IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. 99 of 2013

BETWEEN:

WILLIAM DAVID BUGMY
Appellant

and

THE QUEEN

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Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues Presented by the Appeal

2.1 Issue 1: When considering a Crown appeal against inadequacy of sentence under
20 s5D *Criminal Appeal Act* 1912 No 16 (NSW), is it necessary for a Court of Criminal Appeal to determine whether the sentence is manifestly inadequate and to consider whether or not the 'residual discretion' should be invoked, prior to upholding such an appeal?

2.2 Issue 2: Within the framework of the scope and purpose of the *Crimes (Sentencing Procedure) Act* 1999 No 92 (NSW), is it correct to say that the extent to which factors such as social deprivation in an offender's youth and background, including those set out in *R v Fernando* (1992) 76 A Crim R 52 at 62-3, can be taken into account in determining an appropriate sentence, must diminish with the passage of time? Is this "particularly so" when an offender has a record of substantial offending?

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2.3 Issue 3: Should the approach of the Canadian Supreme Court in *R v Gladue* [1999] 1 SCR 688 and *R v Ipeelee* [2012] 1 SCR 433 requiring sentencing courts to take into account the unique systemic or background factors which have played a role in bringing an Aboriginal offender before the Court, even where there is a lengthy criminal history, be adopted in Australia? How is equality before the law to be achieved for an offender such as the appellant?

2.4 Issue 4: May a sentencing judge only take mental illness or disorder into account when it has contributed to the commission of the offence? If not, how is an existing mental
40 illness/disorder relevant to the determination of an appropriate sentence?

2.5 Issue 5: Is general deterrence relevant to an assessment of the objective seriousness of a Division 1A *Crimes (Sentencing Procedure) Act* 1999 No 92 (NSW) (standard non parole period) offence and if so, how?

Part III: Consideration of s78B Judiciary Act 1903 (Cth)

3. The appellant has considered s78B *Judiciary Act* 1903 (Cth) and is of the view that no such notices are required.

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Part IV: Citation of the Reasons for Judgment

4. The citation of the reasons for judgment of the intermediate court is: *R v Bugmy* [2012] NSWCCA 223. The reasons for judgment of the primary judge are unreported: *R v William David Bugmy* (16 February 2012).

Part V: Narrative Statement of Facts

5.1 On 8 January 2011, the appellant assaulted three Corrective Services Officers while in custody at Broken Hill Correctional Centre. In relation to two of the officers, Mr Pitt and Mr Donnelly, he was charged with two separate offences contrary to s60A *Crimes Act* 1900 (NSW), namely assault officer in the execution of his duty (maximum penalty 5 years imprisonment, no standard non parole period). The third count was one contrary to s33(1)(b) *Crimes Act* 1900, namely intentionally causing grievous bodily harm to Mr Gould (maximum penalty 25 years, standard non parole period 7 years[1]).

5.2 The appellant pleaded guilty in the Broken Hill Local Court to all three offences on 17 May 2011 and was committed for sentence to the District Court at Dubbo (NSW). Proceedings on sentence did not commence until December 2011, before his Honour Acting Judge Lerve.

5.3 On 16 February 2012, Lerve ADCJ sentenced the appellant on the two s60A offences to 8 months imprisonment, to date from 8 January 2011. These sentences expired on 7 September 2011. On the s33 offence, special circumstances were found[2] and the appellant was sentenced to 6 years imprisonment with a non parole period of 4 years, to commence on 8 April 2011, and to expire on 7 April 2015. His Honour recommended parole be made conditional on *"the entry into and remaining within a full time residential rehabilitation facility until the relevant course of treatment is completed"* (ROS [67]). The total effective sentence was 6 years and 3 months with a non parole period of 4 years and 3 months.

5.4 On 29 February 2012, the DPP filed a notice of appeal on a single ground of manifest inadequacy. On 12 July 2012, the DPP filed three additional grounds of appeal. The matter was originally listed for hearing on 15 August 2012, however for administrative reasons was re-listed in October. On 8 October 2012, the appeal was heard by the Court of Criminal Appeal **("CCA"),** constituted by Hoeben JA, Johnson and Schmidt JJ. On 18 October 2012, the Crown appeal was allowed by the CCA (per Hoeben JA, Johnson and Schmidt JJ agreeing): *R v Bugmy* [2012] NSWCCA 223. The CCA confirmed the sentences on Counts 1 and 2. In respect of Count 3, the appellant was re-sentenced to 7 ½ years imprisonment with a non parole period of 5 years, to date from 8 April 2011. This increased the total effective sentence to 7 years and 9 months with a non parole period of 5 years and 3 months. There was no reference to full time residential rehabilitation.

5.5 The facts of the case and findings of the sentencing judge are summarised in the judgment of Hoeben JA at [4]-[28]. Briefly stated, the appellant was a 29 year old Aboriginal man from Wilcannia, who had been refused bail and remanded in the Broken Hill Correctional Centre at the time of the offences. The appellant had requested that gaol

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[1] Section54D Table "Standard Non parole periods" Item 4 *Crimes (Sentencing Procedure) Act* 1999 (NSW) **("the Act").**

[2] Section 44(2) of the Act provides: "the balance of the term of sentence must not exceed one third of the non parole period for the sentence unless the court decides there are special circumstances for it being more (in which case the court must make a record of its reasons for that decision)".

visiting hours be extended as visitors were not permitted entry after 1pm, and his visitors might not arrive until after 1pm. The victim, Officer Gould said he would enquire of a senior officer whether the hours could be extended. The appellant then threatened Mr Gould, including saying: "I'll split you open". Mr Gould called for his superior officer, Mr Pitt, and the Emergency Team to attend. Mr Pitt arrived while the appellant was on the telephone to his partner and spoke to the appellant immediately afterwards. The appellant said to Mr Pitt "You want a piece of me, I'll split you cunts". He ran to a nearby pool table and took pool balls which he proceeded to throw at Corrections Officers. The appellant then threw two pool balls at Mr Gould through a gate, one of which struck Gould in the left eye. The incident continued until the appellant surrendered after negotiations (ROS [6]-[14]). Mr Gould suffered serious eye injury including retinal detachment, decompensated cornea and eye socket fractures with a likelihood of full recovery of vision described by the treating doctor, Dr Males, as being very poor (ROS [15]-[18]).

5.6 The sentencing judge took into account as factors of aggravation of the offence that it arose because of Mr Gould's occupation as a correctional officer (ROS [19], s21A (2)(a) *Crimes (Sentencing Procedure) Act* "the Act") and that a weapon was used (ROS [21], s21A (2)(c) the Act). He accepted that the offence was aggravated by significant psychological harm to Mr Gould (ROS [20], s21A (2)(e)). He held that the offence was not a planned or organised criminal activity, rather it was impulsive (ROS [28], s21A (2) (n), s21A (3) (b)). The appellant had a lengthy criminal history, including several convictions for assault police and the sentencing judge held that this was an aggravating factor (ROS [31]-[34], CCA [16]-[21]): s21A (d), *R v McNaughton* (2006) 66 NSWLR 566.

5.7 The sentencing judge also took into account factors including that he had spent 135 days in segregation (ROS [36]), that he was *"in danger of being institutionalised"* (ROS [62]) and that there was *"on the medical evidence a very great need for intensive full time rehabilitation"*, in finding special circumstances on Count 3 pursuant to s44 of the Act (ROS [50], [62], [65], [67]).

5.8 Lerve ADCJ accepted the unchallenged evidence of the appellant's personal circumstances found in the reports of Dr Westmore (ROS [40], Exhibit 1: (1) dated 1 August 2011, (2) dated 11 November 2011). This supported the finding of what were described as "*Fernando/Kennedy*" factors[3] (ROS [52]), namely issues relevantly pertaining to the appellant's Aboriginality and background of socio-economic deprivation. The appellant had since age 12 been in foster care and spent time in boys' homes and juvenile justice facilities, going straight from there to Bathurst Prison. On one occasion when he had been out of custody and had worked in carpentry for 18 months, he was again incarcerated for *"J walking and abusing police"* (Exhibit 1 (1), p.3). He told Dr Westmore that *"the police would drive past his father's house day and night and 'if something happened in the town I would always be questioned'"* (Exhibit 1 (1) p.4). He could not read or write and did not have much education (Exhibit 1 (1) p.3). His early life was associated with frequent violence, including seeing his father stab his mother 15 times (Exhibit 1 (1) p.3). He had been *"coming to this place (gaol) all me life, straight out and back, worse since I lost me old mum..."*(Exhibit 1 (1) p.1). His mother had died some six years previously, a sister had also died of cancer and his brother had died during his remand for the offences at hand. He had not attended any of these funerals as he had been

[3] This was a reference to *R* v *Fernando* (1992) 76 A Crim R 52 (***Fernando***) at 62-63 and *Kennedy v R* [2010] NSWCCA 260 at [50]-[58].

in custody on each occasion. Another sister was herself in custody. The appellant told Dr Westmore that *"he receives no visits"* (Exhibit 1 (1), p.3).

5.9 The appellant had problems with his heart and lungs and he suffered asthma. He was an alcoholic, reporting *"not a day that I missed. If there is grog I would drink it"*, having commenced alcohol and drug use at age 12. Despite requesting it, he had not been sent to residential rehabilitation, *"not once"* (Exhibit 1, (1) p.2). A pre-sentence report before the Court confirmed that in November 2010 he was unable to attend residential rehabilitation as the service was *"not accepting new applications until 2011"* (Exhibit 3 p.2). In a more comprehensive report, Ms McNamara of Broken Hill Probation and Parole recommended entry into a long term residential rehabilitation program, noting that *"unless Mr Bugmy makes a commitment to address his alcohol and drug dependency issues, he will continue to spend a considerable amount of his life in custody"* (Exhibit 2, p.2).

5.10 The appellant also had a history of hearing voices which occurred when he stopped drinking. He reported to Dr Westmore that *"the drinking blocks the voices out"*. Having the radio on all the time also assisted. While in custody on this occasion, he had been placed on antipsychotic medication at night. In a further report, Dr Westmore noted medical reports documenting a history of depression associated with thoughts of self-harm and self-harming behaviours (Exhibit 1 (2), p.1). The unchallenged pre-sentence report included that Mr Bugmy had reported five prior suicide attempts (Exhibit 2 p.2). Dr Westmore also reported on schizophreniform psychosis with likely psychotic origin. He also noted that clinical notes from Justice Health disclosed that in January 2011 the appellant had been "complaining of voices when lonely or stressed". (Exhibit 1 (2), p.2) Dr Westmore's unchallenged opinion was that he was a high-risk prisoner, the greatest risk being to himself (Exhibit 1 (2), p.2).

Part VI: Appellant's argument
Ground 2.1

6.1 The Court of Criminal Appeal erred in its application of s5D *Criminal Appeal Act* 1912 No 16 (NSW) (**"s5D"**) by holding that it was *"not necessary"* to deal with the ground of appeal that the sentence imposed was manifestly inadequate (CCA [53]) and further, in failing to consider the exercise of the residual discretion on the Crown appeal (CCA [54]-[55]). Such an approach was contrary to the scope and purpose of s5D, and failed to appreciate that the three grounds of appeal that were considered were, in truth, particulars of the last ground of appeal[4], that is, manifest inadequacy.

