracts from several victims’ statements did not suggest a relationship between the respondent’s offending from 1996 to the end of 2003. The offender’s psychiatric condition could not be causally linked to the offences in a way that reduced the offender’s moral culpability. There was evidence that the respondent successfully conducted a number of small businesses including a tobacconist, fruit and vegetable shop and a café. He also entered into relationships with women during the eight year period in which the offences were committed.

47 These factors included threatened use of violence, threatened or actual use of a weapon, commission of the offence in company and disregard for public safety.

48 **R v Tadrosse** [2005] NSWCCA 145 at [21]-[24].

(e) s 12 Bonds and Suspended Sentences

Legislation concerning s 12 bonds and suspended sentences, clarified in late 2006, was recently considered by the Court of Appeal. In **Director of Public Prosecutions v Cooke** [2007] NSWCA 2 the Crown sought declaratory relief from a District Court judge's decision to take no action for an offender's breach of five s 12 bonds. The alleged breaches involved the offender and a co-offender participating in a fight outside a railway station. They kicked and punched the victim causing facial injuries that required stitches. The accused's subsequent plea of guilty to malicious wounding in company confirmed that he had breached his bonds. The breach and sentencing proceedings were dealt with together. His Honour imposed a suspended sentence of 18 months imprisonment for the malicious wounding offence, on condition that the offender entered into a further s 12 bond. In respect of the breach proceedings His Honour applied s 98(3) (b) of the **Crimes (Sentencing Procedure) Act** to conclude that whilst the breaches were not trivial, there were "good reasons" to excuse the offender's failure to comply with the conditions of the bond.

On appeal, the court considered several issues including whether His Honour's reasons for not taking action constituted "good reasons" under s 98(3)(b) of the **Crimes (Sentencing Procedure) Act**. Howie J, with whom Sully and Price JJ agreed, emphasised two matters from **R v Marston** (1993) 60 SASR 320. These were first, that —

“... the determination under s 98(3)(b) should be made bearing firmly in mind that generally a breach of the conditions of the bond will result in the offender serving the sentence that was suspended and, secondly, the principal consideration, if not the only one, is upon the conduct giving rise to the breach.”⁴⁹

In **Cooke**, the sentencing judge erred in applying s 98(3)(b) by sentencing for the (fresh) offence that gave rise to the breach before deciding whether to revoke the five bonds to which the offender was already subject. The approach was incorrect because the penalty to be imposed for the malicious wounding offence was irrelevant to a finding of whether good reasons existed to revoke the bonds.

⁴⁹ **Director of Public Prosecutions v Cooke & Anor** [2007] NSWCA 2 at [21].

Howie J explained⁵⁰ that these two issues are separate and each has a different bearing on how the discretions are exercised in the revocation proceedings and the sentence for the fresh offence. That is, two separate jurisdictions are being exercised in deciding the sentence for an offence that also constitutes the breach of good behaviour bonds.⁵¹ It is necessary to deal with the breach first and then determine the sentence for the fresh offence because —

“... the result of the breach proceedings can affect the sentence to be imposed for the offence but the sentence for the offence is irrelevant to a determination of whether there are good reasons to excuse the breach.”⁵²

The judge made a decision to excuse the breach to give effect to the sentence for the malicious wounding offence. This resulted in his Honour “failing to ask himself the correct question in relation to the breach proceedings and in determining those proceedings by taking into account exclusively an irrelevant consideration.”⁵³ A further error identified on appeal was that His Honour incorrectly limited his consideration of the available sentencing options on revocation of the bonds by the sentence he imposed for the malicious wounding offence.

Lastly, it was also not permissible to take into account the offender’s rehabilitation needs because they were irrelevant to fulfilling the judicial task in s 98(3)(b).⁵⁴ The court said that the offender’s subjective features may have been relevant to deciding the nature of the order to be made after revocation occurred. They were however, extraneous to determining whether good reasons existed to excuse the breach of the s 12 bonds.

