IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S44 of 2013

BETWEEN:

GRAEME STEPHEN REEVES
Applicant

and

THE QUEEN
Respondent

APPLICANT'S SUBMISSIONS

Part I: Certification as to publication on the internet

1. This submission is in a form suitable for publication on the internet.

Part II: A concise statement of the issues

2. The following issues arise in the appeal:

a) In what circumstances, if any, can a surgeon who performs an operation believing it to be necessary for the patient's well-being be guilty of a crime requiring proof of malice or specific intent to inflict grievous bodily harm? Does the civil law concept of 'informed consent' have any role in such a case?

b) Where the jury was misdirected by the wrongful introduction of notions of informed consent, was it appropriate for the Court of Criminal Appeal ('CCA') to apply the proviso under s. 6 *Criminal Appeal Act* 1912 No 16 (NSW) (*'CA Act'*)?

c) When considering a Crown appeal against the asserted inadequacy of sentence under s. 5D *CA Act*, is it necessary for a Court of Criminal Appeal to consider whether or not the 'residual discretion' should be invoked prior to upholding such an appeal?

d) May a sentencing judge only take mental illness or disorder into account when it contributed to the commission of the offence? If not, how is an existing mental illness or disorder relevant to the determination of an appropriate sentence?

Part III: *Judiciary Act* 1903 (Cth)

3. The appellant considers that notices under s. 78B are not required.

Part IV: Citation of reasons for judgment of the Court below

4. The citation of the reason for judgment of the intermediate courts is *Reeves v R; R v Reeves* [2013] NSWCCA 34. The summing up ('SU') and remarks on sentence ('ROS') of the primary Judge are unreported.

Part V: A narrative statement of the facts

5. The applicant was born on 28 July 1950 and is 63 years old. In 1975, he qualified in medicine through the University of New South Wales. In 1981 he became registered as a specialist in obstetrics and gynaecology. In 1997 he was found guilty of unsatisfactory professional conduct and ordered by the NSW Medical Board to cease practice in

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obstetrics. In 2002 he moved to the south coast of NSW and practiced in the town of Bega until 23 July 2004 when he was de-registered by the NSW Medical Tribunal. Between 2005 and 2008 there was an increasing amount of publicity about the applicant. The press dubbed him 'the Butcher of Bega'. A number of former patients made complaints, there were civil proceedings and a NSW Police investigation. On 10 September 2008 the applicant was arrested and charged. In 2010-11 there were criminal proceedings in the District Court of NSW. The applicant was sentenced to a total sentence of 3½ years with a non-parole period of 2 years. Under the District Court sentence he was eligible for release to parole on 31 May 2013.

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6. On 13 August 2012 the CCA heard together three appeals. First, the applicant brought a conviction appeal against a jury verdict in relation to an offence of maliciously inflicting grievous bodily harm with intent [s. 33 *Crimes Act* (NSW) 1900] ('the first appeal'). Second, the applicant brought a conviction appeal against two verdicts of guilty for offences of aggravated indecent assault [s. 61M(1)] ('the second appeal'). Third, there was a prosecution appeal against the asserted inadequacy of sentences imposed in relation to those offences and an offence of dishonesty [s. 178BA] in relation to which the applicant had pleaded guilty ('the third appeal').

20 7. On 21 February 2013 the CCA published its judgment. In relation to the first appeal, the CCA found error (misdirection) in the trial process but applied the proviso under s. 6 *CA Act* and dismissed the appeal. In relation to the second appeal, it allowed the appeal in part, quashing one of the convictions while dismissing the appeal in relation to the other conviction. As to the third appeal, the Crown appeal was upheld and the applicant's sentence increased to a total effective sentence of 5½ years with a non-parole period of 3½ years. Under this sentence the applicant becomes eligible for release on 30 November 2014.

8. On 7 June 2013 the applicant's special leave application was referred to the full Court: [2013] HCATrans 143. The application relates to the first and third of the appeals
30 before the CCA.

Infliction of grievous bodily harm with intent to inflict grievous bodily harm

9. The offence of inflicting grievous bodily harm arose out of a surgical procedure undertaken by the applicant on a patient ('CDW') on 8 August 2002. The applicant initially stood trial in November 2010 charged with the offence under s. 33 along with an alternative charge under s. 45 (female genital mutilation). The Crown elected to proceed with the s. 45 offence and the jury, which observed the applicant cross-examined over a number of days, could not agree on a verdict. At the re-trial, a recording of the applicant's evidence was played to the jury[1].

40 10. In June 2002 CDW consulted her GP, Dr Salisbury, in relation to an area of thickening on her vulva. A biopsy was taken. Pathology showed the existence of a rare condition known as *vulval intraepithelial neoplasia* III ('VIN 3') on her left *labia minora.* This is a pre-cancerous lesion which progresses to cancer in many untreated cases. On 5 July 2002, the GP referred CDW to the applicant. Dr Salisbury made the appointment for CDW to see him that same day, the applicant's receptionist entry indicating 'vuvlal (sic)

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[1] In these submissions 'TA' indicates a reference to the transcript of the appellant's evidence in November 2010. 'T' indicates a reference to the transcript of the trial in February-March 2011.

cancer URGENT' (Ex U). There was conflict in the evidence as to what happened during that consultation.

11. The applicant said that he saw CDW for about an hour (TA 366, Ex Q). He had never met or treated her before. He obtained a medical history from her and examined her with use of a colposcope (a binocular magnifying instrument used during gynaecological examination) and acetic acid (TA 371, Ex 3)[2]. In addition to the VIN 3, the applicant said he observed an area *of 'lichen sclerosis'* or '*mixed vulval dystrophy*' on her vulva (TA 372). CDW denied that a colposcope was used and the prosecution alleged that the applicant had not made these observations.

12. The applicant produced a copy of clinical notes of the consultation (Ex P)[3]. The notes referred to a number of stressful life events over the previous years (including the death of CDW's husband, litigation, caring for her sick mother and running a bed and breakfast) (TA 370, 439). The notes recorded a medical history of irregular pap smears and gynaecological surgery (cervical cone biopsy following 'CIN 3' *cervical intraepithelial neoplasia* and later hysterectomy), and a reference to the patient having noticed the presence of the lesion on her vulva in the past 2 years (TA 368, Ex P). The notes included a hand-drawn diagram of the vulva indicating an area identified as 'DYS' (dystrophic) at the top of the vulva and on the right hand side of the patient's labia, in addition to the VIN 3 lesion. The prosecution alleged that two parts of the notes were fabricated: the references on the diagram to 'DYS' and the words 'lesion on vulva noticed in past 2 years' (TA 432, 449). CDW denied telling the applicant that the lesion had been present for 2 years (T 23, 49, 50)[4].

13. The applicant said that he explained to CDW what he 'thought was happening', that she had a 'dystrophic vulva' or that he had seen 'vulval dystrophy' (or words to that effect) and that the 'treatment' would require 'staged procedures' (TA 399). He advised CDW that she could travel to a vulva clinic in Sydney or Melbourne for treatment (TA 375, 441). The applicant said that CDW did not want to travel or leave her unwell mother and wanted it 'done in one go' (TA 375). CDW agreed that she was offered a second opinion and that she told the applicant that she wanted the 'quickest most complete treatment', but denied that she told him that she was unwilling to travel (T 23).

14. The applicant said that his decision to perform a 'simple vulvectomy' was based on a combination of matters including his clinical observations of dystrophy in addition to the presence of VIN 3 (which he described as a 'sinister' combination) (TA 437, 549) along with CDW's medical history and life circumstances (TA 397-398). The operation known as a '*simple vulvectomy*' involves the removal of the external genitalia (T 147)[5]. It is a

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[2] A number of the witnesses gave evidence in relation to the use of a colposcope and whether it was unusual that the applicant charged no fee for its use (see for example, Ex 3, T 145, 150, 158, 174, 210, 271-272; TA 371).

[3] The applicant said that the original of these notes had been produced to solicitors during the Health Care Complaints proceedings and that he only retained a photocopy. The prosecution was unable to locate the original (T 319, SU 51). A translated copy of these notes appears at Ex 11.

[4] Dr Dalrymple, gynaecologist oncologist, was the only expert witness who examined CDW (apart from the applicant and the GP). He said that CDW told him that she had the VIN 3 lesion whilst her husband (who died in August 2001) was ill, but had done nothing about it at the time (T 174, SU 50).

[5] Dr Davy, gynaecologist oncologist, and the applicant said that the term 'simple' vulvectomy included the excision of the clitoris (T 147; TA 387, 523). Dr Korda said that the procedure could be performed without removal of the clitoris (T 266).

technical medical term used to distinguish it from a *'radical vulvectomy'*, a more extensive procedure which involves excision of underlying 'basement tissue adjacent to the bones' (T 168-169). The applicant described a 'radical vulvectomy' as including removal of the lymph nodes (TA 382).

15. The applicant said that he explained the surgery by reference to a diagram (Ex 13)[6]. He had not used the words 'clitoris' or 'orgasm' in describing the surgery and its consequences but he believed that the removal of the external genitalia including the clitoris was implicit by reference to the diagram, which depicted the genitalia before and after surgery (TA 377-379, 398). CDW said that she was not informed that her clitoris would be removed and that she was not advised as to alternative treatments, the consequences and risks of the operation such as complications ('puddling') on urination, embarrassment, loss of self-image or orgasm (T 21-22, 28). The applicant said that CDW asked whether 'intercourse would still be possible' and that he told her that her vulva would 'look and feel different' but that, in time, intercourse would be possible (TA 377, 398). CDW agreed that sexual intercourse had been discussed (T 22) but denied being shown or receiving the diagram (T 24).

16. At the end of the consultation CDW signed a consent form (Ex A) for a 'simple vulvectomy' and was referred to anaesthetist Dr Thomas for a pre-operation consultation[7]. The consent form stated that the applicant had discussed *inter alia*, her 'present condition and the various ways in which it may be treated', the risks, and that she had the opportunity to ask questions and was 'satisfied with the explanation and results'. The consent document contained a diagram of the 'VIN 3', but made no reference to the 'DYS', which appeared on the clinical notes (Ex P). CDW said that she did not consent to the procedure. Although she signed the consent form indicating that a 'simple vulvectomy' would be performed, she did not understand what that procedure involved, and thought that she was having a 'simple operation' (T 20) to 'excise the lesion' (T 21). CDW said that she would not have consented had she known that her entire vulva was to be removed (T 24).

17. The applicant wrote a letter to the GP on the same day as the consultation (Ex J). The letter referred to CDW's medical history including 'in the 1980's a problem with cervical dysplasia and was treated with a cone biopsy' and the 'abdominal hysterectomy in the 1990's'. The letter said 'now she has developed extensive in situ cancer in the vulva'[8] and referred to CDW's life difficulties, stressors and nervous breakdown. The applicant wrote that he had not been able to find any exposure to noxious agents associated with 'multi-genital cancers'[9] but said that 'examination, as you are aware, shows quite localised VIN on her left labia minor extending to the majora'. The letter said that it would be 'simple to adequately excise this lesion' and that the patient should be admitted within the next few weeks 'for a relatively simple vulvectomy'. He said he had 'carefully been through the procedure with [CDW] and I feel that this will be a simple procedure which

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[6] The applicant believed this diagram had been taken by CDW as it was not in his file (TA 376). Ex 13 was his reconstruction of the diagram.

