

Recent Developments in Sentencing

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1. Introduction

The last 12 months have witnessed comprehensive change to the environment in which criminal matters are conducted. Of the many reforms made to criminal proceedings, two developments merit particular mention.

The first is an increase in legislation affecting criminal proceedings such as bail applications, prosecutions and sentencing. In 2000 for example, there were approximately 19 statutes and Regulations which directly affected the conduct of criminal prosecutions by my Office. In 2003 that figure had risen to 36. Last year some 70 Acts and Regulations successively modified the manner in which criminal offending is dealt with. And whenever legislation is made, judicial intervention is often required to determine what it means and how far it extends.

The second is the increased complexity in sentencing, affected also by legislation and litigation.

I propose to discuss these issues with reference to selected statutory changes and NSW Court of Criminal Appeal decisions.

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2. Significant Legislative Change

In 2007 the New South Wales Parliament enacted comprehensive reforms to sentencing law. A combination of election undertakings, the identification of legislative anomalies and continued concerns for community safety led to some of these developments. They include:

- (i) creating eleven new standard non-parole period offences;
- (ii) creating additional aggravating features under s 21A of the *Crimes (Sentencing Procedure) Act*;
- (iii) making a principal in the second degree liable to the same punishment as a principal offender;
- (iv) imposing additional restrictions on considering remorse as a mitigating factor; and
- (v) Expanding the category of persons required to be placed on the NSW Child Protection Register.

These legislative developments were met with a mixed, and at times colourful, response. In Parliament changes enacted to address community concerns about perceived judicial leniency in sentencing were met with expressions of approval. In relation to proposed amendments to the *Crimes (Sentencing Procedure) Act*, it was suggested outside of Parliament that the introduction of additional aggravating factors further complicated s 21A of the *Crimes (Sentencing Procedure) Act*. The argument was that a case for change had not been demonstrated and the amendments constituted a further erosion of judicial discretion.

(a) Amendments to the Crimes (Sentencing Procedure) Act 1999

(i) Amendments to s 21A – Aggravating and mitigating factors

In January this year seven additional aggravating features were added to s 21A(2) of the *Crimes (Sentencing Procedure) Act 1999*.² They fulfilled undertakings made by the NSW Government prior to the last election in March 2007. The amendments provide that an offence is aggravated also where —

s 21A(2)(ca) it involved the actual or threatened use of explosives or a chemical or biological agent;

² *Crimes (Sentencing Procedure) Amendment Act 2007* (No 50).

s 21A(2)(cb) it involved the offender causing the victim to take, inhale or be affected by a narcotic drug, alcohol or any other intoxicating substance; and/or

s 21A(2)(ea) it was committed in the presence of a child under 18 years of age.

Pursuant to s 21A(2)(eb) of the *Crimes (Sentencing Procedure) Act* an offence is aggravated where it was committed in the home of the victim or any other person.

In the Second Reading speech to the Bill, the Attorney General for New South Wales, the Honourable John Hatzistergos, explained that the section applies where the offence has taken place in any home, be it the home of the victim, the offender, the victim and the offender or the home of a person who is neither.³ He did not appear to explain what is meant by a “home”, however.

The other new aggravating features are —

s 21A(2)(ia) the actions of the offender were a risk to national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* of the Commonwealth);

s 21A(2)(ib) the offence involved a grave risk of death to another person or persons; and

s 21A(2)(o) the offence was committed for financial gain.

The aggravating factor contained in s 21A(2)(d) of the *Crimes (Sentencing Procedure) Act* has also been amended to provide “that if an offender is being sentenced for a serious personal violence offence, it is to be regarded as a particular aggravating factor in sentencing if the offender has a record of previous convictions for serious personal violence offences”.⁴ This change is additional to the sentencing principle that a record of prior convictions is, in certain circumstances,⁵ an aggravating factor pursuant to s 21A.

³ *Crimes (Sentencing Procedure) Amendment Bill 2007*, Second Reading Speech, Legislative Council, 17 October 1007.

⁴ Explanatory Note to the *Crimes (Sentencing Procedure) Further Amendment Act (No 50)*.

