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Parole in NSW — the facts — and some fictions

The Honourable Geoffrey Bellew AM SC*

The Chair of the Parole Authority, the Honourable Geoffrey Bellow AM SC outlines the nature of parole; the functions and duties of the State Parole Authority; the involvement of victims in the parole process; parole and terrorism-related offenders; revocation and breach of parole and release in exceptional circumstances.

What is parole?

It would be fair to say that the underlying rationale of parole supervision is often misunderstood by some members of the wider community. Release to parole is not, as is suggested on occasion, a form of "early release". It does not facilitate an offender "walking free" from custody. It not a reward for good behaviour. Parole is, in fact, the ongoing service of a sentence of imprisonment in a manner which allows offenders to be monitored and supported with a view to assisting them to adapt to, and resume, a normal life before the end of their total sentence, whilst simultaneously providing a continuing measure of protection to the community by way of supervision. When an offender is released he or she is subject to a series of conditions which may restrict them, for example, in terms of those with whom they can associate, and geographical areas into which they can enter. Those conditions are antithetical to the proposition that the offender is "walking free".

It should come as no surprise that after a significant period in custody, any offender is likely to experience difficulties resuming any semblance of normal community life. The vast majority have no employment to which they can return; many are homeless; a large percentage have little family or other support; many have ongoing drug and alcohol issues which need to be addressed. Those who advocate against parole would have it that such offenders simply be released into the community at the conclusion of their sentence with no support structures at all. Even the briefest reflection on that suggestion makes it apparent that it is not the answer. On the contrary, it is a recipe for disaster generally, and reoffending in particular. In contrast, release on parole serves the community interest by ensuring offenders are supervised and supported during their reintegration. It provides an effective way of protecting the community. Whilst there is, necessarily, a risk in the release of any offender, parole acts as an important bridge between custody and liberty.

FEATURES

REGULARS

The State Parole Authority of NSW — its functions and duties

The functions and duties of the State Parole Authority (the Authority) and its members are prescribed in the *Crimes (Administration of Sentences) Act 1999* (the Act) and the *Crimes (Administration of Sentences) Regulation 2014* (the Regulation). The fundamental consideration for the Authority in its decision-making process is to be found in s 135(1) of the Act which is in the following terms:

> The Parole Authority **must not make** a parole order directing the release of an offender unless it is satisfied that it is in the interests of the safety of the community. [Emphasis added.]

There are those who advance the proposition that the only way in which the safety of the community can be ensured is to keep offenders, as it were, "behind bars". When releasing an offender, the Authority is often confronted with the views of members of the public that the offender should "never be let out". That sentiment necessarily overlooks the fundamental fact that, leaving aside those offenders who are sentenced to life imprisonment (of whom there are comparatively few), offenders in this State are given determinate sentences. That necessarily means that it is inevitable that they will be released at some point.

The power of the Authority to release an offender is discretionary, save for cases which attract the application of s 135A of the Act (the so-called "no body/no parole" provision that removes the discretion and mandates the refusal of parole in certain defined circumstances). Importantly, however, the discretion must be exercised according to a number of mandatory factors, the wide range of which is:

- reflective of the fact that no two cases are the same, and
- indicative of (as one would expect) an exhaustive and careful decision-making process.

To begin with, and bearing in mind that in terms of releasing an offender the Authority is limited to those cases in which the offender is sentenced to imprisonment for three years or more, s 135(2) of the Act mandates that the Authority have regard to:

1. the risk to the safety of members of the community of releasing the offender on parole
2. whether the release of the offender on parole is likely to address the risk of the offender re-offending, and
3. the risk to community safety of releasing the offender at the end of the sentence without a period of supervised parole or at a later date with a shorter period of parole.

For the reasons already stated, the consideration in point 3 necessarily assumes some importance in almost every case. In addition, the Authority must also consider a range of other factors which include (but which are not limited to) (see s 135(3)):

- the nature and circumstances of the offence
- any relevant comments made by the sentencing Court
- the criminal history of the offender
- the likely effect on any victim or victim's family of the offender being released on parole
- any report in relation to the granting of parole prepared by Community Corrections
- any report provided (in the case of serious offenders so-defined) by the Serious Offenders Review Council
- any other matters that the Authority considers to be relevant.

No single factor is determinative. That is partly because each case is different. The Authority is mandated to take into account the prescribed factors but, in doing so, it attaches to each one the degree of weight that it deems appropriate. In doing so, the Authority necessarily liaises closely with Community Corrections, whose staff are employed both in correctional centres and in the community. If working in a custodial environment, Community Corrections officers will assist the Authority in providing reports on those offenders who are being considered for release to parole.

In the community, those officers supervise offenders, inform the Authority about breaches of parole, and provide a recommendation about the action the Authority should take. Ideally, the supervisory role of a Community Corrections officer should be viewed as being akin to that of a "coach", ie, one who *assists* the offender and works collaboratively with them to achieve the desired result, rather than that of a "referee", whose focus may be directed to finding fault with, and penalising, the offender.

In making a determination for an offender's release, the Authority is empowered to impose conditions over and above those which are standard. Such additional conditions may be directed to a variety of issues, such as geographical restrictions, preventing association with co-offenders and, in the case of those convicted of child sexual offences, restricting exposure to young children. It is necessary, however, to bear in mind that offenders are re-entering the community often after a long period of incarceration. Overseas studies give some support to the proposition that the imposition of a multitude of conditions can overwhelm an offender, and have the capacity to set him or her up to fail. For these reasons, the Authority carefully considers the imposition of conditions over and above those which are standard, and tries to restrict any additional conditions to those which are absolutely necessary for community protection, having regard to the circumstances of the case. For example, if there is evidence that the offending in question was committed in the context of alcohol abuse, it is likely that a condition will be imposed that the offender does not consume alcohol whilst on parole. Conversely, there is little utility in imposing a condition that an offender is not in possession of an unlicenced firearm, in circumstances where such conduct would constitute a criminal offence in any event.