[7] Dr Thomas consulted CDW two days prior to the surgery and noted that she was bereaved by 12 months and had 'lots of emotional problems' (T 186).

[8] Dr Davy said that 'extensive in situ cancer' was not 'a proper description for a VIN 3 of about two centimetres across' (T 149).

[9] Dr Davy confirmed that there were medical reports that associated arsenic and heavy metals with skin cancers T 159; Dr Dalrymple (T 173) and Dr Hacker (T 261) agreed.

will not debilitate her greatly'. The letter made no reference to the sighting of 'dystrophy' or 'lichen sclerosis'.

18. CDW attended the hospital for the surgery on 8 August 2002. A nurse (Demmery) confirmed CDW's consent to a simple vulvectomy although the nurse did not know what the procedure involved. CDW was administered sedatives (*Temazapan* and *Midazolam*) and taken to the operating theatre. Present during surgery were the applicant, Dr Thomas, scrub nurse Ferrara, scout nurse Arnold and anaesthetic nurse Demmery. Dr Thomas said CDW received further drugs namely *Fentanyl* (a 'potent analgesic'), *Maxalon* (an anti-nausea analgesic) and *Propofol* (the drug that renders the patient unconscious) (T 187-188). CDW alleged that just before she lost consciousness the applicant moved close to her face and said 'I'm going to take your clitoris too' (T 26). The applicant denied saying those words (TA 387). Nobody else present heard those words including Nurse Demmery and Dr Thomas who were positioned at her head and watching the patient at this 'critical period' (T 188, 196). Nurse Ferrara said 'I definitely did not hear that' (T 124, SU 29). Dr Thomas said that he would probably have remembered those words if they had been said (T 202). Dr Thomas said that *Midazolam*, particularly in combination with the other drugs, could cause unreliable recollections (T 198, 203). Dr Halliwell, a specialist anaesthetist, said the drugs might cause a patient to forget but not to have false memories (T 280). There was evidence that nurse Demmery commented that the surgery was 'fairly radical' to which the applicant responded 'if I don't take that much the cancer will spread' (T 91). Demmery recalled that when she said 'you wouldn't take my clitoris no matter what' the applicant replied that the patient's husband was dead 'so it didn't matter anyway' (T 92). The applicant recalled some conversation but denied saying that the loss of her clitoris 'did not matter' (TA 389).

19. Neither the applicant's operation report (Ex O) nor the request for pathology (Ex L) referred to the 'dystrophy' that he had observed on examination[10]. A pathologist (Dr Edwards) examined the specimen macroscopically. On examination with the naked eye she made no observations of atrophy or lichen sclerosis. She took 13 x 1-2 mm sections from the specimen, 8 of which were from the left side of the vulva (the site of the VIN 3 lesion) and 5 random sites from the remaining vulva, only 3 of which were from the right side of the patient's labia (Ex M). Microscopic examination was made of the 13 sections and, other than the VIN 3 lesion, the remaining sections were found to be 'unremarkable' (Ex K). One of the experts (Dr Dalrymple) agreed that 20 random pathology samples could miss a particular lesion on a sample of that size (T 178).

20. After the surgery CDW remained in hospital for 5 days during which she was visited daily by the applicant (TA 392-393, Ex 1). She was referred to a social worker for her 'various business personal concerns and serious health worries' (Ex 1). During that time she did not complain about the extent of the surgery. On 19 August 2002 CDW returned to the applicant to have the sutures removed in his rooms, but said she preferred to have them removed under anaesthetic because it was painful (T 40). On 22 August 2002 the applicant removed the sutures at the hospital. CDW agreed that she could have had the sutures removed by another doctor (T 40). The applicant noted she was 'healing well' (Ex Y, P). No complaint about the surgery was made on 19 or 22 August 2002. CDW did not

[10] Crown expert Dr Hacker said that whilst pathology requests ought 'ideally' to invite the pathologist's attention to other areas of disease 'it doesn't always happen in practice' (T 256); Dr Korda said that 'usually' other areas of dystrophy would be marked on a diagram (T 266).

complain to her female GP, who examined her gynaecologically on a number of occasions and noted a 'well healed scar' (Ex 2, T 43). CDW 'started to do some research as to what had happened to me' in about August 2004, commenced civil proceedings in July 2005 (T 32-33). No complaint was made to the police until 2008 (T 47).

21. The Crown called 5 gynaecological oncologists/obstetricians to give evidence about the necessity and appropriateness of the surgery. All agreed that surgical excision of the VIN 3 lesion was necessary. One expert gave evidence that progression to invasive cancer occurred in 87% of untreated VIN 3 cases with a mortality rate of 30%[11]. However, the Crown case was that the appropriate procedure for a unilateral VIN 3 was 'local excision', that is, removing the lesion and a margin of surrounding tissue. The experts said that the simple vulvectomy performed by the applicant was excessive for a unifocal VIN 3 lesion. It was unclear whether the experts were advised of the medical history of the complainant, the applicant's observation of multi-focal dystrophy or of relevant life circumstances discussed in consultation on 5 July 2002 prior to providing their initial opinions[12]. All of the witnesses were asked what they considered to be the appropriate treatment for VIN 3, what margins were to be taken from around the VIN 3 (as to which opinions differed), and the alternatives to performing a simple vulvectomy. The consensus was that the 'simple vulvectomy' was a largely outmoded procedure by 2002, although 3 of the 5 prosecution experts believed that it might still be appropriate where there was evidence of multifocal disease[13].

22. At some points the prosecution pitched the case on the basis that the applicant was motivated by spite – that he performed the operation 'to put her in her place because he thought she was a bit uppity' (SU 60)[14]. However, the case was really put to the jury on two bases. First, that the operation was unnecessary and the applicant knew that it was not necessary. Second, that CDW had not given 'informed consent' to the operation and the applicant did not honestly believe that he had her informed consent. See T 13-14; TA 529, 539; SU 10, 54.

23. The jury retired to consider its verdict at 12.53pm on 9 March 2011 and asked the question about 'informed consent' at around 12.50pm on 10 March 2011. The verdict of guilty was returned at 4.35pm on 10 March 2011.

The indecent assault offences

24. The proceedings and evidence relating to the offences of indecent assault are summarised in the judgment of Hulme J (at [287]ff). The applicant was convicted of two counts of indecent assault relating to two complainants ('CA' and 'RF'). The verdict in relation to RF was quashed (at [389]-[408]). The allegation in relation to CA was that, in the course of a gynaecological examination on 21 February 2003, the applicant touched

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[11] Dr Hacker (T 260-261); Davy said that of those cases that progressed to the lymph nodes the mortality rate rose to in excess of 90% (T 157).

[12] Dr Davy was first retained by lawyers acting on behalf of CDW in relation to civil proceedings (negligence). She did not have the applicant's clinical notes in spite of having requested them (T 154-155).

[13] Dr Davy (T 147), Dalrymple (T 166), Dr Hacker (T 261-262), Dr Korda (T 266, 270-271) and Dr Pesce (T 221).

[14] The prosecutor put to the applicant that he found CDW 'feisty', 'assertive' (TA 440, 516) and that she annoyed him (TA 517; TA 533). The prosecutor asked the applicant 'Did you think to yourself, well I'll show you, I'll fix it in one go' (TA 533). See also the prosecutor's closing address, for example, at T 344: 'he mightn't have liked her ladies and gentlemen' because she was a 'feisty woman with a cultivated English accent' and thought 'I'll show you ... I'll take you down a peg or two'.

CA's clitoris in a manner inconsistent with a proper medical examination and 'for such a duration and nature as to constitute indecent assault' (at [344]). CA's evidence was that the applicant had touched her clitoris during the examination for around 1 minute (at [299]).

The dishonesty offence

25. On 8 February 2011, the applicant pleaded guilty to an offence of obtaining a benefit by deception. The facts are set out in the judgment of Hall J (at [210]). The deception involved the failure to disclose to the South Area Health Service ('SAHS') the restriction on his license, which prevented him from practising obstetrics. As a result he obtained employment with SAHS as both a consulting obstetrician and gynaecologist and participated in an on-call roster. He received a total remuneration of $229,249.39, of which $23,104 related to obstetric services and $44,720 to his participation in the on-call roster.

Sentencing and the Crown's inadequacy appeal

26. Judge Woods imposed sentence on 1 July 2011. Judge Woods accepted the evidence of the applicant's long time treating psychiatrist, Dr Stella Dalton and a forensic psychiatrist Dr Nielssen. His Honour had 'no doubt that at some point in the early 1990's Dr Reeves suffered a breakdown involving a major depressive illness' (ROS 22). He also accepted the uncontested evidence of the applicant's wife concerning the deterioration of the applicant's mental condition (ROS 22) and noted the combined impact of medical conditions (urinary tract surgery leading to impotence; the onset of insulin dependent diabetes and a related eye condition) and financial pressures (bankruptcy) (ROS 22-23) on the applicant's mental state. In 1997 the Medical Board had found that he suffered from 'depression that detrimentally affects his mental capacity to practice medicine' (ROS 6). Judge Woods found that his depressive illness was a 'significant mitigating feature' (ROS 24).

27. Judge Woods imposed a total sentence of 3 years and 6 months, with a non-parole period of 2 years. For the obtain benefit by deception, there was a fixed term of 12 months. For the indecent assault offences there were concurrent fixed terms of one year and six months (accumulated by 6 months on the dishonesty offence). For the grievous bodily harm offence, there was a sentence of 2 years and six months with a non-parole period of 1 year. That sentence was cumulative upon the indecent assault sentences by 6 months (ROS 24-26).

28. The Crown appealed pursuant to s. 5D(1) of the *CA Act*. The grounds of that appeal are set out in the judgment of Hall J (at [116]). In short, these were that the sentencing Judge (1) erred in his characterisation of the grievous bodily harm offence and imposed a sentence that was manifestly inadequate; (2) failed to set a non-parole period for the indecent assault offences; (3) and (4) imposed manifestly inadequate sentences for the indecent assault and dishonesty offences; (5) placed 'undue emphasis on the [applicant's] asserted depression' and (6) failed adequately to accumulate the sentences. The applicant conceded the second ground of appeal on the basis of s. 45(1) *Crimes (Sentencing Procedure) Act* 1999 (NSW). However, the applicant argued that the other grounds were not established and/or were matters of fact or discretion within the proper province of the sentencing Judge.

