Crown Appeals Against Sentence
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Crown Appeals Against Sentence

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The Crown appeal jurisdiction

The right of the Crown to appeal against sentence for matters dealt with on indictment was created in New South Wales in 1924 and is found in s 5D of the Criminal Appeal Act 1912. The substantive text of s 5D, particularly:

“the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as to the said court may seem proper”

has remained unchanged since 1924.

However, the principles upon which the Court of Criminal Appeal should exercise its jurisdiction were only clearly settled by the High Court in 1977, in Griffiths v The Queen. Previously, the Court of Criminal Appeal repeatedly declared that it had an “unfettered discretion,” based on a reading of the High Court decision of Whittaker v The King. That view of the meaning of s 5D and Whittaker was emphatically rejected by the High Court in Griffiths.

Griffiths was a clear departure from the past. The statements in the case that Crown appeals should be:

- “a rarity, brought only to establish some matter of principle,”
- an “extraordinary remedy, intended to be invoked rarely … and then only for reasons of great public importance” and that the
- “incorrectness of the [first instance] sentence must be manifest”

were new.

Legal principles governing Crown appeals

The High Court described the Crown appeal jurisdiction in Bond v The Queen as “exceptional” and recently affirmed that the restriction upon appellate review of the exercise of a discretion applies to Crown appeals against sentence. The Court of Criminal Appeal will only intervene where error is shown. Moreover, it has a discretion to refuse to intervene even if error is established. A primary consideration is the double jeopardy that a convicted person faces as a result of the Crown appeal. If the Court of Criminal

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i  (1977) 137 CLR 293.
ii  R v Gasper (1928) WN (NSW) 165 at 166; R v Geddes (1936) 36 SR (NSW) 554 at 555; R v Herring (1956) 73 WN (NSW) 206; R v Evans (1961) 78 WN (NSW) 1135 and R v Cuthbert (1967) 2 NSWR 329 at 330.
iii (1928) 41 CLR 230.
iv  (1977) 137 CLR 293 Barwick CJ at 310.
v  (1977) 137 CLR 293 Murphy J at 330.
vi  (1977) 137 CLR 293 Jacobs J at 327.
vii (2000) 201 CLR 213 at [27].
viii Marbarian v The Queen [2005] HCA 25 at [25].
ix ibid.
Appeal decides to intervene and re-sentence it does so in the light of all the facts and circumstances as at the time of re-sentencing.\textsuperscript{xi} The element of double jeopardy involved in successful Crown appeals usually results in the substituted sentence being discounted and less than that which should have been imposed by the first-instance sentencing judge.\textsuperscript{xii}

\section*{The overall picture}

The Crown appealed in 2.5\% of all first instance sentencing matters for the period January 2001–September 2004. It is a matter of opinion whether this figure suggests that Crown appeals are “rare.” What is clear, however, is that the DPP appeals mostly to correct sentences in individual cases — Crown appeals are not, as Barwick CJ put it in \textit{Griffiths};\textsuperscript{xiii} “brought only to establish some matter of principle.”

Between 2001–2004 there were 310 Crown appeals lodged against sentence.\textsuperscript{xiv} This study focused on 293 of these 310 cases.\textsuperscript{xv} Of the 293 Crown appeals in our study, 43 cases (14.7\%) involved Commonwealth offences and 250 (85.3\%) involved State offences. The Court of Criminal Appeal allowed the Crown appeal in 160 cases (54.6\%). In 211 cases (72\% of all Crown appeals) an error was identified by the court. In 151 cases multiple errors were committed. The study sought to record the type and frequency of particular errors found in the 211 cases.

When the errors were grouped into the categories referred to in \textit{House v The King};\textsuperscript{xvi} it was revealed that:

\begin{itemize}
  \item in 91\% (192 of 211) of the error cases, the error established was a failure to apply a sentencing principle correctly,
  \item 9\% (19 of the 211 cases) involved errors of a factual kind, and
  \item in 9\% (19 of the 211 cases) no specific error was found but the sentence was held to be plainly unjust or manifestly inadequate.
\end{itemize}

\section*{Error in the application of sentencing principle}

In 65.4\% of the 211 appeals where error was found, the principle transgressed was the principle of proportionality; that is, a failure to reflect the objective gravity of the offence in the sentence and ensure that there was a reasonable proportionality between the

\textsuperscript{xi} \textit{R v Warfield} (1994) 34 NSWLR 200.
\textsuperscript{xii} \textit{R v Salameh} (unrep, NSWCCA, 9 June 1994); \textit{R v Wall} [2004] NSWCCA 42 at [70].
\textsuperscript{xiii} (1977) 137 CLR 293 at 310.
\textsuperscript{xiv} This time period was selected because first instance data to the end of 2004 was not finalised at the time of publication.
\textsuperscript{xv} In 12 of the 310 appeals the convicted person lodged a successful conviction appeal and the question of the quantum of sentence did not arise. In five of the cases the appeal was under s 5DA, where the only issue was that the convicted person had failed to provide promised assistance. Those five cases were discussed separately.
\textsuperscript{xvi} (1936) 55 CLR 499, as explained in \textit{Markarian v the Queen} [2005] HCA 25 at [25].
objective seriousness of the offence and the subjective circumstances.\textsuperscript{xvii} In 39.3\% (83) of these cases there was an error in relation to the short length of the non-parole period,\textsuperscript{xviii} while in 25.1\% (53) of these cases there were totality errors, where the case of \textit{Pearce v The Queen}\textsuperscript{xix} was not properly applied; and in 10.4\% (22) of these cases the sentencing judge misapplied a guideline judgment.