6.2 Section 5D empowers appellate review of the judicial discretion exercised in sentencing, which in turn is governed by the *Crimes (Sentencing Procedure) Act* 1999 (**"the Act"**). The restriction upon appellate review of the exercise of judicial discretion, as set out in *House v The King* (1936) 55 CLR 499 (**"House"**) at 504-5, applies to prosecution appeals against sentence pursuant to s5D[5]. The grounds of appeal were not analysed by the CCA in terms of a consideration of what category of *House* error they were said to establish. The first three grounds of appeal disclosed complaints as to the *"weight"* afforded by the sentencing judge to various features in the sentencing exercise and did not

[4] The grounds of appeal are set out in *R v Bugmy* [2012] NSWCCA 223 ("CCA") at [3].
[5] *Lowndes v The Queen* (1999) 195 CLR 665 at 671-2 [15]; *Dinsdale v The Queen* (2000) 202 CLR 321; *Wong v The Queen* (2001) 207 CLR 884 at 605 [58], 624 [109]; *Markarian v The Queen* (2005) 228 CLR 357 at 370-1 [25]-[28]; *Carroll v The Queen* (2009) 83 ALJR 579 at 581 [6]-[9].

fall into any category of *"House"* error. This Court has previously held that similar grounds of appeal were *"properly understood...to have been little more than particulars of the last"*, 'the last' being, as on this appeal, a ground of manifest inadequacy: *Dinsdale v The Queen* (2000) 202 CLR 321 (***"Dinsdale"***) at 325[5], 329 [22]; *Carroll v The Queen* (2009) 83 ALJR 579 (***"Carroll"***) at 581 [8]-[9]. On a prosecution appeal against sentence manifest inadequacy is a complaint that the decision, was, *"upon the facts...unreasonable or plainly unjust [so that] the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance "*: *House* at 505; *Dinsdale* at 329 [22]; *Carroll* at 581[8]; *Hili v The Queen* (2010) 242 CLR 520 (***"Hili"***) at 538-9 [58]-[60][6]. Hoeben JA and Johnson J themselves agreed with Button J in *Hanania v R* [2012] NSWCCA 220 at [33], an applicant's appeal, when he said that:*"grounds asserting that a particular feature has not been given sufficient regard or sufficient weight by a sentencing judge is, in truth, a particular of a ground asserting that the sentence is manifestly excessive."*

6.3 The CCA failed to determine the sole ground pleading error of principle on the prosecution appeal, namely manifest inadequacy, holding that this was *"not necessary"* and that it was instead *"necessary to re-sentence the respondent"* (at [53]). In the absence of identification of material error of principle, *" a court of criminal appeal may not substitute its own opinion for that of the sentencing judge merely because the appellate court would have exercised its discretion in a manner different from the manner in which the sentencing judge exercised his or her discretion..."*: *Lowndes v The Queen* (1999) 195 CLR 665 at 671 (per Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ). The CCA however, substituted its own weighting of retributive and denunciatory factors in upholding the appeal, despite these matters having been properly taken into account by the sentencing judge: CCA [35]-[39], [41]-[44], [47], [52].

6.4 An assessment of inadequacy is fundamental to a consideration of whether a Crown appeal should be upheld. If patent error is complained of, such an assessment assists in disclosing whether such an error was material. If latent error is the complaint, it assists in the assessment of whether to conclude unreasonableness such that the sentencing discretion has miscarried. It is necessary in order to delineate whether the sentence itself is simply within the range of appropriate sentences, as to which reasonable minds may differ, or whether intervention is necessary to correct error of principle (as to which see *Whittaker v The King* (1928) 41 CLR 230 at 248-9; *Griffiths v The Queen* (1977) 137 293 at 310; *Malvaso v The Queen* (1989) 168 CLR 227 at 234; *Everett v The Queen* (1994) 181 CLR 295 (***"Everett"***) at 299-300)[7]. Further, as McHugh J held in *Everett* (at p.306): *"defining the limits on the range of appropriate sentences with respect to a particular offence is a difficult task. What is the range in a particular case is a question on which reasonable minds may differ. It is only when a court of criminal appeal is convinced that the sentence is definitely outside the appropriate range that it is ever justified in granting leave to the Crown to appeal against the inadequacy of a sentence".*

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[6] See also, by way of comparison to review of administrative decisions, Justices Hayne, Kiefel and Bell JJ recently observed in *Minister for Immigration and Citizenship v Xiujuan Li and Anor* (2013) 87 ALJR 618 at 639 [72], that *"...in Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24 at 41, Mason J considered that the preferred ground for setting aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to an irrelevant factor of no importance, is that the decision is 'manifestly unreasonable'".*

[7] See also *R v Reynolds* [2004] NSWCCA 51 at [23]-[26] per Simpson J (Levine and Barr JJ agreeing).

6.5 The limiting purpose of prosecution appeals and the preservation of the discretion of the sentencing judge as stated by King CJ in *The Queen v Osenkowski* (1982) 30 SASR 212 at 212-3 reflects the purpose and scope of s5D: *"The proper role for prosecution appeals, in my view, is to enable the courts to establish and maintain adequate standards of punishment for crime, to enable idiosyncratic views of individual judges as to particular crimes or types of crimes to be corrected, and occasionally to correct a sentence which is so disproportionate as to the seriousness of the crime as to shock the public conscience."*

6.6 The limiting purpose of Crown appeals was most recently re-stated in this Court in relation to s5D in *Green v The Queen* (2011) 244 CLR 462 (***"Green"***). The plurality in *Green*[8] adopted the statement in *R v Borkowski* (2009) 195 A Crim R 1 at 18 [70], that: *"The purpose of a Crown appeal is not simply to increase an erroneous sentence imposed upon a particular offender. It has a wider purpose, being to achieve consistency in sentencing and the establishment of sentencing principles. That purpose can be achieved to a very significant extent by the statement of this Court that the sentences imposed upon the respondent were wrong and why they were wrong."*

6.7 As the plurality held in *Hili* at 535[48]-[49]: *"consistency is not demonstrated by, and does not require, numerical equivalence"*, but rather *"the consistency that is sought is consistency in the application of sentencing principles"*. Appellate review required a consideration of the statutory provisions applicable to the sentencing of the appellant, and whether in considering all of the matters relevant to determining the sentence, the sentencing judge must have misapplied some principle: *Wong v R* (2001) 207 CLR 584 at 605[58]; *Hili* at 538-9[59]-[60]. There was no error of principle complained of by the respondent below, apart from Ground 4 (last category *House* error). As such, the CCA erred in intervening to increase the appellant's sentence on Count 3.

6.8 Nor could it be argued that a consideration of manifest inadequacy was implicit in the CCA findings on Grounds 1-3, or, if it was, that such finding was not affected by error, as:

(a) There is no reasoning to support such a conclusion: *cf. Dinsdale* at 325 [6] (per Gleeson CJ and Hayne J);

(b) The matters complained of in Grounds 1-3, did not amount either individually or cumulatively to a conclusion that the judge had imposed a sentence that was unreasonable or plainly unjust such as to shock the public conscience[9]; and could never have done so in the circumstances of this case (this is addressed further in the Grounds below);

(c) The respondent had not established that an increase in the sentence was necessary to establish consistency in sentencing, as informed by equal justice considerations: *cf Hili* at 535 [48]-[49], 536-7 [53]-[56], *Green* at 472-3 [28];

(d) The respondent had not established that the sentence imposed on Count 3 was "outside the appropriate range" in all of the circumstances of the offence and the offender;

(e) The CCA had excluded from its consideration those matters in relation to which it said error had flowed, namely some part of the weight to be given to the appellant's

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[8] Bell J agreeing in this respect: *Green v The Queen* (2011) 244 CLR 462 at 500 [112].

[9] The respondent's submission on Ground 4 below was that *"...Grounds 1,2 and 3 demonstrate individually and in conjunction that the total sentence was manifestly inadequate"*(p.15 Crown Submissions in CCA dated 11.7.12).

socio-economic and background circumstances (cf. CCA [50]-[52]) and the appellant's mental illness (cf. CCA [47]);
(f) There was a failure to take into account the service of 135 days of the sentence in segregation: cf. *Carlton v R* (2008) 189 A Crim R 332 at 354 [112]-[113], 355 [118]; *AB v The Queen* (1999) 198 CLR 111 at 115 [105]; *R v Totten* [2003] NSWCCA 207; and that from 1 March 2011 his designation required "Ankle cuffs and sanctions": Exhibit A *Custodial History* , pp.7-8;
(g) There was a failure to take into account those matters referred to below in para [6.22] (a), (d), (e), (k), (l), (m), (n) and (p) of these submissions.

6.9 Even assuming that material error or manifest inadequacy had been established (which is not conceded), the limiting purpose of such an appeal and the exercise of the residual discretion remained for consideration: *R v Holder; R v Johnston* [1983] 3 NSWLR 245 (*"**Holder**"*) at 255G; *R v Allpass* (1993) 72 A Crim R 561 at 562-3; *R v Wall* (2002) 71 NSWLR 692 at 707 [70](d); *Green* at 471 [24]. The CCA did not address the two questions identified in *Green* by French CJ, Crennan and Kiefel JJ at 476-7[35]:

> *"*[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:*
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> 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.*
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> [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"* (emphasis added).

6.10 It is submitted that the CCA failed to have regard to this limiting purpose which *"distinguishes Crown appeals from appeals against severity of sentence by convicted persons, which are concerned with the correction of judicial error in particular cases"*: *Green* at 465 [1] (per French CJ, Crennan and Kiefel JJ), 500 [112] (per Bell J)[10].

6.11 It is settled in NSW, that subsequent to the enactment of s68A *Crimes (Appeal and Review Act)* 2001, the residual discretion to reject a prosecution appeal remains, albeit that considerations of 'double jeopardy' are removed: *Green* at 471 [25], 500 [112]; R *v JW* (2010) 77 NSWLR 7 *("**JW**")* at 23 [85]; *R v Carroll* (2010) 77 NSWLR 45. Further to this, the remaining discretion *"is not one to be exercised on the basis of a narrow range of considerations"*: *JW* at 23 [85]; *R v Carroll* (2010) 77 NSWLR 45. In *JW,* it was accepted by the Attorney General and the respondent that a wide range of matters relevant to the exercise of residual discretion remain subsequent to the enactment of s68A: *JW* at 18-9 [49]-[53]. These include: *"damage to reputation, legal costs, negative effects on third*

[10] See also *DPP v Karazisis* (2010) 31 VR 634 (*"**Karazisis**"*) at 652 [74] per Ashley, Redlich and Weinberg JJA.

parties such as family members, completion of the sentence by the respondent or his or her imminent release from custody, delay...errors by the Crown representative at sentencing...or acquiescence in the sentence by the Crown, and 'tinkering' with the sentence...": *JW* at 18-19 [53] . See also *Green* at 479-480 [42]-[44][11].