29. The applicant adduced evidence before the CCA relevant to the question of whether the CCA should exercise its residual discretion to dismiss the Crown appeal. This evidence was also relevant to an assessment of an appropriate sentence if the CCA upheld the Crown appeal and moved to re-sentence. This included evidence that the applicant's physical and mental health had deteriorated since his incarceration. Since sentence, he was diagnosed with vascular disease and chronic kidney disease requiring dialysis. There was evidence of his difficulty in obtaining timely medical treatment and an appropriate diet for his condition. The applicant's written submissions (at [2]-[9]) set out relevant principles concerning Crown appeals, the residual discretion and analysed case law which followed the introduction of s. 68A of the *Crimes (Appeal and Review) Act* 2001 (NSW). The applicant submitted (at [13] and [97]-[103]) that the CCA should exercise its residual discretion to dismiss the Crown appeal.

30. The Crown appeal was dealt with by Hall J (with whom Bathurst CJ and Hulme J agreed). The CCA upheld part of ground 1, upheld grounds 2, 4, 5 and 6 and rejected ground 3. The Crown appeal was upheld and the applicant was re-sentenced to a total effective sentence of 5½ years with a non-parole period of 3½ years (at [281]). The sentence for the deception charge was increased to a non-parole period of 1 year and 3 months, with a parole period of 6 months. The sentence for indecent assault was increased to a non-parole period of 1 year and 2 months and a parole period of 4 months (cumulative by 12 months upon the dishonesty offence). The maliciously inflict grievous bodily harm offence attracted a sentence of 4 years with a non-parole period of 2 years (cumulative by 6 months upon the indecent assault offence) (at [282]).

Part VI: Applicant's argument

31. From the beginning to the end of the trial, the jury was invited to decide the case by reference to concepts relevant to civil, not criminal, liability. In particular, the jury was asked to consider the question of lawfulness by reference to the concept of 'informed consent'. The jury was provided with written and oral directions on the subject of informed consent and these directions were repeated in response to the only question asked by the jury in the course of its deliberations (MFI 17; SU 73-74). While the CCA accepted that the jury was misdirected, it formulated incorrect legal tests and erroneously applied the proviso.

32. The directions are set out by Bathurst CJ at [56]-[60] (see also SU 9-13; MFI 16). The jury's question - whether the definition of informed consent was 'the literal definition of informed consent by which the accused is to be judged' – was answered in the affirmative and the erroneous directions were repeated: Bathurst CJ [61]; SU 73-74. The verdict was returned a few hours later.

33. Bathurst CJ (with whom Hall and Hulme JJ agreed) accepted the applicant's submission that the directions were erroneous: at [81], [85]-[86], [88]. However, the CCA applied the proviso on the basis of its own conclusion that the applicant was guilty (at [92]). It held that the basis of guilt was that the applicant did not 'honestly believe that that the complainant consented to an operation involving the removal of her labia and clitoris' (at [92]-[93]). The trial Judge had held that the applicant had 'failed in his important duty as a surgeon to discuss with the patient the full scope of what he intended to do' (at [147]).

Ground 2.1

34. The CCA formulated an erroneous legal test when it held that criminal liability would attach to a surgeon if the prosecution establishes that a patient had 'not consented to the nature and extent of the procedure and that the doctor does not honestly believe that she has so consented': per Bathurst CJ at [86].

35. The CCA also erred when it held (at [88]):

> 'The initial part of the direction, namely "there will not be lawful cause or excuse for the surgery performed by the accused if the Crown proves beyond reasonable doubt that the accused did not honestly believe at the time of the operation that the patient had given her informed consent to the full extent of the operation including removal of the labia and clitoris", may not have constituted a misdirection'.

36. The sentencing Judge was:

> '...not satisfied beyond reasonable doubt that the offender deliberately intended to perform an unnecessary and unjustified operation. It is possible he believed, wrongly but honestly, that he should perform the operation as he did in order to eradicate any possibility that the potential cancer could become malignant and invasive': (ROS 14).

Bathurst CJ (at [92]) was 'prepared to assume that the Crown failed to prove beyond reasonable doubt that the applicant did not honestly believe that the surgery was proper surgery for the patient's benefit'. Hall J (at [169]) concluded that the Crown had not established that the applicant 'acted with malice' and observed that 'there was evidence, which it was open to the jury to accept, that the [applicant] acted on a wrongful or misguided belief that the surgery undertaken by him was either necessary or justifiable'. Hulme J (at [285]) had 'a doubt as to whether the applicant did not honestly believe that the surgery was proper surgery for the complainant's benefit'.

37. In the light of such findings, the circumstances in which a doctor is criminally liable must be extremely narrow and circumscribed. It may be that they are limited essentially to cases of fraud.

38. The test for criminal liability should be at least as stringent as that which is derived from civil cases in which a distinction is drawn between actions in battery and actions in negligence: see, for example, *Rogers v Whitaker* (1992) 175 CLR 479 at 490, *Reibl v Hughes* [1980] 2 SCR 880 at [9], [11]-[13], *Chatterton v Gerson* [1981] 1 QB 432 at 443; and see Bathurst CJ at [80]-[83]. The correct formulation is to the following effect:

> 'Once a complainant is informed in broad terms of the nature of the procedure which is intended and gives their consent, the consent is real unless information is withheld in bad faith or the consent is vitiated by fraud.'

39. Bathurst CJ erred when he said (at [86]) that:

> 'any direction to the jury on this issue should be to the effect that the accused will not be guilty of assault unless the Crown proves beyond reasonable doubt that the complainant has not consented to the nature and extent of the procedure and that

> the doctor does not honestly believe that she has so consented. The only exception is where consent is vitiated by fraud or misrepresentation.'

Being informed of the '*nature and [full]*[15] *extent of the procedure*' is different from being informed '*in broad terms of the nature of the procedure*'. The test stated by Bathurst CJ adds a layer of language or gloss which is misplaced when determining criminal liability for a doctor who believes that the surgery is necessary for the well-being of the patient. The correct test was stated in *Rogers v Whitaker*, *Reibl v Hughes* and *Chatterton v Gerson.*

10 40. The CCA's approach means that, in NSW, criminal liability is easier to establish than civil liability for trespass to the person. While Bathurst CJ (at [88]) acknowledged that the use of the term 'informed' consent 'tends to obscure the issue', his Honour did not state clearly that the introduction of such a notion into criminal proceedings requiring proof of malice or specific intention is fundamentally wrong[16].

41. There are many cases, in a variety of jurisdictions, which confirm the distinction between liability in battery and liability in negligence. See, for example, in NSW: *Dean v Phung* [2012] NSWCA 223 at [61]-[64]; in South Australia: *F v R* (1983) 33 SASR 189; in Canada: *Kenny v Lockwood* [1932] 1 DLR 507, *Male v Hopmans* [1966] 54 DLR (2d) 592,
20 *Kelly v Hazlett* [1976] 75 DLR (3d) 536, *Markowa v Adamson Cosmetic Facial Surgery Inc and Ors* (2012) ONSC 1012, *Hopp v Lepp* [1980] 112 DLR (3d) 67.

42. In the United States (where the concept of 'informed consent' appears to have had its genesis), the distinction is maintained, and questions of 'informed consent' only arise in civil cases of negligence and malpractice cases[17]. In *Dries v Gregor* 72 A.D. 2d 231 (1980) the patient consented to a biopsy of her right breast but the surgeon performed a 'quadrant resection or partial mastectomy'. Cardamone JP of the Appellate Division of the Supreme Court of the State of New York (Hancock JR, Schnepp and Callahan JJ agreeing) said (235-236):

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> 'We believe that medical treatment beyond the scope of a patient's consent should not be considered as an intentional tort or species of assault and battery as it has been viewed in the past (see, e.g. *Schloendorff v Society of N,Y Hosp*, 211 N.Y. 125). The doctor in a malpractice case is ordinarily not an actor who intends to inflict an injury on his patient and any legal theory which presumes that intent appears to be based upon an erroneous supposition. Instead, the doctor is not one who acts antisocially as one who commits assault and battery, but is an actor who in good faith intends to confer a benefit on the patient...the text writers state that the use of assault and battery terminology has been declining in malpractice suits
40 and that negligence concepts are preferred...'

43. The applicant has found no case in any jurisdiction in which a doctor has been found to be <u>criminally</u> liable based on a failure to disclose the extent (as opposed to the nature) of a surgical procedure. No case has been found where a doctor acting in what he

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[15] See Bathurst CJ at [88], as above at [35].

[16] There may be an exception where the crime involves proof of gross or criminal negligence.

[17] See, for example, *Cobbs v Grant* 8 Cal 3d 229, 502 P 2d 1, 104 Cal Rptr 505 (172) at [33]-[40]; *Kowk Tung Tom v Lennox Hill Hosp* 165 Misc 2d 313 at 315 627 N.Y.S. 2d 874. W Page Keeton et al, *Prosser and Keeton on Torts*, 5th Ed, 1984 pp. 189-190.

or she believed were the best interests of the patient was found to be guilty of a crime involving malice or specific intent.

44. The error became manifest when the CCA came to apply the proviso. In coming to the conclusion that the applicant was guilty, the CCA did not identify any information that was deliberately withheld from the patient or any fraudulent act that vitiated the consent. The CCA focused on 'the extent' of the procedure rather than on how the misdirection impacted on the applicant's trial and whether it was open to a jury to find that it was possible that the applicant believed that he had the patient's consent by informing her in broad terms of the nature of the procedure. This was critical where it was possible that the applicant believed that the operation was necessary for the patient's benefit: see above at paragraph [36]. While it is accepted that a battery *may* occur in the absence of 'hostile intent' (cf *Boughey v The Queen* (1986) 161 CLR 10 at 27), acts committed in surgery can only give rise to criminal liability for such an offence if there is a deliberate failure to inform the patient in broad terms of the nature of the procedure or if the consent for the surgery is vitiated by fraud.

Ground 2.2

45. The CCA erred in its application of the proviso and effectively usurped the role of the jury. In doing so, the CCA applied erroneous legal tests which were insufficiently strict and rigorous. The application of the proviso was inappropriate in circumstances where the misdirection was fundamental to one of the two bases upon which the prosecution case was put to the jury and central to the defence case. The CCA failed to consider the whole of the evidence in coming to a conclusion that the applicant was guilty. The CCA did not consider whether it was possible that a jury may have come to a different view.

46. In *Wilde v The Queen* (1988) 164 CLR 365 Deane J (dissenting in the outcome) said (at 375):

> 'The fundamental prescript of the administration of criminal justice in this country is that no person should be convicted of a serious crime except by the verdict of a jury after a fair trial according to law. The proviso to s. 6(1) - which empowers the New South Wales Court of Criminal Appeal to dismiss an appeal, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of an appellant, "if it considers that no substantial miscarriage of justice has actually occurred" - does not negate that principle'.

See also *Baini v The Queen* (2012) 246 CLR 469 at [33]. Nothing in the judgments of the CCA suggests that deference was paid to this 'fundamental prescript'.

47. The majority in *Wilde* v *The Queen* (Brennan, Dawson and Toohey JJ) said (at 372) that the proviso would not be applied unless it could be said that a properly instructed jury acting reasonably 'would inevitably have convicted'. In *Baida Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 French CJ, Gummow, Hayne and Crennan JJ applied a similar test (at [35]) - 'if it was open to a jury to reach a contrary conclusion' the case was not established beyond reasonable doubt. See also the proposition (at [36]) that the evidence at trial did not 'compel that conclusion'. In *Baini v The Queen* (supra) the Court was considering s. 276(1) *Criminal Procedure Act* 2009 (Vic) which is cast in somewhat different terms. The Court (at [30]-[32]) referred to the question of whether a guilty verdict was 'inevitable (which is to say a verdict of acquittal was not open)'.

