CRIMINAL LAW UPDATE 2025 - June 2026

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A. HIGH COURT

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The King v McGregor [2026] HCA 3 *NSW aggregate sentences and Commonwealth offences*

Obeid; Obeid & McDonald v The King [2026] HCA 1 *Common law offence of conspiracy to commit misconduct in public office*

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Brawn v The King [2025] HCA 20 *Common form criminal appeal provision – "third limb" - error or irregularity must be material to establish miscarriage of justice - 'test for materiality' - s 6(1) Criminal Appeal Act 1912*

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B. SUPREME COURT

C. LEGISLATION

Crimes (Sentencing Procedure) Amendment (Good Character) Bill 2026 ('The Second Bill')

Crimes Amendment (Animal Sexual Abuse) Act 2024

Children (Criminal Proceedings) and Young Offenders Legislation Amendment Act 2025

Crimes Amendment (Intimate Image and Audio Material) Act 2025

Crimes Amendment (Intimate Image and Audio Material) Act 2025

Terrorism and Other Legislation Amendment Act 2025

Crimes (Administration of Sentences) Amendment (Standard of Proof) Act 2025

Crimes Legislation Amendment (Domestic Violence and Sexual Offences) Act 2025

Crimes (Sentencing Procedure) Amendment Act 2025

Crimes Amendment (Sexual Offences and Female Genital Mutilation) Act 2025

Bail Amendment (Ban on Private Electronic Monitoring) Act 2025

Crimes Amendment (Inciting Racial Hatred) Act 2025

Crimes Amendment (Places of Worship) Act 2025

Crimes Legislation Amendment (Racial and Religious Hatred) Act 2025

Jury Amendment Act 2024

SENTENCE

1. GENERAL

Principles for determining whether a s 166 certificate offence is a "related offence"

Comer v R [2025] NSWCCA 164

> ss166-167 *Criminal Procedure Act* allow a court to deal with "related" or "back-up" offences on a certificate and transferred to a court on committal for sentence.
>
> s 165 provides that a "related" offence is a summary offence, or indictable offences dealt with summarily, arising from "substantially the same circumstances" as the first indictable offence.

The applicant, subject to a child protection order, admitted to police he failed to comply with reporting obligations. Thirty minutes after, police located firearms and ammunition at his residence and workplace. A year later, he resisted arrest on outstanding warrants, after which a loaded firearm was found.

The CCA held that the s 166 certificate offences (fail to report and resist arrest) were "related offences" under s 165 to the drug and firearms offences.

Principles for determining "related offences"

Whether a s 166 certificate is a 'related offence' is considered having regard to the following principles:

1. There may be no "bright line"; each case will turn on its own facts
2. The provision should not be read to impose limitations not found in the statutory language
3. "Circumstances" includes time, place, manner, and other accompanying details of the first indictable offence
4. "Substantially" qualifies the text that follows it, and is left to the discretion of the judge of fact according to the circumstances: *Palser v Grinling* [1948] AC 291 at 317; *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 42 FLR 331 at 348
5. A temporal element can be important but not determinative
6. An offence leading soon afterwards to the *detection* of the first indictable offence might be insufficient alone, but could be relevant in combination with other factors;
7. There is no need for either the related offence or the first indictable offence to have occurred first in time
8. The provision's purpose is efficiency in the administration of justice, compelling a broad construction
9. The legislative history demonstrates an intention to broaden the Court's jurisdiction, further supporting a broad construction.

Application

Resist arrest: there was no temporal separation from the firearms and/or drugs offences, all charged as occurring when discovered. Given the closeness in time and place and the factual nexus, it arose from substantially the same circumstances as the firearms offence: at [126]-[129].

Fail to report: This was the triggering event leading to arrest for the first indictable offence. It was relatively close in time, and factually connected, as the failure included not reporting the correct workplace, where police attended and located the relevant items constituting the first indictable offence: at [130]-[132].

Children (Criminal Proceedings) Act 1987 (C(CP) Act), s 31 - related offences on s 31 certificate transferred to District Court - not open to impose sentence of imprisonment, according to law

LG v R [2025] NSWCCA 185

> s 31(6) *Children (Criminal Proceedings) Act 1987* states the Children's Court may transfer back up or related offences when it commits indictable or serious children's indictable offences to another court.

The CCA held the District Court could not impose imprisonment for related offences transferred from the Children's Court on a s 31 certificate: at [51].

By s 168(3) *CPA* and s 31(7) *Children (CP) Act*, the District Court exercises the same powers and is subject to the same limits as the Children's Court when dealing with related offences: at [51].

Relevantly, the Children's Court is confined to Part 3 Div 4 orders and, under s 33(4), is expressly restricted from imposing sentences of imprisonment: at [51].

Section 18 (which permits the District Court to deal with an indictable offence other than a serious children's indictable offence according to law) does not extend to sentencing for related s 31 certificate offences: at [53].

On re-sentence, the CCA set aside imprisonment and imposed control orders.

Children's Court - aggregate control order limited to 3 years – single control order limited to 2 years - ss 33(1)(g), 33A(4) Children (Criminal Proceedings) Act 1987

DPP (NSW) v PD [2025] NSWCA 249

The Children's Court:

> may make a control order for a period not exceeding 2 years: s 33(1)(g) *CCPA*.
>
> must not make a new control order, or give a direction, if it would require a person to be detained for a continuous period of more than 3 years (taking into account any other control orders): s 33A(4).

The Court of Appeal considered the important question of whether the *Children (Criminal Proceedings) Act 1987* permits a single aggregate control order exceeding 2 years (up to 3 years) or requires multiple orders once total control exceeds 2 years . (It is common ground that the total period during which a person could be subject to continuous control was 3 years): at [30].

The Children's Court sentenced PD to a single 3-year aggregate control order (NPP 18 months). The Supreme Court held this was impermissible as 33(1)(g) limits a control order, including an aggregate control order, to 2 years. The Supreme Court re-sentenced PD to the same effective sentence using two separate orders (*PD v DPP (NSW)* [2025] NSWSC 16).

The DPP appealed, submitting the *CCPA* permits an aggregate control order up to 3 years, and the 2-year limit applies only to a single-offence control order.

The Court of Appeal allowed the appeal, holding a single aggregate control order may be up to 3 years.

- s 49(2) *CSPA*, applied to Children's Court proceedings via s 33C(1), limits aggregate sentences to the sum of maximum sentences that could have been imposed if separate sentences were imposed. "Imprisonment" is taken to mean a "control order". Section 33A(4) caps continuous multiple control orders (whether aggregate or cumulative) at 3 years, setting the overall maximum: at [15], [18]. Section 33A(4) operates like s 58(1) *CSPA*, but with a lower limit (3 years instead of 5).
- Although s 53B *CSPA* extends aggregate sentencing in general, s 33A(4) overrides and fixes the Children's Court maximum at 3 years: at [92]-[95].

A single aggregate control order of up to 3 years is valid. The same maximum applies whether sentences are aggregate or cumulative. Aggregate orders are simpler and easier for young offenders to understand. It avoids making that limit depend on whether the sentencing judge chooses cumulative or aggregate sentencing which would be arbitrary: at [82]-[83].

Advocate appeared for two offenders in sentencing proceedings – no conflict of interest - no waiver of privilege – reliance on record of court below – no evidence tendered on appeal

***Decision Restricted v R* [2025] NSWCCA 49**

The applicant and his co-offender were jointly represented by senior counsel at sentence in the District Court.

The applicant's sole appeal ground was that he and his co-offender were not separately represented at sentence. On the appeal, the applicant declined to waive privilege to enable the respondent to adduce evidence from the lawyers who appeared in the District Court.

The CCA dismissed the appeal. The evidence did not allow a finding that the barrister who appeared for both offenders had a conflict of interest such that a miscarriage of justice was occasioned: at [64]-[65].

- There is no rule of practice or ethics that one counsel cannot act for two co-offenders in sentencing proceedings: at [60].
- A conflict of interest will not be established merely because appellate counsel can conjure submissions that "could" have been made and which had "some possible merit": at [57]-[61].
- An applicant may need to adduce evidence to establish possibility of a conflict of interest not addressed by counsel. Failure to waive privilege may leave the court with little or no evidence of matters said to have caused the proceedings to miscarry: at [62].

Error where aggregate non-parole period (NPP) greater than the sum of the two indicated non-parole periods

Portnoy v R [2025] NSWCCA 60

The sentencing judge was required to indicate non-parole periods as part of the sentences indicated for two offences with standard non-parole periods (s 54B *CSPA*).

The CCA found error where the aggregate non-parole period exceeded the total of the two indicated non-parole periods by one month.

A non-parole period which exceeds the sum of the indicated non-parole periods leads to the inference of error. It is also inconsistent with the judge's finding the circumstances of the offences supported "significant concurrency" of sentences indicated. The non-parole periods indicated can be examined to illustrate whether an error occurred in the application of the principle of totality: at [32]-[35]; authorities cited.

Fail to distinguish between being liable for offence as part of joint criminal enterprise and culpability of a participant by reason of role - moral culpability not given consideration

York v R [2025] NSWCCA 81

The applicant was sentenced for use offensive weapon in company with intent to prevent lawful apprehension (s 33B(2) *Crimes Act* 1900) and destroy property by fire (s 195) in context of a joint criminal enterprise.

While he drove a vehicle, his co-offender passenger pointed a firearm at people pursuing them. The sentencing judge found it "immaterial who was driving and who was brandishing the shotgun". The judge also rejected a defence submission that there was a reasonable possibility that the co-offender started the fire.

The CCA allowed the applicant's appeal.

- The judge failed to distinguish between liability in a joint criminal enterprise and individual culpability of a participant based on their role. The applicant's moral culpability was not given consideration: at [49]-[50]; *R v JW* (2010) 77 NSWLR 7; *R v Sukkar* [2011] NSWCCA 140.
- On re-sentence for the s 33B(2) offence, the CCA found moral culpability reduced by the role played, i.e. driving the vehicle. The applicant did not provide, handle or use the firearm: at [84].
- For the s 195 offence, the judge erred in rejecting the reasonable possibility that the co-offender started the fire: at [51]-[52]. As there was such little evidence about who lit the fire, it cannot be found beyond reasonable doubt it was the applicant, and no reason to distinguish the moral culpability between offenders: at [85].

Form 1 - error in having regard to Form 1 in assessment of objective seriousness for principal offences

Roulstone v R [2025] NSWCCA 7

The applicant was sentenced for 4 counts of dishonestly obtain property by deception concerning $1.3m, with 12 further offences concerning $3.4m taken into account on four Forms 1 (*Crimes Act 1900,* s 192E(1)(b)).

The sentencing judge erred by having regard to the quantum and date range for the Form 1 offences when assessing the objective seriousness of the four principal charges. Offences on a Form 1 cannot be taken into account to elevate objective seriousness of a principal offence: at [130]; *A-G's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* [2002] NSWCCA 518 (Form 1 Guideline judgment); *RO v R* [2019] NSWCCA 183; *Tukuafu v R* [2024] NSWCCA 84.

The unorthodox approach made the sentencing task difficult. The manner in which the charge bargaining and agreed facts were arrived at appear contrary to the Form 1 Guideline judgment and *Prosecution Guidelines 4.5*. There was a *clear* imbalance between criminality on the Forms 1 and indictment: at [135]-[139].

Form 1 matters – error in indicating starting point for one offence before taking into account guilty plea discount and Form 1 offences

Koosmen v R [2025] NSWCCA 122

The applicant received an aggregate sentence for manslaughter and three property offences including Form 1 matters (s 33 *CSPA*).

The CCA allowed the appeal on grounds that the sentencing judge erred in approach to the Form 1 matters and application of the discount in respect of the manslaughter offence: at [102].

- It is not permissible to impose a distinct penalty for Form 1 offences. A sentence is determined by reference to the additional need for personal deterrence and retribution arising from the Form 1 offences. This means that the principle of proportionality falls to be assessed by reference to matters which include those additional factors. The discount for a guilty plea is to be applied to the sentence after the Form 1 matters have been taken into account: at [90]-[92]; *AG's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* [2002] NSWCCA 518.
- The judge erred in approach to the manslaughter offence. The judge indicated a starting point of 14 years "before discount and absent the matters on the Form 1". He then applied a 25% discount and took the Form 1 matters into account to nominate an indicative sentence of 12 years: at [93].

  A 25% discount resulted in a reduction of 3 years 6 months to 10 years 6 months' imprisonment. It is implicit in the judge's approach that an additional period of 18 months for the Form 1 offences was identified and added to the indicative sentence once a discount was applied: at [96]-[99]; *Huang v R* [2019] NSWCCA 114 at [41].

Special circumstances - Crimes (Sentencing Procedure) Act 1999, ss 44(2), (2B)

Duncan v R [2026] NSWCCA 19

s 44(2) *CSPA 1999* provides that the balance of term of a sentence must not exceed one-third of the non-parole period (or the non-parole period must not be less than 75% of the total sentence) unless there are special circumstances.

This applies to aggregate sentences: s 44(2B).

On appeal, the applicant submitted the sentencing judge failed to give effect to special circumstances by overlooking impact on the NPP ratio. The applicant was sentenced for drug and firearm offences while already serving a sentence for an armed robbery. The judge found special circumstances due to drug dependency and need for extended supervision, and imposed a largely concurrent sentence with some accumulation, increasing the total effective sentence by 2 months but the total NPP by 6 months. The overall NPP was 71.8%, below the usual 75% required by law unless the court finds special circumstances.

The CCA dismissed the appeal.

The question on appeal reduces to whether such impact was the result of inadvertence or miscalculation: at [26]-[29]; *Harris v R* [2023] NSWCCA 44, *GP v Regina* [2017] NSWCCA 200*; Lonsdale v R* [2020] NSWCCA 267.

The judge did not fail to advert to the effect of accumulation on the ratio between the NPP and total sentence. It may have been preferable the judge state they were aware that the proportion of the NPP to the head sentence would only be a little below 75%, an omission that sometimes leads this Court to intervene. However, it was not necessary where the judge's reasons to the applicant included specifically the impact the sentence would have on the existing sentence: at [26], [34]–[35].

General principles

Some principles regarding special circumstances were set out at [29] (authorities omitted):

1. Section 44 provides that unless there are "special circumstances" the additional term must not exceed one-third of the NPP (or the NPP must not be less than 75% of the total sentence).
2. Special circumstances ought not to be rigidly defined.
3. A statutory duty to give reasons arises where the additional term exceeds one-third of the minimum term; there is no such duty where the NPP exceeds 75% of the total sentence.
4. However, where the NPP exceeds 75%, the sentencing judge is expected to acknowledge that outcome and the reason for diverging from the "statutory ratio" or "statutory norm".
5. Where the NPP exceeds 75%, or accumulation significantly interferes with sentence proportions, it is incumbent on the sentencing judge to consider or advert to the effect of accumulation.
6. The accumulation of sentences will often justify a finding of special circumstances because it impacts the ratio between the total sentence and the NPP.
7. Whenever sentences are accumulated, careful consideration must be given to the principle of totality, and accumulated sentences should usually be adjusted downwards to produce an acceptable total sentence.
8. The question is whether the record of proceedings leads to an inference that the matter was considered or adverted to.
9. The focus should not be solely on percentage proportions; the actual periods involved are equally, and probably more, important.
10. Where there is an existing sentence, the judge is not required to perform calculations of proportions, though doing so may dispel inadvertence.
11. Accumulation, concurrence, special circumstances and non-parole adjustment are matters within the wide discretionary judgment of the sentencing judge.

Consideration of irrelevant material inadvertently put before court - material error

Maximos v R [2026] NSWCCA 22

M was sentenced in 2024 for eight proceeds of crime offences. At sentence, the Crown tendered material referring to four AVO breach offences and an intimidation charge from 2019–2020. It was later realised this material had been redacted and should not have been before the judge. In fact, there was only one rolled-up AVO breach dealt with by a conditional release order; the remaining three AVO charges and the intimidation charge were withdrawn.

The CCA allowed the appeal. Through no fault of the sentencing judge, the factual basis on which M was sentenced was not reasonably open and the error was material: at [97], [102]; *House v R* (1936) 55 CLR 499; *Hancock v R* [2025] NSWCCA 213.

The judge had referred to the erroneous material in remarks, in discussion on suitability of an Intensive Correction Order, the applicant's criminal record and chronology of offending and when assessing likelihood of reoffending. The issue involving the prior domestic violence conduct was the subject of argument: at [96], [98], [101].

No requirement to place finding of objective seriousness on a putative range for SNPP offence

Daher v R [2026] NSWCCA 26

The CCA held the sentencing judge proceeded on the mistaken basis that objective seriousness for an SNPP offence must be assessed within a range: at [23]. There is no such *requirement*; It is neither an error

to do so nor an error to *fail* to do so. What is important is identifying the "facts, matters and circumstances" bearing on gravity: [14]; *Muldrock v The Queen* (2011) CLR 120 at [60]; *CSPA*, s 54B(6).

While placing seriousness within a range may be helpful, decisions of this Court reflect differing views on the utility of doing so: at [12]–[13]; *R v Eaton* [2023] NSWCCA 125.

The appeal was dismissed as it was open to find the offence in the mid-range: [19]–[20]; *Hancock v R* [2025] NSWCCA 213 at [46], [74].

Fail to determine the extent to which mental illness reduced moral culpability, and its impact on general deterrence

Taylor v R [2026] NSWCCA 32

At sentence proceedings, the parties joined issue on the extent of any reduction of moral culpability based on mental health.

The CCA allowed the applicant's appeal. The sentencing judge failed to address whether the applicant's mental health issues impacted moral culpability and the role of general deterrence.

- Sentencing courts must make findings as to objective seriousness but also make separate findings on moral culpability where mental illness, intellectual disability or *Bugmy* considerations arise, and then assess how any reduction affects factors such as general deterrence: at [114]; *Muldrock v The Queen* (2011) 244 CLR 120; *Bugmy v The Queen* (2013) 249 CLR 571.
- Although the judge considered psychological evidence, no finding was made as to the extent of reduced moral culpability, its effect on general deterrence, or moral culpability at all; nor could this be inferred: at [119], [121]-[124]; *Sampson v R* [2025] NSWCCA 25.
- The *extent* of reduced moral culpability was the central issue. Agreement that moral culpability has been reduced is not the end of the exercise. The court is required to go on and consider sentencing consequences, which was not done: at [129]; *NK v R* [2025] NSWCCA 73.

Ponfield: use with caution; avoid unqualified application - Bugmy: causal link not a prerequisite to reduced moral culpability but may strengthen case for reduction.

Whereat v R [2026] NSWCCA 73

The applicant appealed sentence for BES offences, submitting the sentencing judge erred by:

(1) relying on the guideline judgment *R v Ponfield* (1999) 48 NSWLR 327 when assessing objective seriousness; and

(2) requiring a causal link between disadvantaged background and offending before reducing moral culpability under *Bugmy v The Queen* (2013) 249 CLR 571.

The CCA dismissed the appeal.

Ponfield guideline

- Courts should exercise caution when relying on *Ponfield*, as it has largely been overtaken by statute, but it is not an error to refer to it when assessing objective seriousness: at [18], [21-[22]; *Mapp v R* [2010] NSWCCA 269.
- Any reliance in submissions or sentencing remarks should be qualified and acknowledge authorities casting doubt on aspects of *Ponfield*, to avoid unqualified application and ensure compliance with the *Crimes (Sentencing Procedure) Act*: at [20].
- No error found where the judge relied on five relevant *Ponfield* factors – none shown to be irrelevant to objective seriousness and all within permissible s 21A *CSPA* considerations: at [24].

Bugmy principles

- Under *Bugmy*, a causal link between deprivation and offending is not required before moral culpability can be reduced. However, the existence of a causal link remains a relevant consideration: at [30]-[33].

- The judge did not treat a causal link as essential. Rather, the judge found that both that no causal link was established and that the evidence of deprivation was insufficient to reduce moral culpability: at [35], [38].

Federal offenders - steps when imposing a sentence of imprisonment – fail to consider alternatives to full-time imprisonment where alternatives were available and subject of argument

YZ v R [2025] NSWCCA 165

At sentence proceedings, the applicant made lengthy submissions on alternatives to full-time imprisonment. The sentencing judge, satisfied no other sentence than imprisonment was appropriate (s 17A(1) *Crimes Act 1914*) and upon determination of the appropriate sentence (s 16A(1) *Crimes Act 1914*), imposed full-time imprisonment.

On appeal, the applicant submitted error in failing to consider alternatives to full-time imprisonment.

The CCA allowed the appeal. The judge failed to consider alternatives to full-time imprisonment after fixing the term.

There are three steps in determining a sentence of imprisonment:

1. Determine whether the relevant statutory threshold is crossed such that no penalty other than a term of imprisonment is appropriate (s 17A(1));

2. Determine the appropriate term of the sentence of imprisonment (s 16A);

3. Where the issue arises, to consider alternatives to full-time imprisonment: *Vamadevan v The King* [2024] NSWCCA 223 at [57]; *Larkin v The Queen* [2012] WASCA 238.

Two questions fall for consideration. The first is whether the judge was required to undertake this third stage in the sentencing exercise. The second is whether the judge did so: at [53].

The judge was required to undertake the third stage which ceases to be optional when alternatives to full-time imprisonment have been the subject of substantial argument during a sentencing hearing. The judge did not undertake the necessary third stage. Having determined the appropriate term of imprisonment, the judge proceeded immediately to order full-time custody, which is indicative of error: at [54]-[55].

The absence of reasoning meant the court could not infer that the third stage was undertaken. The correct process was not followed: at [57]; *Casella v R* at [63].

Federal offenders - fail to consider alternatives to full-time imprisonment when subject of substantial debate at sentencing hearing

Sayyaketh v R (Cth) [2026] NSWCCA 48

The applicant received a 3-year sentence with release on a recognisance release order (RRO) after 2 years for a federal drug offence.

The CCA allowed the appeal where the sentencing judge failed to consider and give reasons for rejecting substantial submissions for an *immediate* RRO.

The judge asked "how much" time should be served in custody, which suggested the judge proceeded on the basis that imprisonment was required, despite "none" being an option: at [29]–[30]. Central to the case was whether, despite satisfying s 17A *Crimes Act 1914* (imprisonment a last resort) an immediate RRO was appropriate. The judge was required to address and give reasons for rejecting that submission: at [21]–[27]; *YZ v R* [2025] NSWCCA 165).

Sentencing a federal offender involves:

1. Deciding if the s 17A threshold is met;
2. Fixing the term of imprisonment 9s 16A); and
3. Considering alternatives to full-time custody (mandatory where substantially argued).

Consideration of step (3) is not required in every case, but it becomes mandatory where alternatives to full-time imprisonment have been the subject of substantial argument during a sentencing hearing: at [23]-[25]; *YZ v R*.

Federal offenders – cultural practice – forced marriage - s 16A(2A) Crimes Act 1914 (Cth)

MAB v R [2025] NSWCCA 171

> Section 16A(2A) states that when sentencing for a federal offences, the court must not take into account any form of customary law or cultural practice as a reason for:
> (a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or
> (b) aggravating the seriousness of the criminal behaviour to which the offence relates.

The applicant was sentenced for attempting to cause a person under 18 to enter a forced marriage (ss 270.7B(1), 270.8 *Criminal Code* (Cth)). The applicant attempted to arrange marriages for his 17-year-old son and 15-year-old daughter, telling police it was the duty of a Punjabi father.

He appealed, arguing the judge misapplied s 16A(2A) by not considering cultural acceptance of his conduct in the Pakistani community when assessing moral culpability; and failed to follow *Muldrock v The Queen* (2011) 244 CLR 120 at [27], which requires objective seriousness to be assessed without reference to personal factors.

The CCA (Sweeney J; Stern JA agreeing; Garling J agreeing with different reasons) dismissed the appeal.

Relying on the majority decision in *Jan v DPP (Cth)* [2025] VSCA 43, s 16A(2A) renders cultural background and practices irrelevant to assessing the seriousness of a Commonwealth offence. *Jan v DPP* is the only intermediate appellate consideration of s 16A(2A). It is a reasoned decision. The applicant has not demonstrated compelling reasons why this Court should not follow it: at [69].

Muldrock is referable only to standard non-parole periods and is not "of broader import", and s 16A(2A) is not limited to a consideration of the objective seriousness of an offence: at [66].

Garling J held it was unnecessary to resolve the correctness of *Jan*, as the sentencing judge had found insufficient evidence of any relevant cultural practice in any event, and none had been properly advanced at sentence: at [5], [15]-[16].

2. MITIGATING FACTORS

Extra-curial punishment – no error declining to find loss of partner in suicide pact as extra-curial punishment

Baldwin v R [2026] NSWCCA 39

The applicant pleaded guilty to aid and abet suicide of his late wife (s 31C *Crimes Act 1900*) in the context of a 'suicide pact' which the applicant survived.

The applicant submitted the sentencing judge failed to recognise his grief and "quality and depth of the remorse" he suffered as extra-curial punishment, relying on *Hughes v R* [2008] NSWCCA 48; 185 A Crim R (a dangerous driving case where an unborn child was killed) at [50].

The CCA dismissed the appeal.

- This Court has distinguished between:
  - injuries deliberately self-inflicted - not recognised as extra-curial punishment
  - unintentional self-inflicted injuries – which may be extra-curial punishment: at [54]; *Betts v R* [2015] NSWCCA 39 at [31]-[35]; *Quinn v R* [2018] NSWCCA 297 at [261]-[265].
- Aid / abet suicide is an intentional offence where death of the victim is an inevitable consequence. However, the applicant argued on appeal his grief should not be treated as deliberately self-inflicted: see at [57]-[58].
- Grief and despair can constitute extra-curial punishment if at a level where it could properly be regarded as self-punishment: at [57]-[59].
- However, the sentencing judge rejected the factual premise that the applicant suffered grief which had manifested itself as a form of "self-punishment" and found no genuine remorse. Instead, the judge found "mixed feelings" , blaming and lack of insight in seeking help: at [61]-[62].
- The case highlights how extra-curial punishment is heavily dependent on particular facts of the case: at [56].

Fail to take into account prospects of rehabilitation where significant issue at sentence

Snounou v R [2025] NSWCCA 231

The CCA found the sentencing judge erred by failing to address prospects of rehabilitation (s 21A(3)(h) *CSPA*) and any explanation on how that matter had been taken into account where the evidence and submissions at sentence proceedings demonstrated that the matter was a significant issue: at [56], [59]-[61].

Judges are not required to address all possible sentencing considerations but are required to consider and decide issues "that arise in the proceedings before them": at [54]; *Meoli v R* [2021] NSWCCA 213 at [42]; *DL v The Queen* (2018) 266 CLR 1 at [32] – [33].

Absence of any reference to rehabilitation indicated failure to consider or to explain how that factor had been taken into account (cf. *Bhatia v R* [2024] NSWCCA 28 at [34] where, having heard evidence as to prospects of rehabilitation, the sentencing judge declined to make a finding about the issue).

