

# CRIMINAL LAW REVIEW 2013

A Paper for the Land and Environment Court Annual Conference

24 May 2013

Justice Peter Johnson

## A Year of Ongoing Reform

- 1 The last year has seen developments in the criminal law in New South Wales by way of significant statutory reform, case law and the commencement of a process of review in other important areas. This paper seeks to provide an overview of some of these developments.

## Statutory Reforms

- 2 Not without controversy, the *Evidence Amendment (Evidence of Silence) Act 2013* (“*Evidence of Silence Act*”) and the *Criminal Procedure Amendment (Mandatory Pre-Trial Defence Disclosure) Act 2013* (“*Defence Disclosure Act*”) passed through both houses of State Parliament.
- 3 The two Acts have received assent, and will commence on a day or days to be appointed by proclamation, but have yet to be proclaimed.

### *Evidence of Silence Act*

- 4 The *Evidence of Silence Act* amends s.89 *Evidence Act 1995* so that the general prohibition on drawing an unfavourable inference in relation to silence is to be subject to the new s.89A of that Act. Section 89A is in the following terms:

“89A Evidence of silence in criminal proceedings for serious indictable offences

- (1) *In a criminal proceeding for a serious indictable offence, such unfavourable inferences may be drawn as appear proper from evidence that, during official questioning in relation to the offence, the defendant failed or refused to mention a fact:*
  - (a) *that the defendant could reasonably have been expected to mention in the circumstances existing at the time, and*
  - (b) *that is relied on in his or her defence in that proceeding.*
- (2) *Subsection (1) does not apply unless:*
  - (a) *a special caution was given to the defendant by an investigating official who, at the time the caution was given, had reasonable cause to suspect that the defendant had committed the serious indictable offence, and*
  - (b) *the special caution was given before the failure or refusal to mention the fact, and*
  - (c) *the special caution was given in the presence of an Australian legal practitioner who was acting for the defendant at that time, and*
  - (d) *the defendant had, before the failure or refusal to mention the fact, been allowed a reasonable opportunity to consult with that Australian legal practitioner, in the absence of the investigating official, about the general nature and effect of special cautions.*
- (3) *It is not necessary that a particular form of words be used in giving a special caution.*
- (4) *An investigating official must not give a special caution to a person being questioned in relation to an offence unless satisfied that the offence is a serious indictable offence.*
- (5) *This section does not apply:*
  - (a) *to a defendant who, at the time of the official questioning, is under 18 years of age or is incapable of understanding the general nature and effect of a special caution, or*

- (b) *if evidence of the failure or refusal to mention the fact is the only evidence that the defendant is guilty of the serious indictable offence.*
- (6) *The provisions of this section are in addition to any other provisions relating to a person being cautioned before being investigated for an offence that the person does not have to say or do anything. The special caution may be given after or in conjunction with that caution.*

*Note. See section 139 of this Act and section 122 of the Law Enforcement (Powers and Responsibilities) Act 2002.*

- (7) *Nothing in this section precludes the drawing of any inference from evidence of silence that could properly be drawn apart from this section.*
- (8) *The giving of a special caution in accordance with this section in relation to a serious indictable offence does not of itself make evidence obtained after the giving of the special caution inadmissible in proceedings for any other offence (whether or not a serious indictable offence).*
- (9) *In this section:*

*official questioning of a defendant in relation to a serious indictable offence means questions put to the defendant by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of the serious indictable offence.*

*special caution means a caution given to a person that is to the effect that:*

- (a) *the person does not have to say or do anything, but it may harm the person's defence if the person does not mention when questioned something the person later relies on in court, and*
- (b) *anything the person does say or do may be used in evidence."*

5 In the second reading speech with respect to the Bill (Hansard, Legislative Assembly, 13 March 2013), the Attorney General, Mr Smith, stated that the *"provisions in the Bill are targeted at seeking information in the first stages*

*of an investigation from a suspect during police questioning”, and that they “aim to identify the defences and the facts that the suspect will later rely on at court, if the suspect is charged and contests the matter at trial”. The Attorney General observed that “early identification of the issues in the case will later assist in the efficient management of the trial process under the proposed changes to the Criminal Procedure Act”.*

