IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S121 of 2011

BETWEEN

DEREK MULDROCK
Appellant

and

THE QUEEN
Respondent

10

APPELLANT'S SUBMISSIONS

Part I: Certification that the submissions are in a form suitable for publication on the internet

1. I certify that the submissions are in a form suitable for publication on the internet.

20

Part II: A concise statement of the issues the appellant contends that the appeal presents

2. The standard non-parole period represents the non-parole period for an offence in the middle of the range of objective seriousness. Does the standard non-parole period provide a 'benchmark' for offences falling below the middle of the range of objective seriousness?

3. What is the role of the standard non-parole period to offences *per se*, that is, regardless of the level of objective seriousness?

30

4. Does the principle of proportionality apply to setting of the non-parole period in the same way in which the principle applies to the setting of the head sentence?

Part III: Section 78B of the Judiciary Act 1903

5. The appellant has considered whether any notice should be given in compliance with section 78B of the Judiciary Act 1903 (Cth). No such notice is required.

40

Catherine Hunter, Solicitor
Suite 403
185 Elizabeth St
SYDNEY NSW 2000

Telephone: (02) 9713 5044
Fax: (02) 9713 5094
Ref: Catherine Hunter

Part IV: Citation

6. This decision is yet to be reported. The Supreme Court of New South Wales citation is: *R v Muldrock; Muldrock v R* [2010] NSWCCA 106

Part V: A brief statement of the factual background to the appeal

7. In March 2007, the Appellant was charged with the sexual assault of a nine year old boy. The Appellant and victim had been cycling and then swimming. The Appellant touched the victim's buttocks in a lake. Afterwards he sucked the victim's penis for about ten seconds.

8. The Appellant was 30 years old. He suffered from an intellectual disability. In 2000, he had been sentenced to a 12 month intensive supervision order for a very similar offence.

9. The Appellant pleaded guilty to a charge of sexual intercourse with a child under ten years of age, contrary to s 66A of the Crimes Act 1900 (NSW). The maximum penalty is 25 years imprisonment with a standard non-parole period (SNPP) of 15 years. If the victim had been a few weeks older, no standard non-parole period would have applied at all. An offence of aggravated indecent assault, contrary to s 61M(2) of the Act, was taken into account.

10. During the sentence proceedings, evidence was tendered by the Crown and the defence. The evidence included Reports about the disability and its link to the offending. The Crown tendered Reports of Dr Muir, Director, Integrated Mental Health Programme, Cairns Health Service, together with a Report of Ms Daniels, Clinical Psychologist. These Reports had been tendered in the proceedings before the Cairns District Court in 2000. A Report from Dr Hayes, Clinical Psychologist, was tendered by the Appellant in the extant proceedings.

11. The evidence adduced in the sentencing proceedings included the following:

    a. A problem at the Appellant's birth led to a permanent intellectual disability. Dr Muir had observed that the Appellant was 'mentally retarded' and that as a result of his disability had difficulty managing his impulses and controlling his actions.

    b. The Appellant had been sexually abused as a ten year old and again subsequently. He was the victim of a perpetrator engaging in oral intercourse upon him. *(This was the same misconduct he later engaged in.)* (Ex A, Dr Muir, 8 May 2000, p 2)

    c. The offender was in special classes throughout his schooling career. In 2000, at the age of 24, he could barely read or write. He could only tell time from a digital readout. He had enormous difficulty retaining employment. (Ex A, Dr Muir, p 1)

d. 'The offender was suffering from maladaptive sexual behaviour which seems to have manifested as a result of his own childhood sexual abuse and mental retardation. He therefore has little control over his acting out behaviour.' (Ex A, Ms Daniels, Clinical Psychologist, 30 June 2000, p 2)

This Report was tendered by the Crown. The accuracy of the finding has never been challenged. The extract was relied upon before the Court of Criminal Appeal. That Court referred to aspects of the tendered Reports, including that of Ms Daniels. ***It did not refer to this extract.***

e. 'The offender has little comprehension of what constitutes a criminal act. In fact, in all likelihood, a prison sentence would only serve to perpetuate his criminal behaviour. He was only one point from mental retardation.' (Ex A, Daniels at p 2)

f. The offender's father had received treatment for bi-polar disorder and had been taken to a psychiatric facility by the police. He started a fire on the family property and absconded. He had been violent to the offender. (Ex 1, Dr Hayes, 25/9/08, pp 1-2)

g. Dr Hayes concluded (at p 4): 'His IQ Composite Standard Score of 62 indicates a mild intellectual disability and he functions at a level lower than 99% of the population.' His receptive and expressive language was equivalent to a child aged five years and six months (p 5). The Appellant, in terms of adaptive behavior, was functioning in the lowest 0.1%. The age equivalent was of a ten year old. (*This is the same age the offender was when he was first sexually abused. It is also the age of his victims.*)

h. Dr Hayes concluded that the Appellant needed to participate in a programme designed for a sex offender with an intellectual disability. She also expressed concern that if given a custodial sentence the Appellant may not receive or have access to services, interventions and treatment programs that were needed in order to reduce the risk of re-offending (p 6). She expressed the opinion that an appropriate community based facility would need to provide 24 hour supervision, counselling, ongoing medication, treatment and intervention programs. (Ex 1, Dr Hayes at pp 4-6)

12. Only one facility in New South Wales specializes in the treatment of sexual offenders with an intellectual disability. It is a secure facility in Orange with five beds. The Appellant had been assessed. The sentencing court was informed that one bed remained and was being held for the Appellant.

13. The sentencing judge noted the offences, the facts, the maximum penalty, the existence of the SNPP, the early plea and the tension between the SNPP and the objective and subjective factors (ROS1). He found that the Appellant was significantly intellectually disabled and an inappropriate vehicle for general deterrence (ROS2).

14. His Honour was particularly concerned to protect the public. He concluded that the Appellant being placed in the facility near Orange, given that it was secure, remedial and focused upon treating the issues associated with the offending (ROS4), could best achieve this. He found that the offence fell below the mid-range of objective seriousness.

15. The Appellant was sentenced to serve 9 years imprisonment with a non-parole period of 96 days. The 96 days was backdated and related to an earlier period on remand. His Honour directed that parole only be granted on the basis that the Appellant reside at the facility that was operated by the NSW Department of Ageing, Disability and Home Care.

16. The Crown appealed against the non-parole period and the Appellant appealed against the head sentence. The Court dismissed the severity appeal and allowed the Crown appeal. A sentence of 9 years with a non-parole period of 6 years, 8 months was imposed.

Part VI: The Appellant's argument

Ground two: The sentencing judge had found that the Appellant was 'significantly intellectually disabled'. The Court erred in deciding that the finding 'was not justified by the contemporary evidence'.

17. The Crown tendered the Reports from Dr Muir and Ms Daniels. His Honour stated in the ROS at 2.1 that:

> *'It is accepted, and the material both in exhibit A and in exhibit 1 show that he is, in my view, significantly intellectually disabled.'*

18. Professor Hayes concluded that the testing indicated a mild intellectual disability. She was not using the language of a lay person.

19. The Court of Criminal Appeal decided that the Appellant was a suitable vehicle for general deterrence [34] and [42]. Further, that the range of considerations set out by s 3A of the Crimes (Sentencing Procedure) Act (1999) (NSW) (the Act) had application.

20. The World Health Organisation recognizes the following IQ ranges in defining intellectual disability: borderline (70-79), mild (50-69), moderate (35-49), severe (20-34) and profound (less than 20). According to the latest edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV), three criteria must be met for a diagnosis of mental retardation: IQ below 70, significant limitations in two or more areas of adaptive behavior (as measured by an adaptive behavior rating scale, i.e. communication, self-help skills, interpersonal skills, and more), and evidence that the limitations became apparent before the age of 18.