The constitution of the Authority for the purposes of its decision-making is important. It sits as a body of five persons, namely:

- a Judicial Member
- two Community Members
- two Official Members.

The Authority currently has, across its membership, experience in (amongst other issues) psychology, mental health, managing the homeless, policing (including experience in gang related violence and terrorism-related offending), managing victims, managing correctional environments, administration of correctional facilities, and indigenous culture and issues. That experience is obviously wide and, equally obviously, is relevant to the decisions that the Authority is required to make. It also varies widely. The result, is that a wide range of differing qualifications and experiences are brought to bear upon each and every decision that the Authority is required to make. That structure replicates similar successful structures in both government and non-government sectors.

In the case of serious offenders (defined, essentially, as those serving a life sentence or those offenders whose non-parole periods exceed 12 years: s 3(1)) the Authority has a formal relationship with the Serious Offenders Review Council. Whenever a serious offender is to be considered for release on parole, the Council prepares a report for the Authority advising whether, in its view, release to parole is appropriate. In such a case the Authority must, absent exceptional circumstances, not make a parole order for a serious offender unless the Council advises that it is appropriate to do so.

The involvement of victims in the parole process

Consistent with the legislative provisions referred to previously, the Authority expressly facilitates the involvement of victims of offending in its processes. One factor that the Authority must take into account when considering an offender's release is the potential impact of such release upon a victim of the offending. Many victims take the opportunity to record their views in writing. In cases which are the subject of public hearings, many attend and provide their views orally. Common amongst requests made by victims are those seeking an offender's exclusion from geographical areas, for example within which a victim may live, work or have family.

There are those who advocate that considerations surrounding victims should be afforded absolute primacy in the Authority's decision-making, in preference to, or perhaps even to the exclusion of, all other factors. That sentiment is, on one level, entirely understandable. However, to adopt such a course would run the clear risk of the Authority's discretion miscarrying, thus giving rise to an error of law. It will be evident from its published determinations[1] that the Authority gives the necessary weight to the views expressed by victims, and the requests that they might make surrounding conditions to be imposed on an offender's release. Importantly, for those who wish to take part in the process privately as it were, the Authority is given power under s 194 of the Act to preserve the confidentiality of a victim's submission. The exercise of that power provides an important layer of protection for victims, whilst at the same time confirming that their views have been taken into account.

Terrorism-related offenders

Part 6 Div 3A of the Act governs the release of terrorism-related offenders. Section 159C which is contained within that Division, places a significant limitation on the release of such offenders by providing, amongst other things, that the Authority ***must not make a parole order*** unless (amongst other things) it is **satisfied that the offender *will not engage in or incite or assist others to engage in, terrorist acts or violent extremism*** [Emphasis added]. That is an assessment which is necessarily undertaken holistically by reference to the entirety of the available evidence, and not in a piecemeal way. It is also undertaken bearing in mind that the Authority is not bound by rules of evidence.

At the risk of stating the obvious, the section imposes a high bar, reflected (at least in part) by the use of the term "will not". The practical effect of the obviously deliberate use of that term by the Parliament, is that unless the Authority is satisfied that the offender will not engage in the proscribed conduct — or in other words, unless the Authority is satisfied that such conduct on the part of the offender ***will not happen*** — it *must not make* a parole order. To date, there has not been a case in which that bar has been overcome.

Revocation prior to release

Consistent with the fact that its fundamental discretionary power is tethered to the interests of community safety, the Act confers a power on the Authority to revoke a parole order at any time before the offender is actually released: s 130(1). The power is not limited to orders for release made by the Authority, and extends to statutory parole orders made in respect of sentences which are less than three years duration. To exercise that power, the Authority must be satisfied of one of a number of alternatives. They include (but are not limited to) cases in which:

- the offender, if released, would pose a serious identifiable risk to the safety of the community and that the risk cannot be sufficiently mitigated by directions from a community corrections officer or by changing the conditions of parole
- the offender, if released, would pose a serious and immediate risk to the offender's safety and that the risk cannot be sufficiently mitigated by direction from a community corrections officer or by changing the conditions of parole.

Breach of parole

All breaches of parole are dealt with by the Authority, regardless of the length of the sentence imposed. The Authority is notified of breaches through reports prepared by Community Corrections which outline the breach, the offender's response to supervision, and a recommendation as to what action Community Corrections believe is appropriate for the Parole Authority to take.

The types of breaches with which the Authority deals are many and varied. They can include failing to report to, or engage with, Community Corrections within a specified time frame, leaving the State without permission or failing to comply with specific conditions or directions. In cases of that kind there is, appropriately, a degree of flexibility given to Community Corrections officers by the Act as to what action should be taken. Such possible action includes (s 170A(2)):

- recording the breach and taking no further action
- giving a warning, formal or informal, to the offender, and
- giving a reasonable direction to the offender relating to the kind of behaviour by the offender that caused the breach.

The Authority, whilst obviously assisted by recommendations made by Community Corrections as to what actions might be taken, is not bound by them. In considering what action should be implemented in the case of any breach, the Authority will take into account factors such as:

- the perceived risk and actual risk to the safety of the community
- the ability for Community Corrections to appropriately manage the actual risk that the offender presents to the community
- the offender's response to supervision to date and the stabilising factors they have or may not have available to them in the community
- the intervention strategies that could be employed by Community Corrections to engage the offender
- the ramifications of, or the necessity for, the offender to be returned to custody when balanced against any benefits of remaining under supervision.

As a matter of common sense, effective supervision cannot be maintained without regular contact. Failures to report, engage or provide details of an address may have the effect of the offender removing themselves from an appropriate level of parole supervision. At the same time, the Authority will consider the availabilities for intervention, and the development of revised case management strategies, when determining whether revocation is the most appropriate course of action. It is important, as far as possible, for stakeholders in the process to work *with* offenders, rather than against them.