- 6 Section 89A will apply only to criminal proceedings for a serious indictable offence, defined in s.21 *Interpretation Act 1987* as an indictable offence that is punishable by imprisonment for life or for a term of five years or more.
- 7 Section 89A(2), (4) and (5) contain a number of safeguards and limitations which restrict the operation of the provision.
- 8 The *Evidence of Silence Act* will be subject to review after a period of five years after its commencement to determine whether the policy objectives of the amendments remain valid and whether s.89A remains appropriate for securing those objectives: Clause 25, Schedule 2, *Evidence Act 1995*.

#### *Defence Disclosure Act*

- 9 The *Defence Disclosure Act* omits ss.137-138 and ss.141-143 *Criminal Procedure Act 1986* and inserts new ss.141-143 and s.146A in that Act. In substance, the amendments provide for mandatory pre-trial defence disclosure in proceedings on indictment in the Supreme and District Courts.
- 10 Section 141(1)(b) will require the accused person to give notice of the defence response to the prosecution’s notice in accordance with s.143. Amongst other things, s.143 will require a defence response under s.141(1)(b) to contain:

- (a) the nature of the accused person's defence, including particular defences to be relied on: s.143(1)(b);
- (b) the facts, matters or circumstances on which the prosecution intends to rely to prove guilt (as indicated in the prosecution's notice under s.142) and with which the accused person intends to take issue: s.143(1)(c);
- (c) points of law which the accused person intends to raise: s.143(1)(d).

11 Section 143(2) will provide for notice of the defence response to contain certain matters as the Court orders, including a copy of any report, relevant to the trial, that has been prepared by a person whom the accused person intends to call as an expert witness at the trial (s.143(2)(a)).

12 Section 146A provides as follows:

*"146A Drawing of inferences in certain circumstances*

- (1) *This section applies if:*
  - (a) *the accused person fails to comply with the requirements for pre-trial disclosure imposed by or under this Division on the accused person, or*
  - (b) *the accused person is required to give a notice under section 150 (Notice of alibi) and fails to do so.*
- (2) *If this section applies:*
  - (a) *the court, or any other party with the leave of the court, may make such comment at the trial as appears proper, and*
  - (b) *the court or jury may then draw such unfavourable inferences as appear proper.*
- (3) *A person must not be found guilty of an offence solely on an inference drawn under this section.*

(4) *Subsection (2) does not apply unless the prosecutor has complied with the requirements for pre-trial disclosure imposed by or under this Division on the prosecution.*

(5) *This section does not limit the operation of section 146.”*

13 A variety of consequential amendments are made to other provisions in the *Criminal Procedure Act 1986*, including ss.136, 139, 144, 145, 147, 148 and 149.

14 In the course of the second reading speech with respect to the Bill (Hansard, Legislative Assembly, 13 March 2013), the Attorney General observed that the Bill would complement changes effected by the amendments to the *Evidence Act 1995* and “*would represent a second opportunity for an accused to provide information and thereby facilitate the course of justice*”. The Attorney stated that the “*primary purpose of the new case management regime is to narrow the contested issues at trial*” and that this “*will lead to shorter trials and will prevent inconvenience to those witnesses whose evidence can be agreed beforehand*”, and that the “*provisions will also provide a consequence for accused persons who frustrate the criminal justice process by not engaging with the court and the prosecution in identifying the issues in dispute before their trial*”.

15 The *Defence Disclosure Act* will be subject to review, after a period of two years from the commencement of the provisions, to determine whether they have been effective in reducing delays in proceedings on indictment, in promoting the efficient management and conduct of trials, whether the interests of justice have been affected in relation to parties in proceedings on indictment and the cost impact of the procedures: Schedule 2, *Criminal Procedure Act 1986*.