21. The NSW Law Reform Commission discussed intellectual disability in terms:

> *'The severity and consequences of an intellectual disability will vary from person to person and 'generalisations about the needs of people with an intellectual*

disability must be treated with caution.' Any definition needs to take this diversity into account. A person's intellectual disability can be classified as 'mild', 'moderate', 'severe' or 'profound', based upon certain IQ (intelligence quotient) ranges. A further category, 'borderline', is also used to indicate people just above the mild range in terms of intellectual functioning. A person with a 'severe' or 'profound' disability may be unable to learn basic social skills such as speech, walking and personal care, and is likely to require supported accommodation. The majority of people with an intellectual disability have a 'mild' level of intellectual disability and 'can learn skills of reading, writing, numeracy, and daily living sufficient to enable them to live independently in the community.' These classifications have limited utility and can sometimes be misleading. For example, such terms may suggest to criminal justice personnel, who do not have a full understanding of the disability involved, that a 'mild' intellectual disability is inconsequential.' [1]

22. The lifelong deficits suffered by the Appellant, and identified by Professor Hayes, Dr Muir and Ms Daniels, warranted the finding made by his Honour that the Appellant was 'significantly intellectually disabled'. The evidence regarding the Appellant was plain: his IQ score was 62, indicating he functions at a level lower than 99 % of the population. His language skills were equivalent to those of a young child. In terms of his adaptive behaviour, he was assessed as functioning in the lowest 0.1% of the population, with particular deficits in communication skills. The limitations were apparent before he was 18.

23. McClellan CJ at CL stated (at 27):

'In the present case the sentencing judge concluded that the respondent "was significantly intellectually disabled" and that accordingly general deterrence "was inappropriate", although His Honour accepted that personal deterrence was still relevant. In my judgment this finding was not justified by the contemporary evidence.....he had sufficient capacity to have obtained a driver's licence and has undertaken some paid employment.....'

24. To say that this finding was not open, because he held a driver's licence and from time to time had undertaken employment, was to reject the uncontradicted expert evidence and replace it with the inexpert opinion of the Court. The Crown tendered the evidence that described the Appellant as mentally retarded.

25. The Court of Criminal Appeal, having found that the Appellant was not significantly intellectually disabled, allowed the Crown appeal. It found that special circumstances were not warranted. A 'mild' disability in medical terms is a 'significant' disability in lay terms. However, regardless of whether the intellectual disability was 'significant' or 'mild', the Appellant still suffered from the serious problems described above. He still needed treatment. Professor Hayes noted the absence of such facilities within the

[1] NSW Law Reform Commission Discussion Paper 35 (1994) People with an Intellectual Disability in the Criminal Justice System: Courts and Sentencing issues.

correctional system. She recommended participation in a specialized facility in the community. Her report was consistent with the course adopted by the sentencing judge.

Ground one: The Court erred in its consideration of the standard non-parole period. The Court erred by having regard to cases which were incomparable.

26. The applicability of a SNPP is determined by the Crimes (Sentencing Procedure) Act (1999) (NSW).

54A What is the standard non-parole period?

(1) For the purposes of this Division, the standard non-parole period for an offence is the non-parole period set out opposite the offence in the Table to this Division.
(2) For the purposes of sentencing an offender, the standard non-parole period represents the non-parole period for an offence in the middle of the range of objective seriousness for offences in the Table to this Division.

54B Sentencing procedure

(3) This section applies when a court imposes a sentence of imprisonment for an offence set out in the Table to this Division.
(4) When determining the sentence for the offence, the court is to set the standard non-parole period as the non-parole period for the offence unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period.
(5) The reasons for which the court may set a non-parole period that is longer or shorter than the standard non-parole period are only those referred to in section 21A.
(6) The court must make a record of its reasons for increasing or reducing the standard non-parole period. The court must identify in the record of its reasons each factor that it took into account.
(7) The failure of a court to comply with this section does not invalidate the sentence.

27. The first issue is the interpretation of ss 54A and 54B. The provisions were considered in *R v Way* (2004) 60 NSWLR 168. The Appellant makes two submissions.

28. First, having regard to s 54A(2), s 54B only applies to mid-range offences. Therefore, the SNPP is irrelevant to offences that fall below the mid-range. The Court of Criminal Appeal in *Way* determined that s 54B applied to all levels of offending within the relevant charge and that the SNPP served as a benchmark to all offences [65-66]. However, even if s 54B applies to all offences, *the provision does not explicitly say that the SNPP is a benchmark for low-range offences.* Further, the provision does not constrain *the extent* to which the sentence may move from the SNPP.

29. The Second Reading speech explicitly states that the SNPP would operate as a benchmark for all offences (see *Way* at [49]). It is respectfully submitted that this is not reflected by the legislation. As a majority of this Court recently stated in *Lacey v Attorney-General of Queensland* [2011] HCA 10 at [61] (emphasis added):

> *'The Solicitor-General of Queensland pointed to the background to the enactment of the new s 669A(1) in 1975 as a response to the 1973 decision of the Court of Criminal Appeal in Liekefett. The record of the Second Reading Speech shows that the Minister for Justice intended, by the repeal and re-enactment of s 669A(1), to 'make it clear that the Court of Criminal Appeal has an unfettered discretion to determine the proper sentence to impose when the Attorney-General has appealed against the inadequacy of the sentence.' [149]* ***The Minister's words, however, cannot be substituted for the text of the law, particularly where the Minister's intention, not expressed in the law, affects the liberty of the subject*** *[150].'*

30. Heydon J said at [86]-[87]:

> *'A third consideration arises out of what the Minister for Justice said in 1975. Excessive recourse to second reading speeches is one of the blights of modern litigation. Modern legislation permits it, or is often assumed to permit it, to a much greater extent than the common law rules of statutory construction did. Experience is tending to raise grave doubts about the good sense of that legislation. It may be accepted that what Ministers say about what they intended the enactment to provide is no substitute for an examination of what the enactment actually provides, only an aid to it. It may be accepted that that proposition is particularly salutary when the enactment is said to derogate from fundamental rights or damage fundamental interests. But the fact remains that the courts can investigate what Ministers say. There are rare occasions when that investigation has value. This is one of the rare occasions.*
>
> *'In what the Minister for Justice said on 23 April 1975 in his Second Reading Speech [176], there is support for the clear construction to be given to the legislative words 'unfettered discretion' which was adopted by the Court of Appeal majority. There is nothing narrow or incomplete in what he said.'*

31. The second submission is made in the alternative. Regardless of what level(s) of objective seriousness the SNPP applies to, it is only one element of sentencing. It is akin to the maximum penalty in that it provides a check to ensure that the sentence being considered by the Court is within the range.

32. That is consistent with the legislation and with *Way* [122, 124]. The serious error that has developed, and is manifest in this case, is that the SNPP has been given excessive weight. There is no statutory warrant to elevate the impact of the SNPP.

Is the SNPP a benchmark for low (and high) range offences?

33. To interpret ss 54A and 54B such that they provide a benchmark for low-range offences is to increase, and in this case significantly, the sentences for low-range offending. The provisions *do not* explicitly say that the SNPP is a benchmark for low-range offences. Nor do the provisions constrain *the extent* to which the sentence may depart from the SNPP.

