Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act 2013

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INTRODUCTION

The *Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act* 2013 (the Act see Appendix "A") is at least the first part of a legislative response by the NSW Parliament to the decision of *Muldrock v The Queen* (2011) 244 CLR 120. The long title of the Act is "An Act to amend the *Crimes (Sentencing Procedure) Act 1999* to make further provision for standard non-parole periods for certain offences." It seeks to clarify the process by which a standard non–parole period should be applied in an individual case. Schedule 1[4] of the Act provides that the amendments apply to offences committed before the commencement of the Act but the Act does not affect any sentence imposed before commencement. The Act commenced on assent which was on 29 October 2013 (s 2, LW 29.10.13).

REPEALED PROVISIONS

Section 54B(2) - "is to set", "unless"

In determining what has happened to the law it is best to identify which provisions have been repealed. This provides some insight into the issues that were raised by the High Court in *Muldrock*. The most notable provision that has been repealed is s 54B(2).

"54B(2) When determining the sentence for the offence (not being an aggregate sentence), the court **is to set** the standard non-parole period as the non-parole period for the offence **unless** the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period." [emphasis added]

The term "is to set" emphasised above in s 54A(2) was a source of contention in *Muldrock* see: [25], [26], [32]). The High Court said at [25]: "*…it was an error [of the Court in R v Way] to characterise s 54B(2) as framed in mandatory terms*." At [26]: "*It is a mistake to*

give primary, let alone determinative, significance to so much of s 54B(2) as appears before the word 'unless'". Again, at [32]: "*The Court of Criminal Appeal erred by treating the provision of the standard non-parole period as having determinative significance in sentencing the appellant."*

The term "determinative significance" was used by the High Court to describe how the Court of Criminal Appeal (CCA) has misapplied the legislation.

The repeal of s 54B(2) and the phrase "is to set" evinces an intention that a standard non-parole period is not to have determinative significance or dominate the sentencing exercise. Rather, a standard non parole period is a guidepost for the Court which should be taken into account (see discussion of new s 54B(2) below).

The Act accommodates the High Court's view of s 54B. It is to be applied *whenever* a court imposes a sentence of imprisonment for a Div 1A offence. It does not just "apply" to offenders convicted following trial. If it were otherwise the Parliament would have made clear a trial/guilty plea distinction in the Act like the CCA had in *R v Way* (2004) 60 NSWLR 168 at [68].

The High Court at [26] advocated a holistic reading and application of 54B consistent with the approach described by McHugh J in *Markarian v The Queen* (2005) 228 CLR 357 at [51] whereby the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case.

The High Court emphasised at [27] that the standard non-parole period takes its place in the sentencing exercise as a guidepost:

"*Section 54B(2) and s 54B(3) oblige the court to take into account the full range of factors in determining the appropriate sentence for the offence. In so doing, the court is mindful of two legislative guideposts: the maximum sentence and the standard non-parole period."*

It is timely to refer to some more recent CCA authority concerning the status of a standard non-parole period in a given case. The CCA has said a standard non-parole period may be a significant factor in cases where there is little operating in the offender's favour. Conversely, like Mr Muldrock's case, it may have little impact. Johnson J said with support in *R v Nguyen* [2013] NSWCCA 195 at [62]-[64]:

"*…it is necessary to keep in mind the confines of the permissible use of the standard non-parole period in view of the decision in Muldrock v The Queen. The standard non-parole period and the maximum sentence are two legislative guideposts, with the objective seriousness of an offence to be assessed wholly by reference to the nature of the offending: Muldrock v The Queen at 132 [27].*

63There is force in the Crown submission that the standard non-parole period may be a more significant factor on sentence of an offender where there is little operating in the offender's favour on sentence. Its significance in a particular case may vary. In Muldrock v The Queen, it was said that the standard non-parole period said "little about the appropriate sentence for this mentally retarded offender and this offence": Muldrock v The Queen at 133 [32]. In other cases, its significance may well be greater: AB v R at [51]. The present case falls into the latter category.

64The Crown submission, in effect, is that greater weight should have been given in this case to the standard non-parole period attaching to the s.33(1)(a) offence."

This passage in *R v Nguyen* [2013] NSWCCA 195 was quoted with approval in *R v Clarke* [2013] NSWCCA 260 at [4] by Hoeben CJ at CL (His Honour dissented). Whether in a given case it should be a "*significant factor on sentence*" is a matter that will be the subject of discussion and debate at first instance. However in a Crown or severity appeal, one wonders about the fate of a submission that the judge attributed too little or too much weight to a standard non- parole period. In *Bugmy v The Queen* [2013] HCA 37 at [24] the High Court held that the authority for the CCA to resentence was not enlivened by its view that it would have given greater or lesser weight to certain matters. This was not an error of the kind referred to in *House v The King* (1936) 55 CLR 499 at 504-505. The power to resentence could only be engaged if the Court was satisfied the judge's discretion miscarried because the sentence imposed was below the range of sentences justly available for the offence.

Section s 54B(3) – reasons for setting a longer or shorter non-parole period

The Act also repealed s 54B(3). It provided:

"54B(3) The reasons for which the court may set a non-parole period that is longer or shorter than the standard non-parole period are only those referred to in s 21A."

The utility of this provision was always questionable given the wide scope of matters that can be taken into account under s 21A. In reality s 54B(3) did not restrict sentencers because the terms of s 21A are extremely broad. As the High Court observed In *Muldrock* at [19]:

"*The appellant submits and the respondent correctly accepts that s 21A permits the court to take into account all of the factors that, under the common law, are relevant to the*

determination of sentence. This recognition is important to understanding the operation of Div 1A."

Section 54A(2) – what does the standard non-parole period represent?

The final notable repeal was s 54A(2):

"54A(2) For the purposes of sentencing an offender, the standard non-parole period represents the non-parole period for an offence in the middle of the range of objective seriousness for offences in the Table to this Division."

I will return to this below.

NOTABLE PROVISIONS THAT HAVE BEEN INSERTED

The following notable provisions have been inserted:

The new s 54A(2) answers the statutory question in s 54A "What is the standard non-parole period?" as follows:

"For the purposes of sentencing an offender, the standard non-parole period represents the non-parole period for an offence in the Table to this Division that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness."

With respect to the drafters the wording of this provision is perhaps unwieldy.

The repealed s 54B(2) (see above) has been replaced with the following:

"The standard non-parole period for an offence is a matter to be taken into account by a court in determining the appropriate sentence for an offender, without limiting the matters that are otherwise required or permitted to be taken into account in determining the appropriate sentence for an offender."

Section 54B(3) provides that a court must make a record of its reasons for setting a non-parole period that is longer or shorter than the standard non-parole period.

Section 54B(4) provides the court is still to indicate the non-parole period it would have set for each standard non-parole period offence where an aggregate sentence is imposed.

Section 54B(5) is in material terms similar to the repealed s 54B(4B):

Where a court indicates under s 54B(4) that it would have set a non-parole period that is longer or shorter than the standard non-parole period for the offence, the court must make a record of the reasons why and the factors taken into account.

Section 54B(6) provides that the requirement to give reasons for setting a non-parole period that is longer or shorter than the standard non-parole period *does not require the court to identify the extent to which the seriousness of the offence for which the non-parole period is*

set differs from that of an offence to which the standard non-parole period is referable [italics added].

ISSUES FOR FURTHER DEBATE

There are essentially two issues that will persist:

1 What facts are included in the expression in s 54A(2) "only the objective factors affecting the relative seriousness of that offence"?

2. What findings should a judge make about objective seriousness in light of the expression in s 54B(2) above? Should a sentencing judge compare the offence before the Court with an offence "in the middle of the range of seriousness" as referred to in s 54A(2)?

As to the first issue, in *Muldrock* the High Court said at [27]:

"*Meaningful content cannot be given to the concept [an offence in the middle of the range of objective seriousness] by taking into account characteristics of the offender. The objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders. It is to be determined wholly by reference to the nature of the offending*"

Justice RA Hulme has described the High Court's explanation of objective seriousness as "opaque" (see The Honourable Justice RA Hulme "After Muldrock — sentencing for standard non-parole period offences in NSW" (2012) 24 Judicial Officers' Bulletin 10).

There is no doubt that the High Court preferred a minimalist approach to the concept of objective seriousness whereby the court acknowledges the standard non-parole period as a legislative guidepost and includes a limited range of factors in assessing the objective seriousness of the offence. Section 54A(2) recognises this by the use of the expression "*only the objective factors*". Parliament has chosen not to define objective factors. Nevertheless s 54A(2) is a clear attempt to legislate what the High Court said at [27] above.

As I pointed out in an earlier article (H Donnelly, "The diminished role of standard non-parole periods" (2012) 24 *Judicial Officers' Bulletin* 1) the objective-subjective line at sentence can blur. There is no bright line common law definition of objective seriousness to inform the statutory expression "objective factors" in s 54A(2). It may be unrealistic to exclude from the term "*only the objective factors affecting the relative seriousness of th[e] offence*" (in s 54A(2)) matters such as the offender's mental condition, the offender's

intoxication, youth, duress and any provocation. Intoxication and duress by their nature are transitory and bear upon the seriousness of a crime. But the line can blur. In *Williams v R* [2012] NSWCCA 172 at [42]-[43] provocation was said to reduce objective seriousness of the crime. The Court observed however that whether it is categorised as an objective or subjective factor will have little practical impact on the ultimate sentence. In *Muldrock* the High Court effectively treated the offender's mental condition as a matter "*personal to a particular offender or class of offenders*" (see [27]). The Court did not state that it was relevant to the issue of objective seriousness. The offender's mental condition was however highly relevant to the assessment of his moral culpability. And *Bugmy v The Queen* at [40] informs us that a person's deprived background can also reduce their moral culpability:

"The circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way."

Mr Bugmy committed, *inter alia,* the offence of cause grievous bodily harm with intent under s 33(1)(b) *Crimes Act*. The offence carries a standard non parole period of 7 years.

Objective seriousness of the crime and the offender's moral culpability

In *Muldrock* and *Bugmy v The Queen* [2013] HCA 37 at [44] the High Court separated moral culpability from the notion of objective seriousness (see quote below). Predictably this has also occurred in subsequent CCA cases. An offender's moral culpability has been treated as a distinct assessment. In *GN v R* [2012] NSWCCA 96 Basten JA said at [12], Blanch J agreeing at [18]:

"*Usually, the 'objective seriousness' of the offence is equated with the level of moral culpability of the offender. However, although the circumstances of the offence may justify the description of being 'in the middle of the range of objective seriousness' for such an offence, in the language of s 54A(2) of the Sentencing Procedure Act, where the personal characteristics of the offender reduce the level of moral culpability, that description does not identify the level of moral culpability: see Muldrock at [54]."*

In *McLaren v R* [2012] NSWCCA 284 at [28] McCallum J said with support:

"*The phrase "objective seriousness" in Muldrock at [27] where it appears in the underlined sentence in the extract above refers specifically to the definition in s 54A(2) of the Act as to*

what a "standard non-parole period" denotes. That is the "concept" referred to in the previous sentence of that paragraph. The point there made by the High Court, as I would understand it, is that there is no sense in attempting to place the offence at hand (with all its features, including matters personal to the offender where relevant to an assessment of the nature of the offending) at a point along a purely hypothetical range which, of its nature, is ignorant of those matters.

The decision in Muldrock does not, however, derogate from the requirement on a sentencing judge to form an assessment as to the moral culpability of the offending in question, which remains an important task in the sentencing process. That this assessment is also sometimes referred to as the "objective seriousness" of the offence perhaps contributes to the misconception. I do not understand the High Court to have suggested in Muldrock that a sentencing judge cannot have regard to an offender's mental state when undertaking that task (as an aspect of his or her instinctive synthesis of all of the factors relevant to sentencing)."

So where does the assessment of an offender's moral culpability fit in the sentencing exercise? The latter terms of s 54B(2) particularly "…*without limiting the matters that are otherwise required or permitted to be taken into account in determining the appropriate sentence for an offender"* accommodates the notion of moral culpability. The italicised text acknowledges that other sentencing factors, sometimes powerful, can impact upon the sentence reached by the Court. If Mr Muldrock was sentenced under the Act his mental condition, which greatly reduced his moral culpability, could be taken into account under the latter terms of s 54B(2).

The clearest example of a matter that is included in the latter terms of s 54B(2) is the difficult - but essential judicial task - of giving weight to the conflicting purposes of punishment (see *Bugmy v The Queen* [2013] HCA 37 at [44]). So in *Bugmy* an issue in the remitter to the CCA is whether the appellant's background permitted the weight that would usually be given to personal and general deterrence for offences committed by prisoners against prison officers to be moderated in favour of rehabilitation to the extent that it was by the judge. As the High Court said at [46] (footnote excluded):

"Consideration of the objective seriousness of the offence must take account of the fact that this was an offence committed by a prisoner against an officer in a prison. These are the "particular circumstances" to which Hoeben JA was referring when he said that it appeared that Judge Lerve had given inadequate weight to general deterrence. An issue for

determination on the remitter is whether the appellant's background of profound childhood deprivation allowed the weight that would ordinarily be given to personal and general deterrence to be moderated in favour of other purposes of punishment, including rehabilitation, to the extent that Judge Lerve allowed."

There are numerous other areas of sentencing law that could be cited which fall within the dragnet terms of s 54B(2). The concept of special circumstances – of extending an offender's period of supervision beyond the statutory ratio – is entwined with rehabilitation (See T Poletti, H Donnelly, "Special circumstances under s 44 of the Crimes (Sentencing Procedure) Act 1999*"* *Sentencing Trends and Issues* Number 42, July 2013 Judicial Commission of NSW.). Other factors could include the effect of assistance an offender has given to authorities, the application of the principle of totality, an offender's youth or advanced age, parity, good character (where applicable), prior record (as illuminating an offender's moral culpability) and an early guilty plea.

On the second issue there has been a continuous debate in the CCA as to what findings a Court should make concerning objective seriousness for a standard non-parole period offence. On a general level it is widely accepted that a Court should continue to make findings after *Muldrock*. It remains desirable for a judge to make some assessment of the objective seriousness of an offence: *Stewart v R* [2012] NSWCCA 183 per Button J at [41] referring with approval to the statement by Johnson J (dissenting) in *R v Ehrlich* [2012] NSWCCA 38 at [86]. It is not an error to consider the objective gravity of the crime as part of the process of instinctive synthesis leading to the sentence imposed: *Beldon v R* [2012] NSWCCA 194 at [78]; *Zreika v R* [2012] NSWCCA 44 at [46]; *McLaren v R* [2012] NSWCCA 284 at [28]. Indeed the quote from *Bugmy v The Queen* at [46] above assumes such an assessment is to occur.

The High Court held in *Muldrock* at [28] that Div 1A does not require or permit a court to embark upon a two-stage approach to sentencing, involving first assessing whether the offence falls in the middle range of objective seriousness and, if it does, asking whether there are matters which warrant a longer or shorter non-parole period.

The new s 54B(6) puts that into legislative effect. It provides that the requirement to give reasons for setting a non-parole period that is longer or shorter than the standard non-parole period does not require the court to "*identify the extent to which the seriousness of the offence*

for which the non-parole period is set differs from that of an offence to which the standard non-parole period is referable."

Indeed it should be said that the CCA have questioned whether such a comparative exercise is useful in any event. In *PK v R* [2012] NSWCCA 263 at [26] it was held that while the view has been expressed that there is no vice in assessing the objective criminality according to a scale of seriousness, the usefulness of comparing the particular offence before the court with a hypothetical mid-point is doubtful. *PK* was applied in *R v Jolly* [2013] NSWCCA 76 at [55]:

"*In PK v R [2012] NSWCCA 263 McCallum J expressed the view that following Muldrock, a sentencing judge need not, and arguably should not, attempt to quantify the distance between the actual offence before the court and a putative offence in the middle of the range.*

In these circumstances, and although it is not a matter which is necessary to decide for the purposes of determining the applicant's appeal, I am doubtful that her Honour's failure to provide a specific indication of the extent to which the applicant's offending was above the mid range amounted to an error."

The effect of s 54B(6) and these cases may be that the comparative exercise will not ordinarily be attempted by a first instance Court. It does however remain an option for the Court - albeit an undesirable one. There will always be the inevitable question of specifying what is included in the expression in s 54A(2) "*...only the objective factors affecting the relative seriousness of that offence*" and defining "*the middle of the range of seriousness*."

Pre *Muldrock* cases - Re-opening, Out of time appeal cases and inquiry cases

Muldrock caused a review by Legal Aid (NSW) of cases where offenders were sentenced on the basis of the CCA's reasoning in *R v Way* (2004) 60 NSWLR 168. Re-opening was initially considered as a possible remedy by the defence. Section 43 *Crimes (Sentencing Procedure) Act* 1999 empowers a court to re-open sentence proceedings where it has imposed a penalty that is contrary to law. In the five judge bench case of *Achurch v R* (No 2) [2013] NSWCCA 117 at [67] the Court held s 43 cannot be used to correct a purported sentencing error of applying *R v Way*, that is, it should not be used as an alternate to an appeal and to review standard non-parole period cases decided before *Muldrock*. The Court held that the appropriate course for cases decided before *Muldrock* is for an application for leave to appeal

to the CCA to be made out of time. It is to be noted that special leave to appeal was granted by the High Court in *Achurch v The Queen* [2013] HCATrans 278 on 8 November 2013.

Since *Achurch (No 2)* several appeals seeking an extension to appeal out of time to the CCA have been heard and determined (many were delivered on 8 November 2013). Hoeben CJ at CL, Johnson and Bellew JJ in a judgment in *Abdul v R* [2013] NSWCCA 247 at [36] said:

"*The Standard Non Parole Period Review Team within Legal Aid NSW had identified only 38 cases where no appeal had been heard, where it was considered that there was a potential Muldrock error and where a lesser sentence was warranted in law.*"

On the question whether an extension should be granted the court in *Abdul* adopted Campbell JA's test in *Etchell v R* [2010] NSWCCA 262; 205 A Crim R 138 at [24]:

"*… the statutory scheme must call for something beyond the presence of factors that would be sufficient to result in a sentence being varied if an application for leave to appeal against sentence were brought within time."*

The court in *Abdul* at [53] set out the factors that are considered in cases where an extension of time is sought:

Accordingly, when considering an application for extension of time based on "Muldrock error", all relevant factors need to be considered - the length of the delay, the reasons for the delay, the interests of the community, the interests of the victim and whether, if an extension of time were refused, substantial injustice would result. This last factor will inevitably require an assessment of the strength of the proposed appeal although as Etchell made clear, that assessment can be carried out in a "more summary fashion" than would be done in an application for leave to appeal that was brought within time.

Suffice to say that to date these extension of time appeals have had very limited success. (See most recently *Bou-Antoun v R* [2013] NSWCCA 305).

Finally there are the cases where an offender's appeal avenues have been exhausted. Here the only remaining option is an Executive inquiry into sentence under s 79 of the *Crimes (Appeal and Review) Act* 2001. In the five judge bench decision of *Sinkovich v Attorney General of NSW* [2013] NSWCA 383 the Court of Appeal held that s 79 of the *Crimes (Appeal and Review) Act* 2001 could accommodate *Muldrock* type error cases where a sentencing judge and the CCA have erroneously applied *R v Way* (2004) 60 NSWLR 168. The Supreme Court

erred by refusing Sinkovich's application for inquiry into his sentence under s 79(2) since "mitigating circumstances" in that section can accommodate errors of law in sentencing.

Since this decision, another application under Part 7 for an inquiry into sentence (*Application by Chaouki Bou Antoun pursuant to s 78(1) Crimes (Appeal and Review) Act 2001* [2013] NSWSC 1540) was refused on the basis that "There is nothing in the [CCA] judgment … to which reference has been made at [12] to [14], that accords a primary or determinative significance to the standard non-parole period."

Appendix A

Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act 2013

1 Name of Act

This Act is the *Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act 2013*.

2 Commencement

This Act commences on the date of assent to this Act.

Schedule 1 Amendment of Crimes (Sentencing Procedure) Act 1999 No 92

[1] Section 44 Court to set non-parole period

Omit "section 54B (4A)" from section 44 (2C). Insert instead "section 54B".

[2] Section 54A What is the standard non-parole period?

Omit section 54A (2). Insert instead:

(2) For the purposes of sentencing an offender, the standard non-parole period represents the non-parole period for an offence in the Table to this Division that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness.

[3] Section 54B

Omit the section. Insert instead:

54B Consideration of standard non-parole period in sentencing

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

(2) The standard non-parole period for an offence is a matter to be taken into account by a court in determining the appropriate sentence for an offender, without limiting the matters that are otherwise required or permitted to be taken into account in determining the appropriate sentence for an offender.

(3) The court must make a record of its reasons for setting a non-parole period that is longer or shorter than the standard non-parole period and must identify in the record of its reasons each factor that it took into account.

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

(5) If the court indicates under subsection (4) that it would have set a non-parole period for an offence that is longer or shorter than the standard non-parole period for the offence, the

court must make a record of the reasons why it would have done so and must identify in the record of its reasons each factor that it took into account.
(6) A requirement under this section for a court to make a record of reasons for setting a non-parole period that is longer or shorter than a standard non-parole period does not require the court to identify the extent to which the seriousness of the offence for which the non-parole period is set differs from that of an offence to which the standard non-parole period is referable.
(7) The failure of a court to comply with this section does not invalidate the sentence.

[4] Schedule 2 Savings, transitional and other provisions

Insert at the end of the Schedule with appropriate Part and clause numbering:

Part Provision consequent on enactment of Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act 2013

Operation of amendments
An amendment made by the *Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act 2013* extends to an offence committed before the commencement of the amendment but does not affect any sentence imposed before the commencement of the amendment.