⁵ In so far as it has been held in *Veen v The Queen (No 2)* (1987) 164 CLR 465.

“Serious personal violence offence” is defined in s 21A(6) as —

“... a personal violence offence (within the meaning of section 562A of the *Crimes Act 1900*) that is punishable by imprisonment for life or for a term of 5 years or more.”

“Remorse” as a mitigating factor also received legislative attention in 2007. Prior to the amendment an offender could demonstrate remorse “in any manner”. Under the amended s 21A(3)(i) remorse may only be raised in sentence proceedings where —

“(i) the offender has provided evidence that he or she has accepted responsibility for his or her actions, and

(ii) the offender has acknowledged any injury, loss or damage caused by his or her actions or made reparation for such injury, loss or damage (or both).”

The Explanatory Note to the Bill does not identify or explain what constitutes “evidence”. This situation has raised practical concerns for prosecution and defence representatives appearing on sentence. Some commentators have argued that the requirement is unnecessary because courts are already in a position to assess remorse.⁶ Concerns have also been raised that the requirement will disadvantage less articulate offenders and prolong court proceedings, particularly in the Local Court where it has been claimed that offenders give evidence on sentence less often.⁷

(ii) New Standard Non-parole Period Offences

A total of eleven new offences have been added to the **Table of Standard Non-Parole Period Offences** which follows s 54D of the *Crimes (Sentencing Procedure) Act*. These offences are —

- Murder, where the victim is a child under 18 years of age – 25 years;
- Reckless causing of grievous bodily harm in company, s 35(1) *Crimes Act* – 5 years;
- Reckless causing of grievous bodily harm, s 35(2) *Crimes Act* – 4 years;
- Reckless wounding in company, s 35(3) *Crimes Act* – 4 years;
- Reckless wounding, s 35(4) *Crimes Act* – 3 years;
- Organised car or boat re-birthing activities, s 154G *Crimes Act* – 4 years;

⁶ The Honourable Lee Rhiannon, *Crimes (Sentencing Procedure) Amendment Bill 2007*, Second Reading Speech, Legislative Council, 23/10/2007

⁷ *Ibid.*

- Cultivation, supply or possession of prohibited plants, involving not less than the large commercial quantity (if any) specified for the prohibited plant concerned under that Act, s 23(2) *Drug Misuse and Trafficking Act 1985* – 10 years;
- Unauthorised sale of prohibited firearm or pistol, s 51(1A) or (2A) *Firearms Act 1996* – 10 years;
- Unauthorised sale of firearms on an ongoing basis, s 51B *Firearms Act* – 10 years;
- Unauthorised possession of more than three firearms any one of which is a prohibited pistol, s 51D(3) *Firearms Act 1996* – 10 years; and
- Unauthorised possession or use of prohibited weapon where the offence is prosecuted on indictment, s 7 *Weapons Prohibition Act 1998* – 3 years.

(iii) Commencement and Transitional provisions

Amendments to the *Crimes (Sentencing Procedure) Act 1999* by the *Crimes (Sentencing Procedure) Amendment 2007* commenced on 1 January 2008. They apply to the determination of a sentence whenever the offence was committed, unless, before the amendments commenced, the court either convicted the person being sentenced of the offence, or accepted a plea of guilty and that plea has not been withdrawn: s 57.

(c) Registration of Sex Offenders: Khanna v Commissioner of Police (NSW)

The *Child Protection (Offenders Registration) Act 2000* was amended in response to the Supreme Court's 2007 decision in *Khanna v Commissioner of Police*.⁸ Mr Khanna, the plaintiff, was a resident of New South Wales who had been convicted in Victoria of indecently assaulting a child. He applied for a declaration that he was not a "registrable person" and an injunction restraining the NSW Police Force from entering his name on the NSW Child Protection Register. Although the Victorian Court imposed a term of 12 months imprisonment, this sentence had been wholly suspended for 18 months. Somewhat unusually, the suspended sentence did not require Mr Khanna to enter into a bond or to accept any court ordered supervision. On that basis, the New South Wales Supreme Court found he was not an offender subject to the registration requirements of the *Child Protection (Offenders Registration) Act*. This was so even though the Mr Khanna was sentenced in relation to a class 2 (sexual) offence.⁹

⁸ (2007) 168 A Crim R 530.