34. Section 54A(2) clearly applies to an offence in the mid-range of objective seriousness. Does s 54B? In *Way*, the Court agreed that a literal reading of s 54B(2) confines 'the offence' to that falling in the mid-range [65]. However, the Court stated that the Division was not intended to have such a restrictive application and stated that a purposive interpretation needed to be applied [66]. The Court said that such an interpretation was 'possibly open' by reference to the open-ended terms of s 21A(1)(c) [67]. With respect, the interpretation contended for by the Appellant is consistent with a literal reading of the provision and a proper application of sentencing principles. This is criminal legislation dealing with substantial sentences of imprisonment. It ought to be interpreted with that in mind.

35. Section 54B(2) is important. It prima facie *mandates* that a sentencing court impose the SNPP. This, from a reading of s 54A(2), applies to the mid-range offence. A Court is not to prima facie impose the SNPP for a very low-range offence or the worst case. Therefore the word 'offence' in s 54B is confined by s 54A(2) and means 'an offence in the middle of the range of objective seriousness'.

36. Section 54B(2) allows a Court to impose a sentence which is higher or lower than the SNPP for a mid-range offence. That is consistent with s 54A(2). There are many reasons why a sentence below the SNPP would be imposed for a mid-range offence. See the submissions below under the heading 'The weight to be given to the SNPP'.

37. This approach is also consistent with *De Simoni* (1981) 147 CLR 383. The legislation states that offences at a particular level of seriousness merit a particular level of punishment. A low-level offender is not to be punished as if he or she committed a more serious offence.

38. The alternate interpretation, that the Court is prima facie mandated to impose the SNPP for *all* levels of offending, would rely upon the balance of the provision. That is, the Court could impose a lower non-parole period, than the SNPP, because the objective seriousness falls below the mid-range. However, it requires a starting position that the SNPP applies to the least and most serious offences. This starting point is entirely inconsistent with s 54A(2). It would mean that 'unless the Court determines', the SNPP must be imposed for a low-range offence. That is, a sentence wholly inconsistent with s 54A(2) must be imposed unless a sentencing judge determined otherwise.

39. If the interpretation contended for by the Appellant were correct, s 54B(2) would operate such that the SNPP would be imposed for mid-range offences unless there was a reason

to impose a higher or lower sentence. The sentence would depend upon the existence and importance of factors of aggravation (s 21A(1)(a)), mitigation (s 21A(1)(b)) and criminality (s 21A(1)(c)).

40. If s 54B applies to all offences, irrespective of any assessment of objective seriousness, then the effect of the legislation would be to increase the penalties for offences of low-range objective seriousness. This is what has happened to low-range offences because of the 'benchmark' principle. However, there was no mention in the Second Reading Speech of any dissatisfaction with the general level of sentencing for these offences or of any intention to increase the non-parole periods across the spectrum: see *Way* at 141. As the Court said in *Way* [at 142], 'it may be' that some sentencing patterns will move upwards 'while for others it will not'. However, the application of the benchmark principle has not given due regard to the absence of any legislative concern. As demonstrated by this case, the sentences for low level offending of SNPP offences have risen significantly.

41. The Parliament has prescribed a penalty for a particular level of offending. Parliament has not prescribed an overall increase in all sentences subject to a SNPP. It has not increased the maximum penalty. The SNPP is not grid sentencing. To have regard to the SNPP for offences below the mid-range threshold prescribed by Parliament introduces grid sentencing without any basis to do so.

42. Given the finding that the offence fell below the mid-range, the SNPP did not have any relevance to the sentence that ought to have been imposed on the Appellant. The SNPP only applies to mid-range offences. There is no statutory warrant to have regard to it otherwise. Clear words are required before sentences of imprisonment are increased, especially for low range offences.

The weight to be given to the SNPP – the alternative argument

43. This submission assumes that the SNPP may be regarded as a benchmark.

44. It is respectfully submitted that McClellan CJ at CL erred in giving undue weight to the applicable standard non-parole period and the objective circumstances of the offence. In effect, his Honour engaged in a form of 'grid sentencing' where determination of sentence turns on the 'objective' features of the offence with little or no weight being given to the 'subjective' characteristics of the offender. General principles of sentencing must determine the appropriate non-parole period if the standard non-parole period is not required. The SNPP is only mandated when each of the following applies:

- mid-range offence; and
- conviction after trial rather than a plea of guilty; and
- no factors in mitigation.

The sentencing process remains one of instinctive synthesis.

45. If s 54B(2) mandates that, prima facie, the applicable standard non-parole period must be imposed on any person who commits an offence set out in the Table, close attention must be given to the qualification ('unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period'). The effect of s 54B(3) is to limit permissible 'reasons' to 'only those referred to in section 21A'. However that provision explicitly incorporates almost all of the considerations that the common law permits or requires a sentencing court to take into account when determining a non-parole period (quite apart from the general language of s 21A(1)(c) and the following words in that provision): *Way* at [57] – [58].

10

46. McClellan CJ at CL plainly determined, correctly, that there were reasons for setting a non-parole period that was shorter than the standard non-parole period. One reason that he gave, at least implicitly, was that the 'objective seriousness' of the offence was 'less than mid range of objective seriousness for this offence' (at [34]). His Honour did not elaborate but there were at least two reasons for this conclusion. Firstly, the conduct itself as a form of intercourse. Secondly, the Appellant's subjective factors and their impact on the objective criminality.

47. Section 21A(3) expressly requires '(j) the offender was not fully aware of the
20 consequences of his ... actions because of the offender's ... disability', to be taken into account as a mitigating factor. This is a further, explicit, reason that called for a departure from the SNPP.

48. The legislation does not reduce the importance of subjective considerations. A movement away from the SNPP is not constrained in the way that grid sentencing would. All a sentencing court is required to do is to determine that such reasons exist, and then give reasons. How much weight ought to be given to the various factors on sentence? That is determined by a proper application of the general sentencing principles that have been established by this Court.

30

49. Even for offences falling within the 'middle of the range of objective seriousness', it is not necessarily the case that the SNPP will be imposed. The 'objective seriousness' is not the only factor relevant to the fixing of the non-parole period. Section 54B does not reduce the number of factors relevant to the fixing of the non-parole period (as to which see s 54B(3)). This is recognised in *Way* (118(ii)).

50. Section 54B(2) only requires a Court to 'set the standard non-parole period' if an offence is in the middle of the range and there are no factors whatever favouring a lesser sentence. Section 54B(4) imposes an obligation to articulate (all of) the reasons for
40 departure. The scope of potential reasons for departure is very wide.

51. In *Cvitan v R* [2009] NSWCCA 156, Simpson J referred to a submission that as the determination of 'objective seriousness' is made on the basis of circumstances not including mitigating factors, evidence of such factors, however trivial, will demand a reduction from the standard non-parole period. Her Honour observed:

'62 The argument is not entirely devoid of logic. It is true that, in combination, s 54A and s 54B(2) have the effect of requiring the imposition of the standard non-parole period in respect of offences determined to be in the mid-range of objective gravity; the assessment of objective gravity does not include mitigating factors; it logically follows that subjective circumstances justifying a degree of leniency are capable of enlivening the discretion conferred by s 54B(2). It does not logically follow that any such evidence has the (almost) automatic effect proposed. Whether the subjective case is such as to warrant, or permit, departure from the standard non-parole period remains essentially within the judicial function of the judge.'

52. Section 54B(2) does not speak to, and contains no presumption at all about, the weight, or significance, to be given to any factor not referable (or relevantly referable) to the assessment of 'objective seriousness'. The SNPP is not given added importance.