An inference that the judge reached a favourable but unexpressed view was not available given the applicant's prior convictions. Thus, the judge was obliged to make a finding or to explain in remarks how that matter had been taken into account: at [52]-[54].

Remorse not a prerequisite to finding of prospects of rehabilitation

FRP v R [2025] NSWCCA 178

The CCA allowed the applicant's sentence appeal for child sex offences. The sentencing judge erred by reasoning that a finding of good prospects of rehabilitation was conditional on remorse and/or insight.

- Existence of remorse is not a prerequisite to a finding of prospects of rehabilitation (*Alseedi v R* [2009] NSWCCA 185 at [65]). However, remorse is a major factor in determining likelihood of re-offending (*MLP v R* [2014] NSWCCA 183 at [34]): at [54]-[55].
- The judge was entitled to find the applicant lacked remorse and this "*did not bode well*" for prospects of rehabilitation : at [56].
- But the judge accepted unchallenged evidence that the applicant was willing to engage in appropriate courses, and that the applicant's age reduced reoffending risk particularly whilst serving a sentence of imprisonment: at [58]-[60].

  Despite this, the judge's remarks suggest that without remorse or insight, rehabilitation prospects could not be positive. The manner in which the judge expressed his findings was erroneous and not based on any factual material: at [56], [61]-[63].
- The error further affected the judge's finding that personal deterrence was a "significant factor": at [63].

Correct approach to application of principles in Bugmy v The Queen (2013) 249 CLR 571
NK v R [2025] NSWCCA 73

The applicant was sentenced for child sexual offences against KL and domestic violence offences against his wife SK.

The CCA allowed the appeal, finding error in the application of *Bugmy v The Queen* (2013) 249 CLR 571.

- The sentencing judge accepted the applicant's background of violence but did not reduce moral culpability in accordance with *Bugmy* due to the importance of general deterrence in sentencing for domestic violence offending. The judge conflated the requirement in *Bugmy* to give "full weight" to childhood deprivation with the need in cases of domestic violence to give appropriate weight to general deterrence: at [96].
- Correct application of the *Bugmy* principles involves:

  (i) assessment of whether background reduces moral blameworthiness;
  (ii) if so, then considering its impact on sentencing purposes;
  (iii) even where reduction in moral culpability is offset by weight afforded to one or more sentencing purposes, a background of disadvantage must be given "full weight": [110]-[114].

- The judge erred because she failed to consider (ii), that is, how background impacted in other factors (aside from deterrence) including denunciation, specific deterrence, and rehabilitation, for *all* offences: at [104]. The remarks also do not show how background was taken into account on the child sexual offences: at [106]–[107].

Summary of key principles in Bugmy v The Queen (2013) 249 CLR 571

YZ v R [2025] NSWCCA 165

The CCA summarised key principles that have emerged since *Bugmy* was decided.

Correct application of the *Bugmy* principles involves 3 considerations (*NK v R* [2025] NSWCCA 73 at [110]-[113]):

(1). Determine whether background is one of "deprivation" or "disadvantage" and whether it affects an offender's moral blameworthiness: *NK* at [110]. It need not be "profound" or "sustained" to enliven *Bugmy* principles (*Hoskins v R* [2021] NSWCCA 169 at [57]; *Nasrallah v R* [2021] NSWCCA 207 at [110]-[111]): at [63]. Relevant principles are (at [64]):

(i) Moral culpability may be reduced by a causal link between background and the offending: *DR v R* [2022] NSWCCA 151 at [37]; *Dungay v R* [2020] NSWCCA 209 at [153].

(ii) However, a causal link is not required to make a finding of reduced moral culpability: *Dungay* [136]-[153]; *Hoskins* at [57]; *Nasrallah* at [88]; *Lloyd v R* [2022] NSWCCA 18; *R v MJ* [2023] NSWCCA 306 at [2]-[15].

(iii) Assessment of whether moral culpability is reduced by disadvantaged upbringing often involves one simple consideration: in all the circumstances, can it be accepted that the offender bears the same moral responsibility for their offending as a person of a privileged or conventional upbringing? If not, there must inevitably be a reduction in moral culpability.

(iv) Planning or lack of impulsivity do not preclude a finding of reduced moral culpability: see *Robertson v R* [2024] NSWCCA 22 at [111]-[114].

(v) The effects of a background of profound disadvantage "do not diminish with the passage of time": *Bugmy* at [43]. A long history of offending or a pro-social life between disadvantaged childhood and offending are also not barriers to reduced moral culpability: *Robertson* at [114], *Bugmy* at [43]-[44].

(2). If moral culpability is reduced, consider how this impacts sentencing purposes in s 3A *CSPA* (or for Commonwealth offenders, in s 16A *Crimes Act 1914*): at [65]-[67]. Reduction in moral culpability does not automatically translate to a reduced sentence (*Harris v R* [2021] NSWCCA 322 at [89]). Regard must be had to relevant countervailing factors (*Munda v Western Australia* (2013) 249 CLR 600): at [67].

(3). Even if a reduction in moral culpability is offset by the weight given to sentencing purposes, a deprived background must be given "full weight": *Bugmy* at [44], *NK* at [113].

Youth – children - "adult like conduct"

TH v R [2025] NSWCCA 121

The applicant, aged 15 years 11 months, was sentenced for two counts of aggravated sexual assault (s 61J *Crimes Act*) of his girlfriend, aged 14. The applicant restrained the complainant with a belt and assaulted her despite resistance.

The CCA (by majority) dismissed the applicant's appeal. The sentencing judge properly considered youth and disadvantage, and the sentence was not manifestly excessive.

The CCA made observations regarding "adult like conduct" when sentencing young offenders:

- It was open to the sentencing judge to find that youth had some impact on the weight to be given to general deterrence but that this principle "yields to others where young offenders commit crimes of an adult nature": at [95]-[96]; *KT v* R [2008] NSWCCA 5 at [25].

- However, "adult like conduct" is difficult to define. The indicia of "adult like conduct" can be vague, equivocal or obscure, particularly where children have increasing access to pornography and content through digital sources. Even with serious offending resembling "adult like conduct", one should not lose sight of the fact that a child's neurodevelopment, emotional maturity, impulse control and consequential thinking is less advanced than an adult: at [92]; *BP v R* [2010] NSWCCA 159; *TM v R* [2023] NSWCCA 185.
- The efficacy of labels such as "adult like conduct" may be questionable in some cases. The essential issue is assessment of objective seriousness: at [94]; *Singh v R* (2020) 104 NSWLR 43.

Principles for taking into account offender's history as a victim of childhood sexual abuse

RG v R [2025] NSWCCA 36

The CCA summarised principles for taking into account an offender's own childhood sexual abuse:

> (i) For a history of childhood abuse to be taken into account as reducing moral culpability, an offender must establish on a balance of probabilities the fact of the abuse.
>
> (ii) An offender must establish on a balance of probabilities that the history of abuse *was a contributing factor* in the offender's own offending conduct (emphasis added).
>
> (iii) A history of sexual abuse will not automatically lead to reduction of sentence. The important consideration is the consequences which flow from the earlier events.
>
> (iv) The weight which should be given to the history of sexual abuse will depend very much on the facts of the individual case (at [122]).

There was no error in not taking into account in mitigation the applicant's own childhood sexual abuse for multiple child sexual assaults upon his two daughters.

First, the sentencing judge had regard to his dysfunctional childhood, a feature of which was his sexual abuse. There was no requirement in this case to address that abuse separately. Second, the judge turned her mind to the extent to which dysfunctional childhood and mental health reduced moral culpability and determined that assessment be conducted in context of nature of the offending. It was open to approach the question of moral culpability in that way, given the extremely serious, persistent and prolonged offending: at [82]-[83].

Prior criminal history but no convictions - "good character" - positive (good works) and negative aspects (absence of prior convictions or lack of history of criminal or blameworthy conduct)

Warton v R [2025] NSWCCA 5

The applicant was convicted at trial for sexual offences by a person in authority. He had a criminal history but no prior recorded convictions.

On appeal, the applicant submitted the sentencing judge erred in finding that *the applicant's criminal history was "limited" but that he was disentitled to the leniency otherwise available to a person of good character*.

The CCA dismissed the appeal.

The judge recognised the applicant's history did *not* result in convictions; and took into account his "limited" history favourably in assessing rehabilitation and reoffending: at [62]-[64]; *Saunders v R* [2022] NSWCCA 174.

"Good character" has both positive aspects ("good works and contribution to the community") and negative ("absence of prior offending or convictions"). Previous criminal conduct cannot be treated as a "single undifferentiated whole" (*Weininger v The Queen* (2003) 212 CLR 629 at [25]): at [66]-[67]; *R v Levi* (CCA NSW, 15 May 1997, unrep); *Ryan v The Queen* (2001) 206 CLR 267.

The judge used "good character" as meaning absence of criminal convictions. The parties had agreed, for trial and sentence, that *because* the applicant had not previously committed either sexual or dishonesty offences (which 'sexual offences by person in authority' belonged to), he was of good character and the jury was directed accordingly: at [68]-[69]; *R v Price* [2005] NSWCCA 285 at [36].

The judge was not required to disregard the applicant's antecedents entirely. The antecedents showed no prior convictions but still showed criminal conduct. The judge expressly acknowledged previous offending did not result in convictions: at [70]-[72]; *R v I R Hall (No 2)* [2005] NSWSC 890; *R v Gent* [2005] NSWCCA 370; (2005) 162 A Crim R 29 at [59].

Mental health - De La Rosa [2010] NSWCCA 194 - test is whether a mental health condition "contributes to the commission of the offence in a material way" - "direct causal link" not required

Lane v R [2025] NSWCCA 113

The CCA allowed the applicant's sentence appeal for Commonwealth child abuse material offences. The sentencing judge erred in application of the principles in *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 by wrongly treating a direct causal link between the applicant's schizophrenia and the offending as necessary to reduce moral culpability: at [112].

Moral culpability may be reduced where mental illness contributes in a material way to the offending; but it need not be the direct or precipitating cause. Although the judge referred to *De La Rosa*, they effectively went on to adopt and equate the concept of a "direct causal link" with "contributing to the commission of the offence in a material way," which was erroneous: at [108]-[110]; *DS v R* (2022) 109 NSWLR 82 at [95].

The remarks indicated the judge accepted that social isolation and cognitive impairments from schizophrenia contributed to the offending but rejected their relevance because they were not seen as "direct" causes: at [111].

On resentence, the CCA found that serious relapse of schizophrenia that led to six weeks of involuntary hospitalisation before the offence, contributed to commission of the offence in a material way: at [120].

3. AGGRAVATING FACTORS

Denial of procedural fairness - substantial harm, s 21A(2)(g) CSPA – finding of aggravating factor not raised at sentence - finding of 'significant' harm – incorrect test applied

Brown (a pseudonym) v R [2025] NSWCCA 124

At sentence for sexual offences, the Crown set out aggravating features but not s 21A(2)(g) "substantial" emotional harm caused by the offence. The sentencing judge did not indicate that he was considering s 21A(2)(g), then found the offences aggravated by s 21A(2)(g) on the basis there was "significant" emotional harm to the complainant.

The CCA allowed the applicant's appeal, finding procedural unfairness and legal error in the judge's approach to s 21A(2)(g).

- *Procedural unfairness*: The judge gave no indication s 21A(2)(g) would be considered. The applicant was *led to believe* (*Stokes v R* (2008) 185 A Crim R 74; [2008] NSWCCA 123 at [87]) that the only aggravating factors to be considered were identified by the Crown. As the finding was not inevitable, the applicant was deprived of making submissions, causing practical injustice. The judge was required to notify the parties before departing from that approach (*Smith v R* [2024] NSWCCA 59 at [10], [69]: at [101].
- *Incorrect test applied*: The judge erred by finding "significant" rather than "substantial" emotional harm as required under s 21A(2)(g). This requires harm extending beyond what is ordinarily encompassed in offences of this kind (*R v Youkhana* [2004] NSWCCA 412; *R v Tuala* (2015) 248 A Crim R 502; [2015] NSWCCA 8 at [84]). Given the complexities of this aggravating factor, and lack of submissions, it cannot be assumed that the judge simply misspoke: at [103]-[105].

Finding of aggravating factor inevitable - procedural unfairness – threshold of materiality – no practical injustice

Dent v R [2025] NSWCCA 43

The applicant was sentenced for recklessly cause GBH. He attacked a member of the public with an axe at a hardware store.

On appeal, the applicant submitted that the sentencing judge erred in finding the offence aggravated by being committed "without regard for public safety" (s 21A(2)(i) *CSPA*). That finding was not pursued by the Crown, conceded by the defence or foreshadowed by the sentencing judge.

The CCA dismissed the appeal.

Although there was a breach of procedural fairness in that there was no indication nor opportunity to address, there remained the threshold question of materiality or practical injustice: whether it was open for the judge to find beyond a reasonable doubt that the offence was committed without regard for public safety: at [80]-[81]; *Smith v R* [2024] NSWCCA 59.

On the facts, attacking a person with an axe in a public hardware store readily supported such an inference. It was inevitable for the judge to find the factor proved beyond reasonable doubt, and thus no practical injustice arose: at [87]-[88]; authorities cited.

Relationship between guideline judgment of R v Ponfield and s 21A CSPA

MacBlane v R [2025] NSWCCA 52

The applicant was sentenced for BE and commit a serious indictable offence, larceny, under s 112 *Crimes Act 1900*. The sentencing judge referred to *R v Ponfield* (1999) 48 NSWLR 327, the guideline judgment for s 112, finding that relevant factors of aggravation were the applicant's criminal record of committing similar offences, and that he was subject to an Intensive Corrections Order. The judge took into account these factors in assessing objective seriousness.

The CCA held the judge erred in assessing objective seriousness by taking into account the offender's criminal record and that he was on conditional liberty, i.e. subject to an Intensive Correction Order.

The issue concerned the relationship between *R v Ponfield* (1999) 48 NSWLR 327 and s 21A *Crimes (Sentencing Procedure) Act 1999* (NSW).

Ponfield (at [48]) expressed that a court should regard the seriousness of a s 112 offence as "enhanced" if any listed factors are present. Relevantly, these include:

- The offence is committed whilst the offender is at conditional liberty on bail or on parole.
- The offender has a prior record particularly for like offences.

Section 21A(2) *CSPA* states that aggravating factors to be taken into account in determining sentence are, relevantly:

(d) The offender has a record of previous convictions.
(j) The offence was committed while the offender was on conditional liberty.

Ponfield is of limited utility. It was decided before s 21A *CSPA* and is little more than a statement of the general sentencing principles that applied at the time. *Ponfield* has been largely overtaken by statute: at [35]; *Mapp* v *R* [2010] NSWCCA 269.

It is now well established that prior criminal history and the fact the offence was committed while on conditional liberty are not relevant to assessment of objective gravity: at [35]-[36]; *Mapp; R v McNaughton* (2006) 66 NSWLR 566; *R v Way* (2004) 60 NSWLR 168.

Drug offences where drugs located in home - "presence of children" a relevant / aggravating factor

Tsoumbanellis v R [2025] NSWCCA 107

The applicant pleaded guilty to commercial drug supply commercial (s 25(2) *DMTA*) with Form 1 drug-related offences. The drugs were found in common areas of a home shared with his partner and her two children. The sentencing judge did not regard the aggravating factor in s 21A(2)(ea) to be made out for the supply offence but did for a Form 1 offence.

The applicant submitted the judge erred in nonetheless regarding the supply offence as serious on the basis that it "exposed the children to a danger", and finding the Form 1 offence aggravated under s 21A(2)(ea).

The CCA held dismissed the appeal:

- The judge did not err in regarding the supply offence as serious on the basis it "exposed the children to a danger". It was not necessary that the risk was realised before the judge could take this matter into account (cf. *McLaughlin v R* [2013] NSWCCA 152): at [55]-[56].
- There was no error in treating the presence of children as aggravating for the Form 1 offence of allowing premises to be used for drug activities, which even if not within s 21A(2)(ea) *CSPA*, increased culpability: at [55]-[56].

4. DISCOUNTS

Early Appropriate Guilty Pleas - s.25F(2) CSPA - finding of extreme culpability – meaning of "culpability in the commission of the offence" the same as in s 61(1) CSPA

Kovaleff v R [2026] NSWCCA 56

Section 25F(2) provides a court discretion to not apply the legislative EAGP mandatory scheme where the level of *culpability in the commission of the offence* is so extreme that no or reduced discount is warranted.

The offender pleaded guilty in the Local Court to murder and wound with intent to inflict GBH involving two separate victims.

The CCA held that the sentencing judge did not err in reducing the discount under s 25F(2) from 25% to 15% for the murder offence but erred in doing so for the wounding offence. The judge did not distinguish in his application of s 25F(2) between the murder offence and the wounding offence: at [71]-[73].

Meaning of "culpability in the commission of the offence"

- The term *"the level of culpability in the commission of the offence is so extreme"* in s 25F(2) is to be construed consistently with s 61(1) *CSPA* [Mandatory life sentences]: at [65].
- The focus of attention in s 61(1) is the 'level of culpability in the commission of the offence'. This assessment involves consideration of objective factors, such as objective seriousness, as well as subjective factors, such as the offender's background, criminal history and mental disease, disorder or incapacity: at [64]; *Rogerson; McNamara v R* [2021] NSWCCA 160.
- The assessment of culpability in s 61(1) is "directed to circumstances surrounding or causally connected to the offence" which can include an offender's mental state, motive or personal and troubled background: at [63], [64]; *Rogerson*; *R v Harris* (2000) 50 NSWLR 409.

For the murder offence, the finding that the level of culpability in the commission of the offence was so extreme was reasonably open, having regard to planning, intent to kill, violent fantasy motivating intention, wounds inflicted, callous behaviour in leaving the victim to die, and taking into account youth, immaturity and borderline intelligence: at [72].

For the wounding offence, stabbing the wounding victim once, youth, immaturity and borderline intelligence, could not justify a finding that the level of culpability was so extreme: at [71].

Inability of Local Court to reject plaintiff's guilty pleas to Table offences where agreed facts disclose commission of more serious offence

Reyter v Director of Public Prosecutions (NSW) [2026] NSWSC 100

Note: This case is relevant to the early guilty plea (EAGP) provisions because acceptance of a plea by the Local Court is a precondition of the usual 25% discount.

The Local Court rejected a guilty plea to Table offences (*Criminal Procedure Act 1986*, Sch.1) on the basis it did not have jurisdiction to hear the matter because the agreed facts disclosed a more serious, non-summary offence: at [7], [37].

The Court held the Local Court erred: at [7], [37].

- As the charges were Table offences, the Local Court had to deal with them summarily in the absence of an election. The presence of an aggravating circumstance did not give rise to an absence of jurisdiction: at [34]-35]; [37]-[38], [45].

- Whether the material disclosed a circumstance of aggravation was irrelevant to the jurisdiction of the Local Court to hear and determine the charge and to which the accused wished to plead guilty. The only relevance of that material was that it was required to be dealt with by the Local Court in accordance with the principle in *De Simoni* (1981) 147 CLR 383: at [39], [44]-[45].
- Further, s 194 obliges the magistrate to proceed to hear and determine the charge if it does not accept a guilty plea: at [46].

Early Appropriate Guilty Pleas - mandatory discounts for guilty pleas - offer to plead guilty in Local Court rejected, but later accepted in District Court on same terms - s 25D(2) CSPA, 25% discount applies only if plea is actually entered in Local Court

Rokovada v R [2025] NSWCCA 64

The applicant was charged with sexual offences. He made an offer to plead guilty to one count of sexual intercourse without consent on the factual basis that the complainant consented to all sexual activity except the act of ejaculation. The Crown rejected this offer. However, at a subsequent "Super Call-over" in the District Court, the Crown accepted an offer to plead guilty on the same terms as the applicant's earlier offer.

The sentencing judge allowed a 10% discount for the plea of guilty under s 25D(2)(b)(ii) *CSPA*.

Section 25D provides mandatory discounts for guilty pleas:

- 25% - where the guilty plea was accepted by the magistrate in committal proceedings: s 25D(2)(a)
- 10% - where the guilty plea was made at the first available opportunity after the offender was committed for trial: s 25D(2)(b)(ii)

On appeal, the applicant submitted that the judge erred in applying a 10% discount, and not a 25% discount under s 25D(2)(a), as it would be manifestly unfair given the Crown achieved no better result at the Super Call-over than it would have achieved in the Local Court. The case conference certificate filed in the Local Court recording his conditional offer to plead *should* be sufficient to establish under s 25D(2)(a) that a plea offer was made and "accepted" by the Magistrate as the offer to plead ultimately accepted by the Crown was in the same terms. The "literal" words of s 25D(2)(a), "guilty plea … accepted by the Magistrate in committal proceedings" ought to mean "offered to plead guilty in the Local Court": at [32]-[33], [49].

The CCA dismissed the appeal.

- The applicant falls squarely within the express words of s 25D(2)(b)(ii) since he pleaded guilty after having been committed for trial. Section 25D(2)(a) applies only to a plea of guilty which has been *made before*, and *accepted by*, a Magistrate in committal proceedings. The quantum of the sentencing discount in Division 1A "turns on the *actual* timing of the plea or the *actual* compliance with the pre-trial notice requirements": at [37]; *Green v R* [2022] NSWCCA 17 at [47]-[48]; *Black v R* (2022) 107 NSWLR 225.
- The legislative intention was that those who plead to an offence with which they have been charged in the Local Court will *only* be entitled to a 25% discount if the plea is *actually entered in the Local Court*. Parliament could have made a different legislative choice and based entitlement to a discount of 25% on an *offer to plead* rather than the *making and acceptance of a plea* to that offence: at [42]-[43].
- It was open to the applicant to plead guilty pursuant to s 97(1) *Criminal Procedure Act*, before he was committed for trial, to one of the two charges of sexual intercourse without consent. He chose not to, thereby losing entitlement to the discount under s 25D(2)(a). It is not to the point that there were practical forensic reasons, arising from s 25F(4), why the applicant might have been wary of entering a plea and engaging in a disputed facts hearing on the complainant's lack of consent: at [38].

Members of the Court made observations on the operation, inflexibility and potential unfairness of the statutory regime and desirability of review and possible reform: at [52]-[54], [61] (Hamill J); [65]-[69] (Ierace J).

Early Appropriate Guilty Pleas - mandatory discounts - error to round down discount to even months, s 25D CSPA - plea of guilty at District Court super callover may demonstrate facilitation of administration of justice, s 22A CSPA

Sampson v R [2025] NSWCCA 25

The applicant pleaded guilty at super call-over in the District Court to GBH with intent upon his partner. He was sentenced to 5y, NPP 3y.

The applicable EAGP discount was 10%: s 25D *CSPA*.

The sentencing judge stated, "*I have started the sentence at five and a half years and discounted it by 10%. In arriving at that start point I have taken into account the additional discount in relation to the super call-over* [s 22A]... *Having rounded the discount to even months, I impose a sentence of five years*."

The CCA allowed the applicant's appeal on the following grounds:

Error in rounding down 10% discount to even months

- It was not open to round the 10% discount in s 25D, either up or down: at [49]. Div 1A *CSPA* is a mandatory scheme subject only to exceptions in ss 25F(2), (4): at [43]-[44].
- Rounding the discount effectively reduced the discount. The judge was obliged to discount his starting point by 6.6 months (10% of 66 months), i.e. 6 months 18 days. The head sentence ought to have been 4 years 11 months 12 days. It would then have been open to round that down to take account of the "lesser penalty" in s 22A: at [44]-[45], [49].

s 22A *CSPA* can apply to a plea at super callover

- Section 22A can apply to a plea at super callover and is not confined to a "trial on indictment": at [36]-[37]; *BAP v R* [2024] NSWCCA 206. (In *BAP v R*, the CCA said that a plea of guilty at a District Court "super callover" may demonstrate facilitation of the administration of justice, over and beyond utilitarian value of the plea (*CSPA*, s.22A). Each case must be decided upon its own facts and circumstances: at [61]; *Doyle v R* (2022) 108 NSWLR 1; *R v Borkowski* (2009) 195 A Crim R 1).

Re-sentence: The CCA applied a 10% discount (s 25D), but none under s 22A as it would result in a sentence unreasonably disproportionate to the offending: at [117]. The applicant was re-sentenced to 4y 6m, NPP 2y 8m.

Guilty plea at super callover - discount for facilitation of justice pursuant to s 22A CSPA – factors said to facilitate justice not identified by defence counsel at sentencing hearing

Abdallah v R [2025] NSWCCA 98

An appeal ground asserting failure to address a submission that a lesser sentence should be imposed under s 22A *CSPA* will be likely to succeed only if the submission made at sentence identified the specific factors or circumstances said to constitute a sufficient degree of facilitation of the administration of justice, as opposed to the utilitarian value of the plea and remorse: at [58]; *BAP v R* [2024] NSWCCA 206 at [62].

In this case, although the issue was raised before the sentencing judge, there was no identification of any factor said to demonstrate facilitation of the administration of justice beyond the offer of a plea at a super callover: at [48]. The judge referred to a compelling Crown case and some acceptance of responsibility by the applicant. It is implicit the judge did not accept that the degree to which the administration of justice had been facilitated justified further lessening of sentence. In light of the way the issue was argued, the judge did in substance address the issue: at [52]-[55].

Fail to determine whether applicant facilitated the administration of justice, s 22A CSPA - error taking into account subjective matters by way of a quantified 2.5% discount

Snounou v R [2025] NSWCCA 231

The sentencing judge erred in not expressly determining whether the applicant had facilitated the administration of justice under s 22A *CSPA* where the applicant raised it as a significant issue: at [82].

Section 22A involves the exercise of discretion that the court "may impose a lesser penalty". However, the judge did not properly consider the exercise of the discretion under s 22A and failed to resolve the applicant's submissions that he was entitled to a significant discount for "substantial" facilitation of the administration of justice. Failure to resolve that significant issue with any certainty is demonstrative of error (*Lee, Matthew v R* [2016] NSWCCA 146 at [21]): at [83].

The judge further erred by taking remorse, delay and other unidentified subjective matters into account by way of a quantified discount of 2.5% rather than in an unquantified way as part of the instinctive synthesis. Courts should not engage in arithmetical processes attempting to add or subtract items from some subliminally derived figure to calculate the term of a sentence: at [68]-[70]; *Markarian v the Queen* (2005) 228 CLR 357.

Early Appropriate Guilty Plea - mandatory discounts - error in not applying 5% statutory discount for guilty plea entered after trial commenced and victim had given evidence - s 25D(2)(c), CSPA

DS v R [2025] NSWCCA 53 and ***WP v R*** [2024] NSWCCA 77

The applicants' appeals were allowed where the parties erroneously told the sentencing judge that the applicant was not entitled to a 5% discount under s 25D because he pleaded guilty after the trial had commenced and a victim had given evidence. The applicable numerical discount is 5%: s 25D(2)(c). The fact the victim had given evidence before the applicant entered his pleas did not alter that statutory fact: ***WP v R*** at [108]; ***DS v R*** at [61]-[63].