6.12 Street CJ described the residual discretion in *Holder* at 255G-256C: *"An important element in the determination of a Crown appeal is the exercise of the residual discretion to dismiss an appeal notwithstanding that error of one or other of the categories mentioned above may have been established by the Crown. This discretion is a real and live discretion. In practice, it is exercised not infrequently. It enables the court to keep an ultimate control by protecting a person against unfairness of injustice if that would flow from an adverse appellate decision".*

6.13 It is submitted that the CCA erred in failing to consider and to exercise the residual discretion. A consideration of the residual discretion reveals the following relevant considerations, that were not taken into account by the CCA:

(a) No question of error of principle was, in truth, raised by the appeal such as to displace the considerations set out in para [6.9] above: *cf. Green* at 479 [42];

(b) If error of principle had been established, whether the purposes of the Crown appeal could have been achieved by a statement by the CCA *"that the sentences imposed on the respondent were wrong and why they were wrong"*: cf. *Borkowski* (at para 6.6 above);

(c) The prosecutor before the sentencing judge made no submission as to any particular "level" of objective seriousness of the offence, consistently with *Muldrock v The Queen* (2011) 244 CLR 120 ("***Muldrock***") at 131-132 [25], [28], [29];

(d) The prosecutor conceded before the primary judge *"what my friend said about mental illness, I accept that your Honour and your Honour would say that's a circumstance that means necessarily that he is in some ways not a great vehicle for general deterrence* (15/12/11 T18.17-.20, referring to the submission on behalf of Mr Bugmy at T12.36-.50): *cf. Malvaso v The Queen* (1989) 168 CLR 227 at 233, 240; *Everett* at 302-303, 307; *R v Wilton* (1981) 28 SASR 367-368; *JW* at 505 [92]-[93], [95];

(e) The sentence was being served at Goulburn Correctional Centre, that is, many miles from what remained of the applicant's family: cf. *Fernando* at p.63;

(f) Those matters referred to at [6.22] (a), (d), (e), (f), (k), (l), (m), (n), (p) and [6.29] below.

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[11] A similar approach to cognate provisions relating to consideration of double jeopardy in prosecution appeals has been adopted in Victoria in *Karazisis* and in Tasmania in *DPP v Chatters* (2011) 218 A Crim R 156 (Tasmania). Ashley, Redlich and Weinberg JJA held in *Karazisis* at 658 [104]: *"Among the factors that might be relevant to the exercise of the Court's discretion to dismiss an appeal, despite inadequacy of sentence having been demonstrated, are delay, parity, the totality principle, rehabilitation, and fault on the part of the Crown".* In *R v Abdulla* (2011) 109 SASR 258, similar provisions have been interpreted even more beneficially for a respondent to a Crown appeal: per Vanstone J at 273 [64], White J agreeing at 274 [72], albeit without reference to decisions of other intermediate courts of appeal in relation to cognate provisions. The discretion also remains in Western Australia, although the scope of the discretion is said to be more limited: *The State of Western Australia v Munda* [2012] WASCA 164 ***(Munda)*** at [41] per McClure P (Mazza J agreeing at [260]), [241], [242] (c), [251]-[253] per Buss JA (dissenting as to the scope of the discretion). Special leave to appeal from this decision was recently granted: *Munda v The State of Western Australia* [2013] HCA Trans 136.

(g) The recommendation of entry into a full time rehabilitation program[12] on release to parole, reflecting the needs of the community in addressing recidivism and the needs of the individual: cf. *Muldrock* at 140 [58].

Ground 2.2

6.14 The statutory framework for sentencing the appellant consisted of s33 *Crimes Act* and the Act, in particular ss3A, 5, 21A,44, Division 1A. Section 21A of the Act, preserves the entire body of principles established by the common law in relation to the sentencing discretion, including for example, the principles of proportionality and totality: *Muldrock* at 128 [18]. The purposes of sentencing, as set out in s3A of the Act are not ranked or prioritised: *Muldrock* at 129 [20]. Section 5 (1) of the Act, however, does prioritise sentences of a non custodial nature by providing that: *"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". Muldrock* confirmed that in determining the length of a sentence, *"A fundamental precept of the criminal law is that a sentence should not be increased beyond that which is proportionate to the crime in order to extend the period of protection to the community"*[13]. Proportionality to the crime has also been expressed as *"'proportionate to the gravity of the offence'...by reference to all of the circumstances of the case"*: *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 472 (see also at 477). In *R v McNaughton* (2006) 66 NSWLR 566, Spigelman CJ (McClellan CJ at CL, Grove, Barr and Bell JJ agreeing) determined that s21A (2)(d) did not allow an offender's record of previous convictions to be taken into account as part of the objective circumstances of the offence for the purposes of determining the 'upper boundary' of a proportionate sentence, confirming the continuing relevance and application of *Veen (No 2)*[14]. The Court also concluded that *'prior convictions do not themselves play a role in determining the 'gravity of the offence'"*[15] or *"impinge on the mens rea"* for the offence before the Court. The respondent relied on this as the correct approach before the primary judge: T17.49-18.25.

6.15 The Act does not preclude the application of s5 to recidivist offenders. Section 5, mandating imprisonment as a last resort, speaks to the nature, length and structure of a sentence. The sentencing judge retains a broad discretion in this respect, informed by established sentencing principles. As Brennan J held in *Neal v The Queen* (1982) 149 CLR 305 (*"**Neal**"*) at 326: *"In imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice"*. In the case of many offenders, it will be a material fact that those circumstances exist only because of the offender's Aboriginality.

6.16 A decade after this Court's decision in *Neal,* in the wake of then recent report by E Johnston QC on the *Royal Commission into Aboriginal Deaths in Custody* (**RCIADIC**)[16],

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[12] *Brown v R* [2013] NSWCCA 44 at [21]-[26] per Fullerton J (Bathurst CJ and Beech-Jones J agreeing) summarises recent authority as to consideration of service of this form of quasi-custody.

[13] *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 472.

[14] *R v McNaughton* (2006) 66 NSWLR 566, (*"**McNaughton**"*) per Spigelman CJ at 574-5 [24]-[27], [30], McClellan CJ at CL at 578 [60], Grove J at 580 [76], Barr and Bell JJ at 580 [81].

[15] *McNaughton* ibid, per Spigelman CJ at 574 [26] (McClellan CJ at CL, Grove, Barr and Bell JJ agreeing), and per Bell and Barr JJ at 580 [81] (agreeing with McClellan CJ at CL at 578 [61]-[63]).

[16] Commonwealth (**"Cth"**), Commissioner E Johnston QC, *Royal Commission into Aboriginal Deaths in Custody* (**"RCIADIC"**), *National Report* (1991). One of many individual reports into deaths in custody concerned the appellant's community of Wilcannia which reported on the death in custody of Mr Quayle, in a

Wood J (as he then was) in *R v Fernando* (1992) 76 A Crim R 52 (***"Fernando"***) at 62-63, confirmed and explained principles pertaining to an offender's Aboriginality. In particular he held that *"The relevance of Aboriginality of an offender is not necessarily to mitigate punishment but rather to explain or throw light on the particular offence and the circumstances of the offender":* at p.62 (B). Wood J held that where the circumstances of an offender include abuse of alcohol, reflecting the socio-economic circumstances and environment in which an offender has grown up, there needed to be *"realistic recognition by the court of the endemic presence of alcohol within Aboriginal communities, and the grave social difficulties faced by those communities where poor self image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them...":*at p.62 (E); see also (G). Wood J held that while primary courts must not lose sight of the objective seriousness of an offence, *"full weight must be given to the competing public interest to rehabilitation of the offender and the avoidance of recidivism on his part":* at p. 62H (emphasis added)[17]. The weight to be given to these considerations was not said to diminish over time, or be limited in the face of a substantial record of offending or even when an offence was committed in breach of conditional liberty: cf CCA [50], [52]. This *'context'* of the individual, is necessary in order for the Court to properly assess the moral culpability of an offender and the competing purposes of sentencing as set out in s3A the Act.

6.17 The appellant submits the Court of Criminal Appeal erred in principle in holding that *"with the passage of time, the extent to which social deprivation in a person's youth and background can be taken into account, must diminish"* (CCA [50]). While accepting that *Fernando* was applicable in the applicant's case, Hoeben JA held, by reference to a judgment of Hislop J in *R v Ah-See* [2004] NSWCCA 202 *("**Ah-See**")* at [20]-[21], that *"the extent to which his Honour could take into account those matters, was limited"* (CCA [50]). This said constraint on the discretion was, in turn, relied on to justify the finding that any reduction in the weight to be given to general deterrence on account of *Fernando* considerations *"would be modest"*: CCA [52]. The application of such principle does not *"diminish over time"* or with the age of an offender: cf. CCA [50].

6.18 In *Ah-See* at [21] Hislop J stated that *"the mitigating effect of being an Aboriginal person loses much of its force where the offender has committed similar serious offences in the past"*, relying in turn on *R v Drew* [2000] NSWCCA 384 (*"**Drew**"*) at [21]. In *Drew,* Newman J at [21] (Sperling J agreeing at [27]) relied on an unreported decision of *R v Hickey* (27 September 1994 NSWCCA) (*"**Hickey**")* as authority for the statement that *"the mitigating effect of being an Aboriginal person from a disadvantaged background, alcohol abuse by family, lack of home discipline, education deprivation and failure to maintain supportive relationships, loses much of its force where the offender has committed similar serious offences in the past".*

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police cell of the Wilcannia Police Station in 1987: Cth, Commissioner JH Wootton QC, RCIADIC, *Report of the Inquiry into the Death of Mark Anthony Quayle* (1991). See also Cth, Commissioner JH Wootton QC, RCIADIC, *Report into the Inquiry into the Death of Malcolm Charles Smith* (1989), a report into the death at Long Bay jail of an institutionalised Aboriginal man from the Darling River south of Wilcannia (between Ivanhoe, Minindee and Wentworth).

[17] See also *R v Fuller-Cust* (2002) 6 VR 496 at 520-522 per Eames JA, *R v Wordie* [2003] VSCA 107 at [31]; *DPP v Taylor* [2005] VSCA 222 at [14]; *DPP v Terrick* (2009) 24 VR 457 at 467-468 however see contra at 469.8.

6.19 *Hickey* is not authority for this proposition. Simpson J (Finlay and Abadee JJ agreeing) gave the leading judgment in *Hickey*. In additional reasons, not concurred in by either Simpson or Finlay JJ, Abadee J said that in his opinion the applicant Hickey's plea in mitigation based on his deprived background *"loses much of its force when one has regard to the number of types of offence that this applicant has committed. The deprived background, or disadvantaged background argument as a mitigating factor really has no substance in it"*. It is from these additional comments of Abadee J that the statements in *Ah-See* appear to have flowed. In a later decision of *R v Cook* [1999] NSWCCA 234 at [35], Simpson J (Studdert J agreeing) rejected such reliance on *Hickey*: *"It is not authority for the proposition that the subjective features referred to in Fernando (where they exist) which may be treated as mitigating factors or as factors reducing criminal culpability are to be discarded when found in conjunction with other adverse features. All relevant factors on both sides of the register must be taken into account and given their full weight"* (emphasis added). This approach is in accordance with *Fernando* at 63 (H) and a proper application of ss3A, 21A, and *Neal*. As Brennan J held in *Neal* at 326: *"So much is essential to the even administration of criminal justice"*.

6.20 The error of the CCA in constraining the application of *Fernando* following a *"passage of time"* is an issue of significance for all offenders with a background of social deprivation. The foreseeable consequence of this error is the mandatory diminishment of factors relevant in the subjective case of an individual offender. In many cases, social deprivation and its sequelae may be aggravated by the passage of time. The underlying assumption in the reasoning of the CCA that the passage of time and consequent ageing will provide an offender with the opportunity to escape the impact of a difficult childhood was particularly inapposite in its application to an Aboriginal recidivist offender who had spent his life in either the same very remote Aboriginal community of Wilcannia[18] or in custody. There was no suggestion in *Neal* or *Fernando* that the application of principle, essential for equality before the law, is constrained because of an offender's age or the passage of time. Mr Fernando himself was 47 years of age, semi-educated, from a deprived background, with an extensive criminal history and on a bond at the time of his offence.