53. Given the conclusion that there are reasons for setting a non-parole period that is shorter than the standard non-parole period, the only possible relevance of the standard non-parole period is as a yardstick similar to that provided by the maximum penalty. In *Markarian v R* [2005] HCA 25; (2005) 215 ALR 213; (2005) 79 ALJR 1048 the plurality judgment, Gleeson CJ, Gummow, Hayne and Callinan JJ stated at [30] – [31]:

'Legislatures do not enact maximum available sentences as mere formalities. Judges need sentencing yardsticks. It is well accepted that the maximum sentence available may in some cases be a matter of great relevance. ... It follows that careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick.'

54. By analogy, the standard non-parole period invites comparison between the 'objective seriousness' of a case in the 'middle of the range' and the particular case. However, subjective mitigating circumstances, along with other relevant circumstances of the offence and the offender, must also be taken into account in accordance with general principles of sentencing. In that regard, it may be noted that McHugh J referred at [65] to what Jordan CJ said in *R v Geddes* (1936) 36 SR (NSW) 554 at 555:

'This throws one back upon a preliminary question as to the general principles upon which punishment should be meted out to offenders. In the nature of things there is no precise measure, except in the few cases in which the law prescribes one penalty and one penalty only. In all others, the judge must, of necessity, be guided by the facts proved in evidence in the particular case. The maximum penalty may, in some cases, afford some slight assistance, as providing some guide to the relative seriousness with which the offence is regarded in the community; but in many cases, and the present is one of them, it affords none.'

55. Simpson J, with whom the balance of the Court agreed, said in *R v McEvoy* [2010] NSWCCA 110 at [91]:

> *'91 In fact, taking the approach proposed by Howie J provides some check against error. If an intended sentence has a non-parole period substantially below the standard non-parole period, but the offence is held to be slightly below the mid-range of objective seriousness, then a sentencing judge would be wise to examine whether other factors (for example, personal circumstances) warranted that differential. If they do not, the sentence should be re-considered: see Way [124].'*

56. On appeal, undue weight was placed on the SNPP. This approach is without any statutory warrant and is inconsistent with general sentencing principles. A similar situation arose in *Wong v The Queen* (2001) 207 CLR 584. The Court of Criminal Appeal had decided that the most important issue for sentence was the weight of the narcotic. However, weight is only one of the relevant factors. Other important, including mandatory, considerations are found in the Crimes Act (1914) (Cth) (see *Wong* at [71]). Offences, which are subject to SNPP's, also have other important and mandatory considerations. The SNPP is not the only factor. There is no statutory warrant to give it any particular level of importance above any other factor.

57. Since 2003, the Court of Criminal Appeal has slowly but surely increased the importance of the SNPP for sentencing of these offences. The relevance of the SNPP has been elevated beyond that which the provision mandates. The Appellant's case is an example of such undue elevation and a fastening on only one aspect.

58. McClellan CJ at CL, for example at [34]-[35] and by reference to far more serious cases, sentenced the Appellant on the basis that the SNPP was a very, if not the, most important factor. After finding that the level of criminality fell below the mid-range [34], his Honour said (emphasis added):

> *'It is apparent that having regard to the sentencing regime for many offences a non-parole period of 15 years is considerable. Some persons sentenced for murder receive less.* ***However, the responsibility of the courts is to be faithful to the sentences defined by Parliament which includes proper recognition of the standard non-parole period provided for particular offences.'***

59. It is apparent from the last sentence in paragraph 35 of the judgment of McClellan CJ at CL that his Honour gave great weight to the standard non-parole period. However, in the present case, the standard non-parole period provides little or no assistance as a yardstick, for the simple reason that there is nothing 'standard' about this case. The 'objective seriousness' of the offence was below the 'middle of the range of objective seriousness'. Further, the Appellant's mental disability and own sexual abuse, to be taken into account in the weighing of the relevant circumstances for the purposes of determining sentence (including the non-parole period), made it exceptional.

60. It is also apparent from the comparison (at [36] – [41]) to cases with entirely different objective and subjective features, that McClellan CJ at CL gave great weight to the objective features of the offence and very limited weight to the subjective features of the offender. His Honour found the cases to be relevant as a process of comparison, notwithstanding the absence from the cases of the important subjective factors that pertained to the Appellant. This is consistent with his Honour's erroneous approach – an undue focus upon the objective factors and the SNPP. His Honour erred by concluding that:

> *'These cases and others discussed in the reasons, particularly in Eedens, overwhelmingly confirm that the non-parole period which his Honour imposed was entirely inappropriate'.* [41]

61. McClellan CJ at CL considered cases at or above the mid-range of seriousness to determine the appropriateness of the non-parole period of the Appellant. This Court has made clear the care which must be taken in comparing other cases: *Hili v The Queen; Jones v The Queen* [2010] HCA 45 and *Wong v The Queen* (2001) 207 CLR 584 at 605 [58]. To engage in the comparison exercise that his Honour did invited error. The cases chosen as comparators were not 'closely comparable with the present' (*Hili v The Queen; Jones v The Queen* [2010] HCA 45, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at [62]), as none of those offenders suffered from a mental disability let alone had also been a victim of sexual abuse.

62. The cases were entirely irrelevant to the sentence to be imposed on the Appellant. Reliance upon them serves to demonstrate the failure to have proper regard to general sentencing principles. The comparison only served to increase the sentence imposed. His Honour erred in an important respect. His Honour failed to apply general sentencing principles. His Honour impermissibly focused on the objective factors without due regard to the compelling subjectives.

63. In accordance with general sentencing principle, there is no general obligation to give more weight to the 'objective facts' of the offence over the 'subjective features' of the offender. Section 3A of the Act does not indicate anything different. The existence of the standard non-parole period as a 'yardstick' does not require greater weight to be given to the 'objective seriousness' of an offence than other relevant factors.

64. His Honour's approach failed to consider properly the mandatory and important subjective factors that were determinative of the sentence imposed at first instance. The SNPP has distracted attention from important mandatory considerations in the same way that the 'norm' did in *Hili v The Queen; Jones v The Queen.* His Honour's approach is not consistent with that proposed in *Way* [131]. The SNPP has dominated the remainder of the sentencing exercise, thereby fettering the important discretion, which has been preserved. By so constraining the sentence, the effect of this approach is akin to grid sentencing whereby the sentence is determined by the objective seriousness.

65. As the Court said in *Way*, there is nothing in the Act to indicate any intention to confine the available sentence to one of full time custody [116]. It may be obvious from the criminality or subjective factors that the case was not one that called for the SNPP [119].

Ground four: The Court erred in its failure to find special circumstances. The Court erred in finding that treatment was or may be available in prison.

66. Section 44(2) of the Crimes (Sentencing Procedure) Act (1999) (NSW) states that the non-parole period must not be less than 75% of the head sentence 'unless the court decides that there are special circumstances'. Although the sentencing judge must have made such a finding, McClellan CJ at CL was not persuaded that such a finding 'would be appropriate' (at [45]).

67. The history of this provision is discussed by Spigelman CJ in *R v Simpson* [2001] NSWCCA 534, 53 NSWLR 704 at [20] – [23]. As Spigelman CJ concluded at [59], the words 'special circumstances' are words of indeterminate reference and will always take their colour from their surroundings. The sentencing context in which they appear in the present legislation must be understood against the background of a long-standing line of decisions in the High Court, commencing with *Power v The Queen* [1974] HCA 26; (1974) 131 CLR 623, which emphasises that the non-parole period is to be determined by what the sentencing judge concludes that all of the circumstances of the case, including the need for rehabilitation, indicate ought be the minimum period of actual incarceration'. Further, as Spigelman CJ concluded at [73], '[i]t will be a very rare case in which there is no fact capable as a matter of law, of constituting a 'special circumstance'. The decision is first one of fact - to identify the circumstances - and, secondly, one of judgment - to determine that those circumstances justify a lower proportionate relationship between the non-parole period and the head sentence'.