Early guilty pleas - mandatory discount not applied, s 25D(2)(a) CSPA – s 25F(7) not complied with

Tsoumbanellis v R [2025] NSWCCA 107

The appeal was allowed on the ground the sentencing judge made no reference to the 25% mandatory guilty plea discount under s 25D(2)(a) *CSPA*. On the appeal, two sentence documents relied on by the Crown (from the District Court file and a JusticeLink Record) stating "25% discount for early guilty pleas" were irrelevant. While several circumstances suggest the plea was taken into account, the discount was not applied. In any event, s 25F(7) (Court must indicate discount to offender) was not complied with: at [30]-[53].

Voluntary disclosure to police shortly after offence - assistance to authorities discount, s 23 CSPA

R v Denniss [2025] NSWCCA 110

Forty minutes after committing an offence of cause GBH with intent, the applicant attended a police station and told police that he had "murdered" and bashed someone.

The CCA held the disclosure was evidence of remorse and was assistance to police (s 23 *CSPA*), enabling the victim to receive timely attention. Failure by applicant's counsel at sentence to raise the voluntary disclosure resulted in a miscarriage of justice: at [80], [87].

Federal offenders - "any benefit to the community" resulting from plea of guilty – no error providing 25% discount and further unquantified reductions for objective benefits - s 16A(2) (g) Crimes Act 1914 (Cth)

R v Robertson; R v Westwood [2025] NSWCCA 235

> Section 16A(2)(g) *Crimes Act 1914* (Cth) provides the court take into account if the person has pleaded guilty:
>
> (i) that fact; and
> (ii) the timing of the plea; and
> (iii) the degree to which that fact and the timing of the plea resulted in any benefit to the community, or any victim of, or witness to, the offence...

The CCA dismissed the Crown appeal against the respondents' sentences for conspiracy to import drugs. The Crown case relied on evidence of messages sent via the ANOM app which, at the time of the

respondents' sentence proceedings, was the subject of a High Court challenge (*CD v Cth of Australia; CD v DPP (SA)* [2025] HCA 37 – dismissed by the High Court by the time of the present appeal).

The sentencing judge gave a 25% discount for guilty pleas. The Crown submitted the judge erred by then making additional unquantified reductions by taking the pleas of guilty into account in four ways (at [107]):

- As providing additional objective benefits to the community through:
  (a) the benefit of avoiding a contested trial in the particular case;
  (b) the benefit of encouraging others accused in AN0M-related matters to plead guilty (where there was a widespread unresolved challenge to the admissibility of evidence from the AN0M app);
- for their subjective significance as demonstrating remorse and contrition (s 16A(2)(f)); and
- a subjective willingness to facilitate the administration of justice.

The CCA held the sentencing judge did not err in in approach to the guilty pleas: at [12].

Proper construction of s 16A(2)(g)

s 16A(2)(g) is not confined to traditional "utilitarian value" (avoiding a trial). It extends to *"any benefit"* resulting from the plea: at [85], [89]. It is whether the plea "resulted in" a particular benefit to the community, the victim or the witness. Once a benefit that meets the s 16A(2)(g) test is "known to the court", the court must take it into account: at [105].

The judge's uncontested finding was that the guilty pleas resulted in a significant additional benefit to the community, which he was required to take into account: at [106].

Double counting

The judge's approach did not involve double counting. All four ways of taking the pleas into account were distinct. There was risk of double counting, or of excessive weight to the pleas. But the mere fact of taking the pleas into account in all four ways did not of itself constitute error: at [108]-[110]; *Giles-Adams v R; Preca v R* [2023] NSWCCA 122.

Quantified and unquantified reductions for objective benefits

The appeal falls to be decided on the uncontested premise that the objective benefit to the community of encouraging guilty pleas in other AN0M-affected prosecutions had a special or additional value over and above that recognised by the quantified 25% discount. If the judge had given a quantified discount of 30% or 35% on account of the "utilitarian" value of all the benefits to the community resulting from the pleas, that would not necessarily be error: at [119].

The judge took two different sets of objective benefits to the community into account in two different ways (at [112]):

1. Benefit to the community of encouraging accused in other AN0M-related prosecutions to plead guilty was taken into account as part of the instinctive synthesis.
2. The utilitarian value of the benefit to the community in saving time, cost etc of trials in the respondents' matters was taken into account by quantified discount of 25%.

The judge did not err where it is accepted that:

- it is not inherently erroneous to give a discount for the utilitarian value of a guilty plea which exceeds 25%;
- it was open to the judge to quantify the discount for utilitarian value in part; and
- it was common ground that the guilty pleas provided additional benefit to the community (by encouraging guilty pleas in other AN0M-affected prosecutions), over and above the objective benefit of avoiding a trial: at [121].

Federal offenders – error to include contrition in utilitarian guilty plea discount – preferred approach for deducting discount for utilitarian guilty plea – error taking into account co-offender's decision to defend charges - s 16A(2)(f), (g) Crimes Act 1914 (Cth)

Waters v R [2025] NSWCCA 226

The CCA allowed the applicant's appeal for drug offences, finding two errors in treatment of the guilty plea.

Improper blended discount

The sentencing judge erred in specifying a blended discount of 10% for both the utilitarian value of the applicant's plea of guilty and contrition: at [43]-[50].

For a federal offender who has pleaded guilty a Court has a choice whether:

(1) to include the utilitarian value of the plea in the process of instinctive synthesis (*Markarian* (2005) 228 CLR 357); or

(2) determine the result of the process of instinctive synthesis (without taking into account utilitarian value of the plea) and deduct from the resultant figure a percentage referable to the utilitarian value.

Xiao (2018) 96 NSWLR 1 stated (2) is preferable because it informs the offender what discount has been applied for utilitarian value: at [52]. While the choice between (1) and (2) is available, a specified discount may only reflect utilitarian value. To include another factor such as contrition in assessment of the discount is erroneous: at [57]; *Markarian*.

Reducing discount because of co-offender's decision to defend charges

The judge erred by taking in account that the co-offender's trial led to his conviction and thus "there was no substantial saving." The co-offender's decision to defend charges was not relevant: at [61]-[63].

An offender is to be given credit for the potential value of the plea offered, even if the potential was not realised (*Magro v R* [2020] NSWCCA 25; *R v Borkowski* (2009) 195 A Crim R 1 at [32]). A plea offer rejected by the Crown but consistent with a jury verdict can result in a discount even though there is no utilitarian value (*Oinonen* [1999] NSWCCA 310). For similar reasons, the utilitarian value of the applicant's plea should not depend on the co-offender's forensic decision since this would be as arbitrary and unfair as to make the utilitarian value of an offer to plead guilty depend on whether the Crown accepted it or not: at [64]-[65].

Federal offenders - erroneous incorporation of reduction for past cooperation within utilitarian discount for early plea - failure to consider contrition – s 16A(2)(f)–(h) Crimes Act 1914 (Cth).

Wei v R [2025] NSWCCA 150

For Commonwealth matters, a sentencing court must take into account factors including guilty plea, assistance to authorities, and contrition: ss 16A(2)(f)–(h) *Crimes Act 1914* (Cth). The applicant appealed, arguing the judge erred by combining the applicant's 25% discount for an early guilty plea with the assistance to police and by failing to consider contrition.

The CCA held the judge erred by merging consideration of the guilty plea and assistance; these should have been treated as separate sentencing factors. Combining them failed to give proper weight to the assistance: at [52]–[53]. The judge failed to address contrition; which required resolution in light of conflicting submissions and evidence on the issue: at [63]. However, the appeal was dismissed as no lesser sentence was warranted.

5. PARTICULAR OFFENCES

s 66EA Crimes Act 1900 - Crown appeal allowed - sentencing judge misapprehended that he had to be satisfied of each incident beyond reasonable doubt - factors in assessing objective seriousness set out in RA v R [2024] NSWCCA 149 at [102], not Burr v R

R v Lamey [2025] NSWCCA 17

The Crown appealed the respondent's sentence imposed a s 66EA offence. The sentencing judge did not accept the complainant's estimate of frequency of incidents of unlawful sexual acts. The judge sentenced on the basis he could only be satisfied beyond reasonable doubt that a minimum of five *specific* incidents occurred: at [120].

The Crown submitted error in requiring satisfaction beyond reasonable doubt of each incident before assessing the offending.

The CCA allowed the appeal and remitted the matter for sentence.

The focus of s 66EA is not on proof of a particular number of individual sexual offences, but on proving the existence of a particular kind of relationship. The sentencing judge erred in proceeding on the basis that he had to be satisfied of each incident beyond reasonable doubt before he could find that the abuse was ongoing: at [114]-[117], [121]-[127]; *RA v R* [2024] NSWCCA 149; *R v Fisher* [2024] NSWCCA 191.

Relevant factors in assessing objective seriousness as set out in *RA v R* [2024] NSWCCA 149 at [102] not *Burr v R*

Although some of the factors are the same, the proper approach to assessing objective seriousness for s 66EA is to have regard to the factors in *RA v R* at [102], not *Burr v R* [2020] NSWCCA 282; (2020) 285 A Crim R 506 which were relevant to the predecessor s 66EA offence. Although in *GP (a pseudonym) v R* [2021] NSWCCA 180 it was said (at [64]) that the factors identified in *Burr v R* were still relevant to the new provision, that observation was limited to the issue in dispute in that appeal: at [90]. (See also *R v Fisher* [2024] NSWCCA 191 at [81].

s 66EA Crimes Act, maintain unlawful sexual relationship with child - assessing objective seriousness - where sentencing judge expressly relies on sentencing factors in Burr v R [2020] NSWCCA 282

R v LPCM [2025] NSWCCA 78

The respondent was sentenced for two s 66EA offences. Following a disputed facts hearing in relation to particularised acts, the sentencing judge gave a disputed facts judgment outlining particulars and acts which constituted the unlawful sexual relationship.

On appeal, the applicant Crown submitted the judge took an "unduly limited approach" in assessment of objective seriousness due to express reliance on factors in *Burr v R* [2020] NSWCCA 282 (a decision directed at the previous s 66EA), with focus on the "ingredient offences" and failing to refer to other matters: at [62], [65].

The CCA (Harrison CJ at CL; Hamill J; Rigg J with additional comments) dismissed the Crown appeal.

- The judge conducted an extensive contested fact-finding hearing and made specific reference to his disputed facts judgment. It cannot be inferred the judge failed to take account of other matters in assessing objective seriousness: at [66].
- There was no error in utilising the factors in *Burr v R*. Those factors are not prescriptive or exhaustive: at [65], [68]-[73]; authorities cited.
- In *RA v R* [2024] NSWCCA 149 at [102] Wilson J identified factors for evaluation of the objective seriousness of the current s 66EA(1). Those factors are not a check list. The sentencing judge's detailed reference to these matters in his disputed facts judgment informed his Honour of the relevant matters, even if not recited one by one: at [67].

Note additional comments per Rigg J (Hamill J agreeing)

- There will be many sentencing exercises for contravention of the current s 66EA where unqualified reliance upon the factors in *Burr v R* causes sentencing to miscarry, particularly where the victim does not know the number of unlawful sexual acts or they lack identifying detail to enable them to be charged as discrete offences: at [88]; *R v Fisher* [2024] NSWCCA 191.
- Such cases require a significantly different sentencing approach for the offence in its current form compared to the predecessor offence: at [91]-[93]; ***R v Lamey*** [2025] NSWCCA 17; *R v Fisher*.
- In this case, where there was a finite number of discrete offences described with particularity, there was no error in utilising the factors in *Burr v R*, including reference to the number of sexual offences on separate occasions, and using the term "ingredient offences": at [94].

Crown appeal - sentence - domestic violence – choking, s 37(1A) Crimes Act 1900 – factors for assessing objective seriousness – Community Correction Orders for 166 certificate offences manifestly inadequate

R v Sabbah [2025] NSWCCA 203

The respondent received an aggregate sentence with NPP for sexual intercourse without consent, choking (s 37(1A)), and AOABH. Separate offences on a s 166 certificate (additional choking, AOABH, and assaults) were dealt with by CCOs that expired before the NPP, meaning no real additional punishment was imposed.

The CCA allowed the Crown sentence appeal on grounds that (i) the CCOs were manifestly inadequate and (ii) that the sentencing judge erred in assessing the objective seriousness of the choking offences.

Community Correction Orders for offences on s 166 Certificate

Effectively, no punishment was imposed for the s 166 Certificate offences where the CCOs were imposed to run at the same time as the aggregate sentence of imprisonment, and to expire prior to the NPP: at [165], [169]-[173].

There was failure to provide reasons why CCOs were more appropriate than imprisonment or a supervised order (*CSPA*, s 4A), consider safety of the victim (*CSPA*, s 4B(3)), or to make findings on why the threshold of imprisonment was not met (*CSPA*, s 5(1)): at [163]–[166].

Objective seriousness of s 37(1A) choking

It was not open to find that the offences were in the "low range" or "below the mid-range" of objective seriousness: at [116]-[125].

A non-exhaustive list of relevant factors for assessing objective seriousness of a s 37(1A) offence:

1. Nature of relationship, including that the conduct is domestic violence on an intimate partner;
2. Purpose or motivation and whether committed to scare, coerce or control victim;
3. Force of the choking, suffocation or strangulation including degree victim deprived of ability to breathe;
4. Duration of offending;
5. Any circumstances of humiliation or degradation; and
6. Whether offending caused symptom or injury that persisted after conduct.

Here, inability to breathe or swallow saliva indicates the more serious end of objective seriousness; choking only for a matter of seconds does not mean that it is not a serious example; the context of a domestic relationship as a highly relevant factor; and treating an "apology" as reducing objective seriousness was wrong; it could only go to remorse (which was absent): at [111]-[113], [117].

The judge did not make any reference to purpose, motivation, surrounding conduct, or presence of the victim's young children: at [115]–[122].

Armed robbery – lighter as offensive weapon – error in assessing objective seriousness by reference to nature of weapon – R v Henry (1999) 46 NSWLR 346 guideline judgment did not offer guidance

Luchetti v R [2025] NSWCCA 222

The applicant was sentence for armed robbery after threatening a store employee with a lighter (the weapon).

The sentencing judge applied the armed robbery *R v Henry* (1999) 46 NSWLR 346 guideline judgment.

The CCA allowed the applicant's appeal.

The judge erred in assessment of objective seriousness by finding the case fell broadly within *Henry* . The nature of the weapon, i.e. the lighter, was so significantly different from the type of weapon contemplated by *Henry* in actual capacity for inflicting harm and induce fear: at [50]. The degree of violence was markedly less than contemplated in *Henry*: at [47].

The *Henry* guideline is not prescriptive and had no role in this case, given the marked differences and the applicant's significant mental illness: at [54].

This was not a case where guidance was offered by the guideline judgment. Having raised *Henry*, the judge failed to explain how this offence was much less serious, which amounted to material error: at [58].

Federal child sex offences – no evidence as to exact age – could not be proven child in fact below 16

R v Williams [2025] NSWCCA 63

The Court considered sentencing for federal child sex offences where the Crown conceded it could not prove the complainant were under 16. The offences, committed remotely, included persistent child sexual abuse (s 272.11 *Criminal Code*), procuring a child (s 272.14(1)), and grooming (s 272.15A(1)).

The CCA said that persistent sexual abuse (s 272.11) requires proof that the child was under 16, based on proof of the commission of "underlying" offences in relation to the same "child" on two or more occasions: at [14]–[16]. Although there was no evidence as of age, the plea of guilty required sentencing on the basis the victims were under 16 (as conceded by the respondent), but no more than that: at [27].

By contrast, ss 272.14(1) and 272.15A(1) do not require proof that the victim was a child; it is sufficient if the offender believed the person was under 16. Given the Crown's concession, sentencing proceeded on the basis of the respondent's mistaken belief as to age: at [17]-[19], [21], [27].

Federal child sex offenders – objective of rehabilitation under s 16A(2AAA) Crimes Act 1914 (Cth) – sentence permitting applicant to complete custodial rehabilitation program where no evidence about what would constitute 'sufficient time' for rehabilitation

Jbara v R [2025] NSWCCA 83

> s 16A(2AAA)(b) *Crimes Act 1914* (Cth) provides that, when sentencing a Commonwealth child sex offender, a court must have regard to rehabilitation, including allowing sufficient time to complete a rehabilitation program.

On sentencing the applicant for child sex offences, the sentencing judge stated that the non-parole period allowed for a custodial sex offender program in accordance with s 16A(2AAA). The applicant appealed on grounds including that the sentencing judge erred in approach to s 16A(2AAA).

The CCA dismissed the appeal. There was no evidence before the judge about what would constitute "sufficient time" for rehabilitation: at [41]. The lack of evidence or of any submission about the possible availability or duration of programs meant that the judge need not have referred to the subsection at all, except possibly to say that it was not engaged. However, the sentencing process did not miscarry by reason of the judge's reference to rehabilitation: at [48].

The availability and duration of such programs for offenders not yet classified is, for practical purposes, unknowable. Subsection (2AAA)(b) is thus of limited use in relation to such programs. Paragraph (b) is not limited to custody-based programs but that is the type of program to which the judge referred: at [41]-[42].

The judge did not calculate the non-parole period by reference to the time required to complete a program, as there was no evidence. The judge might more accurately have said he made an estimate sufficient to permit rehabilitation before release: at [45]-[47].

Deal with property suspected of being proceeds of crime, s 193C Crimes Act – error to find offender "must have been aware" of the illegitimate source of funds

SZ (a pseudonym) v R [2025] NSWCCA 196

The CCA allowed the applicant's appeal for Deal with property suspected of being proceeds of crime, s 193C *Crimes Act*. The sentencing judge erred when assessing objective gravity by taking into account the mental state of the applicant and concluding he "*must have been aware"* of the illegitimate source of the funds. Section 193C is made out when the person who deals with the property has *"reasonable grounds to suspect"* that the property is proceeds of crime: at [50]-[51]; *R v MT* [2022] NSWCCA 53.

Transmit child abuse material (s. 474.22(1) Crimes Act 1914) – error in applying "statutory presumption" that sentence of imprisonment be imposed, s 20(1)(b)(iii) Crimes Act 1914 – CCO appropriate on re-sentence

Vazquez v R [2026] NSWCCA 49

The applicant was sentenced to 4 months imprisonment for transmit child sexual abuse material (s. 474.22(1) *Crimes Act 1914*).

The applicant submitted the sentencing judge erred in treating s 20(1)(b)(ii) and/or (iii) *Crimes Act 1914* as creating a presumption of actual imprisonment for Commonwealth child abuse material offences, absent exceptional circumstances.

Section 20(1)(b) provides that where a person is convicted of a federal offence, the court may:

> (b) impose imprisonment but direct that the person be released:
> (i) if there is no Commonwealth child sex offence - immediately or after serving a specified period;
> (ii) if there is at least one Commonwealth child sex offence and the court is not satisfied that there are exceptional circumstances - after serving a specified period;
> (iii) if there is at least one Commonwealth child sex offence and the court is satisfied that there are exceptional circumstances – immediately.

The CCA allowed the appeal.

- The sentencing judge erred by finding s 20(1)(b)(iii) created "a statutory presumption" requiring a sentence of imprisonment unless "exceptional circumstances" were established. Section 20(1)(b) only falls for consideration *after* a Court has determined that imprisonment is the only appropriate sentence in all the circumstances in accordance with s 17A *Crimes Act 1914*: at [27]-[28].
- Section 20(1)(b)(iii) does not provide a general restriction on imposition of non-custodial sentences: at [22]-[28], [50]; *R v Bredal* [2024] NSWCCA 75.
- On re-sentence, a 2-year Community Correction Order (CCO) was appropriate: low objective seriousness; 1 image transmitted to single individual; did not feature depravity of other cases; nothing to suggest sexual gratification; message ("ha ha") accompanying transmission suggested immature humour; no evidence part of paedophile network or for profit; young offender; no criminal history.

6. APPEALS

Five-judge bench - House v The King test applies to challenges to factual findings in sentence appeals

Hancock v R [2025] NSWCCA 213

A five-judge bench held the correct test for challenging factual findings in sentencing appeals is *House v The King* (1936) 55 CLR 499, not *R v O'Donoghue* (1988) 34 A Crim R 397.

The test in *R v O'Donoghue* (1988) 34 A Crim R 397 states:

> "...Error may be demonstrated if there is no evidence to support a particular finding, or if the evidence is all one way, or if the judge has misdirected himself. ... It is only where the very narrow basis upon which this Court can intervene in relation to a trial judge's findings of fact has been established that the conviction can be set aside, and then only if the error has led to a miscarriage of justice..."

House v The King (1936) 55 CLR 499 at 504-505 states:

> "If the judge mistakes the facts, their determination should be reviewed and the appellate court may exercise its own discretion in substitution."

Application of *O'Donoghue* may involve a deviation by this Court from its obligation faithfully to follow decisions of the High Court: at [65]-[66].

The *O'Donoghue* test is more stringent than *House v The King*. To say that "error may be demonstrated if there is no evidence to support a particular finding, or if the evidence is all one way, or if the judge has misdirected himself" is to describe an error of law. It is more stringent than asking whether a judge "mistakes the facts" as per *House v The King*: at [60].

<u>House v The King test</u>

It is an error within the meaning of *House v The King* for a sentencing judge to "mistake the facts": at [62].

A correct test to ascertain existence of a mistake of fact as per *House v The King* is to ask whether the finding was "reasonably open": at [73].

Evaluative findings of fact may be shown to be in error only if not "reasonably open". A principle of appellate restraint thus applies to evaluative findings. If a finding may be described as "reasonably open", it is not an error: at [74].

A number of existing principles are unaffected by the "reasonably open" test (at [75]):

1. Appellate restraint to demeanour-based credit findings: at [76].
2. Approach of an appellate court to reasons given ex tempore is not disturbed: at [77].
3. Approach to offender statements / reports (e.g. to doctors, psychologists, psychiatrists, pre-sentence reports etc): at [78].
4. *House v The King* error only if the factual finding is material: at [79].

Present case

The applicant was sentenced for three counts of child sexual assault (s 66C(2) *Crimes Act*). The applicant argued the sentencing judge erred in assessing objective seriousness by finding the charged conduct took place against "*a background of similar offending* around a period of about 12 months".

The CCA held the judge's finding was not erroneous. The correct characterisation of the finding was that the applicant was not entitled to have the three offences treated as isolated instances because of the fact he had engaged in "similar offending" with the victim when she was 13: at [93].

The judge did not mistake the facts within *House v The King*: at [94]-[97].

Factual finding – Hancock [2025] NSWCCA 213 - not "reasonably open" to find applicant possessed pistol in connection with drug supply

Edwards v R [2026] NSWCCA 15

The applicant was sentenced for drug supply, with a Form 1 offence of possess imitation pistol. He stated he felt obliged to hold the pistol for an associate who assisted his drug activities.

The CCA upheld the applicant's appeal ground that it was not reasonably open to find the pistol offence aggravated by its association with the surrounding criminal conduct of drug supply.

- The *House v The King* test applies; the question is whether the factual finding was reasonably open: at [72]-[73]; *Hancock* [2025] NSWCCA 213.
- Capacity of a judge to draw an inference from the primary facts (beyond reasonable doubt) will depend upon facts and circumstances of the case. While a firearm may be inferred as a "tool of trade" if supported by surrounding indicia, mere location of a firearm at premises where drugs are also located, may not be sufficient evidence from which an inference can be drawn, to the requisite standard, of a link between the firearm and drug supply (*Andary v R* [2020] NSWCCA 75): at [76]-[77].
- The established primary facts were that the pistol was in a wardrobe with no drugs or indicia, there was no evidence as to when or why it was possessed, and only minimal drugs were nearby: at [78]–[79].
- While it was open to reject the explanation for why he was in possession of the pistol, it was not reasonably open, on the limited evidence in this case, to find beyond reasonable doubt that the applicant possessed the pistol in connection with his drug supply activities thereby increasing the objective seriousness of the firearms offence: at [81]- [82]; *Hancock v R*.

Review of findings of fact in sentence appeals - "reasonably open" test has variable significance based on evaluative character of finding and advantages held by sentencing judge - Hancock v R [2025] NSWCCA 213.

Fisher v R [2026] NSWCCA 27

The applicant pleaded guilty to manslaughter excessive self-defence, after stabbing the deceased once. He submitted the sentencing judge erred in finding an intention to kill.

The CCA allowed the appeal and re-sentenced.

Review of findings of fact in sentence appeals

Relevant principles are summarised as follows (at [81]):

1. Where a discretionary decision is sought to be reviewed, a ground upon which *House v The King* permits such a decision to be challenged is that the primary judge has mistaken the facts. There is reason to think that at least in many contexts that may involve review on the

correctness standard. But the intensity of review can turn on the nature of the issue in question. When findings of fact are challenged in a sentence appeal pursuant to ss 5 and 6 *Criminal Appeal Act* the issue is distinctive. The question is whether the finding was reasonably open: *Hancock v R* [2025] NSWCCA 213.

2. Application of the test will vary depending on (i) how evaluative the finding of fact was; and (ii) any advantage of the sentencing judge.
3. Objective seriousness involves an issue of characterisation but is not itself a finding of fact.
4. An error of fact must be material, i.e. there is a realistic possibility that the sentencing decision could have been different if the error had not occurred: *Hancock* at [79]-[83]
5. Other sentencing principles remain unaffected (e.g. how sentencing judges may find facts; allowance ex tempore reasons): *Hancock* at [77]-[78].

Finding of an intention to kill not reasonably open

The finding of an intent to kill was an inference not reasonably open. It was based on documentary evidence, so the judge had no advantage. Factors relied on (deceased unarmed; stabbed to left side of body) did not establish intention to kill beyond reasonable doubt. The judge did not refer to facts that deceased was the aggressor, intoxicated and agitated. There was no evidence of intent beyond a single defensive stab: at [121]-[131].

Distinction between "fresh" and "new" evidence of less significance on a sentence appeal - relevant enquiry when determining whether to admit additional evidence - additional evidence admitted on appeal

Lawavou v R [2025] NSWCCA 35

The applicant did not disclose to his lawyers at sentence serious sexual assaults upon him in prison which took place close to commission of his charged offences, because he was ashamed and did not appreciate its significance.

The CCA allowed the applicant's appeal on the ground that the absence of additional material at sentence resulted in a miscarriage of justice.

The CCA stated that:

- The distinction between "fresh" and "new" evidence is of less significance on a sentence appeal where the additional material may have had a real bearing on sentencing outcome and absence resulted in a miscarriage of justice: at [113]; discussed at [112]-[128].
- The relevant enquiry when determining whether to admit additional evidence (irrespective of whether "new" or "fresh" evidence) is a consideration of whether a miscarriage of justice has occurred in depriving the applicant of the opportunity to have material considered which could have a real bearing on the sentence.