**Residual discretion**

In 51 (24.2\%) of the 211 appeals where error was discovered, the court exercised its residual discretion and declined to intervene to increase the sentence. There was often more than one reason cited why the court chose not to intervene despite finding error. Rehabilitation of the offender was the most common reason cited for the court declining to intervene (16 of the 51 cases, or 31.4\%), followed by delay in hearing the appeal (15 of the 51 cases, or 29.4\%). In nine of the 51 cases (17.6\%) the court declined to intervene because the offender had been released from custody or the release date for the offender was imminent. In six of these cases (11.8\%) the need for parity of sentence between an accused and co-offender was cited. In five of these cases (9.8\%) the court declined to intervene because the Crown acquiesced and did not advance the ground relied upon on appeal at first instance and in one other case (2\%) it declined to intervene because the Crown led the court into error at first instance.

**Re-sentencing**

It is often assumed that the sentences imposed following a successful Crown appeal fall at the bottom of the range of the population of sentences for any given offence. This is not necessarily the case. Ordinarily, the substituted sentence falls at the lower end of the range for the particular case before the court — not the population of sentences for a given offence.

This study selected Crown appeals for the offences of murder, manslaughter, malicious wounding with intent to inflict grievous bodily harm, aggravated sexual assault and armed robbery where the court re-sentenced. The analysis revealed that the first instance sentences appealed by the Crown were sometimes above the median of the population of sentences for a given offence. Similarly, the substituted sentences imposed by the Court of Criminal Appeal frequently fell above the median of the population of sentences. These findings emphasise the complexity of sentencing and the limitations of relying heavily upon statistical concepts such as “population,” “average” and “medians” in explaining sentencing results.

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14 June 2005


\textsuperscript{xviii} See \textit{Power v The Queen} (1974) 131 CLR 623 and \textit{Bugmy v The Queen} (1990) 169 CLR 525 at 531.

\textsuperscript{xix} (1998) 194 CLR 610.
Introduction

This study analyses 310 Crown appeals lodged against inadequacy of sentence, determined by the Court of Criminal Appeal between 2001–2004. The system of Crown appeals allows the Court of Criminal Appeal to perform its function of declaring sentencing principle and, more generally, providing guidance to lower courts responsible for sentencing convicted persons. It has been said, however, that Crown appeals are a limited means of correcting inadequate sentences and achieving consistency in imposing sentences.\(^1\)

The limitations placed on the Court of Criminal Appeal’s jurisdiction in Crown appeals (discussed below) are not unique to New South Wales — they apply across the common law world. The statutory right of the Crown to appeal against sentence for matters dealt with on indictment is found in s 5D(1) of the *Criminal Appeal Act 1912* (NSW). The right was conferred in 1924 for State offences and 1932 for Commonwealth offences dealt with in New South Wales courts.\(^2\) This was decades ahead of most other States and some comparable countries. Appeals against inadequacy of sentence were created in Victoria in 1971,\(^3\) Western Australia in 1975,\(^4\) South Australia in 1980,\(^5\) Queensland in 1939,\(^6\) Tasmania in 1924\(^7\) and in the ACT and Northern Territory with the operation of the Federal Court of Australia on 1 February 1977.\(^8\) Crown appeals


\(^2\) For appeals against Commonwealth offences under s 5D of the *Criminal Appeal Act 1912*, see *Williams v The King* [No 2] (1934) 50 CLR 551 following the amendment to s 68(2) of the *Judiciary Act 1903* (Cth) and *Peel v The Queen* (1971) 125 CLR 447.

\(^3\) *Crimes Act* 1958 (Vic) s 567A.

\(^4\) *The Criminal Code* 1913 (WA) s 688(2)(d).

\(^5\) *Criminal Law Consolidation Act* 1935 (SA) s 352(2).

\(^6\) *The Criminal Code* 1899 (Qld) s 669A.

\(^7\) *Criminal Code* 1924 (Tas) s 401(2).

\(^8\) *Federal Court of Australia Act* 1976 (Cth) ss 24(1)(b) and 28(5).
were introduced in Canada in 1923, England and Wales in 1988, Ireland in 1993, Scotland in 1995, New Zealand in 1966 and in the United States, at least federally, in 1987. The relatively recent introduction of Crown appeals in countries such as England is a reflection of the controversial nature of the statutory right. As Deane and McHugh JJ said in *Malvoso v The Queen*, the statutory right is a:

“departure from traditional standards of what is proper in the administration of criminal justice in that, in a practical sense, it is contrary to the deep-rooted notions of fairness and decency which underlie the common law principle against double jeopardy.”