⁹ (2007) 168 A Crim R 530 at [38].

Effects of the Decision in Khanna

Following the decision in *Khanna*, 26 offenders were removed from the Child Protection Register.¹⁰ The *Child Protection (Offenders Registration) Amendment (Suspended Sentences) Act 2007* was enacted to address this statutory anomaly. It commenced operation on 28 June 2007. The amending legislation requires that persons sentenced to imprisonment for a single class 2 (sexual) offence, are not excluded from the reporting requirements of the principal Act only because the sentence was suspended under s 12 of the *Crimes (Sentencing Procedure) Act 1999*. The definition of “registrable person” in s 3A(2)(b)(i) of the principal Act has been revised to include a person the subject of a sentence suspension order. Section 4(2A) “extends to any registrable person whom the court has sentenced to a term of imprisonment even if the term of imprisonment is subject to a sentence suspension order.” The amendments are retrospective and apply to offenders sentenced before the changes were introduced.¹¹

(d) Making a Principal in the Second Degree Liable to the Same Punishment as a Principal Offender

On 15 November 2007 amendments to ss 345, 346 and 351B of the *Crimes Act* made by the *Criminal Legislation Amendment Act 2007* commenced operation. The changes make offenders liable to the “same punishment to which the person would have been liable had the person been the principal” (in s 345) or “principal offender” (in ss 346 and 351B). Their object is to remove any doubt that “an accessory, when sentenced, should be sentenced on the same basis as the principal offender would have been sentenced rather than on the basis of the circumstances of being an accessory”.¹²

3. NSW Court of Criminal Appeal Decisions

In 2007 the NSW Court of Criminal Appeal issued approximately 362 judgments and of these about 279 (or 77.07 per cent) concerned various types of sentence appeals. Some of the issues raised in these appeals are not new.¹³

¹⁰ Child Protection (Offenders Registration) Amendment (Suspended Sentences) Bill 2007, *Second Reading Speech, Legislative Assembly*, 19 June 2007.

¹¹ Pt 4, Cl 11 *Child Protection (Offenders Registration) Act 2000*.

¹² Explanatory Note to the *Criminal Legislation Amendment Act 2007*.

¹³ Based on judgments available to my Office as at 15 February 2008.

(a) Standard Non-Parole Period Sentencing

Standard non-parole period sentencing began in February 2003 and became the subject of appeals to the Court of Criminal Appeal; however, the practical application of the principles in *R v Way* (2004) 60 NSWLR 168 has not been without difficulties. Throughout 2007 a range of sentencing problems arose. I mention two, although there are others which may well merit examination on another day.¹⁴

The **first** concerns the failure to use the standard non-parole period as a reference point or benchmark in cases involving a plea of guilty or where a decision is made to depart from imposing the standard non-parole period. The **second** focuses on incorrectly using the standard non-parole period generally as a starting point in the sentencing exercise.

(i) Failure to use the standard non-parole period in matters involving a guilty plea

Standard non-parole period legislation¹⁵ applies to sentencing for specific offences following a conviction after trial. It is also a factor to be considered in sentencing for standard non-parole period offences to which a guilty plea has been entered. In *R v Way* (2004) 60 NSWLR 168 the court explained that one of the mitigating factors specified in s 21A(3) of the *Crimes (Sentencing Procedure) Act 1999* which may justify departing from the standard non-parole period is a plea of guilty: s 21A(3)(k). This situation calls for the relevant standard non-parole period to be considered¹⁶ by way of a “reference point or bench mark or ...guide post along with other extrinsic aids such as authorities, statistics, guideline judgments and the specified maximum penalty, as are applicable and relevant”.¹⁷ While the principle appears straightforward, its practical application has not been.