  In considering that test, the Court is to consider whether the additional material had the capacity or potential to materially impact the sentence. It is not whether the Court can conclude with any certainty that the material *would* have made a material difference to the sentence: at [129]; *Betts v The Queen* (2016) 258 CLR 420; *Shalida v R* [2024] NSWCCA 55; *Green v R* [2022] NSWCCA 230; *Shortland v R* [2024] NSWCCA 174, applied.
- The additional evidence in this case was "fresh" evidence, not being discoverable with the exercise of reasonable diligence. Even if characterised as "new", it had capacity to have a real bearing upon the exercise of the sentencing discretion: at [32]-[34]; authorities cited.

CONVICTION AND OTHER APPEALS

1. EVIDENCE

Note – see below 'A. High Court' The King v AR [2026] HCA 10 ***Tendency – directions***

Tendency – directions – AR v R [2026] HCA 10, applied

Carter (a pseudonym) v R [2026] NSWCCA 43

The applicant was convicted of child sexual assault offences, with the complainant's recorded interview used as tendency evidence and as proof of the offences.

The CCA allowed the appeal, quashed the convictions and ordered a new trial due to erroneous tendency directions.

- The judge's tendency direction required the jury first "decide whether in fact, [the applicant] did conduct himself" as alleged, and later that "[u]ltimately…whether the specific offences…charged have been proved". The jury was directed to decide the same factual issue twice without being told the different standards of proof - tendency (not beyond reasonable doubt) and ultimate guilt (beyond reasonable doubt). This undermined the jury's understanding of the different standards of proof: at [159]-[162]; *DPP v Roder* [2024] HCA 15; *The King v AR* [2026] HCA 10.
- This omission substantially weakened directions on onus, standard of proof and separate consideration of each count when the jury engaged in tendency reasoning. Unlike *The King v AR*, directions did not cure the defective tendency direction: at [162], [170].
- The tendency direction, with the preceding inferences direction, risked reasoning of treating the charged conduct as "proved facts" to establish tendency, then using that tendency to prove those same acts. It failed to explain that guilt required the inference to be not only "rational" but also the "only reasonably available inference": at [163]-[167].
- The tendency and inferences direction led to a real risk the jury was deflected from its task, amounting to a substantial miscarriage of justice: at [173]; *DPP v Roder* [2024] HCA 15.
- The risk was further undermined because the alleged tendency was to commit the charged acts themselves (rather than a more general tendency), meaning the jury could not consider tendency without first deciding the charged conduct, based on a single complainant and few acts, increasing likely findings to a lesser standard: at [168]-[169]; *The King v AR* at [58].

Tendency directions - potential for impermissible circular reasoning by jury - summing up viewed as a whole - no miscarriage of justice - DPP v Roder (a pseudonym) [2024] HCA 15

Wardell v R [2025] NSWCCA 26

The applicant's trial took place before the High Court judgment in *DPP v Roder (a pseudonym)* [2024] HCA 15; 98 ALJR 644.

The applicant was convicted of sexual offences. The Crown relied on charged and uncharged acts as tendency evidence. The applicant appealed on grounds including that the trial judge's tendency directions were not in accordance with *Roder*.

The CCA dismissed the appeal.

Although the trial judge's direction did not comply with the approach in *Roder*, when the summing up is read as a whole, there was no realistic possibility that the onus and standard of proof were not properly applied by the jury. No miscarriage of justice occurred: at [84].

The CCA reached this conclusion for a number of reasons, including:

- it was not contended that there was any specific misstatement of the law in the summing up, including in relation to tendency evidence: at [75].
- the trial judge's directions were consistent with the principle in *R v Bauer* (2018) 266 CLR 56 and *Roder* that ordinarily a jury should not be directed that evidence of charged or uncharged acts

adduced to support the asserted tendencies are required to be proved beyond reasonable doubt when determining whether the tendencies have been established: at [76].

- the directions identified the tendencies as intermediate facts to be proved in their own right and then deployed in aid of the proof of each charge (*Roder* at [27]): at [77].
- the summing up included careful directions as to: the standard of proof beyond reasonable doubt and the onus on the Crown to prove the elements of each charge beyond reasonable doubt; the need for separate consideration of each count; the need to accept the evidence of the relevant complainant as to the occurrence of each count; and, the direction that the tendency, if proved, "may assist the Crown to prove the accused committed the offences, but it is not enough by itself": at [82].

Content of tendency directions

This does not mean that similar tendency directions should continue to be given. *Roder* at [37] requires that content and length of directions should not overcomplicate the jury's task and that there should be one tendency direction.

Where the prosecution relies on charged and uncharged acts to establish asserted tendencies, a single, separate tendency direction should be given in which:

1. the evidence relied on to support the asserted tendencies is identified.
2. the jury is directed to consider whether they are satisfied that any of the asserted tendencies is established; and
3. the jury is advised that, if any of the tendencies is established, that tendency can be used in considering whether it is more likely that the accused committed a relevant offence charged: at [96].

Tendency directions should not include the jury being directed or invited to make findings in respect of charged conduct for the purposes of considering whether any of the tendencies was established: at [97]; *Roder*; *JS v R* [2022] NSWCCA 145.

Tendency to intentionally touch body of unconscious female – Crown relied on significantly less serious conduct alleged by tendency witness to prove offence – evidence wrongly admitted as tendency - New v R [2025] NSWCCA 32

At trial, the Crown relied on evidence that the appellant had a tendency to "*intentionally touch the body of an unconscious female*." He was convicted by jury of two sexual offences against complainants AP and EM of intentionally touching without consent (s 61KC(a) *Crimes Act 1900*) and sexual intercourse without consent (s 61I).

As part of that tendency, the Crown was permitted to rely also on evidence by witness FK that she woke to find the appellant touching her in a sexual manner. The CCA held this evidence of FK was admissible.

However, the CCA allowed the appeal and quashed the convictions on a ground that further evidence by FK should not have been admitted. FK's further evidence was of conduct by the appellant of an attempt on multiple different occasions, commenced while FK was asleep, to initiate sex.

Such evidence was evidence of the non-consensual sexual touching of a conscious woman in an apparent attempt to engage in further, consensual, sexual activity. This was not evidence which directly supported a tendency to sexually touch unconscious women. To the extent that it could be said to support the tendency it did not give the evidence significant probative value: at [245]-[246]. The evidence was both extremely damaging, and not probative of the asserted tendency: at [248]-[250].

Crown served late tendency notice shortly before trial – "reasonable notice" provided

Wright v R [2025] NSWCCA 108

The Crown accepted it served a "late" tendency notice 4 days before the initial trial date, which was adjourned to 7 days later. The applicant submitted the trial judge erred by holding that the tendency notice was served with "reasonable notice" within s 97(1)(a) Evidence Act.

The CCA dismissed the appeal.

- Although the Crown did not comply with r 31.5 Uniform Civil Procedure Rules 2005 (timeframe for notice), reasonable notice was given. Where the Crown does not seek positively to rely upon compliance with r 31.5 UCPR, and where lateness was accepted by the Crown and taken into account by the trial judge, the trial judge did not err in not making any express reference in reasons to the terms of the notice requirements in s 99 Evidence Act or r 31.5: at [36], [55].
- 'Reasonable notice'. Relevant matters to whether 'reasonable notice' has been given include timing of service, adverse impact on a party, nature and breadth of tendency evidence, and whether evidence was already in the brief of evidence or identified as evidence that the Crown may rely upon at trial: at [31].

  Here, there was no suggestion that late service caused prejudice or unfairness to the applicant. By the time the judge determined the issue, the applicant would have 11 days' notice of the tendency. Where there was no new evidence relied upon to establish the tendency, the purposes of the reasonable notice requirement in s 97 had been met: at [42].
- Reasonable notice is not determined by reference to the fact or extent of non-compliance with regulations or rules of court. The question of whether a tendency notice is reasonable is evaluated by the Court, having regard to the purpose of s 97 in the context of the Evidence Act as a whole. It is likely that full compliance with time periods in r 31.5 UCPR would meet the requirement of reasonableness, but a court might, in an appropriate case, rely upon non-compliance with Evidence Regulation, reg 5, or r 31.5, in support of a conclusion that reasonable notice had not been given: at [47]-[49], [53]-[54]; authorities discussed.

s 177 Evidence Act 1995 - certificate of expert opinion - "adduced" in s 177 means admitted

JS v Director of Public Prosecutions (NSW) [2026] NSWCA 58

> Section 177(1) *Evidence Act 1995* provides that evidence of a person's opinion may be "adduced" by tendering a certificate that is expressed to be wholly or substantially based on their specialised knowledge.
>
> Section 76(1) states that opinion evidence is inadmissible to prove the existence of a fact about which the opinion was expressed (the "opinion rule").
>
> Section 79(1) states that the opinion rule does not apply to evidence of an opinion that is wholly or substantially based on the person's specialised knowledge.

In the Children's Court, the prosecution sought to tender an expert certificate under s 177 stating the opinion of a forensic examiner that images on JS's phone showed a pistol. The defence did not require the expert to be called for cross-examination under s 177(5).

The Children's Court Judge refused to admit the certificate holding it was not admissible under s 76 because it did not comply with the requirements of s 79. The charge was dismissed.

The Court of Appeal (Bell CJ, Ward P agreeing, Leeming JA agreeing with additional reasons) held that the Children's Court was in error.

- The word "adduced" in s 177(1) means "admitted". Section 177 is an exception to the 'opinion rule' in s 76. An expert certificate tendered under s 177 is admissible on its own terms, without the need separately to satisfy the requirements of s 79, where the maker is not required for cross-examination under s 177(5): at [60].
- An expert certificate tendered under s 177 is admissible, subject to satisfaction of ss 177(2) and (3), unless its maker has been required to be called, in which case the certificate is not admissible (s 177(5)). However, if the maker is called as a witness and wishes to give expert opinion evidence, the maker will at that stage need to satisfy the qualifying requirements of s 79: at [59].

Parliament deliberately made s 177 easier to prove certain matters (see *R v Milne* and *DPP v Tong*) to streamline proceedings and avoid unnecessary expert evidence, especially where cross-examination is not sought. This does not cause any unfairness because s 177(5), requiring the expert to attend, provides a safeguard against prejudice.

2. DEFENCES & CRIMINAL RESPONSIBILTIY

Special verdict of "act proven but not criminally responsible" under s 31 Mental Health and Cognitive Impairment Forensic Provisions Act 2020 can be entered where an accused has been found unfit to be tried

R v Bugmy (No 2) [2026] NSWSC 70

Section 31 *MHCIFPA 2020* provides that the court may enter a special verdict of "act proven but not criminally responsible" at any time in the proceedings if -
(a) the defendant and the prosecutor agree the proposed evidence establishes a defence of mental health or cognitive impairment;
(b) the defendant is represented; and
(c) the court is satisfied that the defence is established.

The Court held that a special verdict of "act proven but not criminally responsible" under s 31 can still be entered even where an accused has been found unfit to be tried: at [59].

There is no statutory requirement for the accused to have received advice, nor for the judge to be satisfied in relation to this. The question is concerned with how the proceedings will be conducted procedurally. If an accused is advised by their lawyers that the proposed evidence establishes a defence under s 28, there is no reason why it should be presumed by a court that the accused is incapable of accepting such advice. The fact the accused is unfit to be tried is presumed not to be an impediment to their representation (s 56(4)): at [55]-[56].

Section 31 is available "at any time" in criminal proceedings in the Supreme Court and District Court (ss 27, 35). There is nothing that excludes s 31 from applying because the accused is unfit or because a special hearing has been ordered: at [57].

Doli incapax - evidence as to contemporaneous character or maturity not sufficient to rebut presumption beyond reasonable doubt

BV v R [2025] NSWCCA 217

The CCA allowed the applicant's appeal against conviction for sexual intercourse with child under 10 (s 66A(1)) on the ground the evidence at trial was insufficient for the Crown to rebut the presumption that he was *doli incapax*. The applicant was aged between 13 – 18 at the time of the offence.

The Crown had to prove, beyond reasonable doubt, that the applicant understood that his acts were "seriously wrong" or "gravely wrong" as per *RP v The Queen* (2016) 259 CLR 64. The question of how the prosecution is to rebut the presumption in practical terms remains somewhat vexed. The CCA discussed *RP v The Queen* and the types of evidence capable of rebutting the *doli incapax* presumption: see at [66] ff.

In practical terms, *RP* means whether the child knew that their conduct was morally or seriously wrong cannot be established merely by inferences arising from the fact they engaged in the acts constituting the alleged offence. While the conduct remains relevant, rebutting the presumption requires additional evidence - such as the child's upbringing, education, and moral development - rather than inferences drawn from the offence alone: at [83].

The prosecution's ability to rebut *doli incapax* depends on available evidence such as school records, agency reports, or Youth Justice material, often absent when complaints arise years later. In this case, none existed: the applicant had no prior trouble, assessments or government involvement, and the complaint was made six years later: at [95]-[96].

Here, the only evidence by the Crown in addition to the offending as to the applicant's contemporaneous character or maturity was that he missed school on multiple occasions, may have been present for a class on consent and respectful relationships, and lived with his parents and siblings and had outings with extended family. This evidence was not sufficient to rebut the presumption of *doli incapax* beyond reasonable doubt: at [99]-[100]; *RP v The Queen* (2016) 259 CLR 641.

The case shows the practical difficulties for the prosecution in obtaining evidence to rebut the presumption, where parents are generally not compellable and children not required to participate in interviews or psychological assessments: at [97].

Sexual intercourse without consent in company based on joint criminal enterprise

***Decision Restricted* [2025] NSWCCA 210**

Three accused were jointly tried for multiple sexual assaults over two nights. The Crown alleged two separate joint criminal enterprise (JCE). The trial judge, in directions, described the JCE as an agreement to have sexual intercourse "*with or without consent"* knowing the complainants were not consenting and/or reckless to that fact. The accused were found guilty on all counts except one.

The CCA quashed the convictions; ordered retrials for two accused and acquitted one.

JCE directions

- The jury was misdirected on JCE. The actus reus of sexual assault is sexual intercourse *without consent*. An agreement to have sexual intercourse is not an agreement to commit a crime; the agreement had to be to intercourse *without consent*. The judge's references to an agreement to have sexual intercourse "with or without" consent amplified the prospect of the jury not understanding the significance of the need for agreement to commit the crime of sexual assault: at [136]-[141]; [189]-[190]; [205]-[206]; authorities cited.

The agreement

- Focus on liability of "each accused", rather than the agreement and participation, improperly shifted focus away from the agreement. It was essential that the jury understood the requirement to prove beyond reasonable doubt both the making of the agreement (tacit or express) and the participation of each accused: at [196], [204]- [205].

Inadvertent recklessness as to absence of consent

- Inadvertent recklessness (not considering at all whether the complainant is consenting) was not capable of coherent combination with JCE liability in this case: at [146]; [176]-[183], [188]-[189]. It is not possible for three men to have agreed to not think about consent; at least not in circumstances as alleged here of a spontaneously formed agreement. The extremely artificial prospect of agreeing at one time to have sexual intercourse with someone in the future, and at that future time to not think about consent may be put aside: at [176].
- Advertent recklessness (realises there is a possibility the complainant does not consent but proceeds regardless) was capable of coherent combination with JCE liability: at [146], [188]-[192]. A suggested direction is: *"that enterprise was to engage in sexual activity or intercourse with the complainant, without their consent, knowing they were not consenting or realising they may not be consenting"*: at [192].

Severance, transaction evidence and state of mind

- It was not the Crown case that there was a single continuing JCE ("transaction") over two nights: at [249]. Rather, there were two discrete JCE's on the two nights involving a different complainant. The evidence was not admissible on this basis as it was not relevant: at [265]; *O'Leary v The King* (1946) 73 CLR 566; other authorities cited.
- Nor does the present case involve evidence capable of proving the sorts of 'enduring states of mind' in *Elomar v R* (2014) 316 ALR 206: at [228], [268].
- There was an error of law in admission of evidence of the events of each night in support of proof of allegations on the other night. A correct ruling regarding cross-admissibility of the evidence would have been an order for separate trials: at [276]-[277].

Mental health impairment - impairment at time of offending "solely caused" by drug ingestion – s 4(3) MHCIFP Act – onus of proof under ss 4(1), (3)

Delaney v R [2025] NSWCCA 76

s 4(3) *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* provides:

A person does not have a mental health impairment if the impairment is *caused solely by* –

(a) the temporary effect of ingesting a substance, or
(b) a substance use disorder.

The CCA allowed the applicant's appeal where his plea of guilty to murder was entered based on mistaken expert opinion evidence and legal advice about the definition of "mental health impairment" in s 4.

Two psychiatrists diagnosed the applicant with the mental health impairment schizophrenia. However, both concluded acute intoxication could not be excluded as "the most important factor" to the offending, therefore a defence of mental health impairment under s 28 was not available. The applicant's lawyers advised the applicant accordingly.

The CCA held that the advice was wrong.

- Section 4(3) excludes an accused, who otherwise had a mental health impairment, only where the impairment was *caused solely by* use of the drugs. The "caused solely by" test cannot be equated with a "but for" test where it would be sufficient to prove that but for the ingestion of drugs the psychosis would not have occurred: at [66]-[67], [72]; *R v Patterson (No 6)* [2024] NSWSC 458 at [16].
- The applicant did not have to prove that he was not taking drugs nor exclude the effect of drugs as a contributing factor. The jury only had to be satisfied impairment at the time was not solely caused by the temporary effect of ingesting the drugs. If so, then they had to consider under s 28 if the mental health impairment had either effect in that section: at [71].

The conviction was set aside and the matter remitted to the Supreme Court: at [73].

Onus of proof

Where mental health impairment is raised by the accused, s/he bears the onus of proof of demonstrating a mental health impairment within s 4(1): at [74].

But if the evidence discloses either matter in s 4(3) and the Crown seeks to argue that s 4(3) applies, the onus is on the Crown to show impairment was caused solely by those matters: at [74]; *R v Patterson (No 6)* at [5], [17]; further authorities cited. Unless it is shown that the impairment was caused solely by either matter, the accused will not be precluded from relying on a mental health impairment: at [89].

The directions by Dhanji J in *Patterson (No 6)* are the preferred directions where an accused relies on a mental health impairment and the Crown relies on s 4(3): at [88].

Standard of proof for partial defence of substantial impairment and full defence of mental illness – balance of probabilities – where directions not given in the terms of R v Porter or the Criminal Trial Courts Bench Book

White v R [2025] NSWCCA 141

The CCA dismissed the applicant's appeal against his murder conviction. The applicant argued on appeal that the trial judge failed to properly explain the "balance of probabilities" standard for substantial impairment (relying on *R v Porter* (1933) 55 CLR 182 and the Criminal Trials Bench Book). The CCA held the directions, read as a whole, adequately conveyed that this lower standard applied to both defences.

Price AJA (N Adams J and Seeney J agreeing) made the following observations about the applicant's reliance on *Porter* and the Bench Book (at [43]; *authorities omitted*):

1. A judge's summing up on matters of law does not depend on a particular formula of words; the effect of the summing up is what matters.
2. Even where a direction in the form of *Porter* is requested, that does not mean that omission amounts to an improper failure to direct. In the present trial, neither party requested that a direction in the form of *Porter*.
3. The Bench Book's suggested oral direction for the partial defence appears to be standalone. It does not anticipate that other oral directions have been given on the full defence. The summing up must be read as a whole.
4. What is required when the full defence or partial defence (or both) are raised, is to make the jury aware of the "distinction between very different burdens of proof resting upon the Crown and defence".
5. Analysis of the jury's understanding of the different burdens of proof is includes the summing up and also oral and written directions during trial and counsel addresses.
6. There are dangers of over-elaboration. Unnecessary repetition may have adverse impact on the jury's concentration and understanding.

7. The lack of objection or request for further directions supports the adequacy of the summing up and warrants appellate restraint. In the present trial, no objections were taken at trial nor were further directions requested.

3. DIRECTIONS

Good character – directions - no error where trial judge did not direct jury that applicant's good character could be used in assessing credibility

Neil v R [2025] NSWCCA 160

The applicant was convicted by jury of sexual intercourse with a child under 10 (s 66A(1) *Crimes Act*). At trial, the applicant relied on character evidence through witnesses who gave unchallenged evidence of his "qualities of honesty and integrity."

The trial judge told the parties he would give a "full" character direction. The judge directed the jury that the applicant's good character was relevant to the likelihood of him having committed the offence.

The applicant appealed on the sole ground that the trial miscarried because the trial judge failed to direct the jury as to the relevance of his good character in assessing his credibility as a witness.

The CCA dismissed the appeal.

- The authorities do not support the proposition that, if a good character direction is given, it must cover relevance to credibility as well as relevance to guilt: at [76].
- Good character is sometimes described as having "two limbs". However, the authorities are consistent with the two limbs being either:
    1. (negative) good character on the basis of absence of criminal history; or (positive) good character by reason of possessing "good" character traits, such as honesty and integrity; or
    2. the relevance of good character to guilt, as opposed to its relevance to the accused's credibility: at [67].
- There is no rule of law that where evidence of good character is given the judge must give a direction as to the manner in which it can be used. The omission to give a specific direction on the credibility aspect may or may not result in miscarriage: at [52], [57]; *Simic v The Queen* (1980) 144 CLR 319; *Melbourne v The Queen* (1999) 198 CLR 1.
- While there is a well-established practice of directing juries that they can use good character in assessing both guilt and credibility, deviation from that practice is insufficient to establish error (*R v Murphy* (1985) 4 NSWLR 42). The trial judge was not obliged to give such a direction: at [82].
- Even if there was irregularity or error, any omission to direct the jury specifically on using the applicant's honesty to assess credibility did not risk diverting them from their task of determining guilt. The judge's detailed references to the applicant's honesty in summing up ensured the jury understood they could use this to assess credibility: at [83]–[85].

Sexual assault – consent - case confined to actual knowledge of absence of consent – jury not sufficiently directed to disregard recklessness and unreasonable belief – knowledge, belief and thought distinct concepts - s 61HE(3)(c) (rep) Crimes Act (now s 61HK)

Kumar v R [2025] NSWCCA 119

The CCA allowed the applicant's appeal against conviction by jury for sexual assault due to a miscarriage of justice concerning directions on knowledge of non-consent. The issue concerned the bases upon which knowledge of absence of consent was left to the jury where the Crown case was confined to actual knowledge.

Section 61HE(3) *Crimes Act* (repealed and replaced by s 61HK) provides the accused knows the alleged victim does not consent if the accused:

(a) knows the alleged victim does not consent, or
(b) is reckless as to consent, or
(c) has no reasonable grounds for believing that the victim consents.

During closing address to the jury, the Crown submitted knowledge of absence of consent could be proved by each of these three ways.

Defence counsel then made an application to confine proof of knowledge of absence of consent to actual knowledge, which the trial judge acceded to.

In summing up, the judge did not direct the jury to disregard the two paths of recklessness and "unreasonable belief". In relation to knowledge, the judge also gave directions that it is what the applicant "knew, thought or believed".

- The Crown submissions regarding the three methods of proving knowledge of absence of consent (knowledge, recklessness, unreasonable belief), in light of the evidence in the case, lack of correction by the trial judge, and directions in fact given by the judge, amounted to a material irregularity. Where the Crown invites the jury to rely on a path of reasoning later ruled impermissible by the judge, it will often be necessary to provide explicit direction against such reasoning, which did not occur: at [101], [106], [108]-[110]; *Brawn v The King* [2025] HCA 20 at [9]–[10].
- It is not orthodox, and may be misleading or confusing, to refer to the mental states of thought and belief in the context of proof of actual knowledge of absence of consent. Knowledge, thought and belief are concepts that are related, but distinct: at [86].
- Referring to what the applicant "believed" created a real risk the jury applied a lesser mental standard than actual knowledge. Alternatively, "thought" as attaching to a mental inclination regarding the absence of consent would bear a strong correlation to the law of advertent recklessness: at [93]-[96]; *Lee v R* [2023] NSWCCA 203; *Tuuholoaki v R* [2024] NSWCCA 135.

Sexual assault - where accused believed complainant consented but no reasonable grounds for belief – s 61HE(3)(c) (rep) Crimes Act (now s 61HK)

Koch v R [2025] NSWCCA 219

The accused was convicted of sexual intercourse without consent (s 61I *Crimes Act*). He submitted the trial judge erred in directing the jury on mens rea with respect to s 61HE(3)(c) (rep), as follows:

> "The accused may have actually believed the complainant consented but he had no reasonable grounds for that belief. So the accused may have actually believed the complainant consented. **If you are satisfied of that belief**, *and that there were no reasonable grounds for that belief* - I'll go back. The accused may have **actually believed** the complainant consented, but he had no reasonable grounds for that belief, so the Crown has to satisfy you beyond reasonable doubt that **even though he believed there was consent**, *there was no reasonable grounds for that belief*."

The applicant argued the directions "shifted the focus away from whether the appellant had reasonable grounds to an objective test of whether there were reasonable grounds", relying on *Lazarus v R* [2016] NSWCCA 52 and *Hayne v R* [2022] NSWCCA 11. He also submitted some directions impermissibly suggested he bore an onus to establish his belief in consent.

The CCA refused leave to appeal.

Reasonable grounds for belief

Section 61HE(3)(c) requires a focus on the circumstances known to the accused at the time. It is assumed (without deciding) that s 61HE(3)(c) is not a wholly objective test but allows at least some subjective characteristics of the accused to be taken into account when assessing whether they had reasonable grounds for believing that the alleged victim consented to the sexual activity: at [43].

Determination of whether there has been a misdirection requires a holistic assessment of the directions rather than scrutinising a specific phrase or sentence in an acontextual fashion. An error that is corrected or of no practical significance is not likely to be material: at [46], [49].

The first italicised phrase was preceded by a statement which the applicant accepted to be correct ("may have actually believed the complainant consented but he had no reasonable grounds for that belief"). The second italicised phrase taken in isolation might be seen as problematic in light of *Lazarus* and *Hayne*, but

earlier in that sentence the judge expressed the issue in terms of "he had no reasonable grounds for that belief": at [57]-[58]. The judge also reiterated the four types of knowledge consistent with the statutory language of s 61HE(3)(c): at [59]-[60].

There was no misdirection which could have affected the jury's reasoning to the verdict of guilty.: at [62].

Onus of proof

s 61HE(3) creates four types of knowledge of lack of consent: actual knowledge; advertent recklessness; inadvertent recklessness; and having no reasonable grounds for believing in consent. The fourth category will only arise where there is some basis to consider that the accused did believe that the complainant was consenting. It is practically relevant where there is a reasonable possibility that the accused did believe consent, but the Crown alleges that there were no reasonable grounds for any such belief: at [74].