Crimes (High Risk Offenders) Act 2013

- 16 On 19 March 2013, the *Crimes (Serious Sex Offenders) Act 2006* was renamed the *Crimes (High Risk Offenders) Act 2013*. The amended legislation extends the statutory scheme for detention or supervision after a sentence is served to high-risk violent offenders, as well as serious sex offenders.
- 17 In addition, s.25C requires a Court that sentences a person for a serious violence offence (as defined in s.5A of the Act) to cause the offender to be advised of the existence of the Act and of its application to the offence.

Bail Bill 2013

- 18 The *Bail Bill 2013* was introduced in the Legislative Assembly on 1 May 2013. By 9 May 2013, the Bill had passed through all stages in the Legislative Assembly without amendment.
- 19 The introduction of the Bill followed the issue by the NSW Law Reform Commission of Report 133, *Bail* (April 2012).
- 20 In the course of the second reading speech (Hansard, Legislative Assembly, 1 May 2013), the Attorney General stated that a key feature of the Bill was a simple unacceptable-risk test for bail decisions, with a movement away from offence-based presumptions as contained in the *Bail Act 1978*. The Attorney General stated:

*“Rather than rely on presumptions, the bill requires that the bail authority consider particular risks when determining bail, namely, the risk that the accused will fail to appear, commit a serious offence, endanger the safety of individuals or the community, or interfere with witnesses. The bill incorporates a number of key considerations that need to be taken into account in deciding whether there are any risks of this nature and whether they are unacceptable. These considerations incorporate matters relevant to the protection of the community and the criminal justice system as well as the rights of the accused person. If the bail authority is*

*satisfied that the accused person presents an unacceptable risk, it will have to assess whether that risk can be sufficiently mitigated by the imposition of bail conditions. If satisfied that the risk can be sufficiently mitigated, the person will be released to conditional bail. If the risk cannot be so mitigated, bail will be refused.*

*The Government considers that applying its unacceptable-risk test is a much simpler and more responsive way to make bail decisions than applying the complex scheme of presumptions in the existing Bail Act. Simplifying bail laws so that they are easier to understand and apply is one of the key goals of this bill.”*

- 21 The Attorney indicated in the second reading speech that the new Act would commence operation approximately 12 months from the date of its assent, with the intervening period being used to mount an education and training campaign for police, legal practitioners and Courts, and to allow changes to be made to the JusticeLink system and the New South Wales Police information technology systems.

## **Case Law**

### Dissemination and Use of Evidence Obtained Under Compulsory Examination Before Investigatory Commissions

- 22 Several recent decisions of the Court of Criminal Appeal and the Court of Appeal have considered issues arising from the dissemination to the prosecution of the record of compulsory examinations with accused persons before investigatory commissions.
- 23 In *R v Seller; R v McCarthy* [2013] NSWCCA 42, the respondents were to stand trial for conspiring to dishonestly influence a public official, the Commissioner of Taxation, contrary to provisions of the *Criminal Code (Cth)*. Before the trial commenced, a permanent stay of proceedings was sought because the Australian Crime Commission had disseminated transcripts to the Commonwealth DPP of compulsory examinations conducted with each respondent before they were charged.



- 24 There was a statutory prohibition upon direct use of such material, but derivative use was permitted. Directions had been given under the *Australian Crime Commission Act 2002 (Cth)* permitting dissemination of the evidence given and documents produced, to members of the staff of the ACC and the ATO only. Contrary to that direction, a disk containing transcripts of the examination of both respondents was supplied to the Commonwealth DPP. Thereafter, a variation was made to the relevant direction to permit access to be granted to the Commonwealth DPP.
- 25 The primary Judge granted a stay on the basis that the continuation of the trial would be an offence to the administration of justice: *R v Seller; R v McCarthy* [2012] NSWSC 934; 269 FLR 125 at 169 [257]-[261].
- 26 A Crown appeal was upheld and the stay was set aside by the Court of Criminal Appeal. It was held that the fact that dissemination had taken place in contravention of a statutory direction did not automatically entitle an accused to a stay. There was no evidence to justify a conclusion that the trial would suffer from a fundamental defect because the transcripts were provided to the Commonwealth DPP, or to suggest use would be made of the transcripts in the future. The Court held that s.25A *Australian Crime Commission Act 2002 (Cth)* preserved a statutory safeguard to the right to a fair trial but did not prohibit all derivative use of the material (at [101]).
- 27 In *Lee v R* [2013] NSWCCA 68, the Court of Criminal Appeal considered a conviction appeal in circumstances where there had been unlawful dissemination to the prosecution of compulsory examinations with each appellant before the NSW Crime Commission. The NSW Crime Commissioner had released the transcripts of the appellants' evidence to the NSW DPP before the trial. On appeal, the Crown conceded that this supply of relevant transcripts was unlawful.
- 28 On appeal, it was argued for the appellants that the prosecutor's possession or use of the transcripts deprived the appellants of the right to