48. The CCA erred in failing to approach the matter in accordance with these principles. The CCA did not address the question of whether conviction was inevitable. The CCA did not ask itself whether it was open to the jury to reach a contrary conclusion, that is, whether it was open to the jury to acquit. The CCA did not identify the extent to which the issue of 'informed consent' (and its legal content) had permeated the trial or consider whether the jury may have convicted on the basis that the applicant had failed to inform the complainant of possible risks, complications and consequences of the procedure. This was a critical consideration in light of the only question asked by the jury in the course of its deliberations, namely:

> 'On page 6 of the Directions of Law a definition of informed consent is given. Are we to assume that this is the literal definition of informed consent by which the accused is to be judged for his actions relating to the operation he carried out in August 2002.' (See MFI 17; SU 73).

49. The role of the jury is especially important in cases where the tribunal of fact is called upon to make value judgments on behalf of the community. This was a factor in the instant case. A jury, not an appellate court, ought to have determined whether the applicant had obtained consent by advising his patient 'in broad terms of the nature of the procedure'. Further, the jury was directed to consider whether the conduct amounted to 'grave misbehaviour amounting to a crime and deserving of punishment' (SU 13-14). Putting to one side the correctness of that direction in a case such as the present (it is the kind of direction given in criminal negligence cases), it was clearly a matter involving value judgments.

50. Similarly, the CCA's approach involved a rejection of the applicant's evidence and a finding that he had manufactured evidence (a finding that the sentencing Judge, who heard and saw the applicant give evidence, did not make). Central credibility issues are matters properly left to a jury: cf *Maric v the Queen* (1978) 52 ALJR 631 at 635-636.

51. The misdirection in the present case went to the heart of the trial; it was a fundamental defect such that it could not be said that there was 'no substantial miscarriage of justice'. The applicant put the question of unlawfulness in issue; his defence was that he had a lawful excuse. The wrongful introduction of notions of 'informed consent' denied him a proper consideration of his defence. Cf *Baida Poultry v The Queen* (supra) at [31]-[32]; *Darkan v The Queen* (2006) 227 CLR 373 per Kirby J at [140], [161].

52. In considering the basis of the jury's verdict, the CCA wrongly asked itself whether there was a 'real likelihood' that the jury convicted on the basis of the evidence that the appellant had not advised the complainant of alternative treatments or the consequences of the operation (at [102]). The correct question was whether the jury might have reasoned in that way or whether such a process of reasoning was possible: cf *Handlen v The Queen* (2001) 245 CLR 282 at [47]; *Gassy v the Queen* (2008) 236 CLR 293 at [34]. In view of the evidence elicited at trial by the prosecutor and cross-examination of the applicant on the issue, together with the very specific question asked by the jury, it was possible that the jury reasoned that the failure of the applicant to obtain 'informed consent' as 'literally [defined]', meant that consent was not 'valid' and that, therefore, the surgery was unlawful.

53. The way in which the trial was conducted does not lead to the conclusion that the verdict could only have been based on a finding that the applicant deliberately or fraudulently failed to inform CDW that her clitoris would be removed. Rather, the focus was often directed towards matters relevant to negligence and informed consent, as it came to be defined in the summing up. For example:

(i) The Crown opened to the jury on the basis that the applicant had not obtained the 'informed consent' of CDW as he had not told her of the 'amount of tissue' that would be taken, or of 'any of the consequences sexually, or in every day life' (T 13). The Crown referred in opening to expert testimony that would be given as to appropriate treatment, the appropriate margins to be taken around the lesion, and the necessity for second opinions and treatment options (T 10-11).

(ii) In her evidence in chief, CDW was asked many questions which went well beyond a case based on a deliberate failure to advise her of the removal of her clitoris: T 21, 22 and 28 (sexual intercourse and sexual response), T23 (second opinion), T28 ('puddling' on urination).

(iii) Many of the expert witnesses gave evidence on issues of disclosure which would have been relevant to a civil negligence case[18] but confused the issue of consent at criminal law: SU 38-50; Dr Dalrymple (T 167, SU 42); Dr Pesce (T 208-209 and 211); Dr Hacker (T 259); Dr Korda (T 265, 267-268; SU 47-48). An example is the following examination of Dr Korda (T 267):

> 'Q. How would one prepare a patient who was to have a simple vulvectomy; how would one convey the extent of the operation its --
> A. The usual way is that, to explain the operation step by step and with a diagram, so the patient fully understands what it is going to happen to her. And then warn her of the relevant material risks which include the risks of general anaesthesia, bleeding, infections, clots and the specific risks of this operation which in this instance, would be marked scarring and loss of clitoris, if you were going to take the clitoris.
>
> Q. Would any sexual effects be explained..
> A. Well, one would think it would be necessary to.'
>
> And (at T 268):
> 'Q. What type of consent would be required before a simple vulvectomy could be performed upon a patient; what type of consent from her?
> A. Similar to what we spoke of a few minutes ago; about explaining what the operation involves; what structures are ultimately removed and what impact it has on sexual function and the general material risks of that type of surgery in relationship to her.'

---

[18] As to this, see the distinction in *Rogers v Whittaker* (supra) at 489-490 between the relevance of expert opinion to the question of whether a particular form of treatment is carried out in accordance with an appropriate standard of care and the question of whether a patient has been given all relevant information to make a choice. See also the Court's adoption (at 488-489) of Lord Scarman's dissenting judgment in *Sidaway v Governors of Bethlem Royal Hospital* [1985] AC 871 and the approach of King CJ in *F v R* (1983) 33 SASR 189.

(iv) The prosecutor's cross-examination of the applicant included questions about 'informed consent' (TA 529, 539). He was asked 'wasn't it your place to raise intercourse?' (TA 475), whether he advised her about her 'sexual response' (TA 475, 476), whether he talked to her about 'how she would cope psychosexually with forming a relationship and having to tell a new man that she had no vulva or clitoris' (TA 525). It was put that 'you didn't care about her future psychosexual function' (TA 539). He was asked whether he advised her of alternative treatments (TA 485-486), potential 'difficulty in the process of urination' (TA 516) and it was put that he 'didn't discuss body image with her' (TA 539).

(v) The Crown Prosecutor's address to the jury included strident criticism of the applicant for the failure to advise the complainant about her 'sexual response' (T 353), deprivation of sexual function (T 389), impact on orgasm (T 353), future impact of the procedure (T 354), alternative treatments (T 383-384) and difficulties in urination (T 387 and 389).

(vi) In summarising the evidence and explaining 'informed consent' and what he meant by 'possible major consequences' (SU 10) the trial Judge referred to 'sexual response'/'sexual function' (SU 18, 64), difficulties in using the lavatory ('stream is now puddling') (SU 18) and the failure of the applicant to advise of possible 'urinary problems' (SU 53-54, 65).

54. The CCA's approach was logically inconsistent and failed to take into account significant parts of the evidence. Even though it accepted that the applicant may have believed that the surgery was appropriate (as per 36 above), in applying the proviso, the CCA focused on evidence most relevant to disproof of that belief. Bathurst CJ referred to the applicant's evidence that the existence of a multifocal disease justified the surgery and said that it was 'inconceivable' that such an observation would not be referred to in correspondence to the patient's GP, in the operation notes or on the signed consent form. It was the rejection of the applicant's evidence on this issue which led the Chief Justice to conclude (at [95]-[97]) that the applicant was not credible, and that as a consequence 'there is no reason to doubt the complainant's evidence' as to her version of events concerning issues relevant to consent (at [97]). The rejection of the applicant's account ought not to have resulted in an acceptance of CDW's evidence without a thorough analysis of issues surrounding her credibility. Similarly, it ought not to have been a question of preferring one account over the other: cf *Liberato v R* (1985) 159 CLR 507, 515 per Brennan J; *Murray v The Queen* (2002) 211 CLR 193 at 201-202, 213.

55. The evidence concerning the observation of dystrophy was central to the Crown case in the earlier (s. 45) trial at which the jury was unable to agree, and directly relevant to the first basis upon which the Crown put its case in the s. 33 trial (i.e. the applicant did not honestly believe that the surgery was necessary). As the trial Judge directed the jury (SU 32), the 'pathological evidence really goes to this question of whether the operation was medically necessary, or justified by the degree of illness that affected the vulva'. The sentencing Judge and CCA rejected this first basis of liability.

56. In rejecting the applicant's evidence as to the sighting of dystrophy (on a review of the transcript) Bathurst CJ made no reference to other evidence and inferences supporting

the applicant's case. For example, when asked whether the applicant told her that he had observed dystrophy, possibly *lichen sclerosis et atrophicus,* on colposcopic examination, CDW agreed that the word 'atrophy' had been used (T 52). While relying on evidence of the pathology results (at [95]), Bathurst CJ did not consider the evidence of the pathologists that the *whole* specimen had not been examined microscopically. Nor did his Honour refer to the fact that only three of the samples were from the right side of the labia or to the evidence of Dr Dalrymple that pathological examination based on random samples could 'miss' the 'lesion' (Ex M, T 178).

57. While the CCA (at [95]) placed reliance on the fact that the letter to the GP (Ex J) did not refer to the observation of lichen sclerosis or dystrophy, it failed to consider the detail and ambiguities in that letter. The letter referred to the complainant having 'developed extensive in situ cancer in the vulva' which, according to Dr Davy, did not describe a two centimetre VIN 3 (T 149). The letter also considered the possible causes for CDW's 'multi-genital cancers'.

58. The CCA failed to examine the evidence directly relevant to the applicant's belief that the complainant consented to the procedure. The applicant said he determined from the time of the initial consultation to proceed with a simple vulvectomy on the basis of CDW's medical history, personal circumstances, and physical examination. He described the operation to her by providing her with a diagram illustrating how her genitals would be changed by the surgery (SU 22) and advised her that she would be capable of intercourse in the future but that the look and sensation of her vulva would be different (SU 22). He obtained her written consent to a '*simple vulvectomy*' and thereafter sent a letter to the GP referring to a 'relatively simple vulvectomy', (in contrast to a '*radical vulvectomy*' which involves the additional removal of the lymph nodes). He referred her to the anaesthetist, Dr Thomas, for consultation and was conscious of the hospital protocol to confirm consent prior to the surgery (TA 498-499, 546).

59. Bathurst CJ made no reference to the applicant's clinical notes or to correspondence in which he described CDW's various life difficulties and her choice not to undergo staged procedures, travel for surgery or obtain a second opinion: see for example, Ex Q. His Honour seemed to accept the allegation put by the Crown Prosecutor at trial that the applicant changed (i.e. forged) parts of the clinical notes (Ex P) after the event by inserting the reference to 'DYS' and by adding the words 'lesion on vulva noticed in the past 2 years'. However, his Honour did not take into account that the applicant's note was corroborated by Dr Dalrymple's evidence that the complainant had told him in 2005 that she had the condition prior to her husband dying in 2001 (T 174). As the trial Judge said in summing up (SU 50):

> 'Why would she tell that to Dr Dalrymple in 2005 if it was not right. And if it was right, why would she not also say the same thing to Dr Reeves in 2002?'