The impugned directions in bold were withdrawn or preceded by directions that the Crown bore the burden of proof: at [78]-[81]. Taken as a whole, there was no real risk that the jury would have understood that the applicant bore any onus: at [84]-[87].

Sexual assault - consent - self-induced intoxication - Crimes Act 1900, s 61HE(4)(b) (now s 61HK(5))

Poveda v R [2025] NSWCCA 174

The applicant was convicted of sexual intercourse and sexual touching without consent (*Crimes Act 1900* ss 61I, 61KC(a)). The Crown had to prove knowledge of non-consent. Evidence showed the applicant had alcohol and cocaine before the offences.

Section 61HE(4)(b) (now s 61HK(5)) provided that the jury must for the purposes of determining an accused's knowledge "have regard to all circumstances... not including any self-induced intoxication."

The judge directed the jury that any self-induced intoxication must be ignored and to decide knowledge by "considering what the accused's state of mind would have been if the accused had not been intoxicated": at [119].

On appeal, the applicant submitted this caused a miscarriage of justice because the jury was required to make findings about whether he was intoxicated and then speculate about a hypothetical sober person's state of mind.

The CCA dismissed the appeal.

- The language of s 61HE(4)(b) is difficult. By directing the trier of fact not to have regard to self-induced intoxication, Parliament has required that findings are made by reference to something other than the actual state of mind that an intoxicated accused had. The trier of fact must make findings, and likely draw inferences, as to the accused's knowledge on what may be a hypothetical assumption that their state of mind was not impacted by intoxication: at [116].
- The Crown relied upon what it submitted was the applicant's intoxication in its closing. The applicant's evidence was that he consumed alcohol and cocaine. In these circumstances, the trial judge did not err directing the jury as to what they must do "if [they] consider[ed] that the [applicant] was intoxicated by voluntarily drinking alcohol and/or taking drugs". That direction catered to evidence and submissions at trial which raised a real possibility that the jury might find that the applicant was intoxicated. The judge was not inviting / requiring the jury to make a finding as to whether the applicant was intoxicated: at [121].
- The second complaint is that the direction invited the jury to speculate about a hypothetical person. However, the judge clearly directed the jury that the element of knowledge raised a question about the applicant's actual state of mind, then paraphrased that as "what he knew, thought or believed". The direction maintained necessary focus on the applicant's actual state of mind but directed the jury to consider this by putting any self-induced intoxication to one side: at [122].
- Provided the focus is upon an accused's actual state of mind, adjusted to exclude the effect of self-induced intoxication, there is no error in seeking to paraphrase "ignoring intoxication" by using the words "as if he were sober" or, as the trial judge directed, "if [he] had not been intoxicated". Those words do not bring in "a hypothetical reasonable sober person": at [125].

- It is important that s 61HE(4)(b) directions are unambiguous in emphasising that there is no room for hypothesising beyond that which is necessarily involved in the removal of an accused's self-induced intoxication from the matters to be taken into account when finding knowledge: at [127].

4. JURY

Application for request to sheriff for investigation of potential juror impropriety - s 73A Jury Act 1977 - renewed application to appellate court on same basis dismissed

Menon v R; Onley v R [2025] NSWCCA 56

> s73A(1) *Jury Act 1977* provides that the sheriff may, with the consent of or at the request of the Supreme Court or District Court, investigate suspected improper conduct by a juror.

The CCA, also sitting as the Court of Appeal, dismissed the applicants' applications for leave to appeal from the Supreme Court's refusal that the sheriff investigate the jury; and for a request to the sheriff to conduct an investigation pursuant to s 73A.

Construction of s 73A

Section 73A(1) authorises *two* distinct processes. Both lead to an investigation and report. One starts with the sheriff and requires court consent; the other with a request from the court, which the applicants sought: at [20]. Section 73A proceeds on the basis that in the ordinary course, application is made to the sheriff: at [24]. There is plainly no *obligation* first to approach the relevant court: at [28].

Repeat applications to a court

On an application to a court to request the sheriff to conduct an investigation, the court is exercising an administrative, not judicial, function: at [39]. Whether or not the function is administrative or judicial, an applicant is not normally permitted to make repeat applications to a court, on the same basis, unless there has been a material change of circumstance: at [40]-[41].

Conclusions and orders

The applicants are free to start afresh and make a further application to this Court on the basis of the same material as considered by the primary judge: at [64].

The applications are refused. The critical thing is not to confine the inquiry to whether there is reason to suspect improper conduct. That is merely the precondition to exercise of the power and does not of itself mandate its exercise. Here, there has not been an investigation *by the sheriff* but something *better* - an inquiry by the judge. The inquiry was timely; involved evidence on oath which the sheriff is unable to do, questions asked of the juror, and answers which go directly to the applicants' concerns; and assessment of the juror's answers and applicant's evidence: at [66]-[68].

Jury must not be informed of any count where accused has pleaded guilty - "one indictment, one jury" rule – s 130 Criminal Procedure Act 1986

Decision Restricted **[2025] NSWCCA 61**

> s 130(3)(b) *Criminal Procedure Act 1986* provides that where the accused is arraigned on indictment prior to jury empanelment, the accused is to be arraigned again on the indictment when the jury is empanelled for the continuation of the trial.
>
> s 130(4) states that nothing in s 130 requires a jury be empanelled if the accused pleads guilty to an offence during proceedings on indictment.

The applicant pleaded guilty to two offences and not guilty to one offence. To avoid the need to seek leave to withdraw his guilty pleas, he sought re-arraignment before the jury on all counts and to enter new pleas of not guilty. The trial judge ruled he could only be arraigned before the jury on the count to which he had pleaded not guilty (count 2): at [163].

The applicant appealed the judge's decision to limit the jury arraignment to count 2, submitting the judge misunderstood his right under s 130(3) of the Act and/or the general law to be arraigned before the jury on all counts in the indictment.

The CCA dismissed the appeal.

- The text, context and purpose of s 130 is clear. An accused is not required to be re-arraigned before a jury on those counts on the indictment that they have pleaded guilty to before a jury is empanelled: at [64]-[85].
- Sub-section 130(4) reflects the "one indictment, one jury" rule - that no reference be made before the jury to any count where the accused has pleaded guilty before unless the accused waives that prohibition: at [63]; *R v Darke* (1938) 26 Cr App R 85.
- By s 130(4) , the accused need not be arraigned before a jury if they have earlier pleaded guilty to an offence on the indictment. Where an accused pleads guilty to only some of the offences, no jury is required to be empanelled in relation to those offences. The section permits empanelment of a jury for those offences to which the accused has pleaded not guilty: at [67]-[68].

Jury irregularities - prejudicial transcript provided to jury - fail to discharge jury following juror misconduct where juror holding out for acquittal - ss 53A, 53C Jury Act 1977

Decision Restricted [2025] NSWCCA 131

The CCA allowed the applicant's appeal where two jury irregularities resulted in a miscarriage of justice.

Provision to jury of prejudicial transcript

The jury was mistakenly provided with a transcript containing discussions held in their absence, including of allegations of counts at an earlier trial of which the applicant had in fact been acquitted.

- Nothing disclosed to the jury that the applicant was acquitted of the previous counts, depriving him of the full benefit of those acquittals and placing him in potential double jeopardy: at [69]-[70].
- The trial judge's direction to the jury to disregard the material did not remove unfair prejudice. A clear direction was needed that discussion in their absence concerned acquitted charges, the jury must fully respect those verdicts, disregard the allegations, and be reminded of the applicant's good character and lack of prior convictions: at [71]-[72].
- A miscarriage of justice was occasioned. The materiality threshold has been met, as mistaken provision of portions of the transcript could realistically have affected the jury's reasoning to verdicts of guilty: at [76]–[78]; *Brawn v The King* [2025] HCA 20.
- Where a judge agrees to a jury's request for a transcript, parties must ensure all evidence or discussion in the jury's absence is removed. The Court should reconvene without the jury so counsel can take the judge through removed transcript. This formality ensures the right to a fair trial is not at risk: at [66]-[67].

Fail to discharge jury following juror misconduct where juror holding out for acquittal

Juror H was discharged for misconduct under s 53A *Jury Act* after making an inquiry outside the courtroom. When the judge questioned Juror H, it was known the jury was in disagreement. Juror H's answers suggested he would likely vote not guilty. A short time later majority verdicts were returned by the 11 jurors, leading to the reasonable inference that Juror H and another juror were holding out for an acquittal: at [95]-[96].

- *BG v R* [2012] NSWCCA 139 identified three categories of whether a trial should continue with a reduced number of jurors or be discharged under s 53C *Jury Act 1977*. This case falls into the second: where there is evidence from which it can be inferred prospectively that the discharged juror would have voted for an acquittal: at [97-[98].
- The Crown's argument that *BG* does not apply when discharge occurs under s 53A is rejected. The overriding principle is a fair trial: at [99]; authorities cited.
- The trial judge's failure to discharge the entire jury after Juror H's testimony and removal caused a substantial miscarriage of justice: at [100].

Jury irregularities - alleged bullying and harassment in jury room - sheriff's officers interviewed juror privately and prepared jury report without knowledge of parties

D'Agostino v R [2025] NSWCCA 159

The applicant was convicted by jury of Comonwealth drug offences.

After three days of jury deliberations, the sheriff's officer informed the judge of jury issues. The judge asked for a written report which was received the following day. The report stated bullying and conflict among jurors, that a juror wished to be discharged, and the sheriff's officer had spoken to the jury and then later privately interviewed the juror. The judge declined to discharge the jury.

The applicant appealed, arguing a miscarriage of justice due to jury irregularities and denial of procedural fairness.

Under s 53A *Jury Act*, a juror must be discharged if their conduct gives rise to a substantial miscarriage of justice.

The CCA allowed the appeal, quashed the convictions and ordered a retrial.

- The sheriff's private interview with a juror was a serious breach of trial procedure, constituting a fundamental irregularity and substantial miscarriage of justice. It went beyond discussion on a mere procedural or administrative matter at least insofar as it records agreement by the juror not to seek to be discharged: at [98]-[99]. The one-day delay in receiving the Report led to the further unauthorised communications and the jury continuing its deliberations. This could not be remedied by jury directions: at [101].
- The applicant was denied procedural fairness. He was not promptly informed about, or heard on, the developments regarding jury issues. He should have been made aware of matters when they arose (*Carson (a pseudonym) v The Queen*): at [120].

5. PROCEDURE

Judicial intervention - principles - unrepresented accused must be given opportunity to present case but there are limits

Zhang v R (No 4) [2026] NSWCCA 8

The CCA dismissed the applicant's conviction appeal, brought on the ground that the trial judge's excessive and undue intervention occasioned a miscarriage of justice.

The Court set out principles regarding judicial intervention, particularly for an unrepresented accused.

Judicial intervention

A judge's questioning may be excessive and lead to a miscarriage of justice when the questioning:

(1) unfairly undermines the proper presentation of a party's case (the disruption ground);
(2) gives an appearance of bias (the bias ground);
(3) is such an egregious departure from the role of a judge presiding over an adversarial trial that it unduly compromises the judge's advantage in objectively evaluating the evidence from a detached distance (the dust of conflict ground): at [114]; *Mehajer v R* [2022] NSWCCA 240 at [144].

A decision as to "whether the point of unfairness has been reached must be made in the context of the whole trial and in the light of the number, length, terms and circumstances of the interventions": at [115]; *R v Thompson* [2002] NSWCCA 149; *Galea v Galea* (1990) 19 NSWLR 263 at 281.

Principles regarding judicial intervention (at [116]):

The principles are set out in *Nwagbo v The Queen* [2021] VSCA 93 at [38]:

(a) Judicial intervention causing a substantial miscarriage of justice is a question of fact and degree.
(b) The adversarial system prescribes distinct roles to counsel and the judge, and the judge's role is circumscribed by that system.
(c) In jury trials, judges should avoid unnecessary intervention in the presence of the jury.
(d) Judicial intervention before a jury must not descend to denigration of counsel or counsel's case.
(e) A judge must not appear to adopt the role of a party or appear as that party's partial advocate.
(f) A judge must not shape the content of a trial save for procedural or evidentiary rulings, nor fill gaps in a party's case, examine areas left alone, or impact a witness's credit.
(g) A judge may intervene to understand technical issues or clarify those issues for the jury.
(h) A judge may intervene to maintain proper control over proceedings.

The ultimate question is whether the judge's conduct was such that there was unfairness to the applicant resulting in miscarriage of justice: at [117].

Unrepresented accused

An unrepresented accused must be given an opportunity to present their case but there are limits. For example, not merely being permitted to pursue any argument or issue they wish to irrespective of relevance or time taken: at [119]; *TS v R* [2022] NSWCCA 222.

A fair trial requires self-represented accused to follow the same general principles, although some flexibility may be given in how they question witnesses. Trials must be fair to both parties. Here, the applicant repeatedly suggested fabrication and deliberate wrongdoing by ATO officers with no basis. Legal practitioners are bound to ensure propositions have proper foundation. Self-represented persons may not be bound by the same principles (in the sense of being subject to sanction) but a judge must ensure against offensive, harassing or speculative questioning (*Evidence Act 1995*, s 41): at [120]-[122].

Accused did not give evidence at trial based on legal advice - "correctly" advised by defence counsel not to give evidence - principles

AA v R [2026] NSWCCA 10

The applicant was convicted by jury of sexual assault offences. The defence case was that the complainant consented, had clear motive to lie and was not sufficiently credible.

The applicant did not give evidence at trial based on legal advice. He appealed on the ground he was not adequately or properly advised as to whether he should give evidence, particularly as to the advantages and risks, leading to a miscarriage of justice.

The CCA dismissed the appeal.

- The preliminary question is whether the applicant has established that he would have chosen to give evidence at trial had he been "correctly" advised. The applicant gave no such express evidence. Without such express evidence, on which he could have been cross-examined, the evidence does not establish that the trial would have been conducted differently. The appeal must fail on this basis: at [141]-[143]; *Craig v The Queen* (2018) 264 CLR 202 at [37].
- It was not necessary for defence counsel to explain all pros and cons or a potential advantage of negligible value (*R v Szabo* [2001] 2 Qd R 214; *Liberato v The Queen* (1985) 159 CLR 507). There was adequate discussion and opportunity for the applicant to decide whether to give evidence, and he was not bound to be convicted if he did not do so. The advice not to give evidence was reasonable and adequate. Prospects of acquittal would have been significantly reduced had he given evidence. He made the decision not to give evidence and was not deprived of a fairly open chance of acquittal: at [160]-[163].

Principles on appeal relying on alleged incompetence of counsel's advice whether to give evidence

- *Craig v The Queen* (2018) 264 CLR 202 establishes that:

  (1) a fair trial requires awareness of the right to give evidence; and

  (2) that the decision is for the accused.

  A miscarriage may arise where incorrect legal advice affected that decision and, but for that advice, the accused would have chosen to give evidence: at [152]-[154].
- The appellate court must be satisfied that (1) it was the accused's wish to give evidence; and (2) that incorrect advice deprived that opportunity: at [155]-[157]; *Craig v The Queen* at [34].
- The extent of any discussion is a matter of forensic judgment. Counsel need only mention the main points, may give strong advice, and regret about an election does not amount to a ground of appeal: at [158]-[159]; *White v R* [2018] NSWCCA 1 citing *R v Szabo* [2001] 2 Qd R 214.

Whether to advise an accused to give evidence

Generalisations about advising an accused to give evidence are rarely helpful as the evaluation depends on specific circumstances of the case. Matters may include (at [144]):

1. whether the complainant's evidence has been impugned so as not to be accepted beyond reasonable doubt;
2. how the accused is likely to present in the witness box;
3. whether damaging material not tendered in the Crown case may become admissible in accused's cross-examination;
4. whether the accused's evidence would support the complainant on peripheral matters;
5. whether a guilty verdict would be unreasonable;
6. where, if the accused gives evidence, the prospect of a verdict of guilty being found to be unreasonable is likely to be foreclosed; and
7. whether the Crown case is so strong that the accused has nothing to lose by giving evidence.

No remaining controversy between parties - moot appeal

R v Chamma [2026] NSWCCA 12

C discontinued his application for production under subpoena served on the Commissioner of Police after accepting a Crown plea offer. However, the Attorney-General and Commissioner asked the CCA to nevertheless determine their appeal against orders refusing to excuse production, arguing the matter raised issues of public importance concerning informer privilege and s 130 *Evidence Act 1995* (NSW).

The CCA refused to hear the appeal. After the accused discontinued the subpoena application there was no longer a live controversy, rendering the issues hypothetical. Courts do not give advisory opinions in the absence of a real dispute, a principle applying to both civil and criminal proceedings (*Bonan v Hadgkiss* (2007) 160 FCR 29): at [9]-[10], [14].

Although the Attorney-General and Commissioner argued the matter raised important issues about informer privilege and s 130 of the *Evidence Act 1995*, the Court held that its discretion to hear moot appeals should not be exercised here, as the issues could be determined in future cases with real disputes and subpoenas of this kind are not common: see at [11]-[16].

Apprehended bias – Judge subject to inquiry allegations – recusal required

R v Bechara [2026] NSWCCA 71

The applicant, facing trial for drug supply, alleged that the evidence against him was obtained through police and civilian misconduct.

He sought the trial judge's recusal for apprehended bias because the judge was the subject of ongoing allegations before a judicial inquiry that he had fabricated evidence, ignored police violence, and lied under oath in relation to the Croatian Six investigation. The inquiry had not yet reported.

The applicant appealed the judge's refusal to recuse himself.

The CCA allowed the appeal, set aside the refusal to recuse, and remitted the matter to the District Court before a different judge.

- Apprehended bias requires identifying a relevant factor suggesting possible bias, linking it logically to a potential departure from impartial decision-making, and assessing whether a fair-minded lay observer would reasonably apprehend bias: *Ebner v The Official Trustee in Bankruptcy* (2000) 205 CLR 337.
- The relevant factor was the judge facing unresolved and serious allegations of dishonesty and police misconduct that were under current investigation and potentially damaging to his reputation. A fair-minded observer could reasonably perceive that the judge might be particularly sensitive to similar allegations against police in the present case, giving rise to an apprehension of bias: at [17]-[28].
- As this ground succeeded, the Court did not determine truth of the allegations: at [41]-[46].

Sexual assault communications privilege – subpoena of documents containing "protected confidences" – failure to consider or inspect documents – ss 299B(4), 299D Criminal Procedure Act 1986

***Decision Restricted* [2025] NSWCCA 55**

The sexual assault communications privilege provisions require leave to compel production of protected confidence documents: s 298(1) *Criminal Procedure Act 1986*.

> If a question arises relating to a document, a court may consider the document: s 299B(1).
>
> A court may make orders to facilitate its consideration of a document: s 299B(4).
>
> s 299D states that a court cannot grant leave unless satisfied:
>
> - the document will have "substantial probative value" (s 299D(1)(a));
> - other evidence concerning the matters to which the protected confidence relates are not available (s 299D(1)(b)); and
> - public interest in preserving the confidentiality of protected confidences and protecting the principal protected confider from harm is substantially outweighed by public interest in admitting the document (s 299D(1)(c)).

The CCA held that the primary judge, in refusing leave to subpoena counselling documents, had failed to exercise powers under s 299B to consider whether the documents satisfied the s 299D test: at [72]. The CCA ordered under s 299B(4) that the documents be produced to the District Court and remitted the matter back to the District Court.

- It is not suggested documents must be inspected in every case. However, in many cases inspection may be important, if not determinative, in considering whether documents have "substantial probative value": at [26]-[27]; *KS v Veitch (No 2)* [2012] NSWCCA 266; *Rohan v R* [2018] NSWCCA 89.
- Here, it was not possible to determine whether the documents had substantial probative value without considering the documents, nor engage with the balancing exercise required under s 299D(1)(c). The possibility that the applicant may have met the high statutory test in s 299D arose due to matters including timing of the complaints, both parties proposing to call expert evidence, and the complainant's reliability and credibility being a central issue at trial: at [81]-[82].
- Further, insofar as the judge did, it was an error to apply the "will have … substantial probative value" test to the question that arose under s 299B(1) and (4). Leave was not required before such powers could be called into aid and the test in s 299D(1)(a) did not apply: at [75].

In the similar case of ***JK v R*** [2025] NSWCCA 44 inspection of documents was essential to evaluation of probative value. The judge's error in failing to inspect the documents was established not because of a universal requirement to inspect ("consider") the documents, but because of the centrality of the complainant's credibility and reliability to proceedings and 'evolution' of her statements: at [24]-[28].

Evidence by sexual assault complainant by AVL – directions inconsistent with s 294B(7) Criminal Procedure Act 1986 - Crown interlocutory appeal allowed - sample direction where there is weakness in manner in which evidence was given

R v Walker [2025] NSWCCA 62

Section 294B *Criminal Procedure Act* provides:

> *Giving of evidence by complainant in prescribed sexual offence proceedings—alternative arrangements*
> …
> (7) In any proceedings in which evidence is given as referred to in subsection (3), the judge must—
> (a) inform the jury that it is standard procedure for complainants' evidence in such cases to be given by those means or use of those arrangements, and
> (b) warn the jury not to draw any inference adverse to the accused or give the evidence any greater or lesser weight because it is given by those means or by use of those arrangements.

At the accused's sexual assault trial, the trial judge directed the jury that, in the event that there was difficulty assessing the complainant's credibility because the evidence had been given by way of AVL, the difficulty should be "resolved in favour of the accused" so they were entitled to, as per s 294B(7)(b), "give the evidence … lesser weight because it [was] given by those means".

The Crown appealed the judge's refusal of the Crown's application to discharge the jury (s 5F *Criminal Appeal Act*).

The CCA allowed the appeal and remitted the matter to the District Court.

- The directions breached the prohibition in s 294B(7). The direction raised the relationship between the assessment of the witness's demeanour and the means by which the evidence was given. A subsequent direction that the means by which the evidence was given might lead to a doubt as to whether the evidence could be relied on was to similar effect. The judge's reasons for refusing to order the discharge were wrong as they were premised on his view that the directions were not inconsistent with s 294B(7). He thereby erred: at [24]-[25].
- The CCA made observations on research and views of judges as to evidence in sexual offence proceedings given by alternative arrangements, and impact of evidence given by AVL: at [30] ff.

Sample direction where there is weakness in manner in which evidence was given

- If it is suggested that there is some weakness in the Crown case because of the manner in which evidence was given, it may be open, in an appropriate case, to point out the potential difficulties in the evidence.
- An *example direction* is provided for where the impact of AVL is capable of being identified; for example, the image was blurry, there was a delay, or for some other reason: see at [59].

6. PARTICULAR OFFENCES

Common law escape police custody - escape a continuing offence with temporal limitation - R v Tommy Ryan (1890) 11 LR (NSW) 171

Elali v R [2025] NSWCCA 9

The applicant, a prisoner, was being escorted by police from an outside hospital. He escaped, entered residential premises and hid.

The applicant appealed his conviction under s.114(1)(d) *Crimes Act* of entering a building with intent to commit an indictable offence, namely the common law offence of escape.

The question on appeal was whether the applicant was continuing to commit the common law offence of escape when he entered the premises; or, as the applicant submitted, that the offence was complete at the time police officers lost sight of him.

The CCA had not considered this issue since *R v Tommy Ryan* (1890) 11 LR (NSW) 171, which held that the common law offence of escaping is a continuing offence. The applicant relied on Victorian and NZ authority to argue that escape is not a continuing offence.

The CCA dismissed the appeal.

- The common law offence of escaping from lawful custody is a continuing offence. It is not constrained by imposition of boundaries such as lack of immediate pursuit, loss of control or being out of sight: at [61]; *R v Tommy Ryan*, applied.
- However, there is a temporal limitation. Escape does not continue indefinitely as there will come a time that the escape has been completed such that the escapee becomes a fugitive from justice. Whether an escape has ended is a question of fact: at [59]-[61].
- Here, the applicant was in the process of escaping when he entered the premises. A jury, properly instructed, could not reasonably reach any other conclusion: at [38], [62].

Should Tommy Ryan no longer be followed?

- It is not necessary in the present case to resolve whether *Tommy Ryan* should be overruled. However, the CCA did express reservation about the offence continuing so long as the person escaping is kept out of imprisonment. The CCA observed there will be a time when as a question of fact, the escape has been completed, but this was not an issue in the present case: at [64]-[65].

Section 192E Crimes Act - dishonestly cause financial disadvantage by deception - no element of intentionally or recklessly causing the financial disadvantage

Dimitriou v R [2025] NSWCCA 18

s 192E(1)(b) *Crimes Act 1900* - Dishonestly causing a financial disadvantage by deception - states:

> "A person who, by any deception, dishonestly obtains any financial advantage or causes any financial disadvantage, is guilty of the offence of fraud".

The CCA dismissed the applicant's appeal against conviction by judge alone for a s 192(1)(b) offence. The trial judge was not required to direct herself that she needed to be satisfied beyond reasonable doubt that the applicant intended to cause a financial disadvantage or was reckless as to that outcome. No court has construed the offence as including a fourth element of intentionally or recklessly causing the financial disadvantage: at [94]. The CCA stated:

- The offence expressly requires that it be committed both "by deception" (see 192B) and "dishonestly" (see s 4B), with definitions of those terms assigning a different mental element: at [94]; *Bazouni v R* [2021] NSWCCA 256 at [75]–[76]
- "Deception" (s 192B) does not require the deception to induce a false belief in the recipient of information. Rather, the relevant effect is prescribed by the third element of the offence; namely, obtaining any financial advantage or causing any financial disadvantage: at [95]; *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143 at [647].
- "By deception" (in s 192E(1)) requires a causal connection between the deception and the relevant effect: at [95]-[98]. The Crown must establish that the deception substantially or significantly contributed to the outcome: at [96]; *Re Robert Burton* [2021] NSWCCA 87; *Flack v R* [2011] NSWCCA 167.
- Contrast ss 192F and 192G which, unlike s 192E, do not require that the financial advantage actually be obtained but rather that there be an *intention* to obtain such an advantage: at [97]; *Duncan v Independent Commission Against Corruption*; *Hughes v R* [2021] NSWCCA 238.

Murder trial – "honour killing" – religious, cultural stereotypes - conduct of Prosecutor – no miscarriage

Iskandar v R [2025] NSWCCA 33

The applicant appealed his murder conviction on grounds including the trial miscarried because the Crown Prosecutor addressed the jury and cross-examined in an improper manner, describing the murder as "an honour killing" and cross-examining the applicant about his religious beliefs and the approach of Islam to adultery. The Crown case at trial was that the applicant and his father killed the male deceased for having an affair with the applicant's mother (and wife of the applicant's father).