a fair trial or created a miscarriage of justice. The Court of Criminal Appeal dismissed the appeals.

- 29 With respect to the claim that there had been a miscarriage of justice under the third limb of s.6(1) *Criminal Appeal Act 1912*, the Court held that it is necessary for an appellant to show a causal connection between the relevant irregularity and the conviction, that is, but for the irregularity, the result might have been different (at [30]). In this case, the release of the transcripts to the prosecutor did not occasion a miscarriage of justice for the appellants.
- 30 With respect to one appellant, the charges against him at the time of the examination were irrelevant to the subject matter of the examination. Documents he was compelled to produce to the NSW Crime Commission had been found independently during a police search and were available to be tendered at the trial. He was not precluded from putting any defence that was otherwise available. The examination transcripts did not contain anything which related to the trial as it in fact ran (at [146]-[149]).
- 31 Concerning the second appellant, simply because the prosecution had possession of inadmissible material which was potentially relevant to the defence of the accused did not render the trial unfair (at [162]). Further, no objection was taken at trial although both appellants were aware of the material in the prosecution brief before the trial. Absent practical unfairness, the failure to object was itself fatal to the ground of appeal and the appellants did not seek to establish any practical unfairness in the conduct of the trial resulting from the dissemination of the transcripts (at [163]-[164]).
- 32 The same persons, Jason Lee and Seong Won Lee, have been involved in litigation involving similar issues on a different front. In February 2011, a primary Judge refused an application by the NSW Crime Commission for orders that each of these persons be examined before a Registrar of the

Supreme Court concerning their affairs under s.31D(1) *Criminal Assets Recovery Act 1990 (NSW)*.

- 33 The Court of Appeal (constituted by five Judges) allowed an appeal from these orders: *New South Wales Crime Commission v Jason Lee* [2012] NSWCA 276. An extensive analysis was undertaken by the Court of the scheme for examination under the *Criminal Assets Recovery Act 1990 (NSW)*, and the principles emerging from authorities concerning the interaction of compulsory examination of a person under statute and pending criminal proceedings.
- 34 To the extent that reliance was placed upon authorities dealing with compulsory examinations under the *Australian Crime Commission Act 2002 (Cth)*, the Court observed that the scheme under that Act was different in subject matter. Likewise, evidence as to what happened in respect of interviews conducted under the *New South Wales Crime Commission Act 1985* was said to be of limited value in determining whether an order should be made for examination under the *Criminal Assets Recovery Act 1990 (NSW)*. If questions and answers given during an examination under the lastmentioned Act would (were they to be revealed) prejudice a future criminal trial, there was no reason to suppose that a relevant order could not be made under s.8(1)(a) or (e) *Court Suppression and Non-Publication Orders Act 2010*. If a real risk of prejudice was revealed in the course of the conduct of the examination, the Registrar before whom the examination was taking place would have powers available to diminish or prevent that prejudice (at [53]-[54], [62], [81], [100]-[101]).
- 35 On 15 February 2013, the High Court granted special leave to appeal from the decision of the Court of Appeal. The hearing of the appeal proceeded before the High Court on 1 May 2013, with judgment being reserved: *Lee and Anor v New South Wales Crime Commission* [2013] HCA Trans 93.

36 It will be apparent from these judgments that the use of evidence from compulsory examinations before investigatory commissions will remain a topical issue, and one likely to be explored further in the context of criminal trials and appeals.