In some instances, the breach of parole is constituted by the alleged commission of a further offence, punishable by imprisonment. In such a case, a grant of bail, whilst obviously relevant, is not determinative of the outcome in relation to the offender's parole. Quite apart from other factors, in such cases the Authority may have at its disposal additional information regarding the offender's engagement whilst on parole that was not available to the Court considering release on bail.

As always, a principal consideration for the Authority is the safety of the community. Leaving aside issues surrounding bail, the Authority will, in cases where a breach is said to be constituted by the commission of a further offence, consider factors such as:

- the seriousness surrounding the commission of the alleged offence(s), and
- any similarity between the alleged offence(s) and those for which the offender was originally sentenced.

It is open to the Authority to warn an offender of the necessity to comply with parole conditions, rather than exercise the power of revocation immediately upon being made aware of a breach. If a warning has previously been issued to an offender, whether by the Authority or Community Corrections, the Authority will seek to satisfy itself that the offender has been given sufficient time to amend their behaviour. The Authority is empowered to vary or revoke conditions. If an offender seeks a variation to a condition which imposes a geographical restriction, the Authority will consult any victim(s) to ascertain their views.

Release in exceptional circumstances

Section 160 of the Act confers a discretion on the Authority to make an order releasing an offender who is not otherwise eligible for release on parole if the offender is dying or if the Authority is otherwise satisfied that it is necessary to do so because of exceptional extenuating circumstances. There is no limit to the circumstances in which an application for early release under s 160 might be made, although generally speaking they come from offenders who assert that they have a terminal illness. Relevant considerations might include:

- What was the nature of the offending?
- How objectively serious was the offending?
- What are the views of the victim(s)?
- How much of the sentence is remaining?
- Was the medical condition in existence and/or considered at the time that sentence was imposed?
- What is the medical evidence regarding prognosis?
- Is the condition properly manageable by the Justice Health Authorities in custody?

In making its decision, it is a matter for the Authority to ascribe, in its discretion, such weight to each of these considerations as it thinks fit. The last of those considerations — namely whether the condition is properly manageable by the Justice Health Authorities in custody — is invariably an important one.

On 28 November 2023, the *Voluntary Assisted Dying Act 2022* came into force. Although it has not yet occurred, an offender who falls within the legislation may obviously make an application under s 160 of the Act for early release. Clearly, in such a case, there could not be any dispute that the offender was dying. That, at least potentially, would raise a number of considerations for the Authority, including:

- To what extent should the Authority take into account the fact that the substance can be administered in a hospital setting in custody?
- What weight should be placed upon an offender's request to be with his or her family when they die?
- What if the presence of relatives cannot be facilitated in custody?
- What if the application is granted and the offender changes his or her mind about participating in voluntary assisted dying?

Conclusion

Effective parole supervision obviously depends, at least in part, upon the willingness of an offender to engage with the process. Equally obviously, there will always be those who are released on parole and who are then taken back into custody because of further offending. However, studies have demonstrated that offenders who receive effective parole supervision are less likely to reoffend than those who are released unconditionally, and unsupervised, into the community. That supports the conclusions that release on parole as a process which is conducive to the safety of the community.

Endnotes

* Chair, State Parole Authority of NSW.

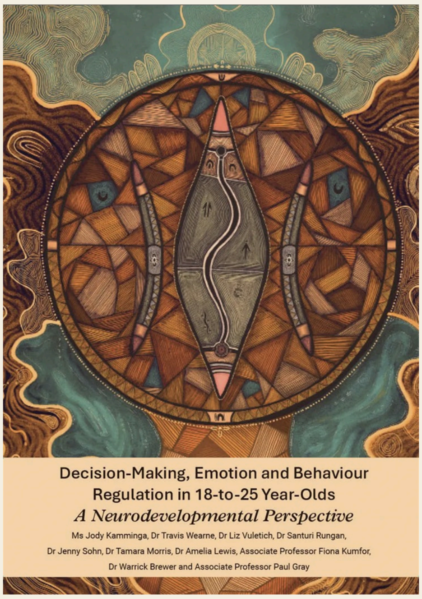
1 NSW State Parole Authority, Parole decisions, accessed 23/4/2026.

Decision-making, emotion and behaviour regulation in 18–25 year-olds — a neurodevelopmental perspective

A report by J Kamminga, T Wearne and P Gray et al

Review by Rebecca McMahon, Co-Chair *Bugmy* Bar Book Project

This report, published by the *Bugmy* Bar Book, provides a neurodevelopmental overview of 18 to 25 year olds. The authors detail how this cohort is still undergoing neurodevelopment, especially in brain areas responsible for decision-making, impulse control and emotional regulation.



The authors examine how adverse life experience can impact brain maturation which can lead to an increase risk of harmful behaviours, which may be a reason for a person coming into contact with the criminal justice system.

The report is relevant to all young adults, but the authors address the unique social, cultural, political and historical context of Aboriginal and Torres Strait Islander peoples, and the ongoing impacts of colonisation.

In criminal proceedings, this report may assist judicial officers to have a deeper understanding of the connection between a young adult's development and how this may impact on decision-making and behaviour when considering the circumstances of the offence, assessments of moral culpability and weight to be given to the purposes of sentencing.

The authors emphasise that long-term rehabilitation is best achieved through tailored treatment plans which combine mental health support with other broader factors influencing neurodevelopment including family, education and social and cultural connections. This knowledge can assist judicial officers when assessing a person's whole circumstances when considering prospects of rehabilitation and to assist to develop conditions for community-based sentence options which take into account these broader factors.

The Judicial Commission acknowledges the Gadigal people of the Eora Nation, the traditional custodians of the land on which the Commission is based, and pays respect to their Elders past and present.

Catching up with the times — NSW magistrates become judges

His Honour Judge Michael Allen*

In November 2024, the Attorney General of NSW announced that the Office of Magistrate of the Local Court would be replaced by Office of Judge of the Local Court. NSW was to join the Northern Territory and the Commonwealth in using the title of judge for all ranks of the respective judiciaries by virtue of the *Local Court and Bail Amendment Act 2025*.