68. The general principles applicable to determination of the non-parole period are identified in *Power, Deakin v The Queen* [1984] HCA 31, (1984) 58 ALJR 367 and *Bugmy v The Queen* [1990] HCA 18, 169 CLR 525. While it would be wrong to approach the task of fixing the non-parole period on the basis that the sole or primary concern is the offender's prospects of rehabilitation, in *Bugmy*, Dawson, Toohey and Gaudron JJ stated at 537 (emphasis added):

> *'In saying that he had gone to 'the permissible limit of what is appropriate to the crime on the footing that the term proposed is, in all the circumstances, appropriate and not disproportionate', [the sentencing judge] was echoing what had been said in* ***Veen (No.2), but said in relation to the fixing of a head sentence.'***

69. This observation would indicate that the reference to proportionality in *Veen (No 2)* should not be understood to apply to the setting of the non-parole period. That is, while the principle applicable to the determination of the head sentence is that the sentence should be proportionate to the gravity of the offence committed, and protection of society

can be taken into account in determining a proportionate sentence, different analysis should be adopted in respect of the determination of the non-parole period. In *Veen (No 2),* the plurality judgment concluded at 476-7 that the 'danger to society' arising from the Appellant's mental abnormality tended to 'balance out' his diminished moral culpability when determining a proportionate sentence. That is, the risk he presented justified a heavier sentence. The observation that a different approach should be taken to the determination of the non-parole period implies that the focus should be less on the risk/possibility of re-offending and more on the possibility of rehabilitation. After all, the end of the non-parole period only makes the offender *eligible* for parole. Whether or not parole is granted, and the conditions of parole if granted, will depend on an assessment of the offender by the parole authority at an appropriate date in the future.

70. There is support for this analysis in the judgment of Mason CJ and McHugh J, notwithstanding the fact that they were in dissent as to the outcome of the appeal. While their Honours observed (at 530-1) that it is wrong to approach the task of fixing the non-parole period on the basis that the sole or primary concern is the offender's prospects of rehabilitation and (at 531) that 'the considerations which the sentencing judge must take into account when fixing a minimum term will be the same as those applicable to the setting of the head sentence', they then stated (at 531-2):

> *'Obviously, the weight to be attached to these factors and the way in which they are relevant will differ due to the different purposes behind each function.*
>
> *'A prisoner's prospects of rehabilitation will be relevant to the fixing of a minimum term, both by way of mitigation and because the community benefits from the reformation of one of its members. Conversely, the community needs to be protected from a violent offender, especially one whose prospects for rehabilitation are bleak. Likewise, the nature of the crime will be relevant because a more serious offence will warrant a greater minimum term due to its deterrent effect upon others. But the nature of the offence does not assume the importance which it has when the head sentence is determined. There, the sentence must be proportionate to the gravity of the offence (Veen v. The Queen (No. 2) [1988] HCA 14; (1988) 164 CLR 465, at p 477), whereas the minimum term represents a portion of the head sentence during which the offender will not be considered for parole. In one sense, that portion must itself bear a proportionate relation to the crime. Generally speaking, the perceived prospects of rehabilitation will make a significant difference. Among other things, those prospects will affect what is required by way of protection of the community. Release on parole is a concession made when the Parole Board decides that the benefits accruing by way of rehabilitation and the recognition of mitigating factors outweigh the danger to the community of relaxing the requirement of imprisonment.'*

71. Where Mason CJ and McHugh J differed from the majority was that they were not persuaded that the sentencing judge in that case 'was unduly influenced by considerations relevant to the determination of a head sentence' (at 533).

72. His Honour concluded that the Court of Criminal Appeal was 'constrained' by the Crown choosing not to appeal the head sentence [41]. It is difficult to imagine what sentence would have been imposed had the Crown Appeal been at large. *A fortiori* if the Appellant did not receive the benefit of a twenty five per cent discount for his plea.

73. In the present case, there were powerful considerations supporting the approach of the sentencing judge to the determination of the non-parole period (with the resulting unusual ratio to the head sentence). The Appellant suffered an intellectual disability and had been sexually abused. There was a connection between his offending and the disability. He was unlikely to receive appropriate rehabilitation in custody. He was likely to endure real hardship in custody because of his disability. Upon becoming eligible for release to parole, there was an appropriate residential program. These considerations plainly were 'special circumstances' for the purposes of s 44(2). The Crown had not asserted at first instance or on appeal that special circumstances were not open. In fact, it agreed that the Community Justice Program was a reason to find 'special circumstances'. The Court of Criminal Appeal did not invite submissions on the issue. McClellan CJ at CL erred in taking an unduly narrow approach to that requirement. His Honour found that the non-parole period would allow for his treatment *'if it is available'* [44]. However, in the next paragraph, his Honour said that treatment *'is available'* in the prison system and for that reason, special circumstances were not found. This was an error. The required treatment was not available in custody. His Honour then said that the parole period would be sufficient time for treatment if the Parole Authority determines that he should be released. Such a finding was not based on any expert evidence.

Ground three: The Court of Criminal Appeal erred in concluding that the sentencing judge had focused entirely on rehabilitation and had not had regard to the other recognized aspects of sentencing.

74. Section 3A of the Crimes (Sentencing Procedure) Act (1999) (NSW) sets out the purposes for which a court may sentence an offender. The list is not exhaustive:

(a) to ensure that the offender is adequately punished for the offence,
(b) to prevent crime by deterring the offender and other persons from committing similar offences,
(c) to protect the community from the offender,
(d) to promote the rehabilitation of the offender,
(e) to make the offender accountable for his or her actions,
(f) to denounce the conduct of the offender,
(g) to recognize the harm done to the victim of the crime and the community.

Some of these purposes should either not apply to the Appellant or be given little weight.

75. Given his intellectual disability and related 'maladaptive sexual behaviour', born from similar sexual acts perpetrated on him when he was about 10 years of age and subsequently, the Court was entitled to focus upon a sentence that promoted

rehabilitation and protection of the community. The sentencing judge made it clear that this was precisely what he hoped the sentence would achieve. General sentencing principles continue to apply.

76. Mental Health Courts do not exist in this State. The revolving custodial door for the mentally and intellectually impaired has not been slowed. The current restrictive approach to sentencing such persons has failed. The prison system does not have the resources.

77. Selwood Lane is a government program and therefore funded by taxpayer funds. It is a secure, quasi-custodial facility. It is the only facility in NSW for the treatment of sexual offenders with an intellectual disability. When such programs are available, it is in the interests of the community that they be used. The sentencing judge was entitled, in his discretion, to seek to have the Appellant commence treatment immediately. Sentencing courts are, and should be, an instrument of social administration. The best way to protect the community is to treat the Appellant, to teach him to stay on his medication. It is not achieved by imposing a lengthy prison sentence on an intellectually disabled person who operates in the bottom one per cent of the community.

78. In effect, given the length of the overall sentence imposed by Judge Black, the Appellant would have been required to spend a significant period of time at the centre. It may have been many years. It was an alternative form of custody. His liberty would have been substantially curtailed. Subject to the head sentence, the decision as to whether, and if so when, he could return to the community is one for the NSW Parole Authority.