#### Case Stated to Court of Criminal Appeal

37 In *Elias v Director of Public Prosecutions (NSW)* [2012] NSWCA 302, consideration was given to the stated case procedure contained in s.5B *Criminal Appeal Act 1912* where a case is stated from the District Court to the Court of Criminal Appeal.

38 Section 5BA *Criminal Appeal Act 1912* is expressed in similar terms to s.5B with respect to a case stated from the Land and Environment Court to the Court of Criminal Appeal.

39 The District Court had dismissed an appeal against conviction in the Local Court upon two counts of making a false statement with intent to obtain a financial advantage contrary to s.170BB *Crimes Act 1900*. The District Court Judge refused to submit a question under s.5B upon the basis that the proposed questions were not questions of law, and that it would be an abuse of process for the applicant to pursue (as he sought to do), relief under s.5B and under s.69 *Supreme Court Act 1970* simultaneously.

40 The Court of Appeal held that the question sought to be stated was a question of fact, and that the primary Judge was correct in refusing to submit a question of law under s.5B (at [2], [19], [48]).

41 With respect to the duty to state a case under s.5B, Basten JA (Beazley JA agreeing) said at [8]-[9]:

[8] *The applicant placed reliance upon the observations of Jordan CJ in Ex parte McGavin; Re Berne (1946) 46 SR(NSW) 58; 63 WN(NSW) 45, to the effect that a District Court judge (then a Chairman of Quarter Sessions) is*

*obliged to exercise the power to submit a question of law unless 'the question is so obviously frivolous and baseless that its submission would be an abuse of process'. Those observations, and their subsequent history, were referred to in Sasterawan (2007) at [5]. It is, however, important to understand the premise underlying the duty identified by Jordan CJ, namely that the occasion to exercise the power has in fact arisen. There is no power unless the question raised for submission is a question of law, an assessment which Jordan CJ had already made before observing that a duty arose. Thus, at least in the first instance, the District Court judge must be satisfied that a relevant question of law has been identified before there can be a duty to submit the question to the Court of Criminal Appeal.*

[9] *Furthermore, there may be other bases for identifying an abuse of process which were not relevant in the circumstances of McGavin. For example, and subject to the comments already made in this regard, the prior commencement of an alternative procedure, or unjustifiable delay, may be factors relevant to the scope of the power and thus the duty. The primary judge, not having been satisfied that the issue sought to be submitted for consideration by the Court of Criminal Appeal was indeed a question of law, was under no duty to submit the proposed question."*

- 42 These observations have application where a Judge of the Land and Environment Court is asked to state a case under s.5BA *Criminal Appeal Act 1912*.

#### Reasons in Trial by Judge Alone

- 43 *CJ v R* [2012] NSWCCA 258 involved an appeal from a trial by Judge alone in the District Court for a number of sexual offences. There was no dispute at trial as to whether the offences had been committed. The controversy at trial concerned the availability of a special verdict arising from the accused's asserted mental illness.
- 44 In upholding an appeal against conviction, the Court (Hall J, Beazley JA and SG Campbell J agreeing) held that the trial Judge's simple statement that he preferred one expert witness to another, without more, was not a proper exercise of judicial decision making. After referring to relevant

authorities concerning the duty to provide reasons, Hall J concluded at [93]-[96]:

*[93] It is plain, having regard to the issue in dispute and the conflict in the expert evidence, that it was critical for the trial judge to analyse and evaluate the evidence of each witness before determining whether or not the appellant had discharged the onus upon her to establish the mental illness defence.*

*[94] An evaluation of the whole of the evidence required particular consideration of the statements made by the appellant which, taken at face value, could be construed as acknowledgements by her that she understood that what she was doing was wrong. However, there was expert evidence, in particular, that of Drs Richardson and Nielssen, that established that such statements may properly be taken as retrospective statements rather than as statements reflecting the appellant's state of mind contemporaneously with the particular acts in question.*