6.21 The CCA erred in holding (at [50]) that a sentencing court is even further constrained in taking into account "*Fernando* considerations" where there is a lengthy criminal history. This was so, even where that criminal history had been taken into account as an aggravating factor on sentence in accordance with s21A(2)(d): cf. CCA [20]-[21], ROS [34][19]. This error of principle fails to engage with the delicate balance of discretionary considerations required when persons with a history of social disadvantage who are recidivists stand before the law for sentence. These two characteristics often go hand in hand. This "difficult problem of sentencing", was one recognised by Wood J in

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[18]Wilcannia is classified as "very remote" under Australian Standard Geographical Classification. Wilcannia's geography, people and town history are briefly described in Wilcannia Community Working Party, *"Working Together to Close the Gap in Wilcannia: Remote Service Delivery Local Implementation Plan"* (2010), pp.20-25; Wilcannia Community Working Party, "*Community Action Plan 2005*", (September 2005) pp.25-26; see also McCausland and Vivian, *"Factors affecting crime rates in Indigenous communities in NSW: a pilot study in Wilcannia and Menindee"* (**"Jumbunna"**), Community Report, Jumbunna, Indigenous House of Learning, UTS, (2009).

[19] *McNaughton*, per Spigelman CJ at 574[26] (McClellan CJ at CL, Grove, Barr and Bell JJ agreeing), and per Bell and Barr JJ at [81] (agreeing with McClellan CJ at CL at 578[61]-[63]). The approach to the contrary in *DPP v Terrick* (2009) 24 VR 457 at [60], relying on *R v Mulholland* (1991) 102 FLR 465 was considered in *McNaughton* (at 574 [23]), but not adopted in NSW. *Terrick* (at [60]) was relied on in *Munda* per Buss JA at [129] (in dissent).

Fernando (at 62) and Lerve ADCJ's remarks at the outset of sentencing the appellant that *"the matter is quite complex"* (ROS [1]). A "passage of time", with repeated periods of incarceration, may, in fact, serve to exacerbate social dislocation and "*Fernando* considerations"[20] and further decrease moral culpability. The interplay between the imposition of repeated jail sentences, increased marginalisation of the offender and the effect this has on social cohesion are also factors relevant to rehabilitation and the protection of the community. Such factors may make a lengthy sentence of imprisonment unviable when the interest of the community in preventing recidivism is considered best served by a different outcome. A primary court should not be constrained in taking into account factors personal to an offender, in their proper context, and should rather seek to impose a sentence that is proportionate to the circumstances of the offence and the moral culpability of the offender giving full weight to both the circumstances of the offence and the circumstances of the offender.

6.22 The circumstances of the appellant's offence were serious and warranted a full time custodial sentence. In the appellant's case there were material facts upon which it was open to the sentencing judge, and appropriate, to not "diminish" '*Fernando* considerations' in determining an appropriate sentence and further to give "some moderation" to general deterrence on account of the 'psycho-social evidence' (ROS 36): cf. *Neal v The Queen* (per Brennan J at p. 325, see also Gibbs J at p.309). Those material facts are set out below:

(a) A history of separation from his family and being housed in institutions from age 12, including separation through foster care, boys homes and juvenile justice facilities[21] (Ex A Criminal History p.2, Dr Westmore);

(b) He was exposed to domestic violence as a child, including his father stabbing his mother 15 times[22] (Exhibit 1(1));

(c) He had a history of drug and alcohol abuse from age 12, with thereafter longstanding abuse of alcohol (EX A Criminal History p.2, Exhibit 1(1) [23], Exhibit 2);

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[20] Kinner et al *Counting the cost: estimating the number of deaths among recently released prisoners in Australia* (2011) Med J Aust 195 (2); 64-68, Cth *Aboriginal and Torres Strait Islander Health Performance Framework* (2012) p.95.

[21] In respect of the effects of separation from a young age, Cth, Human Rights and Equal Opportunity Commission *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families: Bringing Them Home* (***"Bringing Them Home"***) (1997) is instructive, in particular Chapter 24 relating to juvenile justice in the 1990s, the very time when the appellant was part of the over-represented Indigenous youth in custody. It was specifically noted at that time that Indigenous children tended to enter the justice system at an earlier age and stay in the system for longer, at locations geographically isolated from their family and kin (p.498, p.536). The appellant's record shows that this was the case with him, including geographical isolation, there being entries for Cobham (at St Marys) and Kariong (near Gosford) Juvenile Justice Centres.

[22] Northern Territory, *Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse: Ampe Akelyrnemane Meke Mekarle "Little Children are Sacred"("**Little Children are Sacred**")* (2007), documents *"a cycle of offending"* with children who are exposed to violence often themselves growing up to offend, see eg. p.67, see also Australian Bureau of Statistics (**"ABS"**) 4275.0 – Aboriginal and Torres Strait Islander Wellbeing: A focus on children and youth, April 2011, p.1:*"In 2008...- youth who have been arrested in the last five years were more likely to have been a victim of physical violence and to have experienced high or very high levels of psychological distress than those who had not"*; Day et al, *Indigenous Family Violence: An Attempt to Understand the Problems and Inform Appropriate and Effective Responses to Criminal Justice System Intervention,* (2012) 19 (1) *Psychiatry, Psychology and Law* 104 note consistent contextual triggers (as reported by Indigenous men in prison and the community) for Indigenous male violence as being: (a) growing up with disrupted family lives, (b) growing up experiencing or witnessing anger and/or violence, (c) drug and alcohol abuse, (d) impacts of government policy/intervention enforcing feelings of powerlessness (p.109-110).

(d) Multiple periods in his youth that were spent in custody, during which time (at least) the State was responsible for his 'parenting'[24];
(e) He had made five previous suicide attempts whilst in custody where a history of self-harming behavior was noted (Exhibit 1(2), Exhibit 2)[25];
(f) He cannot read or write and was educated to Year 7 level only (Exhibit 1 (1), p.3, Exhibit 2, p.2)[26];
(g) He was transferred directly from a juvenile institution to an adult jail and been in custody for most of his adult life, having never spent an adult birthday in the community (Exhibit 1(1), p.3);
(h) Prior employment while in the community was said to consist of casual labouring work (Exhibit 2, p.2);
(i) He gave an account of over-policing and discrimination by authority figures in their treatment of him and his family (Exhibit 1(1) p.4, 6)[27]; described by Dr Westmore as *'negative attitudes towards authority figures particularly police and I suspect prison officers'*; his description of anger with *"the law, them harassing me over the years. I feel I'm going to be in one of these places for the rest of me life if I don't get help. They said I can't be helped"* (Exhibit 1(1) p.4), re-enforcing hopelessness;
(j) He was aged 31 years at the time of sentence, in the context that the life expectancy for a Wilcannia man, is 36.7 years[28] (should the sentence imposed by the CCA stand, the sentence will expire when he is aged 36.9 years);
(k) He has a history ill health physically- including a history of head injuries, problems with his heart and lungs and asthma (Exhibit 1 (1) pp.2, 4);
(l) He has mental health issues, with a history of depression and self-harming behaviour while in custody, psychotic symptoms, a history of hearing voices *"when lonely and stressed"*, including in January 2011, that is the month of the offences (Exhibit 1 (2) p.2);
(m) He had experienced significant loss of life in his immediate family[29], with the death of his mother in her 40s (Exhibit 1 (1) p.2), the death of his brother while he was in custody, occurring between the date of the offences and sentencing (Exhibit 1(2) p.2), and the death of his sister to cancer (Exhibit 1 (1), p.3);

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[23] The authors of *Little Children Are Sacred* noted at p.226: *"There is a strong, repeatedly documented association between substance abuse and violence in Indigenous communities"* and *"The use of alcohol in particular as a way of coping with past traumas of colonization and dispossession is a point made by virtually all commentators"*, see empirical accounts of alcohol and lack of rehabilitation services in *Jumbunna*, pp.9-12.

[24] See footnote 21 above.

[25] Between 2005-9, the suicide death rate and the non-fatal intentional self harm rate for Indigenous people was 2.5 times the rate for non-Indigenous people: Cth, Productivity Commission, *Overcoming Indigenous Disadvantage 2011* (2011) (***"Indigenous Disadvantage* 2011")** Chapter 7.8.

[26] See footnote 21 and footnote 46 below.

[27] The Standing Committee on Aboriginal and Torres Strait Islander Affairs (SCATSIA), *Inquiry into the high level of involvement of Indigenous juveniles and young adults in the criminal justice system*, House of Representatives (2011) found that there was a continuing *'legacy of profound distrust towards the police'* (pp.196-7); see also ABS, *Aboriginal and Torres Strait Islander Wellbeing: A focus on children and youth* April 2011, p.2, empirical accounts of policing in *Jumbunna* at pp. 22-25, and historically in Cth, Commissioner JH Wootton QC, RCIADIC, *Report of the Inquiry into the Death of Mark Anthony Quayle* (1991) and *Bringing Them Home* at pp.510-513, 517.

[28] Wilcannia Community Working Party, "*Community Action Plan 2005*", (September 2005) p.25. Based on data from 2005- 2007. Life expectancy at birth for Indigenous males was 67.2 years compared to 78.7 for non-Indigenous males: *Indigenous Disadvantage* 2011, Chapter 4.4.

[29] The inter-relationship between grief from frequent deaths in the Wilcannia community, alcohol use and lack of local mental health, grief counselling and substance abuse services is documented: *Jumbunna* at pp. 9-12.

(n) His categorisation by Dr Westmore as a high risk prisoner, the highest risk being self-harm (Exhibit 1(2) p.2);
(o) He had spent 135 days of 2011 in segregation following the commission of the offences (Exhibit 4)[30], and from 1 March 2011 his designation required "Ankle cuffs and sanctions" (Exhibit A, *Custodial History* , pp.7-8);
(p) Since 2008 he had requested placement in a long term rehabilitation program[31] as other intervention had failed to address his issues due to his non compliance and entry into a such a program was recommended (Exhibit 2), however he was sentenced to imprisonment (Exhibit 1, Criminal Record). In November 2010, he was again recommended for the residential treatment program, however new applications were not being received at that time (Exhibit 3, pp.2-3).

6.23 The social deprivation in the appellant's youth, background and community was integrally related to his history of substantial offending and to consideration of questions of deterrence, rehabilitation and protection of the community. As Spigelman CJ (Wood CJ and Kirby J agreeing) held in *R v Fernando* [2002] NSWCCA 28 *"it is, however, often the case that such considerations of deterrence are properly tempered by considerations of compassion which arise when the Court is presented with information about the personal life circumstances which have led an individual into a life of crime"*. Additionally to compassion, a sentencing judge may regard a person such as the appellant, despite the serious offence he committed, to not be a proper vehicle for additional weight (as given by the CCA) to general deterrence. A full time custodial sentence in itself is punitive: *Muldrock* at 140 [57]. The protection of the community and purpose of personal deterrence were best served with the appellant receiving the residential rehabilitative treatment that had been unavailable to him for many years. As the Standing Committee on Aboriginal and Torres Strait Islander Affairs observed in its report on Indigenous Youth in the criminal justice system, *" The evidence shows that incarceration itself is not an effective deterrent to criminal behaviour because it does not address the underlying economic, social, psychological and physiological factors that increase the risk of offending behaviour"*. In order to achieve protection of the community *"there could be no better place to start than rehabilitation strategies for reducing the proportion of Aboriginal people who, after release from prison, come back to prison"*[32]. It is submitted that the sentencing judge was correct to allow "some moderation" to general deterrence in imposing the sentence that he did and to fashion a sentence that gave proper regard to the protection of the community.