60. The CCA did not consider inferences arising from the evidence that CDW specifically asked about her future capacity to engage in sexual intercourse (TA 377, T 22). It is difficult to understand why she would ask such questions if she believed she was undergoing a simple procedure involving only the excision of the lesion (T 20-21). Nor did the CCA consider what meaning the applicant might have attached to the fact that she asked about intercourse. The applicant said that 'showing her the diagram triggered a discussion about sexual intercourse' (TA 376-377).

61. The CCA did not refer to the total lack of support from other witnesses for the complainant's evidence that immediately prior to surgery the applicant said to her 'I'm going to take your clitoris too'. Neither the anaesthetist (Dr Thomas) nor the anaesthetics nurse, each of whom was positioned near CDW's head and focused on her face, recalled such words being said. Another nurse in the operating theatre (Ferrara) said 'I definitely did not hear that' (T 124, SU 29). No reference was made to the contradictory evidence of Doctors Thomas and Halliwell concerning the effect of the sedating medication on CDW's memory and perception at the time the words were said: see [18] above; SU 30-31.

62. The CCA made passing reference to the delay in the complaint [98], but did not consider the fact that CDW returned to the applicant for the removal of sutures under anaesthetic or the lack of complaint immediately after the surgery to any of the nursing staff at the hospital, to the applicant himself (SU 18), or to her female general practitioner who saw her December 2002 and May 2003. There was no complainant on 7 May 2003 when the GP conducted a gynaecological examination and noted a 'well healed scar with normal vaginal opening' (Ex 2). See SU 18 and above at [20].

63. No consideration was given to the complainant's state of mind during the consultation process, her pre-occupation with various stressful life events and the possible impact this may have had on her comprehension of what the applicant was conveying to her on 5 July 2002. There was significant evidence going to this issue and, more generally, to the credibility of the complainant's account of the consultation. For example:

(i) The failure to complain about the extent of the surgery in the consultations with the applicant and her GP in the days and weeks after the surgery.

(ii) The delay in making complaint: cf *Kilby v The Queen* (1973) 129 CLR 460; *Crofts v The Queen* (1996) 186 CLR 427.

(iii) The applicant's notes of the consultation (Ex P) referred to 'very stressful few years', including 'death of husband', 'court', 'mother unwell' and 'cutaneous rashes with major nervous condition'.

(iv) The letter to Dr Salisbury (Ex J) referred to 'very stressful time in the last eighteen months with the death of her husband, the complicated matters with her business and court proceedings and the illness in relation to her mother. She describes, interestingly, this florid cutaneous reaction that she had when she became extremely distressed and had, what she describes as, a nervous breakdown.'

(v) Dr Thomas saw CDW on 6 August 2002 and noted that she was bereaved by 12 months and had 'lots of emotional problems' (T 186).

(vi) The hospital notes (Ex 1) said that CDW 'is dealing with complex business/personal affairs of her late husband as well as her current business arrangements. This follows her serious health worries…'

(vii) Dr Salisbury's medical notes including references to CDW telling her 'various things were going wrong and will sell her place; discussions about feeling her head and body weren't attached; and stress management' (Ex 2).

(viii) While CDW denied (in evidence at T 23, 49 and 55) that she told applicant that she had the (VIN 3) lesion for 2 years, she told Dr Dalrymple much the same thing in 2005 (T 174, SU 50). It was not

suggested to Dr Dalrymple, as it was in her evidence, that she had noticed a 'different red rash' two years earlier.

64. The proviso ought not to have been applied against the applicant. A re-trial ought to have been ordered or a verdict of acquittal entered. The error in the trial process, in the light of the conduct of the trial, was of a fundamental kind. It deprived the applicant of a chance of acquittal that was open to him and denied him the opportunity for a jury to consider his case that he had not acted unlawfully. The CCA failed to apply appropriately stringent standards to the question of whether there was no substantial miscarriage of justice. The CCA did not conduct a comprehensive review of the evidence.

Ground 2.3

65. The applicant made submissions to the CCA on the nature of a Crown appeal, the impact of s. 68A *Crimes (Appeal & Review) Act* 2001 (NSW) and the continued existence of the 'residual discretion' not to increase a sentence: *Green & Quinn v The Queen* (2011) 244 CLR 462 per French CJ, Crennan and Kiefel JJ at [26], [43], *R v JW* (2009) 77 NSWLR 7, *R v DW* [2012] NSWCCA 66. The applicant adduced evidence specifically directed to these issues and the question of re-sentence. The applicant submitted that the CCA should invoke its residual discretion. Hall J made no reference to those submissions or to that evidence. This constituted a fundamental failure of the CCA's function and jurisdiction.

66. Even assuming that material error had been established - which is not conceded save for the technical error under s. 45(1) *Crimes (Sentencing Procedure) Act*[19] - the two questions identified by French CJ, Crennan and Kiefel JJ in *Green & Quinn v The Queen* (*supra*) at [35] as then arising for consideration, were not addressed by the CCA:

> '35. ... Assuming the Court of Criminal Appeal considers the sentence under appeal to be inadequate on account of error by the primary judge, two questions arise. Their answers involve the exercise of the different discretions conferred by s5D. They are:
>
> 1. Whether, notwithstanding the inadequacy of the sentence, the Court should decline in the exercise of its "residual discretion" under s5D, to allow the appeal and thereby interfere with the sentence appealed from.
> 2. To what extent, if the appeal is allowed, the sentence appealed from should be varied.
>
> 36. A primary consideration relevant to the exercise of the residual discretion is the purpose of Crown appeals under s5D which...is "to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons". That is a limiting purpose. It does not extend to the general correction of errors made by sentencing judges. It provides a framework within which to assess the significance of factors relevant to the exercise of the discretion.'

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[19] Section 45 prohibits the imposition of a fixed term sentence for offences carrying a standard non-parole period. The standard non-parole period, which applies to offences committed after 1 February 2003, applied to the aggravated indecent assault offence (committed on 21 February 2003). It did not apply to the other offences. The sentencing Judge, in accumulating the sentence, erred by setting a fixed term. It is doubtful that this error impacted on the total sentence imposed.

67. Matters relevant to the exercise of the residual discretion to dismiss a Crown appeal include a respondent's deteriorating health (see for example *R v LPY* (2002) 135 A Crim R 237 at [46] and *R v Hansel* [2004] NSWCCA 436 at [44]), delay in the appeal process (*Green & Quinn v The Queen* (*supra*) at [43], *R v Price* [2004] NSWCCA 186 at [60], *R v Cheung* (2010) 203 A Crim R 398 at [151] and *R v Hersi* [2010] NSWCCA 57 at [55]) and the imminent release of the respondent (*Green & Quinn v The Queen* (*supra*) at [43]).

68. The applicant was sentenced in the District Court on 1 July 2011. Judgment in the CCA was not delivered until 21 February 2013. He was due to be released on 31 May 2013. Thus, there had been a delay of more than 18 months and his release date was just three months away. His health had deteriorated since he was sentenced. In deciding to re-sentence and in determining the length of the sentence, the CCA erred in failing to take these matters into account.

69. Special leave was granted on a similar ground to *William David Bugmy* [2013] HCATrans111. The appeal is to be argued on 6 August 2013.

Ground 2.5

70. The *Bugmy* appeal raises an almost identical point to that raised by ground 2.5 of the applicant's case.

71. The sentencing Judge made a finding that the applicant's depressive illness was a 'significant mitigating feature'. This finding was open on the evidence. The decision of the CCA (per Hall J at [266]) that the Judge gave 'excessive weight' to the applicant's depressive illness and (at [176]) that there were 'no significant mitigating features' was erroneous: cf *Carroll v The Queen* (2009) 213 CLR 635 at [24].

72. Even if the evidence of Dr Nielssen did not (by itself) establish that the depressive illness was 'directly causative [of] the particular offences' (Hall J at [264]) this did not mean that the condition did not contribute to the offending and reduce the applicant's criminality. Nor did it establish the sentencing Judge was wrong in his approach. There was ample evidence that the depressive illness affected the applicant's judgment: see, for example, Ex S1, S5, SA, SB, SC.

73. In any event, psychiatric illness can be a significant mitigating feature in the absence of a 'causal link'. For example, in *R v Tsiaras* [1996] 1 VR 398 at 400 the Court of Appeal (Vic) held that mental illness may mitigate general deterrence 'whether or not the illness played a part in the commission of the offence'.

Ground 2.6

74. The CCA failed to pay appropriate deference to the discretion residing in the sentencing Judge. It erred by, in effect, substituting its own assessment of an appropriate sentence for that of the sentencing Judge, who had presided over three trials and seen the applicant give evidence in two trials and in the sentencing proceedings.

75. Sentencing is a discretionary exercise; Judges at first instance are allowed a great deal of flexibility; there is no single correct sentence: *Markarian v The Queen* (2006) 228 CLR 357 at [27]. In respect of ground 1 and 4 of the Crown appeal, the CCA simply substituted its own assessment of an appropriate sentence for the particular offences for that of the sentencing Judge: *contra Markarian v The Queen* at [28].

76. In spite of the lengthy judgment of Hall J (from [121]-[187]), the CCA provided no reasons why a sentence of 2½ years was inappropriate for the s. 33 offence while a sentence of 4 years was appropriate. Similarly, with respect of the s. 178BA offence, it provided no reasons why a sentence of 12 months was inappropriate while a sentence of 2 years was appropriate: see Hall J (from [209]-[236]).

Part VII: Relevant legislation

77. The applicable legislation is attached in annexure A.

Part VIII: Orders sought

78. (1) Special leave to appeal granted.

As to the appeal against conviction for the offence under s. 33 *Crimes Act* (1900) NSW (grounds 2.1 and 2.2)

(2) The judgment and orders of the Court of Criminal Appeal of New South Wales of 21 February 2013 dismissing the appeal against conviction are set aside.

(3) The appeal to that court is allowed.

(4) The conviction is quashed.

(5) A verdict of acquittal is entered or, in the alternative

(6) A new trial is ordered.

As to the Crown's appeal against sentence (grounds 2.3, 2.4 and 2.5):

(7) The judgment and orders of the Court of Criminal of New South Wales allowing the prosecution appeal against sentence are quashed.

(8) The Crown appeal is dismissed or, in the alternative

(9) The matter is remitted to the Court of Criminal Appeal to be dealt with according to law.