- The concept of "honour killing" introduced by the Crown Prosecutor at trial and its connection to the applicant's religion gave rise to a danger that the jury's deliberation may be infected with prejudice and emotion. Attempting to categorise the crime as an "honour killing" or one motivated by the applicant's religion was unnecessary, given the strength of the prosecution case and the admissions made to a witness which indicated motive: at [88].
- However, the Prosecutor's conduct was not improper. She raised the issue at the beginning of trial. There was nothing underhanded or improper in approach. Trial counsel did not raise the matter and attempted to use it in the applicant's favour: at [88]-[93]. There was no miscarriage of justice: at [105] – [116]. The CCA dismissed the appeal.

Use carriage service to groom a person under 16 years – proof of belief about age - ss 474.27(1), s 474.28(3) Criminal Code 1995 (Cth)

Jones v R [2025] NSWCCA 38

The appellant was found guilty by jury of using carriage service to groom a person under 16 years of age under s 474.27(1) *Criminal Code 1995* (Cth). The "child" was a police officer posing as a 14-year-old girl.

> Section 474.28(3) provides that for the purpose of s 474.27, evidence that the recipient was represented as being of a particular age is, in the absence of evidence to the contrary, proof that the defendant believed them to be of that age.

Allowing the applicant's appeal, the CCA held the trial judge erred in directing the jury that in the absence of evidence to the contrary it was established that the appellant believed the person to be under 16, and that it was a defence if the appellant established a reasonable possibility that he believed the recipient was at least 16.

- Section s 474.28(3) is a means of proof only in the event there is no evidence to the contrary. If there is "evidence to the contrary", the representation that the person was under 16 no longer operates as proof that the defendant believed the person to be under that age. In such a case the onus falls on the Crown to prove to the criminal standard and on the whole of the evidence that that was what the defendant believed: at [47], [60]. Section 474.28(3) places no burden on a defendant: at [49].
- Whether there is *an absence of evidence to the contrary* is a question of law to be determined by the trial judge; it is not a fact in issue for the jury: at [68].
- In this case, there was "evidence to the contrary" – namely, the appellant's evidence that he believed he was talking to someone over the age of 18, as well as evidence in his police recorded interview. The directions should not have been given to the jury: at [61], [70].

"under authority of" in s 61H(2) Crimes Act 1900 – person receiving treatment from an osteopath is "in the care of" and thus "under the authority of" the osteopath

Hu v R [2025] NSWCCA 66

The applicant, an osteopath, was convicted of aggravated sexual intercourse (s 61J(1) *Crimes Act*) and aggravated indecent assault (s 61M(1), *rep*) in relation to two female patients.

The applicant submitted the trial judge erred in holding it was open to find that the mere fact of providing osteopathic treatment established the circumstance of aggravation, i.e. the victims being *under the authority* of the offender. Section 61H(2) defines "under the authority of":

> "... a person is under the authority of another person if the person is in the care, or under the supervision or authority, of the other person."

The CCA dismissed the appeal.

- On proper construction of relevant provisions, when there is a relationship of patient and health care professional and the patient is receiving treatment, the patient is "in the care of", and thus "under the authority of", the health care professional for the purposes of s 61H(2) and ss 61M and 61J: at [47]-[49].
- Each of the three elements in s 61H(2) - being in the 'care' , 'supervision' and 'under the authority' of a person - operate independently and not as a composite: at [46]-[47]; authorities cited.
- "Care" in this context is an ordinary English word. In s 61H(2), it should be given its ordinary English meaning. In this context, the ordinary meaning of "care" includes "health care", that is treatment by a health care professional: at [48]; *KSC v R* [2012] NSWCCA 179 at [125].

Deemed drug supply, s 29 DMTA - where proof of intention to use part of drug not inconsistent with possession of whole quantity for the purpose of supply

Barber v R [2025] NSWCCA 179

> Section 29 DMTA provides that a person who has in possession a prohibited drug not less than the traffickable quantity shall be deemed to have the drug in possession for supply unless—(a) the person proves that s/he had the drug in possession otherwise than for supply.

The applicant was found guilty by judge alone of supply commercial quantity (1,105.2 g) of 1,4-butanediol, under s 25(2) *DMTA*. The drugs were in four different containers.

On appeal, the applicant submitted unreasonable verdict as the evidence established he intended to use a substantial amount of the drug personally, not supply it. Thus s 29 did not operate to deem the entirety of the drug in possession to be for the purpose of supply, and, if the law was correctly applied, he would have been found guilty of the lesser supply offence under s 25(1).

The CCA dismissed the appeal.

- Under s 29(a), the person is deemed to possess "*the* prohibited drug" for supply. The definite article "the" in this context refers to the entirety of the prohibited drug in possession. The requirement in s 29(a) that the person prove they had possession of "the" prohibited drug for a purpose other than supply is again a reference to the drug as a single quantity. A failure to prove "the" (whole single quantity) of the drug was in possession for a purpose other than supply has the result that s 29(a) is not satisfied. The whole of the drug is thus deemed to be in the person's possession for supply: at [29].
- As the drug quantities were indistinguishable, it became an indivisible whole quantity deemed to be in possession for the purpose of supply. It was not possible to point to any part of the substance and be positively satisfied on the balance of probabilities that it was possessed by the applicant for a purpose other than for supply: at [31].

Deemed drug supply, ss25, 29 DMTA – "exclusive possession" - Crown case rejected joint possession

English v R [2025] NSWCCA 184

The applicant was convicted of deemed drug supply offences (s 25, 29 DMTA) and deal with proceeds of crime, alleged to have been committed at an apartment leased to him.

On appeal, the applicant argued unreasonable verdicts because the Crown relied on *exclusive possession*, and the evidence could not establish the exclusivity of his possession beyond reasonable doubt. Evidence showed the apartment had been leased to another person previously who had two keys and lift fobs, and had only transferred the lease to the applicant a few days before the applicant's arrest.

The CCA allowed the appeal and entered verdicts of acquittal for the drug supply offences. It was not open to the jury to be satisfied beyond reasonable doubt of the applicant's guilt in the manner contended by the Crown: at [98]-[103].

- Where the prosecution alleges exclusive possession by an accused it must negate possession on the part of any other person (*Huynh v R* [2020] NSWCCA 202 at [21]). Although possession ordinarily entails the exclusion of others, several people may still have joint possession of a thing: at [17]-19]; *Moors v Burke* (1919) 26 CLR 265 at 271; *Lee v R* [2013] NSWCCA 68; (2013) 232 A Crim R 337.
- Here, the Crown case at trial was that possession of the drugs and cash was truly exclusive, rejecting the possibility of joint possession: at [22].
- Evidence shows the applicant lived in the apartment, likely alone but not certainly. DNA proves the applicant handled and had possession of the drugs but does not establish exclusive possession. The evidence suggests others accessed the apartment using one or either of the two key fobs: at [86].
- What is at issue is exclusive possession of the drugs and money, not occupancy or possession of the unit, but in this case the two cannot really be disentangled. There is a reasonable possibility that the applicant's possession of the drugs and the cash was not exclusive: at [87], [90].

Attempt to possess commercial quantity of unlawfully imported border-controlled drug - s 11.3 Criminal Code (Cth) applied to proxy who was charged as a principal

DPP (Cth) v Ingram [2025] NSWCCA 103

> Section s 11.3 *Criminal Code* (Cth) deems a person who has the relevant fault elements and who procures the relevant conduct of a proxy to have committed the offence in question.

At trial, the respondent was jointly indicted with his co-offender, C, for attempted possession of a commercial quantity of an unlawfully imported border-controlled drug.

The Crown case was that both the respondent and C were guilty as principals on the basis that each attempted to possess the package. Alternatively, that the respondent was guilty on the basis he procured C as a proxy to attempt to possess the package.

The Commonwealth Director of Public Prosecutions appealed from the trial judge's interlocutory ruling that the Crown could not rely on s 11.3 because s 11.3 had no application where the proxy and the accused were also charged as principals.

The CCA allowed the Director's appeal.

- It is open to the Crown to proceed, in the alternative, on the basis that if the jury is unpersuaded of the respondent's guilt by reason of his own conduct, then the Crown may seek to rely on s 11.3 in its application to C as a proxy, despite that C stands charged as a principal: at [172].
- The only question posed by s 11.3 is whether the proxy's conduct was procured by the person charged. Section 11.3 is silent as to the proxy's state of mind, and prima facie applies in its terms, indifferently to the proxy's ignorance or suspicion or belief or knowledge: at [95], [171].
- The dictum from *Commonwealth DPP v Brady* [2016] VSC 334; 346 FLR 1 at [936] limiting the application of s 11.3 should not be followed. In *Brady* it was said that s 11.3 did not "apply to persons who engaged in the offence with the requisite intention at the time of committing the physical element of the offence". Section 11.3 is available irrespective of the "innocence" or otherwise of the proxy: at [5].
- Leeming JA (Wright and Rigg JJ agreeing) observed that it is necessary for the Crown to act fairly, and that may involve giving notice of the alternative ways it invites a finding of guilt. If there is a standard practice of the Crown "reserving its rights" in joint prosecutions in relation to ss 11.2, 11.2A and 11.3 (as done here in the "Notice of Prosecution Case"), that is far from best practice, as it does not assist those accused to understand how the Crown intends to proceed. However, it was noted that in the present case the Crown case was particularised in advance: at [91].

Drug importation - directions - error in conflating direction as to mental element of intention with direction as to inferential reasoning

Ko v R [2025] NSWCCA 129

The applicant was convicted by jury of attempting to import a commercial quantity of a border-controlled drug under ss 11.1(1), 307.1(1), and 311.1(1)(f) *Criminal Code* (Cth). The requisite mental element is "intending to import a substance, knowing or reckless as to the substance being a border-controlled drug" (at [52]).

The defence case was that the applicant believed he was assisting the importation of a legitimate consignment into the country.

The trial judge directed the jury that if satisfied beyond reasonable doubt the applicant perceived a real or substantial chance of a substance being present, it was open to the jury, having regard to all facts and circumstances, to infer the applicant intended to import: at [94].

On appeal, the applicant submitted the judge erred by conflating the direction as to the mental element of intention with a direction as to inferential reasoning

The CCA allowed the appeal, quashed the conviction, and ordered a retrial.

- There was a misdirection on the issue of intent to import and, as it was central to the offence charged, the conviction should be quashed : at [129].
- The direction fell short of stating that an awareness of a real and significant chance that the conduct involved the importation of the substance would not of itself be sufficient to draw the necessary inference but that it also must be proved beyond reasonable doubt that the applicant "nevertheless persisted with that conduct" notwithstanding that awareness or belief: at [125]; *Smith v The Queen; The Queen v Afford* (2017) 259 CLR 291; *Kural v The Queen* (1987) 162 CLR 502 at [14].
- The jury was required to be directed as to both i.e. that, in order to draw an inference of intent, it was necessary to be satisfied beyond reasonable doubt of *each* of the facts and circumstances

from which the inference of intent is drawn; and, as the jury was directed, that the inference of intent was the only reasonable inference open to be drawn from those facts and circumstances. The jury was not directed as to the former: at [126]-[132].

Conspiracy to commit an act in preparation for, or planning, a terrorist act or acts - preparing for, or planning, a specific terrorist act not an "essential ingredient" - ss 11.5(1), 101.6(1) Criminal Code (Cth).

Khayat v R [2025] NSWCCA 151

The applicant was convicted of one count of conspiracy to do acts in preparation for, or planning, a terrorist act or acts contrary to ss 11.5(1) and 101.6(1) *Criminal Code* (Cth).

At trial, the Crown particularised two distinct terrorist acts: the "bomb plot" (sourcing explosives for a flight) and the "gas plot" (testing a lethal gas).

The applicant appealed, arguing that the trial judge failed to give an extended unanimity direction so that the jury was unanimous on the specific terrorist act being prepared for or planned, that is, that the jury be unanimous in their pathway to guilt for the offence charged**.**

The CCA dismissed the appeal.

An extended unanimity direction was not required. There was no need for the jury to be unanimous as to whether the applicant joined the bomb plot or the gas plot or both: at [116].

First, such a direction would fail to reflect the nature of the essential ingredients of the charge. Section 101.6 is construed as providing that an offence is committed by doing "any act in preparation for, or planning, a terrorist act", without the need for there to be any specific terrorist act identified: at [98]; *Lodhi v R* [2006] NSWCCA 121; *R v B* [2008] NSWCCA 85; *Abbas v The Queen* [2022] VSCA 39.

Rather the essential ingredients for the offence of conspiracy to do acts in preparation for, or planning, a terrorist act might be formulated as (at [99]):

1. The person entered into an agreement with at least one other party to do an act or acts meeting the description of an act in preparation for, or planning, a terrorist act;
2. The person intended, that is meant, to enter into that agreement;
3. The person and at least one other party to the agreement intended that an act meeting the description of an act done in preparation for, or planning, a terrorist act would be done pursuant to the agreement; and
4. The person or at least one other party to the agreement committed an overt act pursuant to the agreement.

The essential ingredients identified by the judge in summing up and written directions were consistent with this: at [100].

Second, such a direction would also fail to reflect the issues in the trial, where the primary issue was whether the applicant became a party to the conspiracy. The existence of the conspiracy was not disputed: at [115].

7. APPEALS

Role of appellate court in conviction appeal where audiovisual evidence available separately from written appeal books

Radburn (a pseudonym) v R [2025] NSWCCA 125

The CCA dismissed the applicant's appeal against conviction for child sexual assault against his granddaughter, aged 3-6, on grounds including that the verdict was unreasonable.

On the appeal, an issue arose regarding the CCA viewing audiovisual recordings of police interviews with the complainant which were in evidence at trial. The recordings were provided to the CCA by the Crown as per usual practice. It was common ground that the CCA could view the recordings if there was a "real forensic purpose". Otherwise, the parties' submissions were diametrically opposed.

Leeming JA (Free JA and N Adams J agreeing) set out the role of the appellate court in a conviction appeal where there is audiovisual evidence available separately from the written appeal books (at [30]-[45]):

First, the appellate court will often see material not before the jury, e.g. wrongly admitted evidence or combined appeals against conviction and sentence.

Second, with audio or audiovisual recordings, the key question is whether the transcript fails to capture relevant evidence. Transcripts often contain minor errors (mis-transcriptions, omissions of non-verbal cues, gestures, pauses, tone, or interpreter differences) which may only become apparent on review of the recording.

Third, the appellate court's "real review" focuses on grounds of appeal and submissions. Most transcript imperfections are immaterial. Even if recordings clarify defects, usually no forensic purpose is served.

Fourth, often no recordings exist, requiring inferences when transcripts matter. When recordings exist, inference may not be necessary.

Fifth, audiovisual recordings are not ordinarily treated as the best record of the trial even though it can be the best evidence. "Real review" does not require viewing them. It is for the parties to identify where reviewing recordings is advantageous: at [40]-[44]; *SKA v The Queen* [2011] HCA 13; *Pell v The Queen* [2020] HCA 12; *R v ZT* [2025] HCA 9 at [14].

Finally, in assessing if a verdict is unreasonable, full weight is given to the jury's advantage, which varies by case. Documentary cases may involve slight advantage, whereas word-against-word cases (e.g. sexual assault trials where the accused gives evidence) give the jury a marked advantage: at [45].

Two appeal judges viewed portions of the recorded evidence: at [46]-[49], [142]. N Adams J, after independently assessing all the evidence and finding the verdict open beyond reasonable doubt, held it was unnecessary to consider whether the jury had an advantage in seeing and hearing the complainant (*R v ZT* [2025] HCA 9 at [18]; *M v The Queen* (1994) 181 CLR 487 at 494). In any event, where the Crown case turns on the complainant's credibility, it is difficult to envisage an appeal in which the jury would not have had such an advantage: at [143].

Appeals - notice of appeal filed out of time – appeal ground raises constitutional issue – bail application

AK v R [2025] NSWCCA 105

The applicant sought leave to appeal out of time his conviction and sentence for an offence against s 66EA *Crimes Act* pursuant to r 3.5(5) *Supreme Court (Criminal Appeal) Rules 2021*.

An appeal ground was that s 66EA is unconstitutional. The applicant also made a release application.

The CCA granted leave under r 3.5(5) to make an appeal and application for leave to appeal out of time, and ordered the matter be listed for hearing.

The CCA dealt separately with two initial issues:

(i) Constitutional challenge to s 66EA: The hearing of the appeal and application for leave to appeal could not be dealt with at the same time as the hearing of the application for leave under r 3.5(5). This is because when leave is granted under r 3.5(5), a 'constitutional ground' attracts s 78B *Judiciary Act* by which it is the Court's duty not to proceed unless requisite notices have been given and reasonable time elapsed for consideration by the Attorneys-General: at [35]-[36].

(ii) Release application: As the notice of appeal was not filed within time, there is no appeal against conviction or sentence "pending" in this court under s 61 *Bail Act 2013*. Therefore, leave under r 3.5(5) must be dealt with before the release application, as the Court does not have power to hear and determine the release application until such leave is granted: at [22], [43], [47]-[48]; *Crowhurst; Crowhurst v R* [2025] NSWCCA 57; s 10(2)(b) *Criminal Appeal Act 1912*.

Judicial review - applicant made online posts about respondent, a transgender athlete – District Court granted respondent apprehended personal violence order (APVO) on appeal from Local Court - Crimes (Domestic and Personal Violence) Act 2007 (NSW), ss 7, 19, 20 - two-stage enquiry in s 19 in deciding whether to make APVO – 'intimidation' in s 7(1)(a) does not require intention to harass or molest – standard of appellate review – APVO provisions did not impermissibly burden constitutionally protected implied freedom of political communication - summons dismissed.

Smith v Blanch [2025] NSWCA 188

The applicant, KS, made a series of online posts about B, the respondent, a transgender athlete on a women's football team in regional NSW.

The Local Court refused the respondent's application for an AVPO against the applicant.

The District Court allowed the respondent's appeal from the Local Court, granting an APVO. The District Court judge relied upon intimidation in s 7(1)(a) of the Act: at [38].

> s 19(1)(b)(i) provides a court may make an APVO if satisfied, on balance of probabilities, that a person has reasonable grounds to fear and in fact fears conduct in which the other person intimidates the person, which in the opinion of the court, is sufficient to warrant the making of the order.
>
> s 20 states matters to be considered by the court in deciding whether or not to make an APVO.
>
> s 7(1)(a) defines "intimidation" as "conduct (including cyberbullying) amounting to harassment or molestation".

The applicant sought judicial review based on alleged jurisdictional error that the judge:

(i) elided the two stages under s 19 in whether to make an APVO;

(ii) should have found that under s 7, an *intention* to harass or molest must be proved to be intimidation;

(iii) applied the wrong standard of appellate review;

(iv) erred by finding the APVO provisions did not impermissibly burden the constitutionally protected implied freedom of political communication.

The Court of Appeal (Kirk, Stern and McHugh JJA jointly) dismissed the summons. There was no jurisdictional error.

(i) Decision-making under s 19

- Decision-making under s 19 involves a two-stage enquiry: at [50]; *Veness v Hodge* [2015] NSWCA 20.
- The first task under s 19 resolves into three, overlapping and interdependent, questions (at [50]):
  (1) Is the court satisfied on balance of probabilities that the protected person (seeking an APVO) in fact fears the engagement of the defendant in conduct falling within s 19(a), (a1) or (b)?
  (2) Is the court satisfied on balance of probabilities that the protected person has reasonable grounds for that fear?
  (3) In the opinion of the court, is the feared conduct sufficient to warrant the making of an order? (*Factors relevant to 'sufficiency enquiry' discussed* **at [53]–[55]**).
- Only if each of the three questions is resolved positively does the court need to resolve question (4) under s 19: whether, having regard to matters in s 20, the court should exercise its discretion to make an order: at [51].
- The court must consider s 20 matters and balance potentially conflicting interests to decide whether to make an order. That process overlaps with, but is distinct from, the sufficiency enquiry (in (3) above): at [56].

The judge did not err by eliding the two stages under s 19. Even if the judge did so, such error did not cross the threshold of materiality: at [113]–[116].

(ii) Intimidation and intention, ss 7 and 19

- Intimidation within s 7(1)(a) does not require an intention to harass or molest: see at [60]-[68].

- Intention can be taken into account when considering whether a person has reasonable grounds to fear conduct falling within s 19(1). Intention may be relevant, for example, to whether past conduct may be repeated. However, it is not a mandatory consideration: at [69].

The judge did consider intention under s 19. It was a matter for the judge what weight to give to intention in making findings under s 19: at [121].

(iii) Standard of appellate review

- A correctness standard applies to a finding that the court has jurisdiction to make an order under s 19(1)(b), encompassing the first three questions. Under s 19, the correctness standard of appellate review applies to the entirety of the jurisdictional enquiry: at [87].
- Though at the fourth stage (whether the court should exercise its discretion to make an order) the *House v The King* (1936) 55 CLR 499 standard of appellate review applies: at [87].

The judge did not err by applying the incorrect standard of review: at [118]-[120].

(iv) Constitutional challenge

- The applicant's posts had a political character; her ability to undertake that type of communication has been constrained by the APVO: at [149].
- However, as the burden imposed on the implied freedom by the impugned provisions (ss 7, 19, 35(2)(f)) is incidental, content-neutral, only occurs where an APVO has been found by a court to be warranted, and likely arises in rare cases, the burden can be characterised as limited and of minor significance, and not requiring a compelling justification: at [150]-[156]; authorities cited.
- The benefit of seeking to protect individuals from significant deleterious effects of intimidatory conduct, including of a political character, outweighs the minor burden imposed on the implied freedom by the impugned provisions (ss 7, 19, 35(2)(f)): at [167].

The applicant's constitutional challenge is rejected: at [167].

Judicial review - Local Court conviction confirmed where appeal dismissed by District Court for want of prosecution - Crimes (Appeal and Review) Act 2001, s 20(1)(b)

Khamiss v DPP (NSW) (No 2) [2025] NSWCA 193

The self-represented applicant was convicted in the Local Court of intimidation (s 13(1) *Crimes (Domestic and Personal Violence) Act 2007*). During her cross-examination, the magistrate adjourned, spoke privately with the prosecutor, then stated in court that a name familiar to the magistrate had been raised but "that part of the evidence" would not be relied on by the prosecutor.

The applicant appealed to the District Court, claiming an unfair hearing, but failed to appear at later hearings. The District Court dismissed the appeal under s 20(1)(b) *Crimes (Appeal and Review) Act 2001* ('*CARA*')

Over a year later, the applicant applied under s 22 *CARA* to set aside the dismissal, citing hospitalisation and a psychiatric diagnosis, but the application was outside the 12-month time limit in s 22(2).

The applicant sought judicial review of the Local Court and District Court decisions.

The Court of Appeal (Bell CJ, Payne and Ball JJ jointly) held judicial review is not available and dismissed the summons.

- There was jurisdictional error in the Local Court because the fact of the private conversation between the Magistrate and prosecutor gave rise to a reasonable apprehension of bias: at [68].
- The question is whether dismissal under s 20(1)(b) *CARA* carries with it implicit confirmation of the Local Court conviction or whether the effect of dismissal is simply that the Local Court verdict is left to operate according to its terms.
- Dismissal under s 20(1)(b) *CARA* must operate as implicit confirmation of the Local Court conviction for several reasons. This is supported by language of ss 68 and 69, operation of s 67, the objectives of the legislation and history of the provision: see discussion at [78]-[107].

- The effect of the District Court orders dismissing the appeal was that the Local Court orders were no longer operative, with the result that this Court had no power to quash those orders. The fact that the appeal was dismissed for want of prosecution cannot affect the position. Dismissal necessarily carries with it confirmation of the decision of the Local Court. The characteristics of the dismissal cannot turn on the reason for it: at [108]-[109].
- The general principle is that judicial review is not available in respect of a verdict or orders of a lower court where the verdict or orders have been superseded by orders of a higher court (*Wishart v Fraser* (1941) 64 CLR 470). The scope of the principle in *Wishart* and its rationale remains in some doubt: see discussion at [46]–[63].
    - *CARA* is drafted on the basis that it does. Section 68(1) allows orders to take effect from a specified date, necessary because s 63(3) provides a stay continues until the appeal is finally determined. Section 69 also uses the language of "confirmation" in relation to sentences: at [79]–[81].
    - It is consistent with s 67, which allows appeal courts to make orders if an appeal is withdrawn and which then operate as Local Court orders. This implies that on dismissal, the orders are operative as orders of the appeal court: at [87].
    - Historically, though s 20 no longer uses the language of "confirming, quashing, setting aside or varying the conviction, order or sentence appealed against" (cf. repealed s 133A *Justices Act 1902*), this was not required where the District Court was granted express power to set aside a conviction or dismiss an appeal. The re-enacted provisions were intended to function the same way in simplified form: at [107].

8. OTHER CASES

Breach of extended supervision order - whether applicant "associated" with a child – meaning of "associate"

SLD v R [2026] NSWCCA 58

The applicant appealed his conviction for breaching an Extended Supervision Order (ESO) condtion prohibiting him from "associating" with anyone under 18 (s 12 *Crimes (High Risk Offenders) Act 2006*

"Associate" was defined in the ESO and included "being in company with".

The applicant submitted the evidence did not show "association", therefore his conviction was unreasonable.

The CCA dismissed the appeal, holding he "associated" with a child by approaching the child's mother and engaging her in conversation about the child, thereby deliberately placing himself in the child's company: at [75]-[77].

Meaning of "associate"

- Court orders are construed objectively, with primacy to text in light of context, purpose, and known circumstances: at [59]–[60]; *Henderson v Harvey* [2026] NSWCA 56 at [40(d)].
- With an ESO, clarity is critical because breach may result in imprisonment: at [67]. The ESO's exception for "incidental contact in a public place in the course of the duties of the minor", suggests all other association is prohibited: at [63]–[64].
- Given the serious index offence (murder), the ESO sought to mitigate the risk to children by limiting the applicant's exposure to them, including being in their company: at [73]–[74].
- It was open to infer the applicant knowingly engaged the mother about her child, placing himself near the child in breach of the ESO, consistent with its protective purpose and that of the HRO Act: [75]–[77].

Did the applicant have the requisite intention?

- The relevant mens rea was the applicant's intention to engage in the conduct constituting association. It was not necessary to prove that the applicant subjectively characterised the conduct as being for the purpose of 'associating' with the child in the legal sense: at [78]–[80].

Murder conviction quashed - re-trial limited to manslaughter – acquittal on murder does not create plea in bar - autrefois acquit - Criminal Procedure Act 1986 (NSW), s 163

Smith v R [2025] NSWCCA 158

The applicant appealed his murder conviction on the ground of unreasonable verdict, as the Crown did not prove beyond reasonable doubt that the applicant did not believe that his conduct was necessary for self-defence.

The applicant sought to have the conviction quashed, a verdict of acquittal entered on the murder charge, and a re-trial ordered confined to the alternative charge of manslaughter. The Crown opposed a directed acquittal.

The issue before the Court was that if it were to direct a verdict of acquittal for the murder charge, whether this would create a plea in bar, either by reference to the common law plea in bar of *autrefois acquit* or under s 163 *Criminal Procedure Act 1986*. Section 163 provides that if a person who is tried for a serious indictable offence may be acquitted of that offence but found guilty of some other offence, the person is not liable to further prosecution on the same facts for that other offence.