In *R v Witchard* [2007] NSWCCA 167 the respondent pleaded guilty in the Local Court to a number of offences, including robbery in company (s 97(1) *Crimes Act*) and assault with intent to

¹⁴ For example Howie J in *R v Mitchell; R v Gallagher* [2007] NSWCCA 296 at [36] cites “... the difficulty of applying the standard non-parole period provisions in a case where the standard non-parole period for a particular offence does not represent a non-parole period that would normally be appropriate for an offence falling within the midpoint of the prescribed statutory maximum.”

¹⁵ Introduced by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW) (No 90).

¹⁶ Indirect application of the standard non-parole period to matters involving a plea of guilty was acknowledged by Howie J in *R v Simon* [2005] NSWCCA 123 at [30].

¹⁷ *R v Way* (2004) 60 NSWLR 168 at [122].

rob with wounding (s 98 *Crimes Act*).¹⁸ Contrary to *Way* the sentencing judge concluded that the standard non-parole period was irrelevant because the respondent pleaded guilty. McClellan CJ at CL confirmed that the standard non-parole period still operates as a guide in determining the appropriate sentence following a plea of guilty. Notwithstanding the guilty plea, the sentencing judge should have considered whether the matter fell within the mid-range of objective seriousness and, if not, where the offence fell in relation to the mid-range of objective seriousness.

A statement by the sentencing judge that a guilty plea “avoided the automatic application” of a standard non-parole period was held to be an error in *GAT v R* [2007] NSWCCA 208.¹⁹ In *R v Dang* [2005] NSWCCA 430 the court concluded that it was not open to the sentencing judge to conclude that to further consider the standard non-parole period after determining the offence fell outside the mid-range of objective seriousness was unnecessary. The continued relevance of the standard non-parole period was based on the premise that it “...still ha[d] some work to do as an indication of what the appropriate sentence should be even though the court had found a reason to depart from it.”²⁰

The judge’s obligations when sentencing for a standard non-parole period offence, even where a plea of guilty is involved, are set out in s 54B of the *Crimes (Sentencing Procedure) Act*. The judicial officer must record reasons for increasing or reducing the standard non-parole period. This requires the judge or magistrate to identify in his or her sentencing remarks, each factor taken into account in departing from the standard non-parole period. A failure to give reasons in compliance with s 54B(3) and (4) has been identified as an error by the NSWCCA in *R v Marshall* [2007] NSWCCA 24; *R v Fahs* [2007] NSWCCA 26; *R v JRD* [2007] NSWCCA 55; *R v Henry* [2007] NSWCCA 90 among others.

(ii) Using the Standard Non-parole Period as a Starting Point Rather Than a Guide

The Court of Criminal Appeal has repeatedly said that error arises in sentencing for standard non-parole period offences²¹ when the standard non-parole period is used as a starting point in

¹⁸ A number of offences were also placed on a s 166 certificate.

¹⁹ *GAT v R* [2007] NSWCCA 208 per Adams J at [23].

²⁰ *R v Dang* [2005] NSWCCA 430 at [17].

²¹ Where the offender’s guilt is established by conviction after trial or by a plea of guilty.

setting the sentence rather than as a guide or reference.²² In *R v Way* (2004) 60 NSWLR 168 Spigelman CJ said it was inappropriate to begin sentencing by using the standard non-parole period "... and then to oscillate about it by reference to the aggravating and mitigating factors." The difficulty with this approach is that "... the standard non-parole period will tend to dominate the remainder of the exercise, thereby fettering the important discretion which has been preserved by the Act."²³

Put another way, using the standard non-parole period as a starting point and "structuring the sentence around it" may fail to produce a proper balance between the "head sentence" (as it used to be known) and the non-parole period. This issue was considered in *R v Nikolic* [2007] NSWCCA 232; *Reaburn v R* (2007) 169 A Crim R 337 and *R v T* [2007] NSWCCA 62.

In *Reaburn*, Hoeben J examined and applied the analysis of Chief Justice Spigelman in *Mulato v R* [2006] NSWCCA 282. In so doing, Hoeben J concluded that using the standard non-parole period as a starting point resulted in a sentence that was manifestly excessive.