*[95] Likewise a complete understanding of the medical evidence was critical in evaluating and determining the nature and/or level of knowledge or understanding of the appellant and whether or not any awareness of the legal wrongness of her acts was sufficient in the circumstances of the case to also establish that she knew that her acts were also wrong according to the ordinary standards of right and wrong adopted by reasonable persons as against 'wrong' in the legal sense of that term. A further or related consideration was whether or not the appellant, in the manic phases of her disorder, was or was not able to reason with a modest degree of calmness in relation to the moral quality of what she was doing: Sodeman v R (above) at 215 per Dixon J (as his Honour then was); Stapleton v R (above) at 367 (per Dixon CJ, Webb and Kitto JJ).*

*[96] The failure by the sentencing judge to analyse all of the evidence, in my opinion, constituted appellable error resulting in a miscarriage of justice."*

#### Intensive Correction Orders and the Concept of Rehabilitation

45 In *R v Pogson; R v Lapham; R v Martin* [2012] NSWCCA 225; 82 NSWLR 60, a five-member Bench of the Court of Criminal Appeal overturned a previous decision of the Court in *R v Boughen; R v Cameron* [2012] NSWCCA 17; 215 A Crim R 476, to the extent that the earlier decision had held that intensive correction orders were only available where the

offender was in need of rehabilitation, in the sense of reducing the risk that he or she would reoffend. The decision canvassed a number of issues relevant to sentencing, including the concept of rehabilitation.

- 46 McClellan CJ at CL and Johnson J (Price, RA Hulme and Button JJ agreeing) said at 85-87 [115]-[123]:

*“[115] Although not defined by statute, the term ‘rehabilitation’ has a well-recognised content in the context of sentencing. Rehabilitation as an object of sentencing has not been confined to those who are regarded as being ill or predisposed to crime by environmental factors, including alcohol or drug abuse. A statement frequently cited with respect to the concept of rehabilitation is that of King CJ in Vartzokas v Zanker (1989) 51 SASR 277 at 279; (1989) 44 A Crim R 243 at 245 where he said:*

*‘The passage which I have quoted from the remarks of the learned sentencing magistrate discloses, in my opinion, an error of principle. It implies that rehabilitation or reform, as an object of sentencing, is confined to those who are ‘in need of’ rehabilitation by reason of factors such as illness or being ‘predisposed to such behaviour by his environment or his experiences of life’, that is to say, to persons subject to some personal or social disadvantage. That involves a misconception of the meaning of rehabilitation and its place in the sentencing process.*

*Rehabilitation as an object of sentencing is aimed at the renunciation by the offender of his wrongdoing and his establishment or re-establishment as an honourable law-abiding citizen. It is not confined to those who fall into wrongdoing by reason of physical or mental infirmity or a disadvantaged background. It applies equally to those who, while not suffering such disadvantages, nevertheless lapse into wrongdoing. The object of the courts is to fashion sentencing measures designed to reclaim such individuals wherever such measures are consistent with the primary object of the criminal law which is the protection of the community. Very often a person who is not disadvantaged and whose character has*

*been formed by a good upbringing, but who has lapsed into criminal behaviour, will be a good subject for rehabilitative measures precisely because he possesses the physical and mental qualities and, by reason of his upbringing, the potential moral fibre to provide a sound basis for rehabilitation. It would be a great mistake to put considerations of rehabilitation aside in fashioning a sentence for such a person.'*

[116] *Leading Australian sentencing texts have emphasised this statement as an explanation of the concept of rehabilitation: RG Fox and A Freiberg, Sentencing: State and Federal Law in Victoria 2nd ed (1999) Melbourne, Oxford University Press, par 3.411; K Warner, Sentencing in Tasmania 2nd ed (2002) Federation Press, pars 3.217–3.221. King CJ's statement has been cited, without disapproval, as recently as 30 July 2012 in a decision of the Victorian Court of Appeal: Pantazis v The Queen [2012] VSCA 160 at [236]–[237] (Warren CJ, Redlich, Hansen and Osborn JJA and Curtain AJA). Vartzokas v Zanker is referred to in the Sentencing Bench Book published by the Judicial Commission of New South Wales, in the context of rehabilitation as a purpose of sentencing (at [2–260]).*