The CCA allowed the appeal, quashed the murder conviction quashed, directed a verdict of acquittal and ordered a re-trial confined to manslaughter: at [74].

Whether the Court ought to direct a verdict of acquittal on the murder charge:

- A verdict of acquittal in respect of the murder charge would not create a plea in bar, either by common law plea in bar of autrefois acquit or under s 163 *CPA,* to a re-trial for manslaughter ordered by this Court: at [90], [111]; *R v PL* [2009] NSWCCA 256; (2009) 199 A Crim R 199.
- Section 163 *CPA* is confined to cases where an indictment has been finally disposed of. It does not apply in cases where this Court has adopted one of the courses under ss 6 or 8 *Criminal Appeal Act 1912* to direct an acquittal and order a retrial: at [87], [90].
- As there is to be no re-trial of the applicant on the charge of murder (since it was not open to the jury to convict him of that charge), he ought to be acquitted of that charge. An acquittal of murder ought to be directed whether the verdict of acquittal of murder is returned by the jury (as in *R v Quinn*) or found by this Court to be the only rational verdict open to the jury on the murder charge (as in *R v PL* and in this case): at [119]-[120]; *R v Quinn* (1952) 53 SR (NSW) 21; *R v PL* [2009] NSWCCA 256; (2009) 199 A Crim R 199.

Stated Case - meaning of phrase "mental illness within the civil law of the State or Territory" in s 20BQ Crimes Act 1914 (Cth) - whether determined with reference only to the definition of "mental illness" in s 4 of the Mental Health Act 2007 (NSW)

R v Skapik [2025] NSWCCA 19

By stated case the following question was submitted for determination:

> "For the purpose of s 20BQ(1)(a) of the *Crimes Act 1914* (Cth), was the question of whether [Mr Skapik] was suffering from a mental illness within the meaning of the civil law of the State to be determined with reference only to the definition of "mental illness" in section 4 of the *Mental Health Act 2007* (NSW)?"

Section 20BQ *Crimes Act 1914* confers various sentencing options upon a court where, in summary proceedings for a federal offence, the person charged is suffering from "*a mental illness within the meaning of the civil law of the State or Territory*".

The Crown argued the answer was "Yes" – that "*mental illness within the meaning of the civil law of the State or Territory*" in s 20BQ(1)(a) means "mental illness within the meaning of the State or Territory law providing for the involuntary detention of the mentally ill" (civil commitment law). Thus, the relevant definition in NSW was s 4 *Mental Health Act 2007*, which defines a "mental illness" as "a condition that seriously impairs, either temporarily or permanently ... mental functioning" characterised by certain symptoms.

Mr Skapik argued that the expression is simply a reference to mental illness as that term is understood as a matter of State or Territory civil, as opposed to criminal, law.

Held: Answer - No.

- As a matter of statutory construction, Parliament used the words "mental illness within the meaning of the State or Territory" in s 20BQ(1)(a) to direct attention to the meaning of "mental illness" in the State or Territory as a matter of civil, as opposed to criminal, law.
- Further, given the range of sentencing options available under s 20BQ, and the breadth of the notion of "intellectual disability", it would be surprising if Parliament had intended the sentencing options conferred by s 20BQ to be conditional upon a person having a mental illness of a character and severity which would justify civil commitment under State or Territory law: at [14]-[26].

Costs – Crown interlocutory appeal - "before the proceedings were instituted" in s 3(1)(a) Costs in Criminal Cases Act 1967 (NSW)

DPP (NSW) v Rokomaqisa [2025] NSWCCA 112

> s 3(1)(a) *Costs in Criminal Cases Act 1967* provides:
>
> (1) A certificate granted under this Act shall specify that, in the opinion of the Court or Judge or Magistrate granting the certificate—
>
> (a) if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings, ...

The primary judge granted the respondent a costs certificate where the DPP directed no further proceedings for a conspiracy to murder charge which had been committed for trial to the District Court. The 'no further proceedings' direction was made because the Crown had since consolidated the conspiracy charge with a separate murder charge in the Supreme Court.

The DPP appealed the costs order, submitting the judge acted on a wrong principle by interpreting the words "before the proceedings were instituted" in s 3(1)(a) as referring to before the proceedings were commenced in the District Court rather than before the proceedings were instituted by the arrest and charging of the respondent.

The CCA allowed the appeal and remitted the matter to the District Court to be determined according to law.

Construction of "before the proceedings were instituted" in s 3(1)(a)

References to the institution of proceedings in s 3(1)(a) are to be construed:

(a) as referring to the commencement of proceedings by the issuing and filing of a court attendance notice, the filing and presentation of an ex officio indictment or any other process provided by statute for the purpose of commencing criminal proceedings: at [59]; and

(b) as not referring to the commencement of a trial in the proceedings: at [91].

9. BAIL

Bail Act 2013, s 28(4) - child - accommodation requirement - court to re-list case every two days

LT v Director of Public Prosecutions (NSW) **[2025] NSWSC 1288**

Section 28(4) *Bail Act* states that a court responsible for hearing bail proceedings must ensure that, if an accommodation requirement is imposed in respect of a child, the matter is re-listed for further hearing at least every two days until the accommodation requirement is complied with.

The DPP raised whether s 28(4) required a matter to be relisted in a minimum of two days, or whether it could be longer. In this case, the Department of Communities and Justice faced difficulties finding accommodation for the 16-year-old offender.

The Court held that s 28(4)) requires the court to continue to list the matter every two days at a minimum.

Section 28(4) seems reasonably clear, as does the purpose of the legislation, which is to ensure that accommodation is organised and effect given to the orders of the Court. Those orders are not to be thwarted by administrative resistance or inactivity: at [13].

Subject to the exigencies such as the weekend and need for flexibility to ensure the Department's officers are not too busy coming to and from Court that they cannot focus on finding accommodation, the Court must continue to list the matter every two days at a minimum: at [16]; *New South Wales Law Reform Commission, Report 133, Bail (April 2012)*.

CCA jurisdiction to hear and determine bail application where proceedings not "pending in the court"- s 61 Bail Act 2013

Crowhurst; Crowhurst v R [2025] NSWCCA 57

> s 61 *Bail Act 2013* provides a court may hear a bail application if proceedings for the offence are pending in the court.
>
> Section 10(2)(b) *Criminal Appeal Act 1912* provides for the purposes of any other Act or statutory instrument, an appeal against conviction or sentence is taken to be pending if notice of intention to appeal has been duly given to the court.

The CCA held that it had no jurisdiction to hear the applicants' bail applications where the applicants' notices of appeal were not filed within the relevant time limit (in this case, three years out of time). The notices had not been "duly given" within s 10(2)(b) *Criminal Appeal Act 1912* and therefore neither applicant had proceedings for an offence "pending in the court" within the meaning of s 61 *Bail Act*: [7]-[13]; *Mashayekhi v R* [2021] NSWCCA 55.

The CCA further held it is not appropriate at this stage to determine whether an extension of time to seek leave to appeal should be granted. The Court still has power to do so having regard to the interests of justice, which requires consideration of the interests of an applicant, the Crown, finality of proceedings, and merits of the grounds of appeal and explanation for any lengthy delay. Here, explanation for delay was not powerful. The Court has reserved judgment in the appeals. Determination of the bail applications is not the occasion to resolve the underlying arguments on the appeals: at [15]-[20]; authorities cited.

A. HIGH COURT

The King v AR [2026] HCA 10

Tendency – directions - evidence in support of charged acts established tendency

Crown Appeal from NSW.

The applicant was convicted of child sexual offences against one complainant. At trial, the prosecution relied on the complainant's police interviews both to prove the charged offences and to show that the applicant had a sexual tendency toward the complainant.

His conviction appeal to the NSW CCA was allowed on grounds relating to tendency evidence and directions.

The Crown appealed to the High Court.

Held: Crown appeal allowed. Set aside orders by the NSW CCA.

It is not wrong to rely on the same evidence to prove both an alleged tendency and the charged offences. A jury, may, if it finds that an alleged tendency has been proved to a lesser standard by relying on direct evidence of charged acts, deploy that tendency in determining whether the charged acts have been proved beyond reasonable doubt. Such reasoning is not "circular or incoherent": at [4], [9], [53].

However, this approach risks undermining the jury's understanding of the need to prove the charged offences beyond reasonable doubt. To minimise that risk, the trial judge when directing the jury in relation to the alleged tendency, should avoid inviting the jury to make findings about the conduct relied on in proof of the charged offence. Instead, the judge should identify the evidence said to support the alleged

tendency and invite the jury to consider whether the tendency is established: at [9], *DPP v Roder* (2024) 281 CLR 18 at [23]-[28], [37].

The mere fact that a tendency direction invites a jury to make findings in respect of the charged acts does not of itself amount to error. Where such a direction is given, the question is whether that direction as part of the summing up as a whole gave rise to a "real" or "practical" risk of undermining the jury's understanding of the necessity for proof of the elements of the charged offence beyond reasonable doubt. Only if so, would there be a material misdirection amounting to a miscarriage of justice: at [10]-[11].

In the present case, the trial judge expressly told the jury that, when deciding whether a tendency was established based on evidence of the charged conduct, it was **not** deciding whether that conduct had been proved beyond reasonable doubt, and that proof of the offences could not be established by tendency alone. The judge gave repeated directions as to standard of proof, elements of the offences, and the need to consider each charge separately: at [59].

Taken as a whole, there was no real risk the jury's understanding of the necessity that elements of the offences be proved beyond reasonable doubt was undermined: at [4].

The King v McGregor [2026] HCA 3

NSW courts can impose aggregate sentence with respect to multiple Commonwealth offences and where Commonwealth offence attracts mandatory minimum sentence

Crown appeal from NSW.

Section 53A *Crimes (Sentencing Procedure) Act 1999* (NSW) provides for aggregate sentencing in NSW.

Section 53A(2) *Crimes (Sentencing Procedure) Act 1999* (NSW) states that a court imposing an aggregate sentence must indicate:

(a) the fact an aggregate sentence is being imposed,
(b) the sentence that would have been imposed for each offence (after taking into account such matters as are relevant under Pt 3 or any other provision of this Act) had separate sentences been imposed instead of an aggregate sentence.

The Crown appealed to the High Court from the decision in *McGregor v R* [2024] NSWCCA 200 which held:

(1) aggregate sentences under s 53A *CSPA 1999* (NSW) may be imposed for Commonwealth offences;
(2) including where one offence attracts a mandatory minimum sentence under s 16AAA of the *Crimes Act 1914* (Cth).

Held: Crown appeal dismissed. The NSW CCA was correct.

- Section 53A is picked up by s 68(1) of the *Judiciary Act* and operates consistently with Pt IB of the *Crimes Act 1914* (Cth). Imposing an aggregate sentence under s 53A still involves "sentencing" for the purposes of Pt IB *Crimes Act 1914* (Cth) so the parenthetical words in s 53A(2)(b) *CSPA* do not exclude or override the application of federal sentencing provisions (the Crown's "wider contention").
- Section 16AAA does not require a separate sentence for the offence attracting a mandatory minimum. The requirement is satisfied so long as the aggregate sentence imposed is at least equal to the minimum term, meaning aggregate sentencing does not undermine the function or deterrent purpose of mandatory minimum sentences (the Crown's "narrower contention").

Obeid; Obeid & MacDonald v The King [2026] HCA 1

Common law offence of conspiracy to commit misconduct in public office

Appeal from NSW.

The appellants were convicted of conspiracy to commit misconduct in public office. The Crown alleged an agreement between the appellants and Mr MacDonald, as NSW Minister for Mineral Resources, that he would misconduct himself to advance the financial interests of the Obeid family.

At trial, the Crown did not provide a statement of acts the appellants agreed that MacDonald would do. The Crown case was that there was an agreement to undertake acts falling within the cumulative elements of the charge. To this end, the Crown gave particulars of acts said to have been done by Macdonald. Thus, that the unlawful agreement could be inferred from Macdonald's later conduct: at [7].

The sole appeal ground was whether the Crown established a conspiracy to commit misconduct in public office without alleging an agreement for Macdonald to do particular acts, but only that he agreed to act when opportunities arose in a way that would amount to misconduct.

Held: Appeals dismissed.

- The agreement alleged by the Crown in its indictment, as particularised during trial, was a complete offence of conspiracy to commit misconduct in public office. The contemplated acts satisfied the elements of the predicate offence of misconduct in public office, albeit that it was not known and could not be known what "particular acts" Macdonald would undertake to bring about the objects of the agreement: at [3], [31], [34].

  The trial judge correctly characterised the agreement as, not that Macdonald would do individual acts, but that he would act when the occasion arose. The conditional aspect of this conspiracy concerned what act(s) Macdonald would do; and whatever those acts were they would satisfy the "cumulative conditions": at [27]. There is no principle that the object of a conspiracy must be reduced to particular specified acts: at [28].

- Even allowing for the (permissible) uncertainty of what acts it was agreed McDonald would undertake, the cumulative conditions meant that any such acts would necessarily involve him committing misconduct by wilfully breaching his duties as a Minister: at [35]-[37].

The King v ZT [2025] HCA 9

NSW CCA did not view or listen to recorded evidence from trial - Error in concluding reasonable doubt not capable of being explained away by jury's natural advantages in having listened to recorded evidence

Crown Appeal from NSW. Appeal allowed.

The NSW CCA by majority allowed the respondent's appeal against his murder conviction. The Crown at trial relied on alleged inconsistent admissions in telephone calls and police interviews. Without listening to the recorded evidence, the CCA majority found that the admissions were insufficiently reliable and concluded that the reasonable doubt they held as to guilt was not capable of "being explained away by the natural advantages" held by the jury had in considering the material.

The Crown appealed to the High Court.

Held: Crown Appeal allowed.

- The NSW CCA majority erred in concluding the jury did not have any advantages without listening to a sufficient part of the recorded evidence to identify whether there were any such advantages: at [4]; [52]–[53].
- Several critical aspects of the majority's conclusion that the admissions were unreliable were matters upon which the jury was in a significantly better position to evaluate: the contested contextual meaning of particular words; and whether the respondent was a general fantasist or prone to exaggeration: see at [54]-[55].

M v The Queen (1994) 181 CLR 487

Three aspects of *M v The Queen* should be noted:

- The jury's advantages are not confined to witness testimony but may extend to all the evidence adduced at trial. The existence, nature and scope of those advantages will vary depending on the form in which the evidence was adduced and nature of issues at trial: at [9].
- The appellate court is to give "full allowance" to the advantages of the jury in seeing and hearing the evidence. The advantages may extend to assessment of matters such as: tone and manner

witnesses spoke or conducted themselves; maturity; emotional state and intelligence; and how they interact with others: at [10].

- The appellate court undertakes an "independent assessment" in a context of an adversarial process. It is for the parties to identify the evidence that the appellate court must review and assess: at [11].

Pell v the Queen [2020] HCA 12

- Ordinarily, there will be a *real forensic purpose* to the appellate court's examination of a video-recording. Such cases will be *exceptional*. It would be expected that the forensic purpose will be adopted by the parties, rather than upon independent scrutiny by the court: at [15]-[16], [85]-[86]; *Pell v The Queen* [2020] HCA 12.
- Nothing in *Pell v The Queen* prevents watching and listening to exhibits containing recorded statements, provided there is a "real forensic purpose". It is expected the parties identify whether there is a real forensic purpose; if not, or it is not persuasive, then it is unlikely that the appellate court had any obligation to undertake that task: at [18]-[20].

The King v Ryan Churchill (a pseudonym) [2025] HCA 11

Evidence of distress of complainant when making complaint

Crown Appeal from Victoria. Appeal allowed.

The respondent was convicted of sexual offences against the child complainant. The trial judge gave a circumstantial evidence direction in relation to evidence of the distress of the complainant when making a complaint to her mother: see at [15]-[17].

Te Victorian Court of Appeal allowed the respondent's conviction appeal and quashed his convictions. The Court stated that a distress direction required a trial judge to warn the jury that: "(1) the jury had to be satisfied that there was a causal link between the distress and the alleged offending; and (2) such evidence generally carries little weight."

The Crown appealed to the High Court.

Held: Crown appeal allowed. Set aside order of Victorian Court of Appeal.

- No such directions are required. The Court's error was to assimilate requirements of the *Evidence Act 2008* (Vic) and the *Jury Directions Act 2015* (Vic) with common law requirements regarding corroboration, circumstantial evidence and hearsay. Each of those evidentiary rules has been superseded in Victoria by statute: corroboration by s 164 *Evidence Act*; hearsay by ss 59 and 66 *Evidence Act*. The notion that evidence of distress should only be treated as corroborative evidence if there was no reasonable explanation consistent with innocence has been swept away by ss 61 and 62 *Jury Directions Act*: at [38]-[52].
- Though circumstances might exist in which evidence of distress when making a complaint is not relevant, those circumstances must be rare: at [26]; *Papakosmas v The Queen* [1999] HCA 37. Ordinarily, like evidence of the complaint itself, evidence of distress at time of making a complaint is relevant under s 55 *Evidence Act* as evidence that, if accepted (1) could support the credit of the complainant if the jury were to find a causal connection between distress and making of the complaint, and/or (2) could support the occurrence of the offending if the jury were to find a causal connection between the distress and the offending: at [27].
- The evidence, having been admitted as indirect or circumstantial evidence, is then left to the jury to determine whether to accept it and weight to be given. In appropriate cases the jury may be given a general direction about the drawing of conclusions and the distinction between direct and circumstantial evidence: at [30].

Cherry v Queensland [2025] HCA 14

'No body-no parole' provision not constitutionally invalid

The High Court held that the "no body-no parole" provision in s 175L of the *Corrective Services Act 2006* (Qld) is not constitutionally invalid. Section 175L provides if the parole board is not satisfied that a prisoner,

serving imprisonment for homicide where the body of the victim has not been located, has given satisfactory cooperation, the parole board must make a "no cooperation declaration" and the prisoner cannot apply for parole.

NSW has a similar provision under s 135A *Crimes (Administration of Sentences) Act 1999* (NSW).

Brawn v The King [2025] HCA 20

Common form criminal appeal provision – "third limb" - error or irregularity must be material to establish miscarriage of justice - 'test for materiality' - s 6(1) Criminal Appeal Act 1912 (NSW))

Appeal from SA. Appeal allowed.

The principal issue in the High Court was whether a materiality threshold exists for an error or irregularity to amount to a "miscarriage of justice" for the purpose of the third limb of the common form appeal provision; and if such a materiality threshold does exist, what it is.

Weiss (2005) 224 CLR 300 stated *any* irregularity or departure from trial according to law amounts to a "miscarriage of justice". Other statements have referred to a materiality threshold which must be overcome before an error or irregularity amounts to a miscarriage of justice, although the formulations of that threshold have differed (*Hofer v The Queen* (2021) 274 CLR 351; *Edwards v The Queen* (2021) 273 CLR 585; *HCF v The Queen* (2023) 97 ALJR 978): at [8].

The High Court "harmonised those formulations" – setting out the '*test for materiality'* **at [9]ff.**

'*Test for materiality'*

- To establish a miscarriage of justice it must be shown that the error or irregularity was material in the sense that the error or irregularity could realistically have affected the reasoning of the jury to its verdict. "Could" is understood as meaning "having the capacity to", and "realistically" distinguishes the relevant assessment of the possibility of a different outcome from a possibility that is fanciful or improbable. This threshold to establish that an error or irregularity is material must be satisfied by the appellant, but that burden is not onerous. It does not invite an analysis of whether, but for the error, the accused might or might not have been found guilty: **at [10].**
- The inquiry required by this materiality threshold / test does not collapse into the inquiry for applying the proviso. The question posed by the materiality test looks to the possible effect of the error or irregularity on the trial. In contrast, the task required of an appellate court in applying so much of the proviso that requires it to address the "negative proposition" in *Weiss* (2005) 224 CLR 300, namely by asking whether "the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt ..", is qualitatively different from asking whether an error or irregularity could realistically have affected the jury's reasoning to the verdict of guilty: **at [11].**
- A material error or irregularity will establish a miscarriage of justice warranting the allowing of the appeal subject to any invocation of the proviso. The burden of satisfying the proviso rests upon the prosecution and the proviso, including the negative proposition, is to be addressed by the appellate court in accordance with existing authority, principally *Weiss*. If the burden imposed on the prosecution by the proviso is discharged, the appeal must be dismissed. Otherwise, the appeal must be allowed: **at [16].**

In the present case, the High Court held there was a breach of the prosecution's duty of disclosure in the appellant's criminal trial for child sexual abuse. The error or irregularity was material in the sense that the error or irregularity could realistically have affected the reasoning of the jury to its verdict. The SA Court of Appeal erred to the extent it addressed that issue by reference to whether it "would" have affected the course of the trial and thus the jury's reasoning.

The appellant's conviction was set aside and a new trial ordered.

MDP v The King [2025] HCA 24

Common form criminal appeal provision – "second limb" - wrong decision on question of law – s 6 Criminal Appeal Act 1912

Appeal from Qld. Appeal allowed.

The decision regards the "second limb" of the common form criminal appeal provision, i.e. appeal against conviction to be allowed on the ground of a wrong decision on any question of law.

Per Gleeson, Jagot and Beech-Jones JJ (Gageler CJ, Gordon, Steward and Edelman JJ agreeing):

As per the "third limb" considered in *Brawn v The King* [2025] HCA 20, there is a materiality threshold for the second limb. The materiality threshold is to be applied within the context of four steps: at [98].

- The first step in engaging the second limb of the common form appeal provision is for the appellant to identify a "decision" by the trial judge on a "question of law": see at [99]-[102], [109].
- Second, the appellant must establish that the decision was "wrong": at [103].
- Third, the appellant must show that the wrong decision involved an error that was either fundamental to the trial or, if not fundamental, material in the relevant sense: at [104]. If "fundamental" to the trial, then the guilty verdict must be set aside; the proviso is necessarily inapplicable: at [106]; *Brawn v The King* at [9]. Otherwise, an appellant must establish that the wrong decision involved an error that was material, that is, it could realistically have affected the reasoning of the judge or jury to the verdict of guilty in the trial: at [107]; *Brawn v The King* at [10].
- The fourth step arises if the wrong decision on a question of law does not concern a question that was fundamental to the trial but is nevertheless found to be material. In such cases, the appeal must be allowed unless the prosecution establishes that no "substantial miscarriage of justice" occurred (ie, by applying the proviso): at [108].

In the present case, the appellant was convicted of child sexual offences. The High Court unanimously held no decision on a question of law occurred when evidence that the appellant smacked the complainant's backside (adduced by the Crown to demonstrate sexual interest in the complainant) was admitted without objection at trial. The trial judge made a wrong decision on a question of law in directing the jury that it was open to treat the smacking evidence as evidence of a propensity to have a sexual interest in the complainant, notwithstanding failure of MDP's counsel to object. A majority of the Court held that the direction could realistically have affected the reasoning of the jury to the verdicts of guilty (Brawn v The King [2025] HCA 20), and that it had not been demonstrated that no substantial miscarriage of justice occurred thus the proviso does not apply (*Weiss v The Queen* (2005) 224 CLR 300).

The appellant's conviction was set aside and a new trial ordered.

CD v The Commonwealth of Australia; CD v Director of Public Prosecutions (SA) [2025] HCA 37

Surveillance Legislation (Confirmation of Application) Act 2024 (Cth) – validity – communications via AN0M application

Appeal from SA. Applicant's special leave to appeal revoked.

The applicants were charged with serious offences after police obtained encrypted AN0M messages (AN0M being end-to-end encryption application). The messaged secretly copied and accessed by the AFP under surveillance and search warrants, but not under the *The Telecommunications (Interception and Access) Act 1979 (Cth)*. The applicants argued the messages were unlawfully intercepted and inadmissible. While their appeal was pending, Parliament passed the *Surveillance Legislation (Confirmation of Application) Act 2024 (Cth)* (Confirmation Act) deeming AN0M communications not to be "intercepted".

The applicants sought a declaration the Confirmation Act was invalid.

Held: The High Court held the Act to be valid.

There is no formula of words for deciding whether a law wrongly interferes with judicial power. Each law must be assessed in terms of its legal and practical operation, taking into account precedent and history: at [16].

The law is not aimed specifically at the applicants. That it applies to impending litigation does not mean the law involves an exercise of or impermissible trespass onto judicial power. The Commonwealth can in the exercise of legislative power regulate the admissibility of evidence: at [22].

The operation and effect of s 5(1) of the *Confirmation Act* is properly characterised as merely evidentiary and does not trespass on the judicial function of adjudging and punishing criminal guilt: at [24]-[25]; *Nicholas v The Queen* (1998) 193 CLR 173.

The Act facilitates AN0M material obtained under the relevant warrants to be admitted as evidence, where it may have been excluded as unlawfully obtained. It does not affect other powers courts have to exclude evidence for different reasons, and it does not change the elements of the offences that the prosecution must prove: at [25].

Farshchi v The King [2025] HCA 46

s.64(1)(e) Jury Directions Act 2015 (Vic) - Direction that "reasonable doubt is not ... an unrealistic possibility" does not detract from the standard of proof "beyond reasonable doubt"

Appeal from Victoria. Appeal dismissed.

The High Court upheld the use of Victoria's jury direction that "a reasonable doubt is not ... an unrealistic possibility" in s 64(1)(e) of the *Jury Directions Act 2015* (Vic). It does not alter, impair, detract from or diminish the criminal standard of proof "beyond reasonable doubt."

The provision validly applies in federal-jurisdiction trials and is not inconsistent with the Commonwealth "beyond reasonable doubt" standard (s 13.2(1) *Criminal Code*).

The King v Tsalkos [2025] HCA 49

Complaint - distress evidence - trial judge's directions did not invite jury to use distress evidence as independent support for complainant's account

Appeal by DPP (Vic). Appeal allowed.

The DPP appealed judgment by the Court of Appeal (Vic) setting aside the respondent's convictions for kidnapping and rape of AB and ordering a new trial.

At trial, AB's mother had testified, without objection, that she found AB "very very distressed" in a hospital cubicle shortly after the alleged kidnapping and rape.

The Court of Appeal had held that the trial judge's directions improperly invited the jury to treat AB's distress as "independent support" for her account, when the necessary causal link between the distress and the alleged offences was not open.

Held: Appeal allowed. Order that respondent's appeal to Court of Appeal against conviction be dismissed.

- The Court of Appeal's reasoning is inconsistent with *R v Churchill (a pseudonym)* (2025) 99 ALJR 719.
- Evidence of AB's distress was capable of supporting the occurrence of the alleged offending and the trial judge did not misdirect / invite the jury to treat the evidence as "independent support" for AB's evidence in the sense of being independent evidence corroborative of AB's testimony.
- No miscarriage of justice arose from the prosecutor's description of the distress as "independent evidence," nor from the admission of that evidence under s 137 of the *Evidence Act 2008 (Vic)*.