The issue of suspended sentences also arose in **JRD** [2007] NSWCCA 55⁵⁵ and **Tran v R** [2007] NSWCCA 110. In **JRD** the Crown appealed against sentences imposed following pleas of guilty to supplying a prohibited drug, and receiving and obtaining credit by fraud. Two further receiving offences were listed on a Form 1.⁵⁶ One of the sentencing errors

50 At [26].

51 At [27].

52 At [28].

53 At [29].

54 At [34].

55 Other issues included totality and discounts given for a plea of guilty and assistance to authorities.

56 The pleas were to one offence under s 25(2) **Drug Misuse and Trafficking Act 1985** and ss 178C and s 188 of the **Crimes Act**.

identified on appeal was the judge's imposition of a suspended sentence before determining what the appropriate sentence should be. **R v Zamagias** [2002] NSWCCA 17 at [26].

(f) Pre-Sentence Custody – to Backdate or to Deduct?

Pursuant to s 24 of the **Crimes (Sentencing Procedure) Act 1999** a sentencing court must take into account, among other matters, “... *any time for which the offender has been held in custody in relation to the offence ...*”⁵⁷. A sentencing court also has the power to backdate a sentence of imprisonment so that it commences “... *before the day on which the sentence is imposed.*”⁵⁸

In **Deron v R** [2006] NSWCCA 73 Spigelman CJ (with whom Simpson and Johnson JJ agreed) held at [9] that:

“There is no rule that a sentencing judge must take into account the period of pre-sentence custody by means of backdating the sentence, rather than by deducting the relevant period from the total sentence he proposes to impose. The important thing is that it be fully taken into account, and on the authorities in this Court, that it be demonstrated that it has been taken into account.”

Spigelman CJ held that the relevant test for determining if error had occurred was “... *whether or not the pre-sentence in custody had been ‘demonstrably reflected in the sentencing order’...*” at [12].

However in **McCabe v R** [2006] NSWCCA 220 the applicant submitted that error was committed by the sentencing judge in not taking into account the pre-sentence custody when setting the non-parole period. Beazley JA, with whom Simpson and Rothman JJ agreed, held that in relation to pre-sentence custody served by the applicant that the sentencing judge’s “... *approach in deducting that period from the sentence rather than backdating the sentence was erroneous: see R v Youkhana* [2005] NSWCCA 231; **Bushara v The Queen** [2006] NSWCCA 8”: at [28]. The court noted that:

57 **Crimes (Sentencing Procedure) Act 1999**, s 24(a).

58 **Crimes (Sentencing Procedure) Act 1999**, s 47(2)(a).

*“In **Youkhana**, Howie J, with whom Spigelman CJ and Hunt AJA agreed, pointed out at [10] that this Court has consistently indicated that the appropriate course for a sentencing judge to take where a period has been served in custody pre-sentence, is to backdate the commencement of the sentence: see also **R v Newman and Simpson** (2004) 145 A Crim R 361; [2004] NSWCCA 102. In **Youkhana**, the Court also pointed out that it was an error for the sentencing judge to deduct from the appropriate sentence the period already served in custody and then to apply the statutory ratio of 75 per cent”: at [29].*

A related issue is whether, when sentencing an offender for an offence committed whilst on parole, the sentencing judge should backdate the sentence to when parole was revoked. The argument that arises is whether an offender is punished twice as a result of parole being revoked and by the new sentences being aggravated pursuant to s 21A(2)(j) of the **Crimes (Sentencing Procedure) Act 1999**; that is, that the offence was committed whilst on parole. In **Callaghan v R** [2006] NSWCCA 58 Simpson J (with whom James and Hall JJ agreed) held that it is a matter of discretion whether the sentence imposed for the offence/s committed whilst on parole should be “... *wholly or partly cumulative upon the sentence to which the applicant was, as a consequence of the revocation of parole, serving ...*”: at [25]. Simpson J was of the view that although in some cases it would be unfair:

“[23] ... not to backdate to some point (not necessarily the date of revocation of parole) ...