[117] *This understanding of rehabilitation finds further support in the academic literature. Criminologist RA Duff has described criminal punishment as 'communicative', in the sense that it aims to persuade the offender of the wrongfulness of his or her conduct. Punishment thereby invites the offender to make 'secular penance' for the wrong. In Punishment, Communication and Community (2001) New York, Oxford University Press, Mr Duff states at pp 111–112:*

*'The offender comes to recognize and repent his crime as a wrong and to realize that he must, and how he can, so reform himself as to refrain from such crimes in the future. He also comes to accept his punishment as a justified response to his crime - as an appropriate means of inducing that repentance and as an appropriate way in which he can express that repentance to others.'* (Citation omitted)

[118] *Inherent in Mr Duff's account of punishment is the assumption that rehabilitation addresses the moral sensibilities of the offender, not just his or her propensity to reoffend. Indeed, were it otherwise, there would be little to distinguish rehabilitation from specific deterrence, which is separately provided for by s 3A(b) of the Sentencing Procedure Act. To the extent that moral self-correction and renunciation of one's own wrongdoing are captured by the*



concept of rehabilitation for which s 3A(d) of that Act provides, it can fairly be said that the present respondents are in need of rehabilitation, notwithstanding that they are unlikely to reoffend.

[119] To our minds, this understanding of rehabilitation is at odds with the view, most recently expressed by Simpson J in R v Agius at [92] and [103], that ICOs are available only for offenders who are apt to reoffend. In our view, the 'correction' sought to be achieved by such orders is not so limited.

[120] Although it is common for judges, when considering the subjective characteristics of an offender, to evaluate the prospects of the person reoffending and to express an opinion as to whether the person is unlikely to reoffend, it could never be said that a person who has once offended would never reoffend. Furthermore, a person who has offended will always be in need of the opportunity to establish themselves as a law abiding and productive member of the community. Rehabilitation is a concept which is broader than merely avoiding reoffending.

[121] A finding that an offender is not likely to reoffend may often be made not only because of expressions of remorse, but because the fact that the offender has been caught, convicted and punished (which may include extra-curial punishment) will operate to deter the offender from future wrongdoing. Deterrence will operate in respect of an offender even though the offender may not have restructured his or her thinking so that they thereafter consciously determine to re-establish themselves as a positive member of society.

[122] By contrast to deterrence, rehabilitation has as its purpose the remodelling of a person's thinking and behaviour so that they will, notwithstanding their past offending, re-establish themselves in the community with a conscious determination to renounce their wrongdoing and establish or re-establish themselves as an honourable law abiding citizen: Vartzokas v Zanker at 279; 245 per King CJ.

[123] In this sense, every offender is in need of rehabilitation. Some may need greater assistance than others. It has been commonplace to speak of 'paying your debt' to society. That phrase, in colloquial parlance, captures the essence of rehabilitation, enabling the offender to re-establish him or herself as an honourable member of the community."

Dealing with Cases Where Error is Asserted Following the Decision in *Muldrock v The Queen*

- 47 The Court of Criminal Appeal has continued to hear applications for leave to appeal against sentence where error is asserted on sentence for standard non-parole period offences following the decision in *Muldrock v the Queen* [2011] HCA 39; 244 CLR 120. A helpful article by RA Hulme J summarised the position as at November 2012: “*After Muldrock - Sentencing for Standard Non-Parole Period Offences in NSW*” (2012) 24 Judicial Officers’ Bulletin 82.
- 48 Whether relevant error is demonstrated depends upon a fair reading of the remarks on sentence in the particular case. In a number of decisions, error has been demonstrated where the sentencing Judge’s approach is indicative of one which involved giving the standard non-parole period undue significance, in an overly prescriptive way: *Essex v R* [2013] NSWCCA 11 at [31]; *Truong v R* [2013] NSWCCA 36 at [32]; *ZZ v R* [2013] NSWCCA 83 at [93]-[94].
- 49 In April 2013, Legal Aid NSW announced that, following a thorough review of sentences in a large number of cases, it was likely that legal aid would be granted in approximately 70 matters which had been determined to have reasonable prospects for the purpose of appeal or review upon the basis of suggested *Muldrock v The Queen* error.
- 50 The Court of Criminal Appeal has reserved judgment upon an application to reopen sentence under s.43 *Crimes (Sentencing Procedure) Act 1999* following a successful Crown appeal in *R v Achurch* [2011] NSWCCA 186; 216 A Crim R 152. The Court (constituted by five Judges) will determine whether it is appropriate to use the s.43 review mechanism in cases where error following *Muldrock v The Queen* is asserted.