Part IX: Estimate of hearing time

79. The applicant estimates that the presentation of the oral argument will require around four hours.

Dated: 12 July 2013

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S44 of 2013

BETWEEN:

GRAEME STEPHEN REEVES
Applicant/Appellant

and

THE QUEEN
Respondent

ANNEXURE 'A'

No.	Description of Document	Date	Section
1.	*Criminal Appeal Act* 1912, No 16 (NSW) (Historical Version for 01.01.2012-23.09.2012)	As at 21.02.2013 Still in force as at 11.07.2013	ss 5D, 6
2.	*Crimes (Appeal and Review) Act* 2001, No 120 (NSW) (Historical Version for 1.10.2010-23.09.2012)	As at 21.02.2013 Still in force as at 11.07.2013	68A
3.	*Crimes (Sentencing Procedure) Act* 1999, No. 92 (NSW) (Historical Version for 7.06.2011-15.11.2011)	As at 1.07.2011 Still in force as at 11.07.2013	ss 3A, 5, 21A, 45, Part 4 Division 1A*
4.	*Crimes Act* 1900, No 40 (NSW) (Historical Version for 19.07.2002-31.08.2002)	As at 08.08.2002°	ss 33, 5, 4A, 45
	(Historical Version for 10.02.2003-30.04.2003)	As at 21.02.2003°	61M
	(Historical Version for 08.07.2003-21.07.2003)	As at 1.12.2001-11.07.2003°	178BA

*The *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002 No 90 (NSW) inserted Division 1A into the *Crimes (Sentencing Procedure) Act* 1999 No 92 (NSW) (attached). Schedule 1[4], which inserted Division 1A,

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commenced on 1 February 2003. The s 61M(1) offence against 'CA' took place on 21 February 2003. Accordingly s 45 and Division 1A apply to this offence. The provisions do not apply to the s.33 offence against 'CDW' which occurred on 8 August 2002.

°Amendments to the *Crimes Act* 1900 (NSW)

Section 33
Section 33 was amended by Schedule 1[4] of the *Crimes Amendment Act* 2007, No 38 (NSW) which commenced on 15 February 2008 (attached).

Section 5
Section 5 was repealed by Schedule 1[2] of the *Crimes Amendment Act* 2007, No 38 (NSW), which commenced on 15 February 2008 (attached).

Section 4A
Section 5 states that where malice is an ingredient of an offence, an act will be taken to be done maliciously if it is done 'recklessly or wantonly'. Schedule 3[1] of the *Criminal Legislation Amendment* Act 2007, No 57 (NSW), which commenced on 15 November 2007, inserted section 4A into the *Crimes Act* 1900 (attached). Section 4A defines recklessness.

Section 45
Section 45 was amended by Schedule 2.1[1]-[2] of the *Nurses Amendment Act* 2003 No 45 (NSW) (attached), which commenced on 1 August 2004, and Schedule 2.7[1] of the *Health Practitioner Regulation Amendment Act* 2010 No 34 (NSW) (attached), which commenced on 9 July 2010.

Section 61M
Section 61M was amended by Schedule 1[2] of the *Crimes Amendment (Cognitivie Impairment - Sexual Offences) Act* 2008 No 74 (NSW) (attached), which commenced on 1 December 2012, and Schedule 1[3]-[4] of the *Crimes Amendment (Sexual Offences) Act* 2008 No 105, which commenced on 1 January 2009 (attached).

Section 178BA
Section 178BA was repealed by Schedule 2[8] of the *Crimes Amendment (Fraud, Identity and Forgery Offences) Act* 2009 No 99 (NSW), which commenced on 22 February 2010 (attached).

Note: Only the relevant portions of the amending schedules have been attached.

(Legislation sourced from: www.legislation.nsw.gov.au and www.austlii.edu.au)

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INDEX - ATTACHMENTS TO ANNEXURE 'A'

Criminal Appeal Act 1912 No 16

Historical version for 1 January 2012 to 23 September 2012 (accessed 4 July 2013 at 14:16)
Current version

5D Appeal by Crown against sentence

(1) The Attorney-General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any sentence pronounced by the court of trial in any proceedings to which the Crown was a party and the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as to the said court may seem proper.

(1A) The Environment Protection Authority may appeal to the Court of Criminal Appeal against any sentence pronounced by the Supreme Court or the Land and Environment Court in any proceedings for an environmental offence (otherwise than on an appeal), if those proceedings have been instituted or carried on by, or on behalf of, the Environment Protection Authority. The Court of Criminal Appeal may impose such sentence as to it may seem proper.

(2) In this section, a reference to proceedings to which the Crown was a party includes a reference to proceedings instituted by or on behalf of:

(a) the Crown, or

(b) an authority within the meaning of the *Public Finance and Audit Act 1983*,

or by an officer or employee of such an authority acting in the course of his or her employment.

(2A) In this section, a reference to an environmental offence is a reference to an offence against the environment protection legislation as defined in the *Protection of the Environment Administration Act 1991*.

(3) This section does not apply to an appeal referred to in section 5DA or 5DC.

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Criminal Appeal Act 1912 No 16

Historical version for 1 January 2012 to 23 September 2012 (accessed 4 July 2013 at 14:18)
Current version

6 Determination of appeals in ordinary cases

(1) The court on any appeal under section 5 (1) against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(2) Subject to the special provisions of this Act, the court shall, if it allows an appeal under section 5 (1) against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.

(3) On an appeal under section 5 (1) against a sentence, the court, if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.

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Crimes (Appeal and Review) Act 2001 No 120

Historical version for 1 October 2010 to 23 September 2012 (accessed 4 July 2013 at 14:22)
Current version

68A Double jeopardy not to be taken into account in prosecution appeals against sentence

(1) An appeal court must not:

(a) dismiss a prosecution appeal against sentence, or

(b) impose a less severe sentence on any such appeal than the court would otherwise consider appropriate,

because of any element of double jeopardy involved in the respondent being sentenced again.

(2) This section extends to an appeal under the *Criminal Appeal Act 1912* and accordingly a reference in this section to an appeal court includes a reference to the Court of Criminal Appeal.

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Crimes (Sentencing Procedure) Act 1999 No 92

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.

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Crimes (Sentencing Procedure) Act 1999 No 92

5 Penalties of imprisonment

(1) A court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate.

(2) A court that sentences an offender to imprisonment for 6 months or less must indicate to the offender, and make a record of, its reasons for doing so, including:

(a) its reasons for deciding that no penalty other than imprisonment is appropriate, and

(b) its reasons for deciding not to make an order allowing the offender to participate in an intervention program or other program for treatment or rehabilitation (if the offender has not previously participated in such a program in respect of the offence for which the court is sentencing the offender).

(3) Subsection (2) does not limit any other requirement that a court has, apart from that subsection, to record the reasons for its decisions.

(4) A sentence of imprisonment is not invalidated by a failure to comply with this section.

(5) Subject to sections 12 and 99, Part 4 applies to all sentences of imprisonment, including any sentence the subject of an intensive correction order or home detention order.

Crimes (Sentencing Procedure) Act 1999 No 92

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.

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Crimes (Sentencing Procedure) Act 1999 No 92

45 Court may decline to set non-parole period

(1) When sentencing an offender to imprisonment for an offence or, in the case of an aggregate sentence of imprisonment, for offences (other than an offence or offences set out in the Table to Division 1A of this Part), a court may decline to set a non-parole period for the offence or offences if it appears to the court that it is appropriate to do so:

(a) because of the nature of the offence to which the sentence, or of each of the offences to which an aggregate sentence relates, or the antecedent character of the offender, or

(b) because of any other penalty previously imposed on the offender, or

(c) for any other reason that the court considers sufficient.

(2) If a court declines to set a non-parole period for a sentence of imprisonment or an aggregate sentence of imprisonment, it must make a record of its reasons for doing so.

(3) Subsection (2) does not limit any other requirement that a court has, apart from that subsection, to record the reasons for its decisions.

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

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Crimes (Sentencing Procedure) Act 1999 No 92

Division 1A Standard non-parole periods

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

(1) This section applies when a court imposes a sentence of imprisonment for an offence, or an aggregate sentence of imprisonment with respect to one or more offences, set out in the Table to this Division.

(2) When determining the sentence for the offence (not being an aggregate sentence), the court is to set the standard non-parole period as the non-parole period for the offence unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period.

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

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

(4A) When determining an aggregate sentence of imprisonment for one or more offences, the court is to indicate, for those offences to which a standard non-parole period applies, the standard non-parole period (or a longer or shorter non-parole period) that it would have set in accordance with subsections (2) and (3) for each such offence to which the aggregate sentence relates had it set a separate sentence of imprisonment for that offence.

(4B) If the court indicates that it would have set a longer or shorter non-parole period for an offence under subsection (4A), it must make a record of the reasons why it would have increased or reduced the standard non-parole period. The court must identify in the record each factor that it would have taken into account.

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

54C Court to give reasons if non-custodial sentence imposed

(1) If the court imposes a non-custodial sentence for an offence set out in the Table to this Division, the court must make a record of its reasons for doing so. The court must identify in the record of its reasons each mitigating factor that it took into account.

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

(3) In this section:

non-custodial sentence means a sentence referred to in Division 3 of Part 2 or a fine.

54D Exclusions from Division

(1) This Division does not apply to the sentencing of an offender:

(a) to imprisonment for life or for any other indeterminate period, or

(b) to detention under the *Mental Health (Forensic Provisions) Act 1990*.

(2) This Division does not apply if the offence for which the offender is sentenced is dealt with summarily.

(3) This Division does not apply to the sentencing of an offender in respect of an offence if the offender was under the age of 18 years at the time the offence was committed.

Table Standard non-parole periods

Item No	Offence	Standard non-parole period
1A	Murder—where 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	25 years
1B	Murder—where the victim was a child under 18 years of age	25 years
1	Murder—in other cases	20 years
2	Section 26 of the *Crimes Act 1900* (conspiracy to murder)	10 years
3	Sections 27, 28, 29 or 30 of the *Crimes Act 1900* (attempt to murder)	10 years
4	Section 33 of the *Crimes Act 1900* (wounding etc with intent to do bodily harm or resist arrest)	7 years
4A	Section 35 (1) of the *Crimes Act 1900* (reckless causing of grievous bodily harm in company)	5 years
4B	Section 35 (2) of the *Crimes Act 1900* (reckless causing of grievous bodily harm)	4 years
4C	Section 35 (3) of the *Crimes Act 1900* (reckless wounding in company)	4 years
4D	Section 35 (4) of the *Crimes Act 1900* (reckless wounding)	3 years
5	Section 60 (2) of the *Crimes Act 1900* (assault of police officer occasioning bodily harm)	3 years
6	Section 60 (3) of the *Crimes Act 1900* (wounding or inflicting grievous bodily harm on police officer)	5 years
7	Section 61I of the *Crimes Act 1900* (sexual assault)	7 years
8	Section 61J of the *Crimes Act 1900* (aggravated sexual assault)	10 years
9	Section 61JA of the *Crimes Act 1900* (aggravated sexual assault in company)	15 years
9A	Section 61M (1) of the *Crimes Act 1900* (aggravated indecent assault)	5 years
9B	Section 61M (2) of the *Crimes Act 1900* (aggravated indecent assault)	8 years
10	Section 66A (1) or (2) of the *Crimes Act 1900* (sexual intercourse—child under 10)	15 years
11	Section 98 of the *Crimes Act 1900* (robbery with arms etc and wounding)	7 years