[24] ... where, as here, the re-offending has occurred within a very short time of release on parole, and the balance of term to which the offender is exposed is quite short, it may be appropriate to proceed on the hypothesis that the whole of the period spent in custody up to the expiration of the parole is, as Hunt CJ at CL said, referable to the earlier offences and not to the subsequent offences”.

Note, however, that where parole has not been revoked by the NSW Parole Board and an offender goes into custody as a result of new offences, the custody served from that date cannot be said to be referable to anything other than the new offences: **Skondin v R** [2006] NSWCCA 59.

(g) Time served on treatment programs

In **Bushara v Regina** [2006] NSWCCA 8 the applicant argued that the sentence imposed was excessive having regard to, among other things, the 13 months spent in the Drug Court program.

Howie J (with whom Basten JA and Hall J agreed) did not accept:

“... that the period that the applicant served during the programme should be treated as a form of custody and taken into account in a mathematical way in determining the actual sentence to be served by the applicant as a consequence of his offending. In my opinion participation in the programme cannot sensibly be regarded as the equivalent of imprisonment notwithstanding that it imposes limitations and obligations upon the applicant by requiring him to attend, for example, counselling sessions and court days. It was in fact an alternative to the applicant serving a full-time custodial sentence for the pre-programme offences.” at [26].

Time spent on a Drug Court program *“... is simply a matter that goes into the synthesis that produces what the court considers to be an appropriate sentence without attempting to attribute to it any mathematical equivalence that would have a direct bearing on the length of the sentence to be imposed.”* at [28]. Howie J was of the view that this situation was analogous to an offender subject to strict bail conditions for a lengthy period. at [27]

In **Reed v Regina** [2007] NSWCCA 4 the applicant had served 91 days in pre-sentence custody and six months in a full time residential rehabilitation program. This was taken to equate to six months full time custody. Instead of reducing the non-parole period by this amount (as periodic detention cannot be backdated, s 70 **Crimes (Sentencing procedure) Act 1999**), the sentencing judge’s view was that it *“... was reflected in the leniency of the sentence of periodic detention.”* at [24]. The court concluded that error had occurred in failing to take the pre-sentence custody and quasi-custody into account and reduced the non-parole period by six months.

In relation to time spent on a Magistrates Early Referral Into Treatment (MERIT) program, James J (with whom Hodgson JA and Hoeben J agreed) stated in **Brown v Regina; Reid v**

Regina [2006] NSWCCA 144 that in relation to such a program it “... *falls far short of being a full time residential program in a drug rehabilitation centre. If any allowance was to be made for this factor, it would, in my opinion, only be a very small allowance.*” at [59].

4. Other Changes in the Sentencing Landscape

In addition to the legislative and common law changes outlined above, a number of other developments have occurred which tend to confirm the continued legal, social and political dominance of sentencing issues in the criminal justice landscape.

Judicial Commission Sentencing Bench Book

To assist judicial officers to better achieve consistency of approach to sentencing and to make sentencing law more accessible, the Judicial Commission of New South Wales issued a **Sentencing Bench Book** in September 2006. This comprehensive online resource, which is freely and publicly available, contains commentary on the legislative framework and case law that underpins sentencing procedures, procedures for imprisonment and the penalties that may be imposed. It deals with the **Crimes Act 1900**, the **Crimes (Sentencing Procedure) Act 1999**, the **Children’s (Criminal Proceedings) Act 1987** and the **Crimes Act 1914** (Cth) as well as providing commentary on particular offences. It is a valuable source of information on sentencing for both judicial officers and those appearing before them in sentence matters.

NSW Sentencing Council

The NSW Sentencing Council which is now chaired by the Honourable James Wood AO QC and of which I remain a member, has received three additional members and has increased its membership from ten to 13. Each of the new appointments will bring experience from corrective services, juvenile justice and the Attorney General’s Department respectively. In addition, an important new function has been conferred expressly on the Council, that of educating the public about sentencing matters.⁵⁹ It is expected that programs will be

⁵⁹ Amendments made to the **Criminal Procedure Act 1986** by the **Crimes and Courts Legislation Amendment Act 2006** (No 107). Assent 29/11/2006. Gaz 175, 8/12/2006 at p 10385.

developed that may build on the successful experience of our Victorian counterpart, the Sentencing Advisory Council.