- 51 The judgment of the Court of Criminal Appeal will provide assistance concerning the operation of s.43, which is capable of applying to all sentencing courts.

#### Accused Absconding During Trial

- 52 In *Williams v R* [2012] NSWCCA 286, the accused was on trial before a jury at a country District Court for offences of aggravated dangerous driving occasioning death and aggravated dangerous driving occasioning grievous bodily harm. During the course of the evidence of the accused, whilst under cross-examination by the Crown prosecutor, she suffered what was described as “*a complete meltdown*” and an adjournment was granted for her to see a doctor. The accused did not return at the appointed time later that day.
- 53 The trial was adjourned from that day and, upon resumption, the accused did not appear. An application to discharge the jury was rejected. The trial proceeded in the absence of the accused and the jury returned verdicts of guilty.
- 54 In rejecting a ground of appeal asserting error in continuing the trial in the absence of the accused, RA Hulme J outlined the relevant discretionary principles and held that no error had been demonstrated in the trial Judge’s exercise of discretion in determining that the trial ought proceed in the absence of the accused (at [92]-[96]).

#### Strong Comments in Remarks on Sentence

- 55 In the course of sentencing an offender for aggravated sexual assault offences committed following the breaking and entry of a home of an 83-year old widow in a country town, the sentencing Judge observed that it was only necessary to read the facts “*to be horrified*” and that it was a “*fact that any right thinking member of the community would be thoroughly disgusted by the facts*” of the case.

56 In the course of dismissing an appeal against sentence in *Piscitelli v R* [2013] NSWCCA 8, Button J (Hoeben JA and Johnson J agreeing) said at [69]:

*“The general purpose of remarks on sentence is to explain to the offender and to the community what sentence is being imposed and why. There is no requirement that remarks on sentence be anodyne or mealy-mouthed. If an offence is trivial, or comically inept, a sentencing judge is surely entitled to say so in the remarks on sentence. Conversely, where, as here, a series of offences is so serious as to inspire severe condemnation, I do not consider that a sentencing judge should be prohibited from using strong, even powerful, language, although it should never become inflamed or inflammatory. A similar approach to the use of powerful language in appropriate circumstances in remarks on sentence was taken by this court in the recent decision of Lobsey v R [2012] NSWCCA 239 at [20]–[21].”*

## Ongoing Areas of Review

57 Several important areas of the criminal law are subject to review and potential reform. On 1 March 2013, the Attorney General referred to the NSW Law Reform Commission for inquiry:

- (a) a review of current avenues of appeal in all criminal matters, with a view to simplifying and streamlining appeal processes, and consolidating criminal appeal provisions into a single Act;
- (b) the identification of opportunities for legislative and operational reforms to encourage appropriate early pleas of guilty in indictable criminal matters;
- (c) a review of mechanisms and processes for considering and determining the grant of parole.

58 The NSW Law Reform Commission Report on Sentencing will be released during the course of this year.

- 59 A wide-ranging inquiry has been undertaken by the Commission. The terms of reference issued in September 2011 required a broad inquiry having regard to current sentencing principles (both statutory and common law), the need to ensure that sentencing courts are provided with adequate options and discretions, opportunities to simplify the law (whilst providing a framework that ensures transparency and consistency) and the operation of the standard minimum non-parole scheme.
- 60 Following the decision of the High Court of Australia in *Muldrock v The Queen*, the Attorney General sought an interim report on the standard minimum non-parole period scheme, leading to the issue of Report 134, “*Sentencing - Interim Report on Standard Minimum Non-Parole Periods*” (May 2012).

\*\*\*\*\*