On Saturday 28 March 2026, the title of magistrate became a thing of the past in NSW. From that date, magistrates became known as judges.

This change is a recognition that magistrates of the Local Court perform judicial functions just as do judges in other courts. The magistrates too, have legal qualifications and come from the ranks of solicitors and barristers. Magistrates have studied law, practised, have a commission from the Governor, and must retire at age 75. I am pleased that the title of judicial officers in the Local Court now reflects that they are judges, albeit dealing with different types and scales of matters than their judicial colleagues in other courts.

Historical origins

The history of the magistracy in NSW is at best a complex one. For so many Aboriginal people the word magistrate is synonymous with European settlement, the Stolen Generations, dispossession, and trauma. This is a difficult legacy that many magistrates on the bench still grapple with today and one of the many drivers for change.

We inherited the title from England, where our common law was established. While changing the title may seem trivial to some, there is a deep history associated with the word "magistrate", one that has been argued to be fundamentally associated (in England at least) with the aristocracy and, within this State, with a number of historical wrongdoings. Such associations are difficult to reconcile with contemporary notions of justice.

Reaching back even farther, the title magistrate is of Roman origin where magistrates occupied important offices of State often combining executive, military and judicial authority.

"Magistrate" has also been used in a wide variety of contexts, to the point where the former title of Chief Magistrate has been used both to refer to Oliver Cromwell as Lord Protector of the Commonwealth of England, and the early Presidents of the United States.

A magistrate in England up to the present, is a name that is interchangeable with that of Justice of the Peace. The modern magistracy in the English judicial hierarchy has its beginnings in the medieval English office of Justice of the Peace, formally recognised in the *Justices of the Peace Act 1361*. Currently, three magistrates convene a bench of the Magistrates' Court of England and Wales, none of whom are required to be legally qualified and are guided by a lawyer who sits to the side of the Bench.[1]

A magistrate in NSW was a very different role. From 1955, all newly appointed magistrates were required to be legally qualified, it became a normative necessity for magistrates to be lawyers, just as judges were. Another key difference between NSW and England is that of remuneration — to the present day in England, the bench of three lay magistrates is not paid for their services, in contrast with a long history of a paid magistracy in NSW. In fact, the first was D'Arcy Wentworth[2] in 1810, and "Stipendiary Magistrates" became common from 1830. In England, some magistrates are qualified lawyers and are paid, however, since 2000 they have been called District Judges, marking the clear distinction between lay unpaid magistrates and legally qualified, paid judges.

Local Court of NSW

The Court that is today known as the Local Court has a long history in NSW,[3] with its basic origins from the First Charter of Justice in 1787, which allowed the Governor to appoint magistrates. In 1832, the Courts of Petty Sessions were formally established, long after the title had been in common usage. It wasn't until 1982 that the modern Local Court began to emerge by virtue of the *Local Courts Act 1982*. This legislation finally abolished the anachronistic name of Courts of Petty Sessions and deleted the word "stipendiary" from the title. The Local Courts were now comprised of "magistrates" with no reference to paid and unpaid magistrates, which had ceased decades earlier.

The position of Chief Magistrate was created for the first time, replacing the Chairman of the Bench of Stipendiary Magistrates, now with specific statutory responsibility for the administration of the Bench, Court sittings, and the deployment of magistrates. This made the role of Chief Magistrate more consistent with that of the other heads of jurisdiction.

The passage of the *Judicial Officers Act 1986* was another milestone, which formally recognised magistrates as judicial officers and brought them within a statutory framework designed to protect judicial independence. During the next 20 years, small changes were made in the Local Courts, magistrates were referred to as "Your Honour" from 2004 and commenced wearing robes in 2005. In 2007,[4] the Local Courts finally became one unified Court, the Local Court of NSW, making the administration of summary justice far more consistent; proceedings could be transferred more readily between Courts, documents filed at any Courthouse, and Registrars being "of the Court", not "the Courthouse". This brought the Court in line with the Supreme Court and District Court; a statewide institution not bound by arbitrary intrastate boundaries.

Over the past few decades, the number and complexity of cases in the Local Court (and its predecessors) have been steadily increasing. The Court deals with over 550,000 criminal, civil, and other cases each year,[5] the highest of any court in our nation. This figure grows each year. This increase is coupled with the expansion of summary jurisdiction to include indictable offences dealt with summarily. Matters that were once exclusively within the purview of the District Court are now routinely heard and finalised in the Local Court, where the benefits of greater deliberative time and the support of judicial associates are not a feature.

Local Court judges must now frequently undertake cases that until relatively recently were almost exclusively dealt with in the District Court with all the complexity that modern technical evidence brings, while still having to deal with the huge volume and burden of long criminal, administrative, and traffic lists. The spectrum of work of a Local Court judge is far wider than it has ever been.

Just as the change in title from magistrate to judge, implicitly at least, is a recognition of the connotations of the prior title and regrettable association with historical wrongdoings, so too does changing the title reflect the ever-increasing complexity and difficulty of the work of the Local Court and its judicial officers. Long gone are the times of non-qualified appointments to the Bench; the Local Court Bench has been for many years a professional judiciary modelled on the Supreme and District Courts, committed to bringing principled, respectful and consistent justice for all court users and the entire community. This is why I have advocated so strongly for this change since my appointment as Chief Magistrate in July 2024.

Arc of change

There has been a long arc for this change; it was pursued by his Honour Acting Justice Derek Price AO when Chief Magistrate. Likewise, his successor his Honour Acting Judge Graeme Henson AO was a strong supporter for the change. More recently, I would like to thank former Chief Magistrate, his Honour Judge Peter Johnstome AM and his Honour Deputy Chief Judge Theo Tsavdaridis for their efforts to progress this change. The Australian Judicial Officers Association through various Presidents to date have been strong and vocal supporters of the change, as has the Magistrates' Association of NSW.