79. The structure that the sentencing judge imposed was one that would have achieved each of the relevant aims of sentencing. It also would likely have achieved, in a humane way, the most important purposes in sentencing an offender with the characteristics of the Appellant: protection of the community and the rehabilitation of the offender.

80. A series of documents from the State Parole Authority were filed in the appeal. One of these, a 'Pre release report' dated 21 August 2009 written by Ms Michele Jordan, Manager, Long Bay Parole Unit concluded:

> *'Mr Muldrock's intellectual disability and subsequent behavioural problems have been the main contributing factor to his offending behaviour and the ongoing management issues within the Additional Support and Behavioural Management Unit at Metropolitan Special Programs Centre. Mr Muldrock's refusal to comply with his prescribed medication and failure to abide by his Behavioural Management Plan which takes into account his Intellectual Disability is of concern and certainly indicates that he will be difficult to manage on parole without the intensive support offered by the Criminal Justice Program. While it is noted that there are no sex offender treatment options for inmates with intellectual disabilities, this Service is hopeful that this program's clinical plan will include some psychological intervention to address any risk of sexual recidivism as it arises.'*

81. The judgment means that an intellectually disabled sex offender is to be held in custody for a minimum period of six years eight months, in circumstances where access to appropriate treatment options is highly unlikely. Given that his behaviour in custody is poor, it must be a real possibility that he will not be released to parole even at the end of the non-parole period. The treatment in Orange through the Criminal Justice Program, appropriate as it was to both his offending and the protection of the community in the long term, may never be utilized.

82. The Court of Criminal Appeal ought to have dismissed the Crown appeal, at least in the exercise of its discretion. The NSW State Parole Authority had the power and responsibility to place the Appellant in the facility and to remove him from it should circumstances require. It is respectfully submitted that the sentencing judge was entitled to structure a sentence that facilitated immediate treatment. Alternatively, the Court could have allowed the Crown appeal and structured a sentence that allowed the Appellant's release on parole to the centre within a relatively short period.

Conclusion

83. Sentencing for offences with a standard non-parole period are numerous and difficult. The range of factors relevant to the non-parole period is not limited to those that concern the objective seriousness of the offending. Even minor subjective circumstances may warrant a non-parole period that is lower than the SNPP. Powerful factors in mitigation would effectively mean that the SNPP has a very small role, if any, in the determination of the non-parole period. The SNPP has been given undue weight. The legislation has been mis-interpreted.

84. Having regard to cases that are entirely dissimilar and far more serious fails to have proper regard to the SNPP provisions. In relation to s 54B(2) there will be normally be no occasion for setting the SNPP if the offence falls below the 'middle of the range of objective seriousness'. If the offence does fall within the mid-range, then other sentencing factors, other than the objective seriousness, may result in a sentence below the SNPP. Having regard to cases that are at the mid-range or above cannot materially assist a sentencing court in determining a particular non-parole period for an offence below the mid-range.

85. Sentencing judges must be given a wide discretion to deal with the particular circumstances of the matters before them. They must be able to sentence on the basis of an instinctive synthesis. This especially applies in cases out of the ordinary. Sentencing courts are an instrument of social administration.

86. Offenders with an intellectual disability require a different approach to sentencing in SNPP matters than other offenders. The objective seriousness of the offending may be significantly reduced. The subjective circumstances may be compelling. The same applies to persons with a mental illness. A most difficult problem facing sentencing

courts and the administration of prisons is the number of persons with mental disabilities. Past approaches to sentencing have failed. As demonstrated by this case, the corrective services system does not have the capacity to deal with the intellectually disabled and mentally ill. The Courts should be alive to specialized treatment facilities. Only in exceptional circumstances ought such programs not be utilised.

87. The tension between a proportionate sentence and one that protects the community exists in mainstream correctional centres. However, the opportunity to access highly specialized and secure treatment facilities helps resolve that tension. Rather than sentencing the Appellant to a very long term of imprisonment, in order to protect the community, he ought to have been sent to the quasi-custodial facility. He could then receive a proportionate sentence.

88. It is in the interest of the community at large, and to the Appellant specifically, that he receives the benefit of highly expert treatment in a secure facility. This will avoid imposing a greater sentence because of an impairment that originated at birth. *A fortiori*, when the impairment and his own sexual abuse caused maladaptive sexual behavior. Further, for offences such as these, the community is further protected by the ability to keep the Appellant in custody once his term expires: Crimes (Serious Sex Offenders) Act 2006 (NSW).

89. The sentence imposed was needlessly punitive. It is destructive on a personal level and provides little prospect of release on parole. The enactment of legislation allowing for the ongoing detention of offenders beyond the term of a sentence makes it incumbent on a sentencing court to consider fully appropriate diversionary schemes. The sentence imposed occasioned an injustice to the Appellant.

90. The sentencing judge erred when he directed a condition of parole (ROS 4.10). His Honour did not have the power to so direct. That was because his Honour imposed a head sentence that exceeded three years.

91. By the time of the appeal, the Appellant would have served over two years in custody. He has not spent any time at the facility in Orange. It is respectfully submitted that he ought to be sent immediately to the secure treatment originally proposed by the sentencing judge. That would require a head sentence of three years or less. That would permit this Court to direct that the Appellant be released to parole. It would also allow this Court to order, as a condition of parole, that the Appellant remain at the Orange facility unless the Probation and Parole Authority are satisfied that he should be released before the expiry of the head sentence.

Part VII: The applicable legislative provisions as they existed at the relevant time

92. The applicable legislative provisions are relevantly still in force. Some amendments have been made. They are annexed.

Part VIII: The precise form of orders sought by the appellant

93. It is respectfully submitted that the Court, *taking into account the time already served in custody*, would make the following orders:

(1) Allow the appeal.

(2) Set aside the sentence imposed by the Court of Criminal Appeal.

(3) Set aside the order of the Court of Criminal Appeal that dismissed the Appellant's sentence appeal. Allow the severity appeal to the Court of Criminal Appeal.

(4) Sentence the Appellant to a head sentence (of less than three years) to date from either 3 June 2011 or the date upon which judgment is delivered. Sentence the Appellant to a non-parole period of one day.

(5) Direct the release of the Appellant to parole on the condition that he stay at Selwood Lane, Orange for such time up to the expiry of the head sentence as the Probation and Parole Authority see fit.

M Thangaraj SC
Counsel for the Appellant

Forbes Chambers
Tel: (02) 9390 7777
Fax: (02) 9261 4600
thangaraj@forbeschambers.com.au

D Barrow

12 April 2011

Crimes Act 1900 No 40

Historical version for 6 July 2009 to 7 January 2010 (accessed 12 April 2011 at 10:01) **Current version**
Part 3 > Division 10 > Section 66A << page >>

66A Sexual intercourse—child under 10

(1) **Child under 10**
Any person who has sexual intercourse with another person who is under the age of 10 years is guilty of an offence.

Maximum penalty: imprisonment for 25 years.

(2) **Child under 10—aggravated offence**
Any person who has sexual intercourse with another person who is under the age of 10 years in circumstances of aggravation is guilty of an offence.

Maximum penalty: imprisonment for life.

(3) In this section, ***circumstances of aggravation*** means circumstances in which:

(a) at the time of, or immediately before or after, the commission of the offence, the alleged offender intentionally or recklessly inflicts actual bodily harm on the alleged victim or any other person who is present or nearby, or

(b) at the time of, or immediately before or after, the commission of the offence, the alleged offender threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument, or

(c) the alleged offender is in the company of another person or persons, or

(d) the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender, or

(e) the alleged victim has a serious physical disability, or

(f) the alleged victim has a cognitive impairment, or

(g) the alleged offender took advantage of the alleged victim being under the influence of alcohol or a drug in order to commit the offence, or

(h) the alleged offender deprives the alleged victim of his or her liberty for a period before or after the commission of the offence, or

(i) the alleged offender breaks and enters into any dwelling-house or other building with the intention of committing the offence or any other serious indictable offence.