6.24 The error of principle by the CCA (at [50], [52]) pertaining to the weight to be given to the personal circumstances of socioeconomic deprivation is an issue of particular concern for Indigenous offenders who are disproportionately represented in the criminal justice system. Indigenous Australians in New South Wales made up 2.5% of the national population in 2011, but approximately 22.1% of the average daily prison population in NSW (Productivity Commission Report 2012, Ch 8 Corrective Services, p.55, p1 of Table 8A.1). In 2011, in the Local Court in NSW, 2609 of 6809 offenders sentenced to

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[30] RCIADIC: Recommendation 181 provides "*it is undesirable in the highest degree that an Aboriginal offender should be placed in segregation or isolated detention...*".
[31] See footnote 23.
[32] Standing Committee on Aboriginal and Torres Strait Islander Affairs, *"Doing Time-Time for Doing: Report on Indigenous Youth in the Criminal Justice System"* (***"Doing Time"***) House of Representatives, at para [7.215], (quoting Don Weatherburn, *Committee Hansard,* Sydney March 2010, p.18). See also footnotes [33] and [50] below.

imprisonment were Indigenous (38.3%), in higher courts in NSW 420 of 2040 offenders sentenced to imprisonment were Indigenous (20.5%) and in the Children's Court in NSW, 432 of 733 young offenders sentenced to control orders were Indigenous (59%)[33]. The same report (at p.8) has the national average Indigenous population as a percentage of inmates at 26.1%. The recently released report of the Australian Institute of Criminology RCIADIC *Monitoring Report* into Deaths in Custody to 30 June 2011, report similar figures in NSW[34], finding that while Indigenous people comprise 2.5% of the total Australian population, they account for more than 50% of youth in juvenile detention and more than 25% of the total adult prison population (p.3). The figures are also high for Indigenous females: 30.7% of female prisoners are Indigenous [35]. These figures should be understood as representing the number of persons in prison per day, that is, the figures are informed both by prison admissions and length of terms of custodial sentences. As such the statement of the CCA at [50] as to constraint in taking into account "background/Fernando" factors, relied on to increase the length of the appellant's sentence, touches directly on over-representation in custody of persons with similar backgrounds, including a history of prior imprisonment[36].

6.25 The Supreme Court of Canada[37] in *R v Gladue* [1999] 1 SCR 688 (***"Gladue"***), described the overrepresentation of Aboriginal offenders in the Canadian prison population and justice system as *"a crisis in the Canadian criminal justice system"* and *"a sad and pressing social problem"* (at 722 [64]). The figures referred to in *Gladue* were much lower than those set out above. As at 1997, Canadian Aboriginal persons made up 3% of the population and 12 % of all federal inmates (*Gladue* at 719 [58]). An examination of further statistics in the later case of *R v Ipeelee* [2012] 1 SCR 433 (***"Ipeelee"***)[38] disclosed that as at 2005 17% of federal inmates were Aboriginal (at 470-1 [62]), this being described as a state of affairs where *"Aboriginal persons were sadly over represented [in the prison populations] indeed"* (at 466-7 [57]), and a *"crushing failure' of the Canadian criminal justice system vis-à-vis Aboriginal peoples"* (at 478-9 [74]). The increase in over-representation over time between the two decisions was attributed to errors in the application of principle which significantly curtailed the scope of *Gladue* (*Ipeelee* at 482 [80]), namely: (a) the erroneous suggestion that there must be a causal link between

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[33]NSW, *New South Wales Criminal Courts Statistics 2011*, (2011), NSW BOCSAR, Executive Summary pp.4-13. In 2012, these figures increased: NSW, *New South Wales Criminal Courts Statistics 2012*, (2012), NSW BOCSAR, Executive Summary pp.3-15. In the Local Court in NSW, 2708 of 6901 offenders sentenced to imprisonment were Indigenous (39.2%). The most frequently imposed penalty for all offenders was a fine, followed by a bond without supervision; for Indigenous offenders the most frequent penalties were a fine followed by imprisonment (p.4). In higher courts in NSW 432 of 1943 offenders sentenced to imprisonment were Indigenous (22.2%) and in the Children's Court in NSW, 428 of 727 offenders sentenced to control orders were Indigenous (59%): p.9

[34] *RCIADIC Monitoring Report* Table 5, p.2 records that Indigenous Australians make up 3.3 % of the Western Australian population but 38.5% of the adult prison population and 68% of the juvenile detention population. In the Northern Territory, Indigenous Australians make up 30.3% of the population, but 82.3% of the adult prison population and 96.9% of the juvenile detention population. In Queensland, Indigenous Australians make up 3.6% of the population, however 30% of the adult incarcerated population and 52.9% of the juvenile detention population.

[35] ABS National Prisoner Census (2011).

[36] In 2008, 73% of Indigenous prisoners had a history of prior imprisonment: Schwartz, *Building Communities, not Prisons: Justice Reinvestment and Indigenous Over-Imprisonment* (2010) 14 (1) Australian Indigenous Law Review 2 at 7.

[37] Cory and Iacobuccii JJ delivered the unanimous judgment of the Court in *R v Gladue* [1999] 1 SCR 688 (Lamer CJ , L'Heureux-Dube, Gonthier, Bastarache and Binnie JJ also presiding).

[38] per LeBel J (McLachlin CJ, Binnie, Deschamps, Fish and Abella JJ agreeing, Rothstein J dissenting in part).

background factors and the commission of the offence which was held to have: (i) demonstrated *"an inadequate understanding of the devastating intergenerational effects of the collective experiences of the Aboriginal peoples"*; (ii) imposed a crushing evidentiary burden on Indigenous offenders, and (iii) failed to recognise that such factors provided necessary context for the offence and the offender (at 482-4 [81]-[83]); and (b) error in failing to apply *Gladue* in the case of serious or violent offences including in the case of repeat offenders (at 484-6 [84]-[87]). The appellant submits that these Canadian cases are persuasive authority for this Court's consideration of the case at hand.

6.26 *Ipeelee* and *Gladue* are authority requiring Canadian courts to take into account the unique circumstances of all Aboriginal offenders that bear on the sentencing process, as relevant to the moral blameworthiness of the individual as an aspect of the principle of proportionality in sentencing. As opposed to limiting the extent to which factors of Indigenous social deprivation can be taken into account, the Supreme Court of Canada has held that it is necessary to take such factors into account in order to achieve equality before the law. This included recognition that the *"unbalanced ratio of imprisonment for Aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education and the lack of employment opportunities for Aboriginal people"*: *Gladue* at 723 [65]. The Supreme Court in *Ipeelee* rejected an argument that the application of the principle diminished when an offender had a significant criminal history: at 484 [84], 486 [87]. Rather than being limited in application, the Supreme Court affirmed (that *"the application of Gladue principles is required in <u>every case</u> involving an Aboriginal offender..."*:*Ipeelee* at 486 [87], emphasis added.

6.27 As in Australia, the fundamental principle of sentencing in Canada is that *"the sentence must be proportionate to both the gravity of the offence and the degree of responsibility of the offender...a just sanction is one that reflects on both perspectives on proportionality and does not elevate one at the expense of the other"* (*Ipeelee* at 456-7 [36]-[37]). The purpose and principles of sentencing set out in the *Canadian Criminal Code* in Article 718 reflect, to a large extent, s3A (cf. 718, *Gladue* at pp.699, 710 [43]), s5 (cf. 718.2 (d), (e)) and s21A (cf 718.1, 718.2) of the Act (NSW). The application of the *Canadian Criminal Code* s.718.2(e) equates with Brennan J's statement in *Neal,* the *Fernando* principles at pp.62-3 and the principle of proportionality in sentencing: see *Ipeelee* at 456-7 [36]-[38]. Section 5 of the Act, mandating imprisonment as a last resort, informs such considerations.

6.28 The *Neal* and *Fernando* principles remain relevant and applicable to the sentencing of an Aboriginal offender in NSW today. Since those decisions, in *Mabo (No 2)* (1992) 175 CLR 1, this Court resiled from the doctrine of *terra nullius,* recognising that *"The fiction by which the rights and interests of Indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country"* (per Brennan J at 42). National reports such as RCIADIC (1991), *Bringing Them Home* (1997), *Ampe Akelyrnemane Meke Mekarle "Little Children are Sacred"* (2007) and AIC, BOCSAR and Productivity Commission statistics relating to Indigenous offenders, all confirm ongoing grave socio-economic difficulties in many Aboriginal communities and the link of these 'background factors' to subsequent offending behaviour[39]. Both State

[39] Cth, Commissioner E Johnston QC, RCIADIC, *National Report* (1991) Vol 1, 15 *"The single significant contributing factor to incarceration is the disadvantaged and unequal position of Aboriginal people in Australian society in every way, whether socially, economically or culturally"*; Cth,*"Deaths in Custody in Australia to 30 June 2011, Twenty Years of Monitoring by the National Deaths in Custody Program since the*

and Federal Governments have now apologised to Indigenous Australians *"for the laws and policies of successive Parliaments and governments that have inflicted profound grief, suffering and loss on these our fellow Australians...especially for the removal of Aboriginal and Torres Strait Islander children from their families, their communities and their country"*[40], coupled in 2008 with a promise to 'close the gap'. Socio-economic or background factors not limited to those outlined in *Fernando,* which give context to the personal circumstances of individual Indigenous offenders continue to be relevant and applicable in 2013 and should continue to be given full weight in the exercise of the sentencing discretion.

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6.29 The proper recognition and consideration by courts (without diminution in 'weight'), that Indigenous Australians are over-represented in the jail population, have a cultural history of dispossession and colonisation[41] and have far worse whole life indicators that the non Indigenous population in so far as health[42], life expectancy[43], mortality rates[44], suicide and self-harm rates[45], educational attainment[46], home ownership[47]

Royal Commission into Aboriginal Deaths in Custody", Lyneham and Chan, Monitoring Reports 20, Australian Institute of Criminology (**"RCIADIC Monitoring Report"**), (2013) p. 5: *"The overarching conclusion from the...research is that 'the principal causal factor of Indigenous over-representation in prison is generally the low status of the Indigenous community in Australia, both in socioeconomic terms and in terms of patterns of discrimination"; Bringing Them Home* (1997) Chapter 24, Juvenile Justice, p.497; *Little Children are Sacred,* Part 6.3 Structural Factors, "Socioeconomic disadvantage"-"Inter-generational transmission of violence"-"Alcohol Abuse in Indigenous Communities" (pp.223-226); see also National Indigenous Drug and Alcohol Committee *"Bridges and Barriers, Addressing Indigenous Incarceration and Health"* (Revised Ed. 2013) (**"Bridges and Barriers"**) "Socioeconomic factors" (p.6); Weatherburn, Snowball and Hunter *"The economic and social factors underpinning Indigenous contact with the justice system: Results from the 2002 NATSISS survey"* Crime and Justice Bulletin No 104, NSW Bureau of Crime Statistics and Research (**"NSW BOCSAR"**) (October 2006) pp.9-12; Prof D. Brown, *"The Limited Benefit of Prison in Controlling Crime"* (July 2010) 22 (1) *Current Issues in Criminal Justice* (CICJ) 137 at 141-2, ABS, *"Aboriginal and Torres Strait Islander Wellbeing: A focus on children and youth"* April 2011, Law and Justice Key Messages *"In 2008: -17 % of all Aboriginal and Torres Strait Islander youth reported that they had been arrested in the last five years; -youth who had been arrested in the last five years were more likely to have been a victim of physical violence and to have experienced high or very high levels of psychological distress than those who had not"*; *Doing Time* at pp.41-45.