In *R v Nikolic* [2007] NSWCCA 232 the sentencing judge set an inappropriate sentence by using the standard non-parole period as a starting point. His Honour applied a discount of 15 per cent for the plea of guilty and then proceeded to determine the sentence by applying the statutory ratio specified in s 44(2) of the *Crimes (Sentencing Procedure) Act 1999*. In dealing with the matter, the Court of Criminal Appeal approved of the approach taken by Grove J in *R v Stankovic* [2006] NSWCCA 229. This approach involves determining an appropriate sentence, applying a discount for the guilty plea and then setting the non-parole period.²⁴

(b) Issues of Concurrency and Accumulation

One of the difficulties facing a sentencing judge is the obligation to impose a sentence which reflects the criminality of the offence without excessively punishing the wrongdoing. The sentencing task is more complex when an offender commits multiple offences which may or may not be part of one episode of criminality. The fundamental issue here is determining an overall appropriate sentence having regard to the principles of concurrence, accumulation and totality.

²² See *R v Way* (2004) 60 NSWLR 168 at [131].

²³ *R v Way* (2004) 60 NSWLR 168 at [131].

²⁴ *R v Nikolic* [2007] NSWCCA 232 at [20].

In the Crown appeal of *R v Harris* (2007) 171 A Crim R 267 the court said²⁵ “Implementation of the principle of totality is perhaps the most common circumstance where concurrency of sentences is justified.” However, while the sentence imposed should appropriately recognise the offending conduct and be confined to reflecting the criminality of the offence, some accumulation of sentences is almost always necessary to punish the greater criminality inherent in the commission of subsequent offences: *Pearce v R* (1998) 194 CLR 610 at [45].

In *Harris* the sentencing judge imposed completely concurrent sentences for two discrete break and enter offences committed in different houses in the same street on the same day. The imposition of wholly concurrent sentences meant that there was no additional punishment for the second offence. The court emphasised at [40] that “a clear message” needed to be sent to those who commit break and enter offences that they cannot continue to do so with “virtual impunity”. The court added that wholly concurrent sentences should not be imposed without good reason: *R v Brown* [1999] NSWCCA 323 at [24]; *R v Montgomery* (2004) 151 A Crim R 376 at 381.

In sentencing in case involving multiple offences considerations of general and personal deterrence oblige courts to “...signal to would-be offenders, many of whom in this area are serial offenders, that they can expect punishment for each of their offences.”²⁶ Further, while the multiple offences may form part of one “crime spree”; this is not an adequate reason for making the sentences completely concurrent. The community is entitled to retribution in circumstances where the decision to commit additional offences involves additional loss or damage and more victims.²⁷

In the Crown appeal of *R v Oloitoa* [2007] NSWCCA 177 the sentencing judge erred by providing an accumulation of only six months for an offence of aggravated entry of premises in company under s 112(2) *Crimes Act* to the term imposed for an offence of aggravated sexual intercourse without consent.²⁸ Part of the course of offending included the sexual assault. However, the offender’s forced entry into the victim’s home, using a knife and being in company,

²⁵ *R v Nikolic* [2007] NSWCCA 232 at [44].

²⁶ *R v Harris* (2007) 171 A Crim R 267 at [41].

²⁷ *Ibid* at [42].

²⁸ Section 61J *Crimes Act*.

constituted a separate, serious offence which warranted a sentence emphasising personal and general deterrence.²⁹

In *Rickaby v Regina* [2007] NSWCCA 288 the court held that it was open to the sentencing judge to accumulate sentences for the offences of discharging a firearm in a public place and possession of an unregistered firearm. Giles JA, with whom Hulme and Hislop JJ agreed, said³⁰ that when sentencing for two or more offences relevant considerations in determining the degree, if any, of accumulation include features common to the offences, as well as those unique to each, and whether or not the offences were part of one course of conduct: *R v Hammoud* (2000) 118 A Crim R 66. The essence of the totality principle requires that the overall sentence reflects the total criminality of the offences, without exceeding it: *R v Cicekdag* (2004) 158 A Crim R 299.