12	Section 112 (2) of the *Crimes Act 1900* (breaking etc into any house etc and committing serious indictable offence in circumstances of aggravation)	5 years
13	Section 112 (3) of the *Crimes Act 1900* (breaking etc into any house etc and committing serious indictable offence in circumstances of special aggravation)	7 years
14	Section 154C (1) of the *Crimes Act 1900* (taking motor vehicle or vessel with assault or with occupant on board)	3 years
15	Section 154C (2) of the *Crimes Act 1900* (taking motor vehicle or vessel with assault or with occupant on board in circumstances of aggravation)	5 years
15A	Section 154G of the *Crimes Act 1900* (organised car or boat rebirthing activities)	4 years
15B	Section 203E of the *Crimes Act 1900* (bushfires)	5 years
15C	Section 23 (2) of the *Drug Misuse and Trafficking Act 1985* (cultivation, supply or possession of prohibited plants), being an offence that involves not less than the large commercial quantity (if any) specified for the prohibited plant concerned under that Act	10 years
16	Section 24 (2) of the *Drug Misuse and Trafficking Act 1985* (manufacture or production of commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug	10 years
17	Section 24 (2) of the *Drug Misuse and Trafficking Act 1985* (manufacture or production of commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug	15 years
18	Section 25 (2) of the *Drug Misuse and Trafficking Act 1985* (supplying commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug	10 years
19	Section 25 (2) of the *Drug Misuse and Trafficking Act 1985* (supplying commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug	15 years
20	Section 7 of the *Firearms Act 1996* (unauthorised possession or use of firearms)	3 years
21	Section 51 (1A) or (2A) of the *Firearms Act 1996* (unauthorised sale of prohibited firearm or pistol)	10 years
22	Section 51B of the *Firearms Act 1996* (unauthorised sale of firearms on an ongoing basis)	10 years
23	Section 51D (2) of the *Firearms Act 1996* (unauthorised possession of more than 3 firearms any one of which is a prohibited firearm or pistol)	10 years
24	Section 7 of the *Weapons Prohibition Act 1998* (unauthorised possession or use of prohibited weapon)—where the offence is prosecuted on indictment	3 years

Schedule 1 Principal amendments to Crimes (Sentencing Procedure) Act 1999

(Section 3)

[1] Section 3A

Insert after section 3:

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.

[2] Section 21A

Omit the section. Insert instead:

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,

(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, 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.

[3] Section 44

Omit the section. Insert instead:

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.

[4] Part 4, Division 1A

Insert after Division 1:

Division 1A Standard non-parole periods

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

(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.

54C Court to give reasons if non-custodial sentence imposed

(1) If the court imposes a non-custodial sentence for an offence set out in the Table to this Division, the court must make a record of its reasons for doing so. The court must identify in the record of its reasons each mitigating factor that it took into account.

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

(3) In this section:

non-custodial sentence means a sentence referred to in Division 3 of Part 2 or a fine.

54D Exclusions from Division

(1) This Division does not apply to the sentencing of an offender:

(a) to imprisonment for life or for any other indeterminate period, or

(b) to detention under the *Mental Health (Criminal Procedure) Act 1990*.

(2) This Division does not apply if the offence for which the offender is sentenced is dealt with summarily.

Table Standard non-parole periods

Item No	Offence	Standard non-parole period
1A	Murder—where 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	25 years
1	Murder—in other cases	20 years
2	Section 26 of the *Crimes Act 1900* (conspiracy to murder)	10 years

Item No	Offence	Standard non-parole period
3	Sections 27, 28, 29 or 30 of the *Crimes Act 1900* (attempt to murder)	10 years
4	Section 33 of the *Crimes Act 1900* (wounding etc with intent to do bodily harm or resist arrest)	7 years
5	Section 60 (2) of the *Crimes Act 1900* (assault of police officer occasioning bodily harm)	3 years
6	Section 60 (3) of the *Crimes Act 1900* (wounding or inflicting grievous bodily harm on police officer)	5 years
7	Section 61I of the *Crimes Act 1900* (sexual assault)	7 years
8	Section 61J of the *Crimes Act 1900* (aggravated sexual assault)	10 years
9	Section 61JA of the *Crimes Act 1900* (aggravated sexual assault in company)	15 years
9A	Section 61M (1) of the *Crimes Act 1900* (aggravated indecent assault)	5 years
9B	Section 61M (2) of the *Crimes Act 1900* (aggravated indecent assault—child under 10)	5 years
10	Section 66A of the *Crimes Act 1900* (sexual intercourse—child under 10)	15 years
11	Section 98 of the *Crimes Act 1900* (robbery with arms etc and wounding)	7 years
12	Section 112 (2) of the *Crimes Act 1900* (breaking etc into any house etc and committing serious indictable offence in circumstances of aggravation)	5 years
13	Section 112 (3) of the *Crimes Act 1900* (breaking etc into any house etc and committing serious indictable offence in circumstances of special aggravation)	7 years
14	Section 154C (1) of the *Crimes Act 1900* (car-jacking)	3 years

Item No	Offence	Standard non-parole period
15	Section 154C (2) of the *Crimes Act 1900* (car-jacking in circumstances of aggravation)	5 years
15A	Section 203E of the *Crimes Act 1900* (bushfires)	5 years
16	Section 24 (2) of the *Drug Misuse and Trafficking Act 1985* (manufacture or production of commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug	10 years
17	Section 24 (2) of the *Drug Misuse and Trafficking Act 1985* (manufacture or production of commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug	15 years
18	Section 25 (2) of the *Drug Misuse and Trafficking Act 1985* (supplying commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug	10 years
19	Section 25 (2) of the *Drug Misuse and Trafficking Act 1985* (supplying commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug	15 years
20	Section 7 of the *Firearms Act 1996* (unauthorised possession or use of firearms)	3 years

Crimes Act 1900 No 40

33 Wounding etc with intent to do bodily harm or resist arrest

Whosoever:

maliciously by any means wounds or inflicts grievous bodily harm upon any person, or

maliciously shoots at, or in any manner attempts to discharge any kind of loaded arms at any person,

with intent in any such case to do grievous bodily harm to any person, or with intent to resist, or prevent, the lawful apprehension or detainer either of himself or herself or any other person, shall be liable to imprisonment for 25 years.

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Crimes Act 1900 No 40

5 Maliciously

Maliciously: Every act done of malice, whether against an individual or any corporate body or number of individuals, or done without malice but with indifference to human life or suffering, or with intent to injure some person or persons, or corporate body, in property or otherwise, and in any such case without lawful cause or excuse, or done recklessly or wantonly, shall be taken to have been done maliciously, within the meaning of this Act, and of every indictment and charge where malice is by law an ingredient in the crime.

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Crimes Amendment Act 2007 No 38

Schedule 1 Principal amendments to Crimes Act 1900

(Section 3)

[1] Section 4 Definitions

Insert at the end of the definition of ***Grievous bodily harm*** in section 4 (1):

, and

(c) any grievous bodily disease (in which case a reference to the infliction of grievous bodily harm includes a reference to causing a person to contract a grievous bodily disease).

Explanatory note

The amendment extends the definition to make it clear that causing harm to a person includes causing a person to contract a disease. As a consequence, item [9] omits the separate offence under section 36.

[2] Section 5 Maliciously

Omit the section.

Explanatory note

This section (which defines "malicious" for the purposes of offences under the Act) is being repealed as a result of the replacement of that term in offences under the Act with the modern fault element of "intention" or "recklessness".

[3] Section 31 Documents containing threats, section 32 Impeding endeavours to escape shipwreck, section 42 Injuries to child at time of birth, section 46 Causing bodily injury by gunpowder etc, section 61J Aggravated sexual assault, section 61JA Aggravated sexual assault in company, section 61K Assault with intent to have sexual intercourse, section 66C Sexual intercourse—child between 10 and 16, section 80A Sexual assault by forced self-manipulation, section 95 Same in circumstances of aggravation, section 105A Definitions, section 138 Stealing, destroying etc records etc of any court or public office, section 154C Taking motor vehicle or vessel with assault or with occupant on board, section 195 Destroying or damaging property, section 201 Interfering with a mine, section 202 Causing damage etc to sea, river, canal and other works, section 210 Destroying, damaging etc an aid to navigation

Omit "maliciously" wherever occurring.

Insert instead "intentionally or recklessly".

Explanatory note

This item makes consequential amendments on the omission of the concept of "malicious" by item [2].

[4] Section 33

Omit the section. Insert instead:

33 Wounding or grievous bodily harm with intent

(1) **Intent to cause grievous bodily harm**
A person who:

(a) wounds any person, or

(b) causes grievous bodily harm to any person,

with intent to cause grievous bodily harm to that or any other person is guilty of an offence.

Maximum penalty: Imprisonment for 25 years.

(2) **Intent to resist arrest**
A person who:

(a) wounds any person, or

(b) causes grievous bodily harm to any person,

with intent to resist or prevent his or her (or another person's) lawful arrest or detention is guilty of an offence.

Maximum penalty: Imprisonment for 25 years.

(3) **Alternative verdict**
If on the trial of a person charged with an offence against this section the jury is not satisfied that the offence is proven but is satisfied that the person has committed an offence against section 35, the jury may acquit the person of the offence charged and find the person guilty of an offence against section 35. The person is liable to punishment accordingly.

Explanatory note

The amendment recasts the offences under section 33 as a consequence of the omission of the concept of "malicious" by item [2] and separates the offence relating to intention to cause grievous bodily harm from the offence relating to resisting or preventing arrest or detention. The offence relating to discharging firearms is to be transferred to the related offences in section 33A.

[5] Section 33A

Omit the section. Insert instead:

33A Discharging firearm etc with intent

(1) **Intent to cause grievous bodily harm**
A person who:

(a) discharges any firearm or other loaded arms, or

(b) attempts to discharge any firearm or other loaded arms,

Crimes Act 1900 No 40

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4A Recklessness

For the purposes of this Act, if an element of an offence is recklessness, that element may also be established by proof of intention or knowledge.

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Criminal Legislation Amendment Act 2007 No 57

Schedule 3 Amendment of Crimes Act 1900 No 40

(Section 3)

[1] Section 4A

Insert after section 4:

4A Recklessness

For the purposes of this Act, if an element of an offence is recklessness, that element may also be established by proof of intention or knowledge.

[2] Section 93FA Possession, supply or making of explosives

Omit section 93FA (2). Insert instead:

(2) A person who possesses, supplies or makes an explosive, under circumstances that give rise to a reasonable suspicion that the person did not possess, supply or make the explosive for a lawful purpose, is guilty of an offence.

Maximum penalty: Imprisonment for 3 years or 50 penalty units, or both.

[3] Section 331 Contradictory statements on oath

Omit "jury" wherever occurring. Insert instead "trier of fact".

[4] Section 345 Principals in the second degree—how tried and punished

Omit "same punishment as the principal".

Insert instead "same punishment to which the person would have been liable had the person been the principal".