[40] Cth, *Parliamentary Debates,* "Apology to Australia's Indigenous Peoples", House of Representatives, 13 February 2008, 167-171, (Kevin Rudd, Prime Minister); NSW, *Parliamentary Debates*, "Aboriginal Reconciliation" 14 November 1996 (Bob Carr, Premier).

[41] Such as identity crisis by virtue of loss of connection to traditional culture and language; intergenerational trauma arising from interactions with government agencies, police and courts: See footnote 39.

[42] From 2004-9 Indigenous people were hospitalised for mental and behavioural disorders at around 1.7 times the rate for non-Indigenous people: Cth, Productivity Commission, *Overcoming Indigenous Disadvantage 2011*, (2011) Chapter 7.7; There are significant disparities evident between Indigenous and non-Indigenous Australians: *"across the life cycle from lower birthweight, earlier onset of some chronic diseases, much higher occurrence of a wide range of illnesses, higher prevalence of many stressors impacting on social and emotional wellbeing, higher death rate and lower life expectancy"*, with the relative gap widening: Cth, Department of Health and Ageing, *Aboriginal and Torres Strait Islander Health Performance Framework,* (2008), p.6,7; No change was reported in these matters for NSW in 2012: Cth, Department of Health and Ageing, *Aboriginal and Torres Strait Islander Health Performance Framework,* (2012). See also intergenerational health problems associated with alcohol abuse such as foetal alcohol spectrum disorder: Peardon E., Fremantle, E. Bower, C. and Elliot E. *"International Survey of Diagnostic Services for Children with Foetal Alcohol Spectrum Disorders"*, BMC Pediatrics (2008) 8:12; *Bridges and Barriers* at pp.8-9.

[43] Based on combined data for Australia for 2005-7, life expectancy at birth for Indigenous males was 67.2 years compared to 78.7 for non-Indigenous males and 72.9 years compared to 82.6 years for females: *Indigenous Disadvantage* 2011, Chapter 4.4.

[44] The "all causes" mortality rate for Indigenous people was twice the rate for non-Indigenous people based on data for 2005-9: *Indigenous Disadvantage* 2011. From 1998-2011, this gap has not fallen in NSW: COAG Reform Council, *"Indigenous Reform 2011-12: Comparing Performance Across Australia"*, 30 April 2013

and employment[48], ensures that all material facts as they pertain to an individual standing before a court for sentencing are seen in their proper context.

6.30 It should be noted that the Canadian Supreme Court held in *Gladue* at p.714-5 [68]-[69] and again in *Ipeelee* at 469 [60] that: *"courts must take judicial notice of such matters as the history of colonialism, displacement and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal offender. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather they provide the necessary context for understanding and evaluating the case-specific information presented by counsel"* (emphasis added). In *Fernando*, Wood J stressed the importance of the factors bearing on the person standing for sentence being seen in the context of their socio-economic circumstances. While this background material supporting 'context' can be placed before sentencing courts[49] time and again, this Court may now see fit to require courts (in NSW) to take into account these known systemic and background factors affecting Indigenous offenders (as set out in [6.29] above) rather than requiring the Aboriginal Legal Service or individual to present authorities and publications relating to this same context in each case[50]. Case specific evidence would continue to be presented (as it was in the appellant's case) in relation to the individual circumstances of the offender[51].

6.31 This is not to detract from a judge's fundamental duty to fashion a sentence that is fit and proper in the circumstances of the offence, offender and victim: the Act (NSW), *Ipeelee* at 474-5 [69]. It is to recognise that it is appropriate for all levels of sentencing courts to: (a) endeavour to reduce crime rates in Aboriginal communities by imposing sentences that *"effectively"* deter criminality and rehabilitate offenders, and that *"to the extent that current sentencing practices do not further these objectives, those practices*

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p.14. Indigenous deaths in custody declined consistently from mid-late 1990s to 2005-6, over the last 5 years the number of Indigenous deaths has increased again with the number recorded in 2009-10 being equal to the highest total annual recorded: *RCIADIC Monitoring Report,* Executive Summary p. xx-xxi.

[45] See footnote 25 above.

[46] In 2010, lower proportions of Indigenous students achieved national minimum standards in reading, writing and numeracy across in Years 3-12, with the gap in learning increasing in as remoteness increased and only half as many Indigenous Australians reporting completing Year 12 as non-Indigenous Australians: Cth, *Indigenous Disadvantage 2011* (2011) Chapter 4.4 -4.5. From 2008-12 there were no significant improvements in numeracy, rather this worsened in Years 3 , 7 and 9 and in NSW there was no improvement in literacy except in reading (but it was worse in Year 9): COAG Reform Council, *"Indigenous Reform 2011-12: Comparing Performance Across Australia"*, 30 April 2013 p.43.

[47] *Indigenous Disadvantage* 2011, Chapter 9.4. ABS *Estimating Homelessness* 2011, 2049.0.

[48] Between 2004-2008 there has been no change in Indigenous disadvantage in employment to population ratio: 50.7-53.8 % for Indigenous Australians as to 74.2-76% non-Indigenous Australians: Commonwealth, Productivity Commission, *Indigenous Disadvantage* 2011 (2011) Chapter 4.6. In the period 2006-2011, NSW reduced the gap, however Indigenous disadvantage remains: COAG Reform Council, *"Indigenous Reform 2011-12: Comparing Performance Across Australia"*, 30 April 2013 p.7.

[49] As it was in *Neal v The Queen* (1982) 149 CLR 305 (see at pp.317-9) and *Fernando* (at p.62).

[50] Cth, The Law Council of Australia, Submission to House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs *"Inquiry into high levels of Indigenous juveniles and young adults in the criminal justice system"*, (June 2010) at p.10 noted that: *"Aboriginal and Torres Strait Islander Legal Services (ATSILS) are desperately underfunded, even compared with unacceptably low (and diminishing) funding given to the Legal Aid Commissions"*.

[51] cf. *Fernando* at p.63; *R v KU; Ex parte Attorney General (No.2)* [2011] 1 Qd R 439 at [129]-[133].

must change..." (*Ipeelee* at 472-3 [66])[52]; (b) *"ensure that systemic factors do not lead inadvertently to discrimination in sentencing" (Ipeelee* at 473 [67]); and (c) recognise that there is *"no sense comparing the sentence that a particular Aboriginal offender would receive to the sentence that some hypothetical non-Aboriginal offender would receive, because there is only one offender standing before the court"* (*Ipeelee* at 485-6 [86]). It is appropriate for sentencing courts to sentence with an awareness of the role the criminal justice system has and continues to play in the over-representation of Aboriginals in that system and the consequences of diminished social cohesion[53], in order to guard against further entrenchment. The appellant submits that a similar approach to that in *Gladue* and *Ipeelee* should be adopted by this Court. These background factors provide important context for assessing individual Indigenous offender's unique circumstances when exercising the sentencing discretion.

6.32 To be clear, the appellant, by relying on the persuasive authority of the Canadian cases, does not advocate for a 'race discount', nor for the elevation of an offender's circumstances over those of the circumstances of the offence. Rather, the appellant submits that such an approach promotes equality before the law. The appellant submits that it is an error of principle to neglect, undervalue or diminish the unique circumstances of any individual when sentencing that person: *cf. Ipeelee* at 479 [75].

Ground 2.3

6.33 The CCA erred in principle in holding that considerations of mental health were erroneously taken into account by the sentencing judge as *"it had nothing to do with any aspect of the offending"*: CCA [47]. Nor was it correct to say that mental illness or disorder may *only* be taken into account when it has contributed (directly or indirectly) to the commission of the offence: [46]-[47]. This is expressly contrary to authority: *R v Tsiaris* [1996] 1 VR 389 at 400; *Muldrock* at 128[18], 129 [20], 132 [27]-[29], 138-9 [53]-[54]; *DPP v De la Rosa* (2010) 79 NSWLR 1 (***"De la Rosa"***) at 43; *Benitez v R* (2006) 160 A Crim R 166; *TC v R* [2009] NSWCCA 296; *Binnie v R* [2010] NSWCCA 14; *SDS v R* [2009] NSWCCA 159; *Rose v R* (2010) 56 MVR 123. The CCA erred in holding (at [47]) that the applicant's mental condition did not give rise to any of the principles summarised in *De la Rosa*. Mental health may be taken into account *"whether or not the illness played a part in the commission of the offence"*: *Tsiaris* at 400. The punitive effect of being held at times in segregation while suffering from poor mental health, for example, is relevant to the exercise of the sentencing discretion whether or not related to the commission of the offence. The mental health of an offender is relevant to the imposition of a proportionate sentence, and again, considerations of equality before the law.

6.34 Contrary to the assumption of the CCA at [45], the sentencing judge did not automatically reduce the weight to be given to general deterrence on account of mental condition (cf. RSA [3.18], CCA [45]), rather he engaged in the delicate balancing of countervailing factors in the case (ROS 10-13, 16-17). As previously noted, the prosecutor conceded that on account of his mental health, the appellant was *"not a great vehicle for general deterrence"*. The sentencing judge did not err in allowing *"some moderation to the*

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[52] It has been noted in one analysis that a 10% reduction in the rate of Indigenous recidivism would reduce the number of Indigenous court appearances by more than 30%; a 20 % reduction would reduce the annual number if Indigenous court appearances by 48%: Beranger, Weatherburn and Moffatt *"Reducing Indigenous Contact with the Court System"*, Issue paper No 54, NSW BOCSAR (Dec 2010), p.3.

[53] Prof D. Brown, "The Limited Benefit of Prison in Controlling Crime" (July 2010) 22 (1) *CICJ* 137.

weight to be given to general deterrence" on account of what was referred to as the *"psycho-social evidence"* (ROS 47).

Ground 2.4

6.35 General deterrence, while recognised by s3A of the Act as one of several *"familiar, overlapping and at times conflicting purposes of criminal punishment"*, is discrete from an assessment of the objective seriousness of a standard non parole period offence: *Muldrock* at p.129 [20], 132 [27]- [29]. The Court of Criminal Appeal erred in relying on general deterrence to hold that the sentencing judge erred in his assessment of the objective seriousness of the offence: CCA [38]-[39]. The primary judge had taken into account as an aggravating factor of the offence that the victim was a Corrective Services officers and the nature of the injuries occasioned, both physical and psychological: CCA [16]; ROS [19]-[27]. General deterrence was adequately taken into account by the sentencing judge, along with matters personal to the offender relevant to an assessment of this purpose of sentencing: ROS [58]-[59], [63]-[65]. Moreover, the sentencing judge had referred to the more nuanced oral, as opposed to written, submission before him in his remarks criticised by the CCA at [30]-[32] and made his own finding, taking all aggravating factors canvassed by the CCA into account.