The Court of Criminal Appeal again addressed the issue of concurrent sentences for multiple offences of break, enter and steal in the Crown appeal of *R v Merrin* [2007] NSWCCA 255. The respondent had committed or participated in 16 offences³¹ of break, enter and steal in relation to domestic premises over a period of about two years. The court held the sentencing judge erred in imposing concurrent sentences for the six offences of break and enter³² and then making those sentences concurrent with concurrent sentences imposed for three offences of aggravated break and enter.³³ The offences were committed over a long period and it was held to be erroneous to subsume the total criminality in a single sentence for one offence of aggravated break and enter.³⁴

²⁹ *R v Oloitoa* [2007] NSWCCA 177 at [50].

³⁰ *Rickaby v Regina* [2007] NSWCCA 288 at [17].

³¹ The respondent pleaded guilty to six counts of break, enter and commit serious indictable offence (steal) (counts 1-6): s 112(1) *Crimes Act*; two counts of aid and abet aggravated break, enter and commit serious indictable offence (steal) (counts 7 and 8): ss 112(2)/345 *Crimes Act*; and one count of aggravated break and enter with intent to commit serious indictable offence (steal) (count 9): ss 112(2)/345 *Crimes Act*. Counts 7-9 have a standard non-parole period of five years. Some errors in the sentences imposed were formally corrected in *R v Merrin (No 2)* [2007] NSWCCA 310.

³² Including matters taken into account on a Form 1.

³³ One of which also included Form 1 matters.

³⁴ *R v Merrin* [2007] NSWCCA 255 at [35].

(c) Suspended Sentences and Good Behavior Bonds

The position following revocation of a good behavior bond and orders made as a result of that revocation, was clarified by the *Crimes and Courts Legislation Amendment Act 2006*. The definition of “sentence” was extended to include the revocation of the s 12 bond. Any order made as a consequence of the revocation was treated as part of an offender’s sentence and subject to appeal.³⁵

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 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 offender’s subsequent plea of guilty to malicious wounding in company confirmed that he had breached the 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 enter 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* and found that while 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 the sentencing judge had “good reasons” under s 98(3)(b) of the *Crimes (Sentencing Procedure) Act* for not taking action. Howie J, with whom Sully and Price JJ agreed, emphasised two matters from *R v Marston* (1993) 60 SASR 320.

“... 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.”³⁶

³⁵ A sentence under s 3(1)(ba) of the *Crimes (Appeal and Review) Act 2001* includes: “(ba) any order made by a Local Court revoking a good behaviour and any order made as a consequence of the revocation of the good behaviour bond.” A similar amendment was inserted into the *Criminal Appeal Act 1912*.

³⁶ *Director of Public Prosecutions v Cooke & Anor* [2007] NSWCA 2 at [21].

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. This 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.

Howie J explained³⁷ 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. Two separate jurisdictions are being exercised in deciding the sentence for an offence that also constitutes the breach of good behavior bonds.³⁸ 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.”³⁹

The sentencing 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.”⁴⁰ A further error identified on appeal was that his Honour incorrectly limited sentencing options available on revocation of the bonds by the sentence he imposed for the malicious wounding offence.

It was impermissible to take into account the offender’s rehabilitation needs because they were not relevant to fulfilling the judicial task in s 98(3)(b).⁴¹ 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.

Whether the new legislative provisions addressing good behavior bonds applied to a bond imposed before the Act commenced arose in *Rickard v R* [2007] NSWCCA 332. The applicant

³⁷ Ibid at [26].

³⁸ Ibid at [27].

³⁹ Director of Public Prosecutions v Cooke & Anor [2007] NSWCA 2 at [28].

⁴⁰ Ibid at [29].

⁴¹ Ibid at [34].

had pleaded guilty to manslaughter by neglect on the basis that her daughter had drowned after she left her unattended in the bath for several minutes. She was sentenced to two years imprisonment. The sentence was suspended on condition that the applicant enter a two year good behavior bond which, for reasons not relevant here, was revoked after the new legislation commenced.