(4) A person sentenced to imprisonment for life for an offence under subsection (2) is to serve that sentence for the term of the person's natural life.

(5) Nothing in this section affects the operation of section 21 of the *Crimes (Sentencing Procedure) Act 1999* (which authorises the passing of a lesser sentence than imprisonment for life).

(6) Nothing in this section affects the prerogative of mercy.

(7) If on the trial of a person charged with another offence against this Act the person is instead found guilty of an offence against this section (as provided by section 61Q), the maximum penalty that may be imposed on the person for the offence against this section is the penalty for the offence charged.

Top of page

Crimes Act 1900 No 40

Historical version for 12 March 2007 to 30 June 2007 (accessed 12 April 2011 at 10:02) **Current version**
Part 3 > Division 10 > Section 66A << page >>

66A Sexual intercourse—child under 10

Any person who has sexual intercourse with another person who is under the age of 10 years shall be liable to imprisonment for 25 years.

Top of page

Crimes Act 1900 No 40

61M Aggravated indecent assault

(1) Any person who assaults another person in circumstances of aggravation, and, at the time of, or immediately before or after, the assault, commits an act of indecency on or in the presence of the other person, is liable to imprisonment for 7 years.

(2) Any person who assaults another person, and, at the time of, or immediately before or after, the assault, commits an act of indecency on or in the presence of the other person, is liable to imprisonment for 10 years, if the other person is under the age of 16 years.

(3) In this section, ***circumstances of aggravation*** means circumstances in which:

(a) the alleged offender is in the company of another person or persons, or

(b) (Repealed)

(c) the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender, or

(d) the alleged victim has a serious physical disability, or

(e) the alleged victim has a cognitive impairment.

Top of page

Crimes Act 1900 No 40

61M Aggravated indecent assault

(1) Any person who assaults another person in circumstances of aggravation, and, at the time of, or immediately before or after, the assault, commits an act of indecency on or in the presence of the other person, is liable to imprisonment for 7 years.

(2) Any person who assaults another person, and, at the time of, or immediately before or after, the assault, commits an act of indecency on or in the presence of the other person, is liable to imprisonment for 10 years, if the other person is under the age of 10 years.

(3) In this section, ***circumstances of aggravation*** means circumstances in which:

(a) the alleged offender is in the company of another person or persons, or

(b) the alleged victim is under the age of 16 years, or

(c) the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender, or

(d) the alleged victim has a serious physical disability, or

(e) the alleged victim has a serious intellectual disability.

Top of page

Crimes (Sentencing Procedure) Act 1999 No 92

Historical version for 6 July 2009 to 18 May 2010 (accessed 12 April 2011 at 10:06) **Current version**
Part 1 › Section 3A << page >>

3A Purposes of sentencing

The purposes for which a court may impose a sentence on an offender are as follows:

(a) to ensure that the offender is adequately punished for the offence,

(b) to prevent crime by deterring the offender and other persons from committing similar offences,

(c) to protect the community from the offender,

(d) to promote the rehabilitation of the offender,

(e) to make the offender accountable for his or her actions,

(f) to denounce the conduct of the offender,

(g) to recognise the harm done to the victim of the crime and the community.

Top of page

Crimes (Sentencing Procedure) Act 1999 No 92

Historical version for 12 March 2007 to 31 December 2007 (accessed 12 April 2011 at 10:06) **Current version**

3A Purposes of sentencing

The purposes for which a court may impose a sentence on an offender are as follows:

(a) to ensure that the offender is adequately punished for the offence,

(b) to prevent crime by deterring the offender and other persons from committing similar offences,

(c) to protect the community from the offender,

(d) to promote the rehabilitation of the offender,

(e) to make the offender accountable for his or her actions,

(f) to denounce the conduct of the offender,

(g) to recognise the harm done to the victim of the crime and the community.

Top of page

Crimes (Sentencing Procedure) Act 1999 No 92

Historical version for 6 July 2009 to 18 May 2010 (accessed 12 April 2011 at 10:07) **Current version**
Part 3 » Division 1 » Section 21A << page >>

21A Aggravating, mitigating and other factors in sentencing

(1) **General**
In determining the appropriate sentence for an offence, the court is to take into account the following matters:

(a) the aggravating factors referred to in subsection (2) that are relevant and known to the court,

(b) the mitigating factors referred to in subsection (3) that are relevant and known to the court,

(c) any other objective or subjective factor that affects the relative seriousness of the offence.

The matters referred to in this subsection are in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law.

(2) **Aggravating factors**
The aggravating factors to be taken into account in determining the appropriate sentence for an offence are as follows:

(a) the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement 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,

(b) the offence involved the actual or threatened use of violence,

(c) the offence involved the actual or threatened use of a weapon,

(ca) the offence involved the actual or threatened use of explosives or a chemical or biological agent,

(cb) the offence involved the offender causing the victim to take, inhale or be affected by a narcotic drug, alcohol or any other intoxicating substance,

(d) the offender has a record of previous convictions (particularly if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences),

(e) the offence was committed in company,

(ea) the offence was committed in the presence of a child under 18 years of age,

(eb) the offence was committed in the home of the victim or any other person,

(f) the offence involved gratuitous cruelty,

(g) the injury, emotional harm, loss or damage caused by the offence was substantial,

(h) the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability),

(i) the offence was committed without regard for public safety,

(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),

(ib) the offence involved a grave risk of death to another person or persons,

(j) the offence was committed while the offender was on conditional liberty in relation to an offence or alleged offence,

(k) the offender abused a position of trust or authority in relation to the victim,

(l) the victim was vulnerable, for example, because the victim was very young or very old or had a disability, or because of the victim's occupation (such as a taxi driver, bus driver or other public transport worker, bank teller or service station attendant),

(m) the offence involved multiple victims or a series of criminal acts,

(n) the offence was part of a planned or organised criminal activity,

(o) the offence was committed for financial gain.

The court is not to have additional regard to any such aggravating factor in sentencing if it is an element of the offence.

(3) **Mitigating factors**

The mitigating factors to be taken into account in determining the appropriate sentence for an offence are as follows:

(a) the injury, emotional harm, loss or damage caused by the offence was not substantial,

(b) the offence was not part of a planned or organised criminal activity,

(c) the offender was provoked by the victim,

(d) the offender was acting under duress,

(e) the offender does not have any record (or any significant record) of previous convictions,

(f) the offender was a person of good character,

(g) the offender is unlikely to re-offend,

(h) the offender has good prospects of rehabilitation, whether by reason of the offender's age or otherwise,

(i) the remorse shown by the offender for the offence, but only if:

(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),

(j) the offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability,

(k) a plea of guilty by the offender (as provided by section 22),

(l) the degree of pre-trial disclosure by the defence (as provided by section 22A),

(m) assistance by the offender to law enforcement authorities (as provided by section 23).

(4) The court is not to have regard to any such aggravating or mitigating factor in sentencing if it would be contrary to any Act or rule of law to do so.

(5) The fact that any such aggravating or mitigating factor is relevant and known to the court does not require the court to increase or reduce the sentence for the offence.

(5A) **Special rules for child sexual offences**
In determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence.

(5B) Subsection (5A) has effect despite any Act or rule of law to the contrary.