I would also like to thank the Chief Justice of NSW, the Honourable Andrew Bell AC, and the Chief Judge of the District Court, the Honourable Justice Sarah Huggett for their ongoing and unqualified support for the change. Without the support of the NSW judiciary as a whole, the various heads of jurisdiction, and the Attorney General, the Honourable Michael Daley MP, we would not be witnessing this essential recognition of the work of the busiest and most efficient court in the nation. I know it is welcomed by all members of the Local Court Bench and will only continue to evoke greater trust in the Court among the profession and the community more broadly.

Endnotes

* Chief Judge of the Local Court of NSW.

1 Courts and Tribunals Judiciary UK, "Magistrates", accessed 23/4/2026.

2 J Auchmuty, "D'Arcy Wentworth (1762–1827)", *Australian Dictionary of Biography*, Vol 2, accessed 23/4/2026.

3 Local Court of NSW, "History of the Local Court", accessed 23/4/2026.

4 See *Local Court Act 2007*.

5 Department of Communities and Justice data, Local Court Annual Review 2025 (forthcoming).

Obituary

It is with regret the Commission notes the recent death of the Honourable Malcolm McLelland QC. His Honour was appointed to the Supreme Court in 1979 at the age of 42. He became Chief Judge in Equity in 1993, and retired from the Court in 1997 after 18 years on the Bench.

Case updates

High Court

Tort

Tort — negligence — non-delegable duty of care may be breached by the intentional criminal acts of the duty-holder or their delegate — *NSW v Lepore* (2003) 212 CLR 511 reopened and overturned

***AA v Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle* [2026] HCA 2**

The appellant (AA) commenced proceedings in the Supreme Court alleging he was sexually abused as a child in 1969 on multiple occasions by Fr Pickin, a priest of the Diocese of Maitland-Newcastle (the Diocese).

The trial judge held the Diocese had breached a duty of care it had owed to AA and that it was also vicariously liable for the abuse committed by Fr Pickin, awarding AA $636,480 in damages. The trial judge did not determine the claim that the Diocese breached a non-delegable duty owed to AA.

The Court of Appeal allowed an appeal by the Diocese against the orders of the trial judge, finding that AA's account of the abuse was unreliable. AA accepted that Schmidt AJ's judgment could not stand on the basis of vicarious liability, following the subsequent decision of the High Court in *Bird v DP (a pseudonym)* [2024] HCA 41, which maintained that vicarious liability could only apply to the conduct of employees and Fr Pickin was not an employee. Applying *NSW v Lepore* (2003) 212 CLR 511 (*Lepore*), the Court of Appeal unanimously held that the common law in Australia did not recognise a non-delegable duty that could be breached by a defendant, where a delegate had committed an intentional wrong.

The appellant was granted special leave to appeal to the High Court.

The Court (Gageler CJ, Jagot and Beech-Jones JJ in a joint judgment; Gordon and Edelman JJ agreeing in separate judgments; Steward and Gleeson JJ dissenting in separate judgments) allowed the appeal. In so holding, the Court overturned its prior decision in *Lepore*: [4], [13], [50], [287].

The Diocese is liable to AA for breach of a non-delegable duty of care it owed to AA in 1969: [2], [122], [147]–[148], [162]–[163], [385]–[390].

Scope of the non-delegable duty of care

A non-delegable common law duty of care requires that the duty-holder has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or their property as to assume a particular responsibility for their or its safety: [6], [272], [408], [445]–[446]. The relationship between the duty-holder and the plaintiff is marked by the "special dependence or vulnerability" of the plaintiff: [17], [21]–[22], [26], [272].

A non-delegable duty can be breached either by the duty-holder personally failing to take reasonable care *or* by the delegate not taking reasonable care to avoid a foreseeable risk of injury to the person to whom the duty-holder owes the non-delegable duty: [2], [20]–[22], [26], [30], [47], [276]. The non-delegable duty-holder's liability is a direct and personal liability of the duty-holder for not having ensured that reasonable care was taken: [30], [137].

NSW v Lepore

A non-delegable duty may be breached by the intentional conduct of the duty-holder or their delegate: [6], [30], [278]. To the extent the majority in *Lepore* held that there could be no common law non-delegable duty in respect of harm caused by an intentional criminal act, the decision should be re-opened and overturned: [4], [13], [50], [287], [340].

An intentional criminal act of a delegate is necessarily a failure by the delegate to take reasonable care and therefore a failure by the duty-holder to ensure that reasonable care is taken: [30]. Recognition of such a duty is analogous to the non-delegable duty that the common law has long imposed on school authorities: [3], [110].

The exclusion of an intentional criminal act from a non-delegable duty of care established by *Lepore* reflected judicial policy choices which are unable to be sustained consistently with principle, have not led to any useful result but rather have created incoherence in the common law, and have not been independently acted upon: [42], [50], [281]–[287]. The imposition of such a duty on the Diocese raises no issue of legal principle not already considered and resolved by those cases. Imposing a non-delegable duty on the Diocese, accordingly, is an incremental development consistent with common law principle: [30], [110].

The reasoning in *Lepore* will continue to stultify coherent development of principle by treating intentional criminal acts as automatically outside the scope of a non-delegable duty of care: [48].

On the facts as found by the primary judge, the Diocese in 1969 owed AA a non-delegable duty. For its own purposes, the Diocese: (1) placed Fr Pickin in the position of performing the functions of parish priest of the Diocese; (2) as part of those functions, required him to establish sufficiently familiar relationships with children to instruct them in their spiritual and personal growth as Catholics and created the circumstances in which he could do so; (3) knew that children, by reason of their immaturity, were particularly vulnerable to many kinds of harm; (4) alone had practical capacity to supervise and control Fr Pickin's performance of his functions as parish priest; and (5) ought reasonably to have foreseen the risk of personal injury to a child under the care, supervision or control of a parish priest, including from an intentional criminal act of the priest or a third party (including sexual abuse): [3], [13], [121]–[122], [147], [162]. Fr Pickin's sexual assaults of AA meant that the Diocese breached that duty, causing AA the harm as found by the primary judge: [4], [13], [147]–[148], [162], [324], [390].