Although the original sentence had not been formally entered, the judge determined he had no power to re-open a sentence that had already been imposed. His Honour therefore ordered that the original sentence take effect. "The applicant appealed against the original sentence, and the later order, following revocation of the bond, that it take effect."⁴²

The NSWCCA held that the judge had a discretionary power to re-open the proceedings because the original sentence had not been perfected: *R v Elliott* [2006] NSWCCA 3305 at [44] and [45]. The exercise of this discretionary power is subject to the proviso⁴³ that the "misapprehension of the facts or the relevant law" was not caused by the neglect or default of the party seeking the rehearing."⁴⁴ Notwithstanding this power, the NSWCCA found that there was nothing in the sentence that warranted its review. Overall the penalty was lenient, there was no demonstrated error of fact or principle and the non-parole period of 12 months was not excessive.

The NSWCCA in *Rickard* also rejected an argument that the amending Act conferred on the court revoking the bond, a power to reconsider any non-parole period set as part of the original sentence. Handley AJA, with whom Hoeben J and Smart AJ agreed, found that the amending Act together with its absence of relevant transitional provisions meant that the statutory changes operated in a prospective manner only⁴⁵: that is, the legislation conferred a power to set a non-parole period where it had not been set before and this could not logically affect suspended sentences where a non-parole period had already been imposed.⁴⁶

⁴² *Rickard v R* [2007] NSWCCA 332 at 1.

⁴³ Handley AJA in *Rickard* at [34] citing *Elliott v the Queen* [2007] HCA 51 at [31]-[32] who were in turn referring to Mason CJ in *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300.

⁴⁴ "... The purpose of the jurisdiction is not to provide a backdoor method by which unsuccessful litigants can seek to reargue their cases." Mason CJ in *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300.

⁴⁵ *Rickard v R* [2007] NSWCCA 332 at [20].

⁴⁶ *Ibid* at [22].

The court also considered when criminal proceedings are finalised. It held that they "... become *res judicata* when they are finally disposed of by sentence or otherwise." *Maxwell v The Queen* (1996) 184 CLR 501 at 509 and 530.⁴⁷

Suspended sentences were also considered in *JRD* [2007] NSWCCA 55 and *Tran v R* [2007] NSWCCA 110. In *JRD* the Crown appealed against sentences imposed following pleas of guilty to supplying a prohibited drug, receiving and obtaining credit by fraud. Two further receiving offences were listed on a Form 1.⁴⁸ One of the sentencing errors identified on appeal was that the judge imposed a sentence which he wholly suspended before determining what the appropriate sentence should be. *R v Zamagias* [2002] NSWCCA 17 at [26].

(d) Child Sexual Assault Offences

Objective medical and psychological evidence of the harm caused to children by sexual assault and community abhorrence of this offending have been reflected in increased penalties for sexual offences. This development, together with the prosecution of offences committed many years ago, has created various sentencing difficulties. One such difficulty is whether to apply the sentencing practices which existed when the offences were committed or to adopt the present and more onerous regime for "prescribed sexual offences".

Regina v MJR [2002] NSWCCA 129 involved child sexual assault offences committed between 1983 and 1989. The Court of Criminal Appeal, sitting as a five judge bench, held that when sentencing for offences that were committed many years before coming before the courts it was necessary to have regard to sentencing standards that existed at the time the offences were committed.

MJR was considered in *AJB v Regina* (2007) 169 A Crim R 32. In *AJB* the applicant had committed a series of indecent assaults against children between 1979 and 1982. The court applied *MJR* and therefore found it was necessary to sentence using the practices existing at the time the offences were committed. The NSWCCA held that the sentencing judge's failure to find special circumstances amounted to an error. While a finding of special circumstances based on the applicant's subjective factors could not be supported, the NSWCCA held that judicial

⁴⁷ *Ibid* at [24].