[5] Section 346 Accessories before the fact—how tried and punished

Omit "same punishment as the principal offender".

Insert instead "same punishment to which the person would have been liable had the person been the principal offender".

[6] Section 351B Aiders and abettors punishable as principals

Omit "the principal offender is liable" from section 351B (2).

Insert instead "the person would have been liable had the person been the principal offender".

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Crimes Act 1900 No 40

45 Prohibition of female genital mutilation

(1) A person who:

(a) excises, infibulates or otherwise mutilates the whole or any part of the labia majora or labia minora or clitoris of another person, or

(b) aids, abets, counsels or procures a person to perform any of those acts on another person,

is liable to imprisonment for 7 years.

(2) An offence is committed against this section even if one or more of the acts constituting the offence occurred outside New South Wales if the person mutilated by or because of the acts is ordinarily resident in the State.

(3) It is not an offence against this section to perform a surgical operation if that operation:

(a) is necessary for the health of the person on whom it is performed and is performed by a medical practitioner, or

(b) is performed on a person in labour or who has just given birth, and for medical purposes connected with that labour or birth, by a medical practitioner or authorised professional, or

(c) is a sexual reassignment procedure and is performed by a medical practitioner.

(4) In determining whether an operation is necessary for the health of a person only matters relevant to the medical welfare of the person are to be taken into account.

(5) It is not a defence to a charge under this section that the person mutilated by or because of the acts alleged to have been committed consented to the acts.

(6) This section applies only to acts occurring after the commencement of the section.

(7) In this section:

authorised professional means:

(a) a person authorised to practise midwifery under the *Nurses Act 1991* or undergoing a course of training with a view to being so authorised, or

(b) in relation to an operation performed in a place outside New South Wales—a person authorised to practise midwifery by a body established under the law of that place having functions similar to the functions of the Nurses Registration Board, or undergoing a course of training with a view to being so authorised, or

(c) a medical student.

medical practitioner, in relation to an operation performed in a place outside New South Wales, includes a person authorised to practise medicine by a body established under the law of that place having functions similar to the functions of the New South Wales Medical Board.

medical student means:

(a) a registered medical student within the meaning of the *Medical Practice Act 1992*, or

(b) in relation to an operation performed in a place outside New South Wales—a person undergoing a course of training with a view to being authorised to be a medical practitioner in that place.

sexual reassignment procedure means a surgical procedure to alter the genital appearance of a person to the appearance (as nearly as practicable) of the opposite sex to the sex of the person.

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Nurses Amendment Act 2003

Schedule 2 Amendment of other Acts

(Section 4)

2.1 Crimes Act 1900 No 40

[1] Section 45 Prohibition of female genital mutilation

Omit "a person authorised to practise midwifery under the *Nurses Act 1991*" from paragraph (a) of the definition of ***authorised professional*** in section 45 (7).

Insert instead "a midwife within the meaning of the *Nurses and Midwives Act 1991*".

[2] Section 45 (7), definition of "authorised professional"

Omit "Nurses Registration Board" from paragraph (b) of the definition.

Insert instead "Nurses and Midwives Board".

[3] Section 428A Definitions

Omit "a person authorised under the *Nurses Act 1991* to practise as a nurse practitioner" from the definition of ***self-induced intoxication***.

Insert instead "a person authorised under the *Nurses and Midwives Act 1991* to practise as a nurse practitioner or a midwife practitioner".

2.2 Drug Misuse and Trafficking Act 1985 No 226

[1] Section 3 Definitions

Insert in alphabetical order in section 3 (1):

midwife means a registered midwife within the meaning of the *Nurses and Midwives Act 1991*.

midwife practitioner means a person authorised under the *Nurses and Midwives Act 1991* to practise as a midwife practitioner.

[2] Section 3 (1), definition of "nurse"

Omit "*Nurses Registration Act 1953*".

Insert instead "*Nurses and Midwives Act 1991*".

[3] Section 3 (1), definition of "nurse practitioner"

Health Practitioner Regulation Amendment Act 2010 No 34

Schedule 2 Consequential amendments to other legislation

2.1 Births, Deaths and Marriages Registration Act 1995 No 62

Section 4 Definitions

Omit the definition of ***doctor*** from section 4 (1). Insert instead:

doctor means a registered medical practitioner.

2.2 Casino Control Regulation 2009

Schedule 6 Applied provisions of Liquor Act 2007 as modified

Omit section 6 (1) (c) (ii) and (iii). Insert instead:

(ii) a registered nurse whose registration is endorsed under the Health Practitioner Regulation National Law as being qualified to practise as a nurse practitioner, or

(iii) a registered midwife whose registration is endorsed under the Health Practitioner Regulation National Law as being qualified to practise as a midwife practitioner, or

2.3 Children and Young Persons (Care and Protection—Child Employment) Regulation 2005

Clause 3 Definitions

Omit the definitions of ***registered nurse*** and ***registered midwife*** from clause 3 (1).

2.4 Children (Detention Centres) Regulation 2005

Clause 3 Definitions

Omit the definition of ***registered nurse*** from clause 3 (1).

2.5 Children's Services Regulation 2004

Clause 52 Qualified staff

Omit clause 52 (2) (a) and (b). Insert instead:

(a) is an enrolled nurse who has obtained:

(i) a Certificate IV from a TAFE establishment on completion of a course in Parenthood, or

(ii) a Certificate III from a registered training organisation on completion of a course in Children's Services, or

(b) is a registered nurse who has had previous work experience in providing a children's service or has another approved qualification, or

2.6 Coal Mine Health and Safety Regulation 2006

Clause 203 Meaning of "workplace injury"

Omit the definition of ***medical treatment***. Insert instead:

medical treatment means treatment by a registered medical practitioner, by a nurse or by a person qualified to give first aid.

2.7 Crimes Act 1900 No 40

[1] Section 45 Prohibition of female genital mutilation

Omit the definitions of ***authorised professional***, ***medical practitioner*** and ***medical student*** from section 45 (7). Insert instead:

authorised professional means:

(a) a registered midwife, or

(b) a midwifery student, or

(c) in relation to an operation performed in a place outside Australia—a person authorised to practise midwifery by a body established under the law of that place having functions similar to the functions of the Nursing and Midwifery Board of Australia, or

(d) a medical student.

medical practitioner, in relation to an operation performed in a place outside Australia, includes a person authorised to practise medicine by a body established under the law of that place having functions similar to the Medical Board of Australia.

medical student means:

(a) a person registered as a student in the medical profession under the Health Practitioner Regulation National Law, or

(b) in relation to an operation performed in a place outside Australia—a person undergoing a course of training with a view to being authorised to be a medical practitioner in that place.

midwifery student means:

(a) a person registered as a student in the nursing and midwifery profession under the Health Practitioner Regulation National Law, or

(b) in relation to an operation performed in a place outside Australia—a person undergoing a course of training with a view to being authorised to be a midwife practitioner in that place.

[2] Section 428A Definitions

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.

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Crimes Amendment (Cognitive Impairment—Sexual Offences) Act 2008 No 74

Schedule 1 Amendment of Crimes Act 1900

(Section 3)

[1] Section 61H Definition of "sexual intercourse" and other terms

Insert after section 61H (1):

(1A) For the purposes of this Division, a person has a ***cognitive impairment*** if the person has:

(a) an intellectual disability, or

(b) a developmental disorder (including an autistic spectrum disorder), or

(c) a neurological disorder, or

(d) dementia, or

(e) a severe mental illness, or

(f) a brain injury,

that results in the person requiring supervision or social habilitation in connection with daily life activities.

[2] Sections 61J (2) (g), 61M (3) (e), 61O (3) (d), 66C (5) (f) and 80A (1) (paragraph (g) of the definition of "circumstances of aggravation")

Omit "serious intellectual disability" wherever occurring.

Insert instead "cognitive impairment".

[3] Section 61Q Alternative verdicts

Insert after section 61Q (4):

(5) **Question of consent regarding cognitive impairment**
If on the trial of a person for an offence under section 61I, 61J or 61JA, the jury is not satisfied that the accused is guilty of the offence charged, but is satisfied on the evidence that the accused is guilty of an offence under section 66F, it may find the accused not guilty of the offence charged but guilty of the latter offence, and the accused is liable to punishment accordingly.

Crimes Amendment (Sexual Offences) Act 2008 No 105

Schedule 1 Amendment of Crimes Act 1900

(Section 3)

[1] Section 61J Aggravated sexual assault

Insert at the end of section 61J (2) (g):

, or

(h) 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, or

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

[2] Section 61J (3)

Insert after section 61J (2):

(3) In this section, ***building*** has the same meaning as it does in Subdivision 4 of Division 1 of Part 4.

[3] Section 61M Aggravated indecent assault

Omit "the age of 10 years" from section 61M (2).

Insert instead "the age of 16 years".

[4] Section 61M (3) (b)

Omit the paragraph.

[5] Section 61O Aggravated act of indecency

Insert after section 61O (2):

(2A) A person:

(a) who commits an act of indecency with or towards a person under the age of 16 years, or incites a person under the age of 16 years to an act of indecency with or towards that person or another person, and

Crimes Act 1900 No 40

178BA Obtaining money etc by deception

(1) Whosoever by any deception dishonestly obtains for himself or herself or another person any money or valuable thing or any financial advantage of any kind whatsoever shall be liable to imprisonment for 5 years.

(2) In subsection (1):

deception means deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including:

(a) a deception as to the present intentions of the person using the deception or of any other person, and

(b) an act or thing done or omitted to be done with the intention of causing:

(i) a computer system, or

(ii) a machine that is designed to operate by means of payment or identification,

to make a response that the person doing or omitting to do the act or thing is not authorised to cause the computer system or machine to make.

(3) For the purposes of and without limiting Part 1A, the necessary geographical nexus exists between the State and an offence against this section if the offence is committed by a public official (within the meaning of the *Independent Commission Against Corruption Act 1988*) and involves public money of the State or other property held by the public official for or on behalf of the State.

Crimes Amendment (Fraud, Identity and Forgery Offences) Act 2009 No 99

Schedule 2 Consequential and other amendments to Crimes Act 1900 No 40

[1] Section 61J (3)

Omit "Subdivision 4 of Division 1". Insert instead "Division 4".

[2] Part 4, heading

Omit the heading. Insert instead:

Part 4 Stealing and similar offences

[3] Part 4, Division 1, heading

Omit the heading.

[4] Part 4, Division 1, Subdivisions 1–6 and 16, headings

Omit "**Subdivision**" wherever occurring.

Insert instead "**Division**".

[5] Sections 154E, 188 (2), 203A and 203D

Omit "Subdivision" wherever occurring.

Insert instead "Division".

[6] Section 158 Destruction, falsification of accounts etc by clerk or servant

Omit the section.

[7] Sections 164–178

Omit the sections (and the Subdivision in which they are contained).

[8] Section 178A

Omit the section (and the Subdivision in which it is contained).

[9] Section 178B

Omit the section (and the Subdivision in which it is contained).

[10] Section 178BA

Omit the section (and the Subdivision in which it is contained).