Civil Liability Act 2002 (NSW) (CLA) and damages

The limitations on personal injury damages imposed by the CLA applied to the determination of the extent of the liability of the Diocese: [13], [144], [287], [292]–[296]. As a result, the award of damages must be reduced from $636,480.00 (common law assessment) to $335,960.00 (CLA assessment): [154], [162], [402]–[403].

Court of Criminal Appeal

Directions

Crimes Act 1900, s 61HE (rep) — sexual consent — trial judge's modified *Liberato* direction sufficient — no miscarriage from judge's omission to give inferences direction from *Criminal Trial Courts Bench Book*

Ellingford v R [2026] NSWCCA 24

The applicant was found guilty following jury trial of sexual intercourse without consent contrary to s 61I of the *Crimes Act 1900*.

The Crown case was the complainant was substantially intoxicated and unconscious, and incapable of consenting to sexual intercourse. The applicant gave evidence that he was intoxicated, and the complainant was conscious and consented to the sexual intercourse. Section 61HE(8) (rep) of the *Crimes Act* relevantly provided that a person does not consent to a sexual activity if they consent while substantially intoxicated by alcohol.

The trial judge gave a modified *Liberato v The Queen* (1985) 159 CLR 507 direction that if the jury believed the applicant's evidence, or considered it might be true, that would be "a very significant step", or put the jury in "a very strong position", towards finding the Crown had not proved its case.

The applicant appealed the conviction on grounds a miscarriage of justice was occasioned by the judge giving a deficient *Liberato* direction and not giving the standard inferences direction at [3-150] of the *Criminal Trial Courts Bench Book* (*Bench Book*).

The Court (Price AJA; N Adams CJ at CL agreeing with additional observations; McGuire J agreeing) refused leave to appeal the conviction.

Liberato direction

The trial judge's modified *Liberato* direction was abundantly fair to the applicant and sufficient to protect against a miscarriage of justice. The absence of an objection or application for a redirection by the applicant's trial counsel supports the fairness of the direction given, and that no material prejudice was caused to the applicant receiving a fair trial: [98]–[99].

The difficulty with giving an unqualified *Liberato* direction as formulated in *De Silva v The Queen* at [12] (see Digest), and [3-600] of the *Bench Book* relates to the third essential element of the offence; the applicant's knowledge that the complainant was not consenting: *Crimes Act*, s 61HE(3) (rep). Even if the jury believed the applicant's evidence or considered it might be true, they could still convict if they found there were no reasonable grounds for the applicant's belief that the complainant was consenting, or he was reckless as to whether the complainant was consenting (putting aside his self-induced intoxication): s 61HE(4)): [5]; [83], [87]–[89].

Where the issue of substantial intoxication was an important factual matter for the jury, it would have been erroneous to direct that they must acquit if they believed the applicant's evidence or considered his evidence might be true of what happened prior to the sexual intercourse: [94]–[96]; s 61HE(8).

There is no difficulty with a *Liberato* direction being fashioned to an aspect of the evidence which is critical to the assessment by the jury of the offence charged. Rigid adherence to the formulation of an unqualified *Liberato* direction contained in the *Bench Book* and set out by the majority in *De Silva* is not required: [91]; *Park v R* [2023] NSWCCA 71 at [101] (see Digest); *Krivosic v R* [2024] NSWCCA 166 at [96]–[97], [102] (see Digest).

Inferences direction

The judge's omission to give the standard direction on inferences did not deflect the jury from its fundamental task, and the absence of the applicant's trial counsel seeking further directions supports that conclusion: [116].

The requirement to give an inferences direction depends on the significance of the inference upon which the Crown relies. Where the only inference to be drawn relates to the accused's state of mind, the usual practice is that no circumstantial evidence direction is required: *La Fontaine v The Queen* (1976) 136 CLR 62. However, where the inference concerns an element of the offence or an essential fact, the jury should be told that the required inference must nevertheless be the only rational or reasonable inference available from the evidence: [107]; *R v Niass* [2005] NSWCCA 120 at [10] (see Digest); *Knight v The Queen* (1992) 175 CLR 495.

There is no obligation to follow the wording in the *Bench Book* as it is the effect of the summing up that matters: [109]; *R v Forbes* [2005] NSWCCA 377 at [75] (see Digest); *Zaro v R* [2009] NSWCCA 219 at [50].

It is plain from the whole of the directions given that the jury would have understood the Crown bore the onus of excluding the reasonable possibility that the applicant did not have the state of mind which the Crown asked them to infer: [106], [114]; *Huxley v The Queen* [2023] HCA 40 at [41] (see Digest). This had the same force and effect as directing the jury that they could not be satisfied beyond reasonable doubt that the applicant knew the complainant was not consenting, unless it was the only reasonably available inference to be drawn from the evidence: [112].

Sentencing

C(SP) Act, s 44(2), (2B) — special circumstances — judge did not fail to advert to effect of accumulation on ratio between non-parole period and total sentence

Duncan v R **[2026] NSWCCA 19**

The applicant was sentenced to an aggregate term of 4 years imprisonment with a non-parole period of 2 years 4 months for 2 counts of possessing a prohibited weapon and two counts of supplying a prohibited drug.

Section 44(2) of the *Crimes (Sentencing Procedure) Act 1999* provides that the balance of term of sentence must not exceed one-third of the non-parole period (or the non-parole period is at least 75% of the total sentence) unless special circumstances are found. Section 44(2B) applies the same rule to aggregate sentences.