6.36 The sentencing judge correctly exercised his discretion in sentencing the applicant, in a matter noted by him to be "quite complex". The Court of Criminal Appeal should have held that the Crown appeal be dismissed for failure to demonstrate error of principle or, alternatively, in the exercise of the residual discretion. Should this Court hold that there was no error of the kind suggested by the respondent in Grounds 1-3 in the court below, the appellant submits that this Court would order that the appeal to the CCA be dismissed.

Part VII: Applicable legislation

7.1 The applicable legislation is attached at Annexure A.

Part VIII: Orders Sought

8.1 1. The orders made by the Court of Criminal Appeal made on 18 October 2012 are set aside;

2. The Crown appeal is dismissed; or alternatively

3. The Crown appeal is remitted to the Court of Criminal Appeal to be dealt with in accordance with law.

Part IX: Time Estimate

9.1 It is estimated that oral argument will take 3 hours.

Dated: 14 June 2013

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY No. S99 of 2013

BETWEEN: **WILLIAM DAVID BUGMY**
Appellant

AND: **THE QUEEN**
Respondent

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ANNEXURE "A"

No.	Description of Document	Date	Section
1.	*Criminal Appeal Act* 1912, No. 12 (NSW) (Historical Version for 24.09.2012-24.03.2012)	As at 18.10.2012 Still in force as at. 13.06.2013	s5D
2.	*Crimes (Sentencing Procedure) Act* 1999, No. 92 (NSW) (Historical Version for 06.01.2012-13.03.2012)	As at 16.02.2012 & 18.10.12 Still in force as at 13.06.2013	ss3A, 5, 21A, Division 1A
3.	*Crimes Act* 1900, No. 40 (NSW) (Historical Version for 07.10.2010-03.02.2011)	As at 08.01.2011°	33(1)(b), 60A
4.	*Criminal Code R.S.C.* 1985 C-46 (Canada) (Historical Version 13.03.2012-04.04.2012)	As at present*	s718

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°Section 33(1)(b) is still in force as at 13.06.2013. Section 60A was amended by the *Crimes Amendment (Reckless Infliction of Harm) Act 2012*, No. 41 (NSW) which commenced on 21 June 2012 (attached).

* Since the decision in *R v Ipeelee* on 23 March 2012 s718.2(a) (iii.1) has been inserted. The remainder of s718 is still in force as at 14 June 2013. [Please note that since the decision in *R v Gladue* but prior to the decision in *R v Ipeelee* s718.01, s718.02 and 718.2(a)(ii.1) were inserted into the *Criminal Code R.S.C.* 1985.]

40 (Legislation sourced from: www.legislation.nsw.gov.au and http://www.laws-lois.justice.gc.ca/eng/acts)

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Criminal Appeal Act 1912 No 16

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.

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.

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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,

(p) without limiting paragraph (ea), the offence was a prescribed traffic offence and was committed while a child under 16 years of age was a passenger in the offender's vehicle.

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.

(5C) For the purpose of subsection (2) (p), an offence under section 13 (2), 15 (4), 18B (2), 18D (2), 22 (2), 24D (1) or 29 (2) of the *Road Transport (Safety and Traffic Management) Act 1999* is taken to have been committed while a child under 16 years of age was a passenger in the offender's vehicle if the offence was part of a series of events that involved the driving of the vehicle while the child was a passenger in the vehicle.

(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.

prescribed traffic offence means an offence under any of the following provisions:

(a) sections 9, 11B (1) and (3), 12 (1), 13 (2), 15 (4), 18B (2), 18D (2), 22 (2), 24D (1) and 29 (2) of the *Road Transport (Safety and Traffic Management) Act 1999*,

(b) sections 51B (1) and 52A (1) (a) and (3) (a) of the *Crimes Act 1900*,

(c) section 52A (2) and (4) of the *Crimes Act 1900* in the circumstances of aggravation referred to in section 52A (7) (a), (c) or (d) of that Act.

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

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	15 years

	concerned under that Act, involves not less than the large commercial quantity of that prohibited drug	
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

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Crimes Act 1900 No 40

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.

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Crimes Act 1900 No 40

Historical version for 7 December 2010 to 3 February 2011 (accessed 13 June 2013 at 15:52)
Current version

60A Assault and other actions against law enforcement officers (other than police officers)

(1) A person who assaults, throws a missile at, stalks, harasses or intimidates a law enforcement officer (other than a police officer) while in the execution of the officer's duty, although no actual bodily harm is occasioned to the officer, is liable to imprisonment for 5 years.

(2) A person who assaults a law enforcement officer (other than a police officer) while in the execution of the officer's duty, and by the assault occasions actual bodily harm, is liable to imprisonment for 7 years.

(3) A person who recklessly by any means:

(a) wounds a law enforcement officer (other than a police officer), or

(b) inflicts grievous bodily harm on a law enforcement officer (other than a police officer),

while in the execution of the officer's duty is liable to imprisonment for 12 years.

(4) For the purposes of this section, an action is taken to be carried out in relation to a law enforcement officer while in the execution of the officer's duty, even though the officer is not on duty at the time, if it is carried out:

(a) as a consequence of, or in retaliation for, actions undertaken by that officer in the execution of the officer's duty, or

(b) because the officer is a law enforcement officer.

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Crimes Amendment (Reckless Infliction of Harm) Act 2012 No 41

Schedule 1 Amendment of Crimes Act 1900 No 40

[1] Section 35 Reckless grievous bodily harm or wounding

Omit section 35 (1)–(4). Insert instead:

(1) **Reckless grievous bodily harm—in company**

A person who, in the company of another person or persons:

(a) causes grievous bodily harm to any person, and

(b) is reckless as to causing actual bodily harm to that or any other person,

is guilty of an offence.

Maximum penalty: Imprisonment for 14 years.

(2) **Reckless grievous bodily harm**

A person who:

(a) causes grievous bodily harm to any person, and

(b) is reckless as to causing actual bodily harm to that or any other person,

is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

(3) **Reckless wounding—in company**

A person who, in the company of another person or persons:

(a) wounds any person, and

(b) is reckless as to causing actual bodily harm to that or any other person,

is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

(4) **Reckless wounding**

A person who:

(a) wounds any person, and

(b) is reckless as to causing actual bodily harm to that or any other person,

is guilty of an offence.

Maximum penalty: Imprisonment for 7 years.

[2] Section 60 Assault and other actions against police officers

Omit section 60 (3) and (3A). Insert instead:

(3) A person who by any means:

(a) wounds or causes grievous bodily harm to a police officer while in the execution of the officer's duty, and

(b) is reckless as to causing actual bodily harm to that officer or any other person,

is liable to imprisonment for 12 years.

(3A) A person who by any means during a public disorder:

(a) wounds or causes grievous bodily harm to a police officer while in the execution of the officer's duty, and

(b) is reckless as to causing actual bodily harm to that officer or any other person,

is liable to imprisonment for 14 years.

[3] Section 60A Assault and other actions against law enforcement officers (other than police officers)

Omit section 60A (3). Insert instead:

(3) A person who by any means:

(a) wounds or causes grievous bodily harm to a law enforcement officer (other than a police officer) while in the execution of the officer's duty, and

(b) is reckless as to causing actual bodily harm to that officer or any other person,

is liable to imprisonment for 12 years.

[4] Section 60E Assaults etc at schools

Omit section 60E (3). Insert instead:

(3) A person who by any means:

(a) wounds or causes grievous bodily harm to a school student or member of staff of a school while the student or member of staff is attending a school, and

(b) is reckless as to causing actual bodily harm to that student or member of staff or any other person,

is liable to imprisonment for 12 years.

[5] Section 105A Definitions

Omit the definition of ***circumstances of special aggravation*** from section 105A (1).

Insert instead:

circumstances of special aggravation means circumstances involving any or all of the following:

(a) the alleged offender intentionally wounds or intentionally inflicts grievous bodily harm on any person,

(b) the alleged offender inflicts grievous bodily harm on any person and is reckless as to causing actual bodily harm to that or any other person,

(c) the alleged offender is armed with a dangerous weapon.

[6] Section 105A (2) (b)

Insert "or (b)" after "paragraph (a)".

[7] Schedule 11 Savings and transitional provisions

Insert after Part 29:

Part 30 Crimes Amendment (Reckless Infliction of Harm) Act 2012

72 Application of amendments

An amendment made by the *Crimes Amendment (Reckless Infliction of Harm) Act 2012* applies only in respect of an offence committed, or alleged to have been committed, on or after the commencement of the amendment.

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would reasonably be expected to identify the person to whom it relates.

Information, copies

(3) Any person to whom a record is authorized to be made available under this section may be given any information contained in the record and may be given a copy of any part of the record.

Communication de renseignements et de copies

(3) Les personnes à qui l'accès à un dossier peut, en application du présent article, être accordé peuvent obtenir tous renseignements contenus dans le dossier ou tout extrait de celui-ci.

Evidence

(4) Nothing in this section authorizes the introduction into evidence of any part of a record that would not otherwise be admissible in evidence.

Production en preuve

(4) Le présent article n'autorise pas la production en preuve des pièces d'un dossier qui, autrement, ne seraient pas admissibles en preuve.

Idem

(5) A record kept pursuant to section 717.2 or 717.3 may not be introduced into evidence, except for the purposes set out in paragraph 721(3)(*c*), more than two years after the end of the period for which the person agreed to participate in the alternative measures.

1995, c. 22, s. 6.

Idem

(5) Tout dossier tenu en application des articles 717.2 ou 717.3 ne peut être produit en preuve après l'expiration d'une période de deux ans suivant la fin de la période d'application des mesures de rechange, sauf si le dossier est produit à l'égard des éléments mentionnés à l'alinéa 721(3)*c*).

1995, ch. 22, art. 6.

Purpose and Principles of Sentencing

Objectif et principes

Purpose

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(*a*) to denounce unlawful conduct;

(*b*) to deter the offender and other persons from committing offences;

(*c*) to separate offenders from society, where necessary;

(*d*) to assist in rehabilitating offenders;

(*e*) to provide reparations for harm done to victims or to the community; and

(*f*) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

R.S., 1985, c. C-46, s. 718; R.S., 1985, c. 27 (1st Supp.), s. 155; 1995, c. 22, s. 6.

Objectif

718. Le prononcé des peines a pour objectif essentiel de contribuer, parallèlement à d'autres initiatives de prévention du crime, au respect de la loi et au maintien d'une société juste, paisible et sûre par l'infliction de sanctions justes visant un ou plusieurs des objectifs suivants :

a) dénoncer le comportement illégal;

b) dissuader les délinquants, et quiconque, de commettre des infractions;

c) isoler, au besoin, les délinquants du reste de la société;

d) favoriser la réinsertion sociale des délinquants;

e) assurer la réparation des torts causés aux victimes ou à la collectivité;

f) susciter la conscience de leurs responsabilités chez les délinquants, notamment par la reconnaissance du tort qu'ils ont causé aux victimes et à la collectivité.

L.R. (1985), ch. C-46, art. 718; L.R. (1985), ch. 27 (1er suppl.), art. 155; 1995, ch. 22, art. 6.

Objectives — offences against children

718.01 When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

2005, c. 32, s. 24.

Objectif — infraction perpétrée à l'égard des enfants

718.01 Le tribunal qui impose une peine pour une infraction qui constitue un mauvais traitement à l'égard d'une personne âgée de moins de dix-huit ans accorde une attention

particulière aux objectifs de dénonciation et de dissuasion d'un tel comportement.