(6) In this section:

child sexual offence means:

(a) an offence against section 61I, 61J, 61JA, 61K, 61M, 61N, 61O or 66F of the *Crimes Act 1900* where the person against whom the offence was committed was then under the age of 16 years, or

(b) an offence against section 66A, 66B, 66C, 66D, 66EA, 66EB, 91D, 91E, 91F, 91G or 91H of the *Crimes Act 1900*, or

(c) an offence against section 80D or 80E of the *Crimes Act 1900* where the person against whom the offence was committed was then under the age of 16 years, or

(d) an offence against section 91J, 91K or 91L of the *Crimes Act 1900* where the person who was being observed or filmed as referred to in those sections was then under the age of 16 years, or

(e) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in any of the above paragraphs.

serious personal violence offence means a personal violence offence (within the meaning of the *Crimes (Domestic and Personal Violence) Act 2007*) that is punishable by imprisonment for life or for a term of 5 years or more.

Top of page

Crimes (Sentencing Procedure) Act 1999 No 92

Historical version for 12 March 2007 to 31 December 2007 (accessed 12 April 2011 at 10:07) **Current version**

21A Aggravating, mitigating and other factors in sentencing

(1) **General**

In determining the appropriate sentence for an offence, the court is to take into account the following matters:

(a) the aggravating factors referred to in subsection (2) that are relevant and known to the court,

(b) the mitigating factors referred to in subsection (3) that are relevant and known to the court,

(c) any other objective or subjective factor that affects the relative seriousness of the offence.

The matters referred to in this subsection are in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law.

(2) **Aggravating factors**

The aggravating factors to be taken into account in determining the appropriate sentence for an offence are as follows:

(a) 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,

(b) the offence involved the actual or threatened use of violence,

(c) the offence involved the actual or threatened use of a weapon,

(d) the offender has a record of previous convictions,

(e) the offence was committed in company,

(f) the offence involved gratuitous cruelty,

(g) the injury, emotional harm, loss or damage caused by the offence was substantial,

(h) the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability),

(i) the offence was committed without regard for public safety,

(j) the offence was committed while the offender was on conditional liberty in relation to an offence or alleged offence,

(k) the offender abused a position of trust or authority in relation to the victim,

(l) the victim was vulnerable, for example, because the victim was very young or very old or had a disability, or because of the victim's occupation (such as a taxi driver, bus driver or other public transport worker, bank teller or service station attendant),

(m) the offence involved multiple victims or a series of criminal acts,

(n) the offence was part of a planned or organised criminal activity.

The court is not to have additional regard to any such aggravating factor in sentencing if it is an element of the offence.

(3) **Mitigating factors**
The mitigating factors to be taken into account in determining the appropriate sentence for an offence are as follows:

(a) the injury, emotional harm, loss or damage caused by the offence was not substantial,

(b) the offence was not part of a planned or organised criminal activity,

(c) the offender was provoked by the victim,

(d) the offender was acting under duress,

(e) the offender does not have any record (or any significant record) of previous convictions,

(f) the offender was a person of good character,

(g) the offender is unlikely to re-offend,

(h) the offender has good prospects of rehabilitation, whether by reason of the offender's age or otherwise,

(i) the offender has shown remorse for the offence by making reparation for any injury, loss or damage or in any other manner,

(j) the offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability,

(k) a plea of guilty by the offender (as provided by section 22),

(l) the degree of pre-trial disclosure by the defence (as provided by section 22A),

(m) assistance by the offender to law enforcement authorities (as provided by section 23).

(4) The court is not to have regard to any such aggravating or mitigating factor in sentencing if it would be contrary to any Act or rule of law to do so.

(5) The fact that any such aggravating or mitigating factor is relevant and known to the court does not require the court to increase or reduce the sentence for the offence.

Top of page

Crimes (Sentencing Procedure) Act 1999 No 92

44 Court to set non-parole period

(1) When sentencing an offender to imprisonment for an offence, the court is first required to set a non-parole period for the sentence (that is, the minimum period for which the offender must be kept in detention in relation to the offence).

(2) The balance of the term of the sentence must not exceed one-third of the non-parole period for the sentence, unless the court decides that there are special circumstances for it being more (in which case the court must make a record of its reasons for that decision).

(3) The failure of a court to comply with subsection (2) does not invalidate the sentence.

(4) Schedule 1 has effect in relation to existing life sentences referred to in that Schedule.

Top of page

Crimes (Sentencing Procedure) Act 1999 No 92

Historical version for 12 March 2007 to 31 December 2007 (accessed 12 April 2011 at 10:08) **Current version**

44 Court to set non-parole period

(1) When sentencing an offender to imprisonment for an offence, the court is first required to set a non-parole period for the sentence (that is, the minimum period for which the offender must be kept in detention in relation to the offence).

(2) The balance of the term of the sentence must not exceed one-third of the non-parole period for the sentence, unless the court decides that there are special circumstances for it being more (in which case the court must make a record of its reasons for that decision).

(3) The failure of a court to comply with subsection (2) does not invalidate the sentence.

(4) Schedule 1 has effect in relation to existing life sentences referred to in that Schedule.

Top of page

Crimes (Sentencing Procedure) Act 1999 No 92

Historical version for 6 July 2009 to 18 May 2010 (accessed 12 April 2011 at 10:11) **Current version**
Part 4 » Division 1A » Section 54A << page >>

54A What is the standard non-parole period?

(1) For the purposes of this Division, the standard non-parole period for an offence is the non-parole period set out opposite the offence in the Table to this Division.

(2) For the purposes of sentencing an offender, the standard non-parole period represents the non-parole period for an offence in the middle of the range of objective seriousness for offences in the Table to this Division.

Top of page

Crimes (Sentencing Procedure) Act 1999 No 92

Historical version for 12 March 2007 to 31 December 2007 (accessed 12 April 2011 at 10:08) **Current version**

54A What is the standard non-parole period?

(1) For the purposes of this Division, the standard non-parole period for an offence is the non-parole period set out opposite the offence in the Table to this Division.

(2) For the purposes of sentencing an offender, the standard non-parole period represents the non-parole period for an offence in the middle of the range of objective seriousness for offences in the Table to this Division.

Top of page

Crimes (Sentencing Procedure) Act 1999 No 92

54B Sentencing procedure

(1) This section applies when a court imposes a sentence of imprisonment for an offence set out in the Table to this Division.

(2) When determining the sentence for the offence, the court is to set the standard non-parole period as the non-parole period for the offence unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period.

(3) The reasons for which the court may set a non-parole period that is longer or shorter than the standard non-parole period are only those referred to in section 21A.

(4) The court must make a record of its reasons for increasing or reducing the standard non-parole period. The court must identify in the record of its reasons each factor that it took into account.

(5) The failure of a court to comply with this section does not invalidate the sentence.

Top of page

Crimes (Sentencing Procedure) Act 1999 No 92

Historical version for 12 March 2007 to 31 December 2007 (accessed 12 April 2011 at 10:12) **Current version**

54B Sentencing procedure

(1) This section applies when a court imposes a sentence of imprisonment for an offence set out in the Table to this Division.

(2) When determining the sentence for the offence, the court is to set the standard non-parole period as the non-parole period for the offence unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period.

(3) The reasons for which the court may set a non-parole period that is longer or shorter than the standard non-parole period are only those referred to in section 21A.

(4) The court must make a record of its reasons for increasing or reducing the standard non-parole period. The court must identify in the record of its reasons each factor that it took into account.

(5) The failure of a court to comply with this section does not invalidate the sentence.

Top of page