More recently, in a single judgment with extensive reference to authority, six members of the High Court of Australia, in *Bond v The Queen*, described the Crown appeal jurisdiction as “exceptional” since:

“Appeals against an alleged inadequacy of sentence have ‘long been accepted in this country as cutting across the time-honoured concepts of criminal administration by putting in jeopardy for the second time the freedom beyond the sentence imposed’ [*Everett v The Queen* (1994) 181 CLR 295 at 299 per Brennan, Deane, Dawson and Gaudron JJ]. And although such a jurisdiction has now become commonplace, in this country and elsewhere in the common law world, it is a jurisdiction the exercise of which is attended by some restraints.”

Appendix E sets out some of the principles governing Crown appeals in other parts of the common law world. What is striking is the similarity of approach between the jurisdictions, not only in terms of the factors that are taken into account by the prosecuting authorities when an appeal is considered, but also the restrained approach the courts in the countries selected have taken in deciding how the jurisdiction must be exercised.

**Recent comments on the limitations of Crown appeals**

The observation that Crown appeals are a blunt device to correct inadequate sentences and to achieve consistency in imposing sentences was made by the Chief Justice of New

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9 *Criminal Code* RS 1985 c C-46 s 676(1)(d) of the Code.
10 *Criminal Justice Act* 1988 s 36.
11 *Criminal Justice Act* 1993 s 2.
12 *Criminal Procedure (Scotland) Act* 1995 s 108.
13 *Crimes Act* 1961 s 383.
14 *United States Code* Title 18 s 3742.
16 *Griffiths v The Queen* (1977) 137 CLR 293 at 310 per Barwick CJ, 327 per Jacobs J, 329–330 per Murphy J; *Malvoso v The Queen* (1989) 168 CLR 227 at 234–235 per Deane and McHugh JJ; *Everett v The Queen* (1994) 181 CLR 295 at 299–300 per Brennan, Deane, Dawson and Gaudron JJ.
17 (2000) 201 CLR 213 at [27].
South Wales in *R v Jurisic*. Spigelman CJ said guideline judgments were needed in appropriate cases because of the inherent limitations of Crown appeals. Spigelman CJ explained:

“Public criticism of particular sentences for inconsistency or excessive leniency is sometimes justified. Courts of criminal appeal operate under constraints which do not ensure that such criticism is necessarily allayed by the usual case by case appellate process. Appeals must be initiated by the Crown. If initiated they are regarded as exceptional and require identification of an error in the exercise of discretion. If upheld, the appellate court is constrained in the sentence it can impose by the principle of double jeopardy.”

In an extra-curial address a year later Spigelman CJ elaborated:

“There is one significant impediment to the ability of our traditional system of appeals achieving the objective of consistency. Our system of appeals operates in a distinctly different way with respect to appeals against severity, from the way it operates with respect to Crown appeals against leniency. Wherever a trial judge sentences in a manner that can be described as inconsistent with that of other trial judges by being too harsh, the appellate court will correct the error without any restraint on its doing so. In the case of Crown appeals however, there are significant restraints which do not operate in the case of severity appeals.”

More recently, in *R v Whyte*, Spigelman CJ said:

“If the frequently stated assertion of the importance of consistency is to rise above the level of empty rhetoric, something more than the system of Crown appeals has been shown to be required.”

**Key issues**

The key issues addressed in this study include:

- The relevant law defining the approach that the Court of Criminal Appeal takes when it determines a Crown appeal. Suffice to state here that the High Court has not been entirely clear and consistent in its interpretation of s 5D(1) of the *Criminal Appeal Act* 1912. The discussion will show that the Court of Criminal Appeal interpreted the High Court’s decision in *Whittaker v The King* to mean that it had an “unfettered
discretion” under s 5D. The High Court finally brushed aside that view in Griffiths v The Queen. The jurisdiction under s 5D is now accepted by the current High Court as being “exceptional.” Appeals should be rare and error must be established by the Crown.

- The number of Crown appeals lodged between 2001 and 2004 and the type of offences for which they are lodged. In that context, the extent to which the following statement of Spigelman CJ in R v Baker is true:
  “The authorities make it clear that Crown appeals should be rare. It may be that present practice does not reflect that restriction, nevertheless, successful Crown appeals should be rare.”

- The “success rate” of the Crown actually establishing a legal error of the type referred to by the High Court in House v The King and, more recently, Dinsdale v The Queen and Markarian v The Queen, once an appeal is heard.

- The types of legal errors most commonly found and whether any patterns exist. Is there a relationship between the type of error found and an appeal being allowed?

- The Court of Criminal Appeal has a residual discretion not to intervene even though a legal error has been established. What are the most common factors affecting the exercise of the discretion not to intervene and re-sentence?

- When the Court of Criminal Appeal intervenes and re-sentences, the sentence substituted by the Court of Criminal Appeal generally falls at the lower end of the appropriate range of sentence. This study will compare cases where the court has re-sentenced following a successful Crown appeal with the general population of sentences for five common offences.

There are very few empirical studies of Crown appeals in Australia. The Judicial Commission has previously examined the number and success rate of Crown appeals in the NSW Court of Criminal Appeal but only as part of broader studies into appeals generally. This study proposes to closely analyse, from a legal perspective, this “exceptional jurisdiction.”