2005, ch. 32, art. 24.

Objectives — offence against peace officer or other justice system participant

718.02 When a court imposes a sentence for an offence under subsection 270(1), section 270.01 or 270.02 or paragraph 423.1(1)(*b*), the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

2009, c. 22, s. 18.

Objectifs — infraction à l'égard d'un agent de la paix ou autre personne associée au système judiciaire

718.02 Le tribunal qui impose une peine pour l'une des infractions prévues au paragraphe 270(1), aux articles 270.01 ou 270.02 ou à l'alinéa 423.1(1)*b*) accorde une attention particulière aux objectifs de dénonciation et de dissuasion de l'agissement à l'origine de l'infraction.

2009, ch. 22, art. 18.

Fundamental principle

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

R.S., 1985, c. 27 (1st Supp.), s. 156; 1995, c. 22, s. 6.

Principe fondamental

718.1 La peine est proportionnelle à la gravité de l'infraction et au degré de responsabilité du délinquant.

L.R. (1985), ch. 27 (1er suppl.), art. 156; 1995, ch. 22, art. 6.

Other sentencing principles

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(*a*) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,

(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or

Principes de détermination de la peine

718.2 Le tribunal détermine la peine à infliger compte tenu également des principes suivants :

a) la peine devrait être adaptée aux circonstances aggravantes ou atténuantes liées à la perpétration de l'infraction ou à la situation du délinquant; sont notamment considérées comme des circonstances aggravantes des éléments de preuve établissant :

(i) que l'infraction est motivée par des préjugés ou de la haine fondés sur des facteurs tels que la race, l'origine nationale ou ethnique, la langue, la couleur, la religion, le sexe, l'âge, la déficience mentale ou physique ou l'orientation sexuelle,

(ii) que l'infraction perpétrée par le délinquant constitue un mauvais traitement de son époux ou conjoint de fait,

(ii.1) que l'infraction perpétrée par le délinquant constitue un mauvais traitement à l'égard d'une personne âgée de moins de dix-huit ans,

(iii) que l'infraction perpétrée par le délinquant constitue un abus de la confiance de la victime ou un abus d'autorité à son égard,

(iii.1) que l'infraction a eu un effet important sur la victime en raison de son âge et de tout autre élément de sa situation personnelle, notamment sa santé et sa situation financière,

(v) evidence that the offence was a terrorism offence

shall be deemed to be aggravating circumstances;

(*b*) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(*c*) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(*d*) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(*e*) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

1995, c. 22, s. 6; 1997, c. 23, s. 17; 2000, c. 12, s. 95; 2001, c. 32, s. 44(F), c. 41, s. 20; 2005, c. 32, s. 25; 2012, c. 29, s. 2.

(iv) que l'infraction a été commise au profit ou sous la direction d'une organisation criminelle, ou en association avec elle,

(v) que l'infraction perpétrée par le délinquant est une infraction de terrorisme;

b) l'harmonisation des peines, c'est-à-dire l'infliction de peines semblables à celles infligées à des délinquants pour des infractions semblables commises dans des circonstances semblables;

c) l'obligation d'éviter l'excès de nature ou de durée dans l'infliction de peines consécutives;

d) l'obligation, avant d'envisager la privation de liberté, d'examiner la possibilité de sanctions moins contraignantes lorsque les circonstances le justifient;

e) l'examen de toutes les sanctions substitutives applicables qui sont justifiées dans les circonstances, plus particulièrement en ce qui concerne les délinquants autochtones.

1995, ch. 22, art. 6; 1997, ch. 23, art. 17; 2000, ch. 12, art. 95; 2001, ch. 32, art. 44(F), ch. 41, art. 20; 2005, ch. 32, art. 25; 2012, ch. 29, art. 2.

ORGANIZATIONS

Additional factors

718.21 A court that imposes a sentence on an organization shall also take into consideration the following factors:

(*a*) any advantage realized by the organization as a result of the offence;

(*b*) the degree of planning involved in carrying out the offence and the duration and complexity of the offence;

(*c*) whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;

(*d*) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;

(*e*) the cost to public authorities of the investigation and prosecution of the offence;

(*f*) any regulatory penalty imposed on the organization or one of its representatives in

ORGANISATIONS

Facteurs à prendre en compte

718.21 Le tribunal détermine la peine à infliger à toute organisation en tenant compte également des facteurs suivants :

a) les avantages tirés par l'organisation du fait de la perpétration de l'infraction;

b) le degré de complexité des préparatifs reliés à l'infraction et de l'infraction elle-même et la période au cours de laquelle elle a été commise;

c) le fait que l'organisation a tenté de dissimuler des éléments d'actif, ou d'en convertir, afin de se montrer incapable de payer une amende ou d'effectuer une restitution;

d) l'effet qu'aurait la peine sur la viabilité économique de l'organisation et le maintien en poste de ses employés;

e) les frais supportés par les administrations publiques dans le cadre des enquêtes et des poursuites relatives à l'infraction;

respect of the conduct that formed the basis of the offence;

(*g*) whether the organization was — or any of its representatives who were involved in the commission of the offence were — convicted of a similar offence or sanctioned by a regulatory body for similar conduct;

(*h*) any penalty imposed by the organization on a representative for their role in the commission of the offence;

(*i*) any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and

(*j*) any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.

2003, c. 21, s. 14.

f) l'imposition de pénalités à l'organisation ou à ses agents à l'égard des agissements à l'origine de l'infraction;

g) les déclarations de culpabilité ou pénalités dont l'organisation — ou tel de ses agents qui a participé à la perpétration de l'infraction — a fait l'objet pour des agissements similaires;

h) l'imposition par l'organisation de pénalités à ses agents pour leur rôle dans la perpétration de l'infraction;

i) toute restitution ou indemnisation imposée à l'organisation ou effectuée par elle au profit de la victime;

j) l'adoption par l'organisation de mesures en vue de réduire la probabilité qu'elle commette d'autres infractions.

2003, ch. 21, art. 14.

Punishment Generally

Degrees of punishment

718.3 (1) Where an enactment prescribes different degrees or kinds of punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence.

Discretion respecting punishment

(2) Where an enactment prescribes a punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence, but no punishment is a minimum punishment unless it is declared to be a minimum punishment.

Imprisonment in default where term not specified

(3) Where an accused is convicted of an offence punishable with both fine and imprisonment and a term of imprisonment in default of payment of the fine is not specified in the enactment that prescribes the punishment to be imposed, the imprisonment that may be imposed in default of payment shall not exceed the term of imprisonment that is prescribed in respect of the offence.

Cumulative punishments

(4) The court or youth justice court that sentences an accused may direct that the terms of imprisonment that are imposed by the court or the youth justice court or that result from the operation of subsection 734(4) or 743.5(1) or (2) shall be served consecutively, when

Peines en général

Degré de la peine

718.3 (1) Lorsqu'une disposition prescrit différents degrés ou genres de peine à l'égard d'une infraction, la punition à infliger est, sous réserve des restrictions contenues dans la disposition, à la discrétion du tribunal qui condamne l'auteur de l'infraction.

Appréciation du tribunal

(2) Lorsqu'une disposition prescrit une peine à l'égard d'une infraction, la peine à infliger est, sous réserve des restrictions contenues dans la disposition, laissée à l'appréciation du tribunal qui condamne l'auteur de l'infraction, mais nulle peine n'est une peine minimale à moins qu'elle ne soit déclarée telle.

Emprisonnement à défaut de paiement d'une amende

(3) Lorsque l'accusé est déclaré coupable d'une infraction punissable à la fois d'une amende et d'un emprisonnement et qu'une période d'emprisonnement à défaut de paiement de l'amende n'est pas spécifiée dans la disposition qui prescrit la peine à infliger, l'emprisonnement pouvant être infligé à défaut de paiement ne peut dépasser l'emprisonnement prescrit à l'égard de l'infraction.

Peines cumulatives

(4) Le tribunal ou le tribunal pour adolescents peut ordonner que soient purgées consécutivement les périodes d'emprisonnement qu'il inflige à l'accusé ou qui sont infligées à celui-ci en application des paragraphes 734(4) ou 743.5(1) ou (2) lorsque, selon le cas :

(*a*) the accused is sentenced while under sentence for an offence, and a term of imprisonment, whether in default of payment of a fine or otherwise, is imposed;

(*b*) the accused is found guilty or convicted of an offence punishable with both a fine and imprisonment and both are imposed;

(*c*) the accused is found guilty or convicted of more than one offence, and

(i) more than one fine is imposed,

(ii) terms of imprisonment for the respective offences are imposed, or

(iii) a term of imprisonment is imposed in respect of one offence and a fine is imposed in respect of another offence; or

(*d*) subsection 743.5(1) or (2) applies.

1995, c. 22, s. 6; 1997, c. 18, s. 141; 2002, c. 1, s. 182.

a) l'accusé est, au moment de l'infliction de la peine, sous le coup d'une peine et une période d'emprisonnement lui est infligée pour défaut de paiement d'une amende ou pour une autre raison;

b) l'accusé est déclaré coupable d'une infraction punissable d'une amende et d'un emprisonnement, et les deux lui sont infligés;

c) l'accusé est déclaré coupable de plus d'une infraction et, selon le cas :

(i) plus d'une amende est infligée,

(ii) des périodes d'emprisonnement sont infligées pour chacune,

(iii) une période d'emprisonnement est infligée pour une et une amende est infligée pour une autre;

d) les paragraphes 743.5(1) ou (2) s'appliquent.

1995, ch. 22, art. 6; 1997, ch. 18, art. 141; 2002, ch. 1, art. 182.

Commencement of sentence

719. (1) A sentence commences when it is imposed, except where a relevant enactment otherwise provides.

Début de la peine

719. (1) La peine commence au moment où elle est infligée, sauf lorsque le texte législatif applicable y pourvoit de façon différente.

Time at large excluded from term of imprisonment

(2) Any time during which a convicted person is unlawfully at large or is lawfully at large on interim release granted pursuant to any provision of this Act does not count as part of any term of imprisonment imposed on the person.

Exclusion de certaines périodes

(2) Les périodes durant lesquelles une personne déclarée coupable est illégalement en liberté ou est légalement en liberté à la suite d'une mise en liberté provisoire accordée en vertu de la présente loi ne sont pas prises en compte dans le calcul de la période d'emprisonnement infligée à cette personne.

Determination of sentence

(3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.

Infliction de la peine

(3) Pour fixer la peine à infliger à une personne déclarée coupable d'une infraction, le tribunal peut prendre en compte toute période que la personne a passée sous garde par suite de l'infraction; il doit, le cas échéant, restreindre le temps alloué pour cette période à un maximum d'un jour pour chaque jour passé sous garde.

Exception

(3.1) Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody unless the reason for detaining the person in custody was stated in the record under subsection 515(9.1) or the person was detained in custody under subsection 524(4) or (8).

Exception

(3.1) Malgré le paragraphe (3), si les circonstances le justifient, le maximum est d'un jour et demi pour chaque jour passé sous garde, sauf dans le cas où la personne a été détenue pour le motif inscrit au dossier de l'instance en application du paragraphe 515(9.1) ou au titre de l'ordonnance rendue en application des paragraphes 524(4) ou (8).

Reasons

(3.2) The court shall give reasons for any credit granted and shall cause those reasons to be stated in the record.

(3.2) Le tribunal motive toute décision d'allouer du temps pour la période passée sous

Motivation obligatoire