WHS v The King [2025] HCA 51

s 293(3) (now s 294CB) Criminal Procedure Act 1986 (NSW) – prior sexual experience or activity - where evidence said to be available that child complainant displayed sexualised behaviour prior to alleged offending - whether evidence admissible under exception: "disclosed or implied in the case for the prosecution" that complainant had or may have had sexual experience or lack of sexual experience or had or may have taken part or not taken part in sexual activity

Appeal from NSW. Appeal dismissed.

At trial for child sexual offences, the appellant sought to adduce evidence that the complainant MW had previously shown sexualised behaviour and had described being touched indecently by a different male, as capable of explaining how, at age 9, MW could describe the in detail the appellant's alleged conduct.

The evidence was excluded under s 293(3) *Criminal Procedure Act* (now s 294CB) which generally prohibits evidence implying a complainant's sexual experience or activity.

The effect of ss 293(4) and 293(6) is to permit such evidence to be adduced in cross-examination of the complainant if it has been "*disclosed or implied in the case for the prosecution*".

On the High Court appeal, the appellant argued this exception applied from the prosecution adducing evidence that MW was 9 when she first spoke to police and not adducing evidence of MW's alleged prior "sexual experience" by MW having previously been exposed to sexual activity by another person. This risked the jury inferring MW lacked prior sexual experience or activity, even though the prosecution did not rely on such an inference: at [3].

Held: Appeal dismissed.

- The "case for the prosecution" in s 293(6) is not confined to what the prosecution expressly invites the jury to find or reason during the prosecutor's opening or final addresses. The "case for the prosecution" includes implicit reasoning; it embraces the entirety of how a prosecution case is presented, including such steps in the reasoning process suggested by the prosecution towards guilt that may be implicit. However, merely adducing evidence of the complainant's young age - raising a risk the jury might assume or infer lack of sexual experience – is not sufficient to engage s 293(6) and that provision was not engaged in this case: at [4], [37].
- Section 293(3) only applies to preclude evidence being adduced. It does not preclude the prosecution in addresses from referring to a complainant's lack of sexual experience, which may be a disclosure or implication such as to engage s 293(6)(a): at [36].
- The Court further dismissed a ground of miscarriage of justice based on the Crown Prosecutor's final address being unfair.

B. SUPREME COURT

"Protected suspect" - Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), s 110(1)

R v Wrigley (No 2) [2025] NSWSC 380 (Ierace J)

> s 110(1) *LEPRA* provides:
> "***protected suspect*** means a person who is in the company of a police officer for the purpose of participating in an investigative procedure in connection with an offence if—
> (a) the person has been informed that he or she is entitled to leave at will, and
> (b) the police officer believes that there is sufficient evidence that the person has committed the offence."

At his murder trial, the Court found the Aboriginal accused was a "protected suspect" but as he was not treated as one by police, he did not receive additional protections that apply to Aboriginal persons under *LEPRA* Regulations. The impropriety resulted in his police interview being ruled inadmissible under s 138 *Evidence Act 1995*.

The Court considered the meaning of the second limb of the definition of a "protected suspect" in s 110, and suggested review to achieve clarity: at [38], [91].

s. 110 - "protected suspect"

Two aspects of the definition of the second limb require consideration: at [47].

1. *Meaning of "belief"*. That based on the available evidence at the time, the officer is inclined to the view that the person committed the offence. "Belief" denotes a state of mind that falls short of being convinced that the person in fact committed the offence: at [53]-[54]; *George v Rockett* (1990) 170 CLR 104 at 115.

2. *The subjective nature of the term "belief", i.e., whether it permits of an assessment of the objective reasonableness of the belief or the credibility of the evidence of the officer's belief* . It is open to the Court to reject an officer's evidence that they did not hold the requisite belief and determine on the evidence that, in fact, they did. An alternative basis of impropriety for the purposes of s 138(1) may be established if the Court accepts that the officer did not hold that belief but that they ought to have done so: at [68].

The Court found the police incorrectly regarded the accused only as a "person of interest", not a suspect or "protected suspect". There was no doubt the officers regarded him as a suspect and, according to the proper construction of the second limb, considered that the evidence was "sufficient for them to believe he had committed those offences". Had the Court not been satisfied the officer held that belief, he ought to have done so on the evidence known to him at that time: at [37], [84]-[85]; *R v FE* [2013] NSWSC 1692.

R v Mr L (a pseudonym) [2025] NSWSC 1194

The Applicant pleaded guilty to murder in the Local Court. He confirmed the plea at arraignment in the Supreme Court, where the Arraignments Judge formally recorded the conviction in JusticeLink. When the applicant later sought to withdraw the plea, the Crown argued that entry of a conviction in the JusticeLink system perfected the order and the principle of finality removed the Court's jurisdiction to consider the application.

Held: The Court retained jurisdiction. Even though the Supreme Court recorded a conviction and it was entered in JusticeLink, the principle of finality does not stop L from applying to withdraw his guilty plea. Because he has not yet been sentenced, the Court can still consider his application: at [40].

Error to exclude evidence pursuant to s 138 Evidence Act 1995 on basis incitement unlawful under s 2 Crimes Prevention Act 1916 (NSW) - specific preclusion of an incitement offence under s 80G Crimes Act displaces general application of s 2 Crimes Prevention Act 1916 (NSW)

Director of Public Prosecutions (NSW) v Beeby [2025] NSWSC 1307 (Free JA)

The defendant was acquitted in the Local Court of procuring child (14-16) for unlawful sexual activity (*Crimes Act 1900*, s 66EB(2)).

The defendant arranged, via an online dating app, to meet "Jeremy" who pretended he was 15. "Jeremy" arrived with three persons armed with knives, and together they assaulted and robbed the defendant.

The magistrate excluded United States National Center for Missing and Exploited Children (NCMEC) evidence of the dating app conversation under s 138 *Evidence Act 1995*, finding it was illegally obtained through incitement, which is an offence under the *Crimes Prevention Act 1916* (NSW), s 2 and *Criminal Code* (Cth), s 11.4.

The DPP appealed, submitting the following question:

- Is inciting the commission of an offence under s 66EB of the *Crimes Act* "in contravention of an Australian law" for the purposes of s 138(1)(a) of the *Evidence Act*?

The DPP relied on s 80G(5)(b) *Crimes Act 1900* which provides "it is not an offence to incite" a s 66EB offence or other listed offences.

Held: Appeal allowed, set aside the dismissal, matter remitted.

- The Local Court erred in holding that inciting an s 66EB offence contravened NSW law: at [63]-[64]. Section 80G(5)(b) expressly displaces the *Crimes Prevention Act*. Its declaratory form ("it is not an offence" to incite the commission of the listed offences) points toward an intention that the

section as a whole should comprehensively define what is and isn't an incitement offence for Divisions 10, 10A, and 15A *Crimes Act*: at [45]-[48], [56].

- Context (NSW Sentencing Council Report; Second Reading Speech) reinforces that s 80G(5) excludes, and implicitly repeals, the *Crimes Prevention Act* for sexual offences: at [49]-[54].
- s 11.4 *Criminal Code* (Cth) only applies to Commonwealth offences, not to s 66EB: at [58]-[59]. The magistrate failed to consider possible contraventions of ss 474.26-474.27 (Cth) (use carriage service to procure / groom recipient under 16 to engage in sexual activity). It would appear to be open to the defendant to rely on these provisions if a fresh s 138 objection is made: at [60]-[62].

C. LEGISLATION

Crimes (Sentencing Procedure) Amendment (Good Character) Bill 2026 **('The Second Bill')**

Passed Parliament on 4 June 2026. To commence on proclamation.

The Second Bill abolishes good character as a mitigating factor for all offences, and repeals amendments by the Crimes (Sentencing Procedure) Amendment (Good Character at Sentencing) Bill 2026 (the First Bill) which abolished good character as a mitigating factor only for sexual offences.

The changes:

- Abolish good character as a mitigating factor for all offences, by repealing s 21A(3)(f) of the *Crimes (Sentencing Procedure) Act 1999* (CSPA), and at common law.
- Provide that while courts must not consider evidence adduced solely to establish good character, the court may continue to consider that evidence if it is relevant to another purpose, principle or factor in sentencing.
- Repeal the 'special rule' for child sexual offences in s 21A(5A) *CSPA* insofar as it relates to good character. The special rule is retained in relation to a lack of previous convictions.
- Make consequential amendments, including removing the references to 'character' from the factors a court must consider before making an order under ss 9 and 10 *CSPA*, or may consider when declining to set a NPP under s 45(1)(a) *CSPA*.
- Provide for a statutory review after 2 years to consider application of the rule to a lack of previous convictions, and impact in domestic and family violence matters.

The reforms apply to sentencing proceedings and sentences imposed after commencement of the legislation.

Crimes Amendment (Animal Sexual Abuse) Act 2024

Commenced 25 March 2026.

Crimes Act 1900

Replaces bestiality and attempt bestiality offences with offences of 'animal sexual abuse':

s 79 Commit an act of animal sexual abuse (max penalty 14y imprisonment)

s 79A Animal sexual touching (max penalty 14y imprisonment)

s 79B Advertisement, sale or transfer of animals for animal sexual abuse (max penalty 2,500pu or imprisonment 5y)

s 80 Animal sexual abuse attempts (max penalty 5y imprisonment)

s 547E Prohibited animal abuse material (previously 'Possess, produce or disseminate animal sexual touching or animal crush'). New offences inserted:

- s 547E(2A) produce/disseminate animal sexual touching material (max penalty 3y imprisonment)
- s 547E(2B) possess animal sexual touching material (max penalty 2y imprisonment).

Children (Criminal Proceedings) and Young Offenders Legislation Amendment Act 2025

Commenced 1 March 2026. Second Reading Speech.

(i) Amends *Children (Criminal Proceedings) Act 1987* to codify common law presumption of doli incapax in relation to children between 10-14; and

(ii) Amends eligibility under *Youth Offenders Act 1997* for a caution or youth justice conference from "admitting" an offence to making a "non-denial statement".

Children (Criminal Proceedings) Act 1987

Section 5 'Age of criminal responsibility':

It is conclusively presumed a child under 10 at the time of the alleged commission of an offence cannot be guilty of the offence: s 5(1).

It is presumed that a child who, at the time of the offence, is 10, 11, 12 or 13 cannot be guilty of the offence: s 5(2).

The presumption is rebutted only if the prosecution proves beyond reasonable doubt that the child knew that their conduct was seriously wrong: s 5(3).

Whether a child knew that their conduct was seriously wrong -

(i) is a question of fact, and

(ii) must not be inferred merely from the fact that the child engaged in the conduct which constituted the offence, and

(iii) refers to the child's knowledge that it was seriously wrong in a moral sense to engage in the act or acts which constituted the alleged offence: s 5(4).

In determining whether the presumption has been rebutted, a court must have regard to the following matters, if known to the court -

(i) the conduct that constitutes the alleged offence,

(ii) the circumstances surrounding the commission of the alleged offence (Example—the child taking steps to plan the conduct, including equipping themself for the conduct or to avoid detection),

(iii) the child's intellectual and moral development and education,

(iv) the environment in which the child was raised: s 5(5).

s 5(5) does not limit other matters to which a court may have regard (s 5(6).

To avoid doubt, a court may determine the presumption is rebutted based on evidence of the conduct and circumstances constituting the alleged offence, without or despite other evidence of the child's intellectual and moral development, if satisfied that the evidence meets s 5(3): s 5(7).

Despite ss.5(5) and (6), a court must not have regard to a caution, youth justice conference participation, or any admission, non-denial statement, confession or information made or given by the child for, or during, a caution or youth justice conference, other than a formal guilty plea under s 10(5) *Young Offenders Act 1997*: s 5(8).

[Note: 'non denial statements' have not yet commenced under s 10 *Young Offenders Act* 1997].

Transitional: Amendments apply only to proceedings commenced after the amending Act commences: Sch 2, Part 22, *Children's (CP) Act 1987*.

Young Offenders Act (Sch 2) - to commence by proclamation

(i) Non-denial statements

The requirement for a child to be eligible for a caution or youth justice conference is changed from "admitting" the offence to making a "non-denial statement": ss 19, 23, 31, 36, 40.

A non-denial statement is a statement that the child does not deny or admits the following allegations about the offence: (a) the elements of the offence; (b) time and place of the offence: s 10.

A non-denial statement is not valid unless made in the presence of certain persons: s 10(2). A formal guilty plea is taken to be a non-denial statement: s 10(5).

When cannot be dealt with by caution (introduces a 3-year expiry period for cautions)

A child cannot be dealt with by caution if they have previously been dealt with by caution on 3 or more occasions *during the previous 3 years*: ss 20, 23(5), 31(5), 37(6), 38(5), 41, 44(5).

Expands offences for which diversion available under YO Act

Offences under ss 13 and 14 *Crimes (Domestic and Personal Violence) Act 2007* and summary offences under Div 1 Pt 2 *Drug Misuse and Trafficking Act 1985*, may be dealt with under the *YO Act* in certain circumstances: s 8.

A warning may be given for summary offences covered by the *YO Act* and offences against s 117 *Crimes Act 1900* if a penalty notice could be issued if committed by an adult: s 13.

A caution may be given for offences covered by the YO Act, excluding any prescribed by the regulations: s 18.

A caution can be given for offences against s 14 *Crimes (Domestic and Personal Violence) Act 2007* involving a *personal violence offence* (only by a court if breached by a personal violence offence); but no longer graffiti offences: s 18.

A youth justice conference can be held for a graffiti offence: ss 37, 38, 40.

Crimes Amendment (Intimate Image and Audio Material) Act 2025

To commence 26 February 2026.

Amends *Crimes Act 1900* in relation to sexually explicit material created by artificial intelligence or other digital means, known as 'deepfake' material.

Crimes Act 1900

- New definition of 'intimate image' in s.91N(1) to include terms and definitions of 'digitally generated', 'intimate audio material', 'intimate image material' and 'simulated person.'

New offences for the alteration of images and audio to be intimate images and audio material, and relating to the production of wholly digitally generated sexually explicit intimate images and audio material:

- s.91PA - Altering images or audio or using simulated person to create intimate image or audio material. Maximum penalty-100 pu or 3 years imprisonment, or both.
- s. 91R(1A) - Threaten to (a) alter an image or audio of another person so that the image or audio is intimate image or audio material; or (b) create intimate image or audio material of a simulated person. Maximum penalty-100 pu or 3 years imprisonment, or both.

Various amendments to offences that provide for non-consensual recording and distribution of intimate images to include digitally generated intimate images and sexually explicit audio material (intimate image and audio material): ss. 91P, 91Q. 91R, 91S.

Terrorism and Other Legislation Amendment Act 2025

Commenced 24 December 2025.

Crimes Act 1900

- New s 93ZB – offence to knowingly display, without reasonable excuse, a prohibited terrorist organisation symbol by a public act. Maximum penalty: Individual – 200pu or 2y imprisonment, or both; Corporation – 1000pu.

Terrorism (Police Powers) Act 2002

- New s 23B(2) – enables NSW Police Commissioner / Deputy Commissioner, in response to terrorist or likely terrorist acts, to make a public assembly restriction declaration that public assemblies are restricted in an area. Such declaration may be made, extended or varied only with Minister's concurrence (s 23F).

Law Enforcement (Powers and Responsibilities) Act 2002

- New s 19A(1)(c) - enables police to require protestors to remove face coverings if reasonably suspected of committing, or being likely to commit, an offence. Failure to remove a face covering is an offence carrying penalty of 50pu or 1 year imprisonment, or both (s 19B(1)).

- New s 200(5) - allows police to give directions for protests held in an area subject to a public assembly restriction declaration.

Firearms Act 1996 (not yet commenced)
(i) limit the number of firearms that can be possessed and used by licensees
(ii) recategorise certain types of firearms that can legally be possessed and used
(iii) reduce the general term for a firearms licence from 5 years to 2 years
(iv) require licensees to be Australian citizens

Crimes (Administration of Sentences) Amendment (Standard of Proof) Act 2025

Commenced on 26 November 2025.

Crimes (Administration of Sentences) Act 1999

- Amends ss 53, 65B and replaces ss 56A(1), 57(2) so as to lower the standard of proof applying to correctional centre disciplinary offences from "beyond reasonable doubt" to "on the balance of probabilities" where the governor deals with a correctional centre offence.
- New s 56A(3) provides that for an offence of use or possess mobile phone, a "mobile phone" includes part of a mobile phone, SIM card or part thereof, and charger or part thereof.

Crimes Legislation Amendment (Domestic Violence and Sexual Offences) Act 2025

Commenced 24 November 2025.

Crimes (Sentencing Procedure) Act 1999

- Introduces a new standard non-parole period of 25 years for murder where victim is intimate partner within the meaning of Crimes Act 1900, Part 3, Division 6A, of the offender (s 1C, Pt 4, Div 1A Table, *CSPA*)
- Savings & Transitional: Part 4, Division 1A, Table, as in force immediately before its amendment by the Crimes Legislation Amendment (Domestic Violence and Sexual Offences) Act 2025, continues to apply in relation to the offence of murder committed before the amendment (Sch3[2]).

Crimes Act 1900
Amends ss 66F(8) and 78F so that the Director of Public Prosecutions may give approval (in addition to the Attorney General) for prosecutions for:

- sexual offences involving a complainant who is a person with a cognitive impairment - ss 66F(2), (3), (6)
- incest / attempt incest offences - ss 78A, 78B

Crimes (Domestic and Personal Violence) Act 2007
The following *Crimes Act* offences are added to the meaning of "personal violence offence" in s 4(a) -

- assault cause death - s 25A
- injuries to child at time of birth – s 42
- causing loss of foetus – s 54A
- causing loss of foetus: death of pregnant woman – s 54B
- sexual offences-cognitive impairment – s 66F
- attempt Incest - s 78B

Crimes (Sentencing Procedure) Amendment Act 2025

Commenced 17 September 2025.

Crimes (Sentencing Procedure) Act 1999

To address a gap in the legislation to allow a 25% discount for plea offers made by offenders who have become fit to be tried after having been earlier committed as mentally unfit to stand trial. While s 25D(5) *CSPA* presently accounts for offenders who become fit after committal and enter timely guilty pleas, there is no equivalent allowance for those who make plea offers: Second Reading Speech.

- New s 25E(3)(a)(ii): Where a guilty plea offer was made for a different offence and refused when made, a 25% discount is to apply-

"(ii) for an offender found fit to be tried after being committed for trial and whose matter was not remitted to a Magistrate for continued committal proceedings—as soon as practicable after the offender was found fit to be tried."

- New s 25E(4): In determining whether an offer is made "as soon as practicable", the court is to take into account whether the offender had a reasonable opportunity to obtain legal advice and instruct a legal representative.

Crimes Amendment (Sexual Offences and Female Genital Mutilation) Act 2025

Commenced 17 September 2025 (except as indicated).

Crimes Act 1900

Female genital mutilation (FGM)

- FGM offences to apply regardless of victims' age: ss 45(1), s 45A(1)
- FGM not limited to acts performed for ritualistic or traditional purposes: s 45(2)
- New s 45(4A) - it is not FGM to perform:
  (a) piercing or tattooing if carried out in accord with legal etc requirements, or
  (b) another act prescribed by the regulations.
- New s 45(7) – allows for new categories of "authorised professionals" to be added by regulation to keep up with evolving medical practice. (Currently, medical procedures during labour or birth done by a medical practitioner or authorised professional are excluded from being FGM: s 45(3)(b)).

The amendments respond to *Russell v R* [2023] NSWCCA 272 where the court quashed the conviction of a body modification artist who performed a cosmetic procedure on an adult female, on the ground s 45 criminalises only ritualistic or traditional FGM on female children (*The Queen v A2* [2019] HCA 35): Second Reading Speech.

New offences of sexual act in *presence* of child

Expands existing offences for sexual acts *with or towards* a child to also apply to sexual acts done in the *presence* of a child aged -

- under 10: s 66DC(a1)
- of or above 10 years and under 16, and in circumstances of aggravation: ss 66DD(a1), 66DE(1)(a1)
- under 16 for the production of child abuse material: s 66DF(a1).

The offences apply where presence of the child is a source of sexual arousal or gratification of the person, even if there is no intention to engage the child physically: Second Reading Speech.

The amendments respond to *DPP v Presnell* [2022] NSWCCA 146: see Second Reading Speech.

Child abuse material

- s 91FA: Definition of 'child' amended to mean a person under 18 (previously, under 16) for the purpose of 'child abuse material' offences under Div 15A.

Misconduct with regard to corpses

- s 81C(a) offence of indecently interferes with any dead human body - maximum penalty increased to 3 years imprisonment (previously, 2 years).
- Where not clear if victim alive or deceased, s 80AH *To commence on date to be fixed by proclamation* – Allows a 'special verdict' where proven beyond reasonable doubt the accused committed either a sexual offence or indecent interference with a corpse, but it is not clear if the victim was alive or deceased. The accused is liable to be sentenced for whichever offence has the lesser punishment.

The amendments respond to the 2024 report of the coronial inquest into the deaths of Jacinta Rose "Cindy" Smith and Mona Lisa Smith: Second Reading Speech.

Evidence (Audio and Audio Visual Links) Amendment (Local Court Bail Division) Act 2025

Commenced 7 July 2025.

Evidence (Audio and Audio Visual Links) Act 1998

Provides for a presumption of the use of audio visual links in bail proceedings relating to bail, including first appearance bail matters: s 5BB(1).

An accused detainee may be permitted to appear before the court using an audio link, only if: - an audio visual link fails or is otherwise not available, the parties consent and the court is satisfied it is in the interests of justice: s 5BB(2A).

A head of jurisdiction for a court may direct that accused detainees are required to appear physically before the court, despite the presumption in s 5BB(1): s 5BB(6). In such a case, the accused detainee must appear physically before the court, unless the court directs otherwise in the interests of the administration of justice: s 5BB(7).

Clarifies protections related to the use of audio links and audio visual links: ss 5BC, 20A, 20B, 20D.

Bail Amendment (Ban on Private Electronic Monitoring) Act 2025

Commenced 11 June 2025.

The Act restricts bail subject to electronic monitoring to serious domestic violence offences.

Bail Act 2013

s 30A: A bail condition must not require an accused be subject to electronic monitoring other than a bail condition imposed under s 28B (s 28B requires electronic monitoring for bail granted for a serious domestic violence offence).

s 28B(2A): Electronic monitoring must be conducted by the Commissioner of Corrective Services.

Transitional: Sch 3. Amendments apply to offences committed or charged before commencement of Act.

At the end of the transition period (3 months from commencement of Act), an accused subject to electronic monitoring is taken to have failed to comply with the bail condition and must be dealt with under s 77. No longer being able to rely on compliance with a private electronic monitoring condition at the end of the transition period constitutes a change in circumstances under s 74.

Observations on the legislation are made in ***R v Xerri*** [2025] NSWSC 560 (Rothman J).

Crimes Amendment (Inciting Racial Hatred) Act 2025

Commenced 15 August 2025.

Crimes Act 1900

New Pt 3A, Div 8A – Public incitement of hatred on ground of race

- s.93ZAA(1) – new offence of publicly inciting hatred on ground of race where –
  (a) a person, by a public act, intentionally incites hatred towards another person / group of persons on the ground of race, and
  (b) the public act would cause a reasonable person who was the target of the incitement of hatred, or a member of a group, to—
  (i) fear harassment, intimidation or violence, or
  (ii) fear for the reasonable person's safety.
  Maximum penalties: Individual – 100pu or 2y imprisonment, or both; Corporation – 500pu.
- The offence does not apply to an act that consists only of directly quoting from or otherwise referencing a religious text for the purpose of religious teaching or discussion: s.93ZAA(2).

Crimes Amendment (Places of Worship) Act 2025

Commenced 2 June 2025.

Crimes Act 1900

s 214B - new offence to block, impede, hinder or take certain other action to affect a person accessing or leaving a place of worship. Maximum penalty: 200 p.u. or imprisonment 2 years, or both.

s 214C – Act to be reviewed by Minister after 2 years.

Law Enforcement (Powers and Responsibilities) Act 2002

ss 200(4), (5) - authorises police to issue move on directions in relation to a demonstration, protest, procession or assembly occurring in or near a place of worship, except in specified circumstances.

Crimes Legislation Amendment (Racial and Religious Hatred) Act 2025

Commenced 2 March 2025.

Crimes Act 1900

- Increased penalties for displaying a Nazi symbol by 'public act', which now includes by graffiti, on or near synagogue, Jewish school or the Sydney Jewish Museum. Maximum penalties: Individual – 200pu or 2y imprisonment, or both; Corporation – 1000pu (ss 93ZA(1AA), 93ZA(5)(a)).

Crimes (Sentencing Procedure) Act 1999

- Insert "partially or wholly" into s 21A(2)(h) to state, "(h) the offence was partially or wholly motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged ...". This is to remove doubt where hatred or prejudice is just one of the motivations of an offender (Second Reading Speech).
- The amendment applies to offences committed, and proceedings commenced, before or after commencement of the Act: Sch 2, Pt 36, cl 96(1).

Graffiti Control Act 2008

- For aggravated offence of intentional marking of premises or property, circumstances of aggravation include marking "a place of worship": s 4(6)(c).
- The amendment applies to offences committed after the Act's commencement: Sch 1, Pt 5, cl 5(1).

Jury Amendment Act 2024

Commenced 10 March 2025.

Jury Act 1977

- Exemption from jury service: To be exempted/excused from jury service, "other reasons" may include temporary disabilities or other physical and mental conditions: s 14A(d).
- Additional jurors: In criminal proceedings in Supreme and District Court, the Court may order the selection of no more than 3 additional jurors if the nature, likely duration or complexity of proceedings, or any other factor that may result in a juror being discharged during the trial of the proceedings, necessitates the selection of additional jurors: s 19(2).
- Separation of jury: The jury may, subject to a contrary order of the court, separate at any time either before or after retiring to consider its verdict. (The requirement for a court to make such an order is removed): s 54.

Not yet commenced - Replacement jurors:

- A court or coroner may order selection of a replacement juror if, before the judge or coroner gives oral directions to the jury in a trial or coronial inquest, a juror dies or is discharged, provided an order would not give rise to risk of a substantial miscarriage of justice: s 53D.
- If the court orders the selection of a replacement juror and the number of allowed peremptory challenges has already been exhausted, one additional peremptory challenge without restriction may be made by each person prosecuted and the Crown: s 53D(5).
- The Supreme or District Court may order selection of a replacement juror in criminal proceedings even if the Court ordered the selection of an additional juror (under s 19(2)) before the jury was selected: s 53D(6).
- Selection of a replacement juror may be made even if the court or coroner has previously ordered continuation of trial / inquest with a reduced number / remaining jurors and replacement juror: s 53D(7).