⁴⁸ The pleas were entered to one offence under s 25(2) *Drug Misuse and Trafficking Act 1985*, s 178C and s 188 of the *Crimes Act 1900*.

recognition of sentencing practices in 1982 was sufficient to establish special circumstances in determining the non-parole period.⁴⁹

Unlike s 44(2) of the *Crimes (Sentencing Procedure) Act 1999*, the *Parole of Prisoners Act 1966* imposed no restrictions on the statutory ratio between the non-parole period and the “head sentence.” In formulating the non-parole period, the CCA took the view that sentencing practices in 1982 should apply because they would “favour the applicant”. In addition, the court held that a finding of special circumstances would address the unfairness which arose from delay in prosecuting the offences and changes to sentencing law concerning the determination of an appropriate non-parole period.⁵⁰

This approach was consistent with *Tatana v R* [2006] NSWCCA 39, also considered by the court in *AJB*. In *Tatana v R* the court held that a finding of special circumstances was appropriate to “... preserve proper parity between co-offenders” and thereby avoid “manifest unfairness arising from a too literal application of conventional sentencing principles and the requirements of s 44.”⁵¹

In *AJB* Howie J highlights a difficulty encountered in sentencing on the basis of practices existing when the offences were committed. His Honour observes that while locating the relevant statutory scheme is straightforward, finding out how it was applied is more difficult. His Honour cites the example of a difference in approach to the Act identified by the NSWCCA in *R v Portolesi* [1972] 1 NSWLR 105 and by the High Court in *Power v The Queen* (1974) 131 CLR 623.⁵² *R v Portolesi* was overruled by *Power v The Queen* which clarified that “... the non-parole period is the minimum period to be served by the offender having regard to all the purposes of punishment including deterrence.”⁵³

AJB was subsequently applied in *MJL v R* [2007] NSWCCA 261.

DBW v R [2007] NSWCCA 236 concerned sexual offences committed by the applicant father against three infants, two of whom were his biological children and one of whom was the child of

⁴⁹ *AJB v Regina* (2007) 169 A Crim R 32 at [37].

⁵⁰ *AJB v Regina* (2007) 169 A Crim R 32 at [37].

⁵¹ *Tatana v R* [2006] NSWCCA 398 at [33] cited in *AJB* at [47].

⁵² *AJB v Regina* (2007) 169 A Crim R 32 at [38].

⁵³ *AJB v Regina* (2007) 169 A Crim R 32 at [38]. Note that *Power v The Queen* (1974) 131 CLR 623 was followed in *Deakin v The Queen* (1984) 58 ALJR 367.

a neighbour. The offences occurred over a period of some five years. Inappropriate sexual conduct by the applicant's son came to the notice of a woman whose daughter attended the same school as the applicant's son. Acting on her suspicions, she confronted the applicant about his son's behaviour. The applicant admitted that he had committed sexual offences against his two children and another whom he had looked after. He later attended a police station and repeated the admissions to the authorities.

The Court of Criminal Appeal found that the sentencing judge did not make an error in saying that the applicant's son had been adversely affected by the sexual assaults. Spigelman CJ said that —

“The possibility of a link between the Applicant's conduct and his son's behaviour was, in my opinion, an inference open to be drawn by his Honour and to be so drawn beyond reasonable doubt.”⁵⁴

Spigelman CJ, with whom Simpson and Harrison JJ agreed, said that the observations in the earlier case of *R v Muldoon* (unrep, 13/12/1990, NSWCCA per Hunt J), concerning evidence that needed to be adduced before drawing conclusions about the future harm to young children caused by sexual abuse, were no longer of assistance.⁵⁵ This is because in recent years “... the public and the courts have become much more aware of, and knowledgeable about, the effects of child sexual abuse.”⁵⁶

4. Conclusion

By now you may have formed the impression that I have barely touched the surface of some of the complex issues which challenge all of us who appear or are otherwise involved in criminal proceedings. Further analysis of these and other matters is perhaps a task for another occasion. One thing of which I am certain is this: that there will be further legislative intervention in the operation of the criminal law and, as a consequence, more issues to be resolved by appellate courts and addressed by practitioners.

⁵⁴ *DBW v R* [2007] NSWCCA 236 at [29].

⁵⁵ *Ibid* at [39].

⁵⁶ *Ibid* at [39].