In June last year, the Council published an interim report on **Seeking a Guideline Judgment on Suspended Sentences**⁶⁰, which examines whether a guideline judgment could clarify the correct judicial approach to the suspension of sentences. It “... *also explores the likelihood of the NSW Court of Criminal Appeal issuing a guideline judgment for suspended sentences on an application by the Attorney General.*” The Council considers that there are various reasons which may cause the Court of Criminal Appeal to be reluctant to promulgate a guideline judgment on the subject of suspended sentences and suggests that an application in relation to it may be “*premature*”.

Juries and the Sentencing Process

The issue of jury involvement in the sentencing process is currently receiving consideration at government level and within the wider community. The concept of confidential discussions and consultation between the judge and members of the jury, after submissions on sentence and before determining an appropriate penalty, was raised by Spigelman CJ several years ago in a speech at the opening of the law year.⁶¹

The subject was referred to the NSW Law Reform Commission in 2005 and in July 2006 the Commission published **Issues Paper 27: Sentencing and Juries**. Its terms of reference are to examine whether a criminal trial judge might, “*following a finding of guilt, and consistent with the final decision remaining with the judge, consult with the jury on aspects of sentencing.*”⁶² Within this framework, the Commission is looking at the jury decision making process including their role as arbiters of fact in a criminal trial and the statutory provisions which operate to safeguard their deliberations. The sentencing process generally and the

60 NSW Sentencing Council website at http://www.lawlink.nsw.gov.au/lawlink/scouncil/ll_scouncil.nsf/pages/scouncil_reports#SuspendedSentence accessed on 5/5/2007.

61 **Reform**, Issue 86, Winter 2005 at p 51 cited by Sir Gerard Brennan AC KBE in “The High Court and the Sentencing Environment”, Conference Paper, **Sentencing: Principles, Perspectives and Possibilities**, 10-12 February 2006, Canberra at p 6.

62 NSW Law Reform Commission, Issues Paper 27, **Sentencing and Juries**, July 2006, terms of reference.

related issue of enhancing public confidence in the administration of justice are also considered. Practical questions of direct jury involvement in sentencing such as the potential for inconvenience and delay and the issues of timing are also reviewed.

Whilst today does not lend itself to a discussion of this topic, the perspectives of criminal lawyers, judges, victims of crime, Parliament, the media and members of community are likely to very different indeed. It is helpful that the Chairman of the LRC is now the Honourable James Wood AO QC.

5. Conclusion

The extent to which sentencing issues have occupied the attention of Parliament and the media and the changing approaches which courts have necessarily taken in response to statutory change suggest that the remarks of Sir Frederick Jordan made over 70 years ago apply now more than ever. In a Crown appeal against a 12 month custodial sentence with hard labour imposed for manslaughter, his Honour observed in relation to sentencing that “... *the only rule is that there is no golden rule.*”⁶³

Within that vast, expansive statement, however, there remains a steadfast obligation on each of us to be as scrupulously prepared for sentence hearings as time and resources allow. So that we may in prosecuting or defending provide our best assistance to those who undertake the sombre duty of “... *balancing overlapping, contradictory and incommensurable objectives... to reconcile the requirements of justice and the requirements of mercy ... in a society which values both...*”⁶⁴

63 **R v Geddes** (1936) 36 SR (NSW) 554 at 555 per Jordan CJ. In referring to sentencing His Honour said at p 555: “It is obviously a class of problem in solving which it is easier to see when a wrong principle has been applied than to lay down rules for solving particular cases, and in which the only rule is that there is no golden rule.”

64 The Honourable JJ Spigelman AC, Chief Justice of New South Wales, Foreword to the **Sentencing Bench Book**, 2006, Judicial Commission of NSW at p i.