The sentencing judge found special circumstances on the basis the applicant required extended supervision in the community. At the date of sentence, the applicant was serving a sentence for an armed robbery committed six weeks after the weapon possession offences, and about a week before the drug supply offences. The sentencing judge ordered the sentence be served largely concurrently with the existing sentence with partial accumulation. The total effective sentence was increased by two months and the non-parole period by six months, and the non-parole period represented 71.8% of the total effective sentence.

The applicant appealed on the ground the judge failed to give effect to the finding of special circumstances by failing to advert to the effect of the sentence on the ratio between the total effective non-parole period and sentence.

The Court (Hamill J; Stern JA and Huggett J agreeing) dismissed the appeal.

The judge did not fail to advert to the effect of the accumulation on the ratio between the non-parole period and the total sentence. Nor, in the particular circumstances, did her Honour erroneously and unwittingly allow the accumulation to nullify her finding of special circumstances. The reduction in the parole period was relatively small, and the effect of the accumulated sentence was to allow (subject to the State Parole Authority's decisions) a parole period of 1 year 8 months. The judge was conscious of these things and concluded the length of parole was sufficient in the circumstances: [35].

It may have been preferable for her Honour to state plainly that she was aware the proportion of the non-parole period to the total sentence was below 75% and to acknowledge that accumulation reduced the potential period on parole, but this was not necessary where her Honour's explanation included specifically the impact the sentence would have on the existing sentence: [32]–[34].

General principles

General and established principles in short form, the application of which will depend on the facts of the case and the sentencing judge's remarks, follow ([28]–[29]):

1. Section 44 provides that unless there are "special circumstances" the additional term must not exceed one-third of the non-parole period.
2. Special circumstances ought not to be rigidly defined: *R v Simpson* [2001] NSWCCA 534 at [27]–[67].
3. The statutory duty to give reasons arises where the additional term exceeds one-third of the minimum term. There is no such duty where the non-parole period exceeds 75% of the total sentence: *R v GDR* (1994) 35 NSWLR 376 at 379.
4. However, where the non-parole period exceeds 75% of the total sentence, the judge is generally expected to acknowledge that outcome and explain the reason for diverging from the "statutory ratio" or "statutory norm" (3:1 or 75%): *R v GDR* at 379; *McKittrick v R* [2014] NSWCCA 128 at [36]–[37], [154]; *GP v Regina* [2017] NSWCCA 200 at [17]–[21].
5. Where the non-parole period exceeds 75% of the total sentence, or where accumulation significantly interferes with the proportions of an existing sentence, "it is incumbent on a sentencing judge to consider or advert to the effect of accumulated sentences they may impose": *Lonsdale v R* [2020] NSWCCA 267 at [65]; *Sabongi v R* [2015] NSWCCA 25 at [85].
6. The accumulation of sentences, whether imposed at the same time or in separate proceedings, will often justify a finding of special circumstances: *R v Simpson* (1992) 61 A Crim R 58 at 60–61; *R v Close* (1992) 31 NSWLR 743 at 748; *Matthews v R* [2014] NSWCCA 185 at [27]; *R v Danishyar* [2025] NSWCCA 46 at [8], [48]–[51] (see Digest).
7. "Whenever sentences are accumulated, careful consideration must always be given to the principle of totality", and the accumulated sentences should usually be adjusted downwards to produce an acceptable total sentence: *R v Close* at 748.
8. The question in such cases will usually be "whether the record of proceedings leads to an inference that the matter was considered or adverted to or not": *GP v Regina* at [22]; *Lonsdale v R* at [65].
9. The "focus should not be solely upon the percentage proportions that the non-parole and parole periods bear to the total term, the actual periods involved are equally, 'and probably more' important": see *MD v R* [2015] NSWCCA 37 at [41]; *Al Shamari v R* [2025] NSWCCA 236 at [61], [65]–[66].
10. Where there is an existing term of imprisonment, the sentencing judge is not required to calculate what proportion the sum of the non-parole period

and the period already spent in custody bears to the total term: *Lonsdale v R* at [32]. However, when such a calculation *is* made and acknowledged, it may assist in dispelling any suggestion that any unusual proportion resulted from inadvertence.

11. Questions of accumulation and concurrence, findings of special circumstances and the extent of any adjustment to the non-parole period are matters within the wide discretionary judgment of the sentencing judge.

Sentencing

C(SP) Act, ss 9, 10 — non-conviction and dismissal/conditional release order — corporation fined — judge's consideration of whether non-conviction available not in error

CEAL Ltd (t/as Multiquip Quarries) v Secretary, Department of Planning, Housing and Infrastructure [2026] NSWCCA 20

The appellant, a corporation, was fined $56,000 and $42,500 for two offences of carrying out development not in accordance with consent (*Environmental Planning and Assessment Act 1979* (EP&A Act), s 4.2(1)(b)).

Over a period of 1 year and 7 months, the appellant did not comply with the in force Development Consent in its use of silt cells, and silt and oversize management areas, as well as by importing screened waste material without a Waste Management Plan (EP&A Act, s 4.2(1)(b)).

The appellant submitted a non-conviction together with a dismissal under s 10 of the *Crimes (Sentencing Procedure) Act 1999* (C(SP) Act), or a conditional release order (CRO) under s 9 of the C(SP) Act, was appropriate as the corporation's conduct complied with previous Modifications of Project Approval and were therefore of the lowest level of objective gravity, and were also impacted by extenuating circumstances: see [10]–[11].

Section 10 of the C(SP) Act provides the court may dismiss a charge and not impose a conviction if the court considers it proper having regard to the person's characteristics, the trivial nature of the offence, extenuating circumstances, or any other matter: s 10(3)(a)–(d). Section 9(1)(b) relevantly provides the court may impose a CRO without conviction under s 10(1)(b).

The appellant appealed the decision on grounds including the sentencing judge erred in her consideration of whether a s 10 disposition was available, and determining that a s 10(1)(b) order is more appropriately made for an individual offender, as appears to be the usual practice.