24 Street CJ in R v Gosper (1928) WN (NSW) 165 at 166 later applied by Evatt CJ in R v Evans (1961) 78 WN (NSW) 1135; Jordan CJ in R v Geddes (1936) 36 SR (NSW) 554 at 555. Street CJ in R v Herring (1956) 73 WN (NSW) 206 and Herron CJ in R v Cuthbert (1967) 2 NSWR 329 at 330. The Crown appeals of R v Williams; R v Somme (1934) 51 NSW WN 24, R v Goodrich (1955) 72 WN (NSW) 42, R v Cooke (1955) 72 WN (NSW) 132 and R v Smith (1955) 72 WN (NSW) 216 throw no light on the subject of the approach that the court should take under s 5D.

25 (1977) 137 CLR 293.

26 [2002] NSWCCA 85 at [19].

27 (1936) 55 CLR 499 at 505.


29 [2005] HCA 25 at [25].

The legislation

At common law the Crown did not have a right to appeal against the purported inadequacy of a sentence.\(^{31}\) The right is statutory in nature. Section 5D(1) of the *Criminal Appeal Act 1912* provides:

“The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any sentence pronounced by the court of trial in any proceedings to which the Crown was a party and the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as to the said court may seem proper.”

The substantive text of s 5D(1) has remained unchanged since it was inserted in 1924.\(^{32}\) Unlike England, no time limit to appeal is imposed by the Act.\(^{33}\) Nor is there any requirement that the Crown can only appeal with the leave of the court.\(^{34}\) The second reading speech of the Attorney General of the day introducing the Bill does not contain any reasons why the section was inserted or what approach the Court of Criminal Appeal should adopt when determining a Crown appeal.\(^{35}\) It has been said

\(^{31}\) For an analysis of the rights of appeal prior to the *Criminal Appeal Act 1912* see the judgment of McHugh and Gummow JJ in *The Queen v Gee* [2003] HCA 12 at [55] and *Fleming v The Queen* (1998) 197 CLR 250 at [16].

\(^{32}\) The section was inserted by the *Crimes (Amendment) Act 1924* No.10. The right of the DPP (NSW) to appeal, as well as the Attorney General, was inserted by the *Criminal Appeal (Amendment) Act 1986* No 211 Schedule 1(4) following the creation of the Office of the Director of Public Prosecutions by the *Director of Public Prosecutions Act 1986* (NSW).

\(^{33}\) The issue of whether time limits apply to Crown appeals was discussed by James J in *R v Ohar* (2004) 145 A Crim R 453. It was held that neither s 10(1) *Criminal Appeal Act* (which provides that an appeal must be filed 28 days from the date of conviction and sentence) nor r 3B of the *Criminal Appeal Rules* apply to Crown appeals. In England there is a time limit of 28 days.

\(^{34}\) In Tasmania leave of the court was required until 1996 when s 401(2) of the *Criminal Code 1924* (Tas) was amended by the *Criminal Code Amendment (Appeals) Act 1996* (Tas) No.41, directly in response to *Everett v The Queen* (1994) 181 CLR 295. Leave of the court is required in England and New Zealand (see Appendix E).

\(^{35}\) The Hon T Bavin, Attorney General, Second Reading Speech, Crimes (Amendment) Bill, NSW *Parliamentary Debates (Hansard)*, Legislative Assembly, 23 October 1923, p 1704 at 1715.
that the law governing Crown Appeals is well settled. But, as the discussion below shows, that only occurred in 1977 when, in *Griffiths v The Queen*, Barwick CJ effectively adopted Isaacs J’s judgment in *Whittaker v The King*.

The early view of the High Court — unfettered discretion

*Whittaker v The King* was the first case where the High Court considered the meaning and effect of s 5D. The court unanimously refused Whittaker special leave to appeal. Higgins J cautioned against using the case to inform the meaning of the phrase “in its discretion” found in s 5D. The High Court held in *Whittaker* that s 5D permitted the Court of Criminal Appeal to increase a manslaughter sentence from one year to five years. The Commonwealth Law Reports head-note in *Whittaker* reads:

“s 5D of the *Criminal Appeal Act* 1912 confers an unfettered discretion upon the Court of Criminal Appeal to alter the sentence imposed by the trial judge.”

The proposition is derived from the judgments of Knox CJ and Powers J and Gavan Duffy and Starke JJ. Knox CJ and Powers J said:

“The learned Chief Justice of New South Wales, who delivered the judgment of the court, thought that in reviewing the exercise of the discretion of the trial judge the court must be guided by the principles laid down in *R v King* [(1923) 25 SR (NSW) 218] and *Skinner’s Case* [(1913) 16 CLR 336] and ought not to interfere unless satisfied that the trial judge had proceeded upon some wrong principle. If this be the rule upon which the Court of Criminal Appeal ought to act in exercising the power conferred on it by s 5D, we agree with the learned Chief Justice in thinking that, for the reasons given by him, the court was justified in the circumstances of the present case in exercising its discretion. If, on the other hand, the true view of s 5D be, as we think it is, that unlimited judicial discretion is thereby conferred on the Court of Criminal Appeal, that court has exercised its discretion.”

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36 Herron CJ used the expression “not in doubt” in *R v Cuthbert* (1967) 2 NSWJR 329 at 330.
37 *Griffiths v The Queen* (1977) 137 CLR 293 at 310.
38 (1928) 41 CLR 230.
39 (1928) 41 CLR 230.
40 His Honour said (at 253): “The absurdity of deciding a point involving such far-reaching consequences on a mere motion for special leave to appeal—without argument, without the matter being considered by the New South Wales Bench, without that Bench having even purported to exercise that absolute discretion which it is said they have under the section—seems, to my mind, to be manifest.”
41 (1928) 41 CLR 230.
42 (1928) 41 CLR 230 at 235.
43 (1928) 41 CLR 230 at 253.
44 (1928) 41 CLR 230 at 235.
Gavan Duffy and Starke JJ said: 45

“There is nothing in the words of the section to limit the exercise of [the Court of Criminal Appeal’s] discretion.”

Isaacs and Higgins JJ in separate judgments did not agree with the approach taken in the joint judgments. They agreed, however, that special leave should be refused.

*Skinner v The King*, the precursor of the now much cited *House v The King*, 46 was a severity of sentence appeal. The High Court had insisted that error had to be established before the Court of Criminal Appeal could interfere with the first instance sentence. 47

In the Crown appeal of *R v Gosper*, 48 Street CJ attributed a broad interpretation to *Whittaker*. His Honour expressly referred to *Skinner v The King* 49 and said: 50

“The question of the extent of this court’s discretion under [s 5D] and of the principles by which it should be guided in exercising the discretion conferred upon it by that section, came under review recently before the High Court, in the case of *R v Whittaker* … and, as I read their judgments … in the opinion of a majority of that tribunal, what is meant by that section is that unlimited judicial discretion is conferred upon this court. What is meant, I understand by unlimited discretion is that the discretion conferred upon this court is one in the exercise of which it cannot be interfered with, so long as it has acted in good faith. That is the interpretation put by the High Court on what the Legislature meant in enacting s 5(d) of the Criminal Appeal Act, and by that interpretation we are bound.”

To Street CJ, the effect of *Whittaker* was “to give this court an unfettered discretion in interfering with sentences.” 51

The significance of *Whittaker* was also acknowledged by Sir Fredrick Jordan CJ in *R v Geddes*: 52

“the majority of the court [in *Whittaker*] expressed the opinion that this court is invested with an unlimited judicial discretion — unlimited that is, within the

45 (1928) 41 CLR 230 at 253.
46 (1936) 55 CLR 499 at 505.
47 (1913) 16 CLR 336. Barton ACJ said (at 337): “A Court of Criminal Appeal is not prone to interfere with the judge’s exercise of his discretion in apportioning the sentence, and will not interfere unless it is seen that the sentence is manifestly excessive or manifestly inadequate. If the sentence is not merely arguably insufficient or excessive, but obviously so because, for instance, the judge has acted on a wrong principle, or has clearly overlooked, or undervalued, or overestimated, or misunderstood, some salient feature of the evidence, the Court of Criminal Appeal will review the sentence; but, short of such reasons, I think it will not.”
48 (1928) WN (NSW) 165 NSWCCA, Ferguson and James JJ concurring.
49 (1913) 16 CLR 336.
50 (1928) WN (NSW) 165 NSWCCA at 166.
51 (1928) WN (NSW) 165 NSWCCA at 166.
52 (1936) 36 SR (NSW) 554 at 554—555.
limits of any statute which may prescribe a maximum or a minimum sentence, and within further limits imposed by the consideration that the discretion is judicial.”

But Jordan CJ added an important rider which seemed to contradict what Street CJ had said in Gosper.53

“Unless some error in principle, or some such unreasonable disproportion appears, I think that a case is not made out for revision of a sentence. When, as here, the contention is that the sentence is inadequate, I think that the court, in the absence of some definite reason to the contrary, should assume that the trial judge was entitled to take the view of the evidence most favourable, or least damaging, to the prisoner that is consistent with the jury’s verdict.”

The task of the court, according to Jordan CJ, was to determine whether the sentence was inadequate — there was no requirement to find that it was manifestly inadequate.

Williams v The King54 involved the right of the Commonwealth Attorney General to appeal under s 5D but the case throws very little light on the meaning and effect of s 5D.55 The substituted sentence eventually imposed, even after two Crown appeals, was double the first instance sentence.

In R v Herring,56 a case described by McHugh J in Markarian v The Queen57 as one of the four most often cited sentencing cases in New South Wales, the unfettered discretion view of s 5D was repeated by Street CJ. His Honour said s 5D empowered the Court of Criminal Appeal:58

“to impose such sentence as to it may seem proper. That is to say, this court is given a free and unfettered discretion, if it thinks that the sentence needs to be increased to impose such sentence as in its view is appropriate to the offence concerned.”

53 (1936) 36 SR (NSW) 554 at 555.
54 Williams v The King [No.2] (1934) 50 CLR 551.
55 The offender pleaded guilty to three offences, including making a counterfeit coin and having in his possession without lawful excuse coining instruments contrary to the Crimes Act 1914 (Cth). He was sentenced to 18 months imprisonment for each offence, with the sentences to be served concurrently. This sentence was increased to five years by the Court of Criminal Appeal upon an appeal instituted by the Attorney General (NSW). On appeal to the High Court it was held that the Attorney General (NSW) had no authority to institute the appeal for Commonwealth offences and the sentence imposed by the sentencing judge was restored [Williams v The King [No 1] (1933) 50 CLR 536 ]. The Attorney General (Cth) then made his application to the Court of Criminal Appeal to increase the sentence. The Court of Criminal Appeal entertained the application and ordered that the applicant be imprisoned for four years with hard labour: R v Williams; R v Somme (1934) 51 NSW WN 24. On appeal the High Court held that the Commonwealth right of appeal was conferred by the operation of s 68(2) of the Judiciary Act and s 5D [Williams v The King [No 2] (1934) 50 CLR 551]. Apart from Dixon J’s passing description of the Crown appeal in Williams v The King [No 2] (1934) 50 CLR 551 at 561 — “such a proceeding is a marked departure from the principles theretofore governing the exercise of penal jurisdiction, its departure is sanctioned by State law” — there is no reference in any of these cases to manifest inadequacy or double jeopardy.
56 (1956) 73 WN (NSW) 206.
57 [2005] HCA 25 at [67].
58 R v Herring (1956) 73 WN (NSW) 206.
The court increased the respondent’s sentence for robbery under s 97 from one year to five years. *R v Abbott* is an example of how the court approached s 5D. The question was whether the sentence imposed was inadequate and whether the judge had failed to give proper weight to “the deterrent effect [of the sentence] upon the criminal class in the community.” *R v Abbott* was a manslaughter case where the respondent negligently drove his lorry and killed a cyclist. The jury had recommended strongly that the trial judge show mercy at punishment. The court held on appeal that the three year good behaviour bond was “a reasonable and proper sentence.”

The “unfettered discretion” view of s 5D drawn from *Whittaker* was repeated by Herron CJ in *R v Cuthbert* and later *R v Taney and Humphries*. Herron CJ said in *Cuthbert* (at 330):

“The principles on which this court should proceed in determining whether a sentence is inadequate are not in doubt.”

And later:

“In applying s 5D this court may vary the sentence imposed if it appears that the wrong principle has been applied, in which case the question of sentence is at large … If no wrong principle has been applied, the question for this court is simply, is there a reasonable proportion between the sentence and the circumstances of the crime …”

There is no reference to double jeopardy or the phrase “manifestly inadequate” used by Barton ACJ in *Skinner* (quoted earlier). The passage also reveals that merely establishing an error in the application of principle appeared to be enough to review the sentence — there was no pre-condition that the sentence was manifestly inadequate.

**The modern view of the High Court — restraint**

The modern approach of the High Court to Crown appeals first appears in *Peel v The Queen*, where Barwick CJ in a minority judgment repeated what Dixon J had said in *Williams v The King [No 2]*, namely, that Crown appeals “cut across time-honoured concepts of criminal
administration.” It was in *Griffiths v The Queen* that the early “unfettered discretion” view of s 5D in *Whittaker v The King* was brushed aside. The Crown submitted that the Court of Criminal Appeal under s 5D had a function, as put by Barwick CJ:

“more akin to original jurisdiction exercisable without reference to what has already been done and in the exercise of which the court was not constrained by those principles of appellate courts which concede to the presiding judge a discretion the exercise of which is not to be disturbed except for error.”

Barwick CJ emphatically rejected the view that *Whittaker* stood for the proposition that, under s 5D, the Court of Criminal Appeal had, in his Honour’s words, an:

“unfettered discretion to substitute what it thinks is the proper sentence for that which the trial judge has imposed without considering whether in truth the trial judge has erred in a matter of principle or whether he has acted unreasonably or in disregard of relevant evidence or whether in some other way he has exceeded or misused the discretion which is committed to him in the sentencing of convicted persons. In my opinion, this court decided no such thing in *Whittaker v The King*.”

To Barwick CJ that interpretation of the case was wrong and caused by a misunderstanding of the judgment of Gavan Duffy and Starke JJ. Barwick CJ commented that it seemed to him that:

“the misapprehension as to the effect of this court’s decision in *Whittaker v The Queen* had led to much more frequent appeals by the Attorney General than might properly have been expected.”

Barwick CJ said inadequacy of sentence was not established by a mere disagreement of the Court of Criminal Appeal of the sentence passed but, rather, “such an inadequacy in the sentence as is indicative of error or departure from principle.”

His Honour agreed with the judgment of Isaacs J in *Whittaker v The King*. Barwick CJ set out the approach that the Court of Criminal Appeal must take when faced with a Crown appeal but also provided guidance as to when, and for what purpose, the Crown should appeal. Barwick CJ said:

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70 This observation was later repeated in *Everett v The Queen* (1994) 181 CLR 295 at 299. It was adopted by all members of the High Court in *Bond v The Queen* (2000) 201 CLR 213.
71 (1977) 137 CLR 293.
72 (1977) 137 CLR 293 at 309.
73 (1977) 137 CLR 293 at 308.
74 (1977) 137 CLR 293 at 309.
75 (1977) 137 CLR 293 at 309.
76 (1977) 137 CLR 293 at 309.
77 (1977) 137 CLR 293 at 309.
78 (1977) 137 CLR 293 at 310.
“On my view of the proper meaning of s 5D in the context of the Criminal Appeal Act, an appeal by the Attorney General should be a rarity, brought only to establish some matter of principle and to afford an opportunity for the Court of Criminal Appeal to perform its proper function in this respect, namely, to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons.”

Griffiths was a clear departure from past approaches to s 5D. The notions that Crown appeals should only be “a rarity,”79 an “extraordinary remedy, intended to be invoked rarely … and then only for reasons of great public importance”80 or “brought only to establish some matter of principle,”81 were new. Jacobs J’s statement that:82

“A court on appeal will not lightly conclude that another sentence should have been passed. The incorrectness of the sentence must be manifest. See House v The King (1936) 55 CLR 499 at 505.”

also put an end to the “unfettered discretion” view.

To complete this narrative of the High Court’s approach to Crown appeals as articulated in Bond v The Queen,83 one only need to make reference to the judgment of Deane and McHugh JJ in Malvaso v The Queen,84 where their Honours approved the statement of Barwick CJ in Griffiths v The Queen and added:

“That statement of the rare circumstances in which an appeal by the Attorney General against sentence can be justified should, in our view, be expanded by the inclusion of express reference to the need to avoid the kind of manifest disparity or inconsistency in sentencing standards which Barwick CJ saw as being ‘error in point of principle’ (see Griffiths at 310). Otherwise, it should be accepted as representing general and authoritative guidance to the Courts of Criminal Appeal of this country.”

Deane J, earlier in his judicial career, had sat with Brennan and Gallop JJ in R v Tait and Bartley85 — the first Northern Territory Crown appeal heard in the Full Federal Court. The case applied Griffiths v The Queen.86

The High Court in the recent case of Markarian v The Queen87 repeated the importance of the Crown establishing error as explained in House.

79  (1977) 137 CLR 293 Barwick CJ at 310.
80  (1977) 137 CLR 293 Murphy J at 330.
81  (1977) 137 CLR 293 at 310.
82  (1977) 137 CLR 293 at 327.
83  (2000) 201 CLR 213 at [27].
84  Malvaso v The Queen (1989) 168 CLR 227 at 234.
85  R v Tait (1979) 46 FLR 386; (1979) 24 ALR 473.
86  (1979) 24 ALR 473 at 476.
87  [2005] HCA 25 at [25]
There has been mild judicial objection to Barwick CJ’s judgment in *Griffiths*. Street CJ in *R v Holder and Johnston* did not agree with the statements in *Griffiths v The Queen* directing the Crown when it could or could not appeal:

“It would … be wrong for courts to adopt a posture of discouraging the bringing of Crown appeals whether by direct statements to this effect or by reluctance to entertain them fairly and properly. The legislature has specifically provided for a Crown appeal against sentence. It is the province of the Crown law authorities to determine whether in any given case to bring such an appeal. It is the duty of the court to decide it. If rights under a statute are used oppressively so as to amount in effect to a misuse, then it is both right and proper for a court to say so. But the mere fact that the Crown exercises its right to appeal falls far short of justifying expressions of judicial disapprobation.”

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88 [1983] 3 NSWLR 245 at 255.
Legal principles governing Crown appeals

The DPP’s decision to appeal

One of the principal functions and responsibilities of the Director of Public Prosecutions is to “institute and conduct, on behalf of the Crown, appeals in any court in respect of any such prosecution.” The decision to institute a Crown appeal is made by the Director of Public Prosecutions. Although the Attorney General also has a statutory right to appeal, it has not been exercised since the establishment of the office of an independent Director of Public Prosecutions (DPP) by the Director of Public Prosecutions Act 1986 (NSW). When a sentence that is perceived to be inadequate is imposed, the Executive government sometimes requests the independent DPP to consider an appeal on behalf of the Crown to correct the sentence. Under s 4(3) of the Director of Public Prosecutions Act, the DPP is responsible to the Attorney General for the due exercise of the DPP’s functions but that obligation does not derogate from the authority of the DPP in respect of the preparation, institution and conduct of any proceedings.

The DPP issues prosecution guidelines under s 13 of the Director of Public Prosecutions Act to Crown Prosecutors and solicitors working in his Office. Guideline 29, extracted in full in Appendix C, states, inter alia:

“...In determining whether or not to appeal against a sentence imposed by a judge or magistrate, the Director will have regard to the following matters:

(i) whether or not the sentencer made a material error of law or fact, misunderstood or misapplied proper sentencing principles, or wrongly assessed or omitted to consider some salient feature of the evidence, apparent from the remarks on sentence;”

89 Section 7(1)(b) Director of Public Prosecutions Act 1986 (NSW).
90 For example, before an appeal was lodged in R v MA (2004) 145 A Crim R 434, the Premier told ABC radio after the sentence was imposed at first instance that he had asked the DPP (NSW) to consider an appeal and seek heavier sentences for the victim’s killers: The Sunday Mail, 3 November 2003: url:<http://www.thesundaymail.news.com.au> (archive search).
Crown Appeals Against Sentence

(ii) manifest inadequacy of the sentence which may imply an error of principle by the sentencer;

(iii) the range of sentences (having regard to official statistics and comparable cases) legitimately open to the sentencer on the facts;

(iv) the conduct of the proceedings at first instance, including the prosecution’s opportunity to be heard and the conduct of its case;

(v) the element of double jeopardy involved in a prosecution/Crown appeal and its likely effect on the outcome (the probable imposition of a lesser sentence than was appropriate at first instance);

(vi) the appeal court’s residual discretion not to intervene, even if the sentence is considered too lenient; and/or

(vii) whether the appeal is considered likely to succeed.”

Sentencing principles extracted from case law

The following principles outlining the various limitations imposed on Crown appeals can be distilled from case law.91

Rarity

Appeals by the Crown should be rare.92 An appeal by the Crown against sentence is concerned with establishing matters of principle, for the “governance and guidance of courts having the duty of sentencing convicted persons.”93 This power extends to doing what is necessary to avoid manifest inadequacy or inconsistency in sentencing.94 Crown appeals should be confined to cases where there is such a degree of difference between the sentence that was imposed and the sentence that ought to have been imposed as to amount to “an affront to community standards.”95

The precondition of establishing error

The normal restriction upon appellate review of the exercise of a discretion applies to Crown appeals against sentence.96 The court will only intervene where error is shown.97 The concept of error (patent or latent) is defined in House v The King,98 which was emphatically affirmed in the joint judgment of the High Court in Markarian v The Queen.99

91 R v Wall [2002] NSWCCA 42 at 70 collects the principles. See also R v Institoris (2002) 129 A Crim R 458 at [47].
92 Malvaso v The Queen (1989) 168 CLR 227 at 234.
93 Griffiths v The Queen (1977) 137 CLR 293 at 310.
94 Everett v The Queen (1994) 181 CLR 295 at 299.
95 R v Hughesman (unrep, NSWCCA, 5 April 1995 per Gleeson CJ at 4).
97 R v Tait (1979) 46 FLR 386 at 388 (1979) 24 ALR 473.
98 (1936) 55 CLR 499 at 505.
An error may take the form of:

- an error in sentencing principle,
- a finding that cannot be supported by the evidence,
- a failure to take into account a relevant matter, or
- the taking into account of an irrelevant matter.

The joint judgment in *Markarian v The Queen*\(^{100}\) expressed the inquiry as follows:

> “Thus is specific error shown? (Has there been some error of principle? Has the sentencer allowed extraneous or irrelevant matters to guide or affect the decision? Have the facts been mistaken? Has the sentencer not taken some material consideration into account?).”

Sometimes the sentence itself suggests that one of those kinds of error has occurred and the result is plainly unjust.\(^{101}\) This is where the Crown cannot identify a specific error of sentencing principle and solely rely upon an assertion that the sentencing result is plainly unjust and manifestly inadequate. The joint judgment in *Markarian v The Queen*\(^{102}\) drew a link between the phrase “plainly unjust” in *House v The King*\(^{103}\) and the concept of manifest inadequacy:

> “If specific error is not shown, is the result embodied in the order unreasonable or plainly unjust? It is this last kind of error that is usually described, in an offender’s appeal, as ‘manifest excess,’ or in a prosecution appeal, as ‘manifest inadequacy.’”

Spigelman CJ has said successful Crown appeals will be rare where the Crown relies only on this form of error.\(^{104}\) The type of error found and the experience of the sentencing judge may also limit the discretion to intervene.\(^{104}\) The Court of Criminal Appeal must recognise the importance of the discretion exercised by the sentencing judge and cannot merely substitute its own opinion as to the appropriate sentence.\(^{105}\) As all members of the High Court put it in *Lowndes v The Queen*:\(^{106}\)

> “The discretion which the law commits to sentencing judges is of vital importance in the administration of our system of criminal justice.”

\(100\) [2005] HCA 25 at [25].

\(101\) *House v The King* (1936) 55 CLR 499 at 505.

\(102\) [2005] HCA 25 at [25].

\(103\) *R v Baker* [2000] NSWCCA 85 at [19].

\(104\) *R v Chua* [2004] NSWCCA 50 at [21].

\(105\) *Lowndes v The Queen* (1999) 195 CLR 665 at 671.

\(106\) (1999) 195 CLR 665 at [15], quoted with approval by the joint judgment in *Markarian v The Queen* [2005] HCA 25 at [27].
The residual discretion

The Court of Criminal Appeal has a discretion to refuse to intervene even if error is established. A primary consideration is the double jeopardy that a convicted person faces as a result of the Crown appeal.107 As Deane J explained in *Rohde v DPP (Cth)*:108

“A conferral of such a prosecution right of appeal infringes the essential rationale of the traditional common law rule against double jeopardy in the administration of criminal justice in a manner comparable to a conferral of a prosecution right of appeal against a trial acquittal.”

The residual discretion, where it is exercised, necessitates an immediate and highly subjective assessment of the circumstances of the case at hand.109 In *R v Hernando*110 Heydon JA said that the Crown must:

“negate any reason why the residual discretion of the Court of Criminal Appeal not to interfere should be exercised.”

The category of factors that bear upon the residual discretion are not closed. They include:

- The delay in lodging or hearing the appeal.111
- The delay in the resolution of the appeal.112
- Whether a non-custodial sentence was imposed on the offender and he or she is in the community.113
- Whether the offender has made substantial progress towards rehabilitation.114