The Court (Rigg J; Payne JA and Weinstein J agreeing) dismissed the appeal.

The judge explicitly took into account all the required circumstances of the offences and offender in accordance with instinctive synthesis, in determining the appropriate sentences to impose in this case: [73], [77]. The judge did not undertake a two-stage process in either the determination to record a conviction, or of the sentences to impose: [71]. Where her Honour resolved the issue by reference to the parties' arguments and by reference to all the matters required under s 10(3), it is inappropriate to contend that rejecting a s 10 requires explicit reference to all circumstances of the offence and offender. Not recording a conviction is a particular sentencing course which requires articulation by, and response from, the parties: [90], [98]. There is further nothing wrong with referring to the submission that s 10 should be utilised as an "application": [96].

The judge did not take into account irrelevant considerations regarding s 10(1)(b): [130]. Her Honour did not restrict the availability s 10(1)(b) as a sentencing option to human offenders: [128]. The inapplicability of a number of CRO conditions to rehabilitate a person was also not an irrelevant consideration. Further, promotion of the appellant's rehabilitation was found not to be of importance in the proceedings: [129]. The only subjective aspect of the case relied upon by the appellant in relation to the s 10 disposition was the absence of prior convictions. Not referring to remorse, the availability of Local Court resolution and low likelihood of reoffending regarding sentencing is of no legal significance where no submissions were made and the judge was not invited to take these matters into account: [88]. The judge also did not err by not expressly taking the guilty plea into account in respect of whether to convict: [87].

It is not significant that the portion of the judgment dealing with s 10 came after the portion headed "Objective circumstances" and before the heading "Subjective circumstances of the Defendant": [75]. The flexibility accorded to sentencing judges means the location within the judgment of the resolution of the issue is not indicative of error: [94]–[95]; *Markarian v R* (2005) 228 CLR 357. It is undesirable for sentence judgments to be structured like checklists so as to avoid appeals based on some overlooked reference: [84]; *Taylor v R* [2018] NSWCCA 255 at [51].

JIRS update

Updates may be accessed through the "Announcements" menu on the JIRS home page:

- JIRS update — office of Judge of the Local Court established from 28 March 2026 (*Local Court and Bail Legislation Amendment Act 2025* (see Digest)) — JIRS email logins updated — Local Court Judge titles updated in Judicial Commission systems and resources — Bench Books updated — "Magistrates' resources" on JIRS renamed "Local Court resources".

Recent justice research

Each month, the Bulletin will include links to select recently published, peer-reviewed justice research for the interest of judicial officers.

- "Impacts of custody and detention on young people", *Bugmy* Bar Book.

Legislation update

See JIRS "Legislation digests" for further details of the following legislative commencements:

- *Crimes Amendment (Animal Sexual Abuse) Act 2025* — amends *Crimes Act 1900* — replaces bestiality offences with offences of animal sexual abuse (s 79); animal sexual touching (s 79A); advertisement, sale or transfer of animals for sexual abuse (s 79B); animal sexual abuse attempts (s 80); producing, disseminating or possessing animal sexual touching material (s 547E(2A)–(2B)) — commenced on proclamation 25/3/2026 (except Sch 2.2[1]) (s 2 and LW 30/1/2026)
- *Law and Justice Legislation Amendment (New South Wales Local Court) Act 2026* (Cth) — consequential to the *Local Court and Bail Legislation Amendment Act 2025* (NSW Act) (see Digest) which replaces office of Magistrate with Local Court Judge — amends *Acts Interpretation Act 1901*, s 16BA to provide that references to "Judge" in Commonwealth legislation excludes Local Court Judges — amends s 16C(3) to provide that references to "Magistrate" in Commonwealth Acts includes Local Court judges — commenced with Sch 1[1] of the NSW Act on 28/3/2026 (s 2)
- *Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2024* (Cth) — repeals *Financial Transaction Reports Act 1988* (Sch 11[1]) — amends *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) — Sch 9 and 11 commenced 7/10/2025; Sch 5[2] commenced 31/3/2025; Schs 1 2, 3 commenced 31/3/2026 (s 2).

Bench book updates

Updates to the following recently published resources may be accessed through the "Announcements" menu on the JIRS home page:

- *Sentencing Bench Book*, update 66 — "Guilty pleas, disclosure and assistance", "Penalties of imprisonment" and "Commonwealth child sex offences" chapters have been revised and updated.
- *Criminal Trial Courts Bench Book*, update 84 — significant revisions to "Expert evidence", "Robbery", "Complicity" and "Supply prohibited drug" chapters.

Judicial education calendar

For a list of scheduled education programs, please see Judicial education calendar 2026 on JIRS.

The Honourable Justice Nicola Pain awarded the 2026 Eminent Environmental Lawyer Award for Excellence

The Judicial Commission of NSW congratulates the Honourable Justice Pain on her Eminent Environmental Lawyer Award for Excellence.

The Australian Environment and Planning Law Group (AEPLG) of the Legal Practice Section of the Law Council of Australia has recognised Justice Pain's longstanding and outstanding contribution to the environmental law field, both directly and in terms of supporting the education and development of younger lawyers. The AEPLG recognised Justice Pain as a highly respected leader in Australian and international environmental law, with more than two decades of judicial service on the Land and Environment Court of NSW. Her Honour's career spans senior roles in government, the NSW EPA, and the Environmental Defenders Office, reflecting a lifelong commitment to public interest environmental protection. An accomplished scholar, educator and global judicial contributor, she has shaped worldwide environmental jurisprudence, policy and capacity-building.

Justice Pain is Chair of the Judicial Commission's Land and Environment Court Education Committee and contributes to the Commission's publications.

The *Judicial Officers' Bulletin* informs Judicial Officers of current law and promotes consideration of important judicial issues. To respond to articles or to make a contribution to a future issue of the *Judicial Officers' Bulletin* please contact the Editor, Beatrice Marett-Bird at: bmarett-bird@judcom.nsw.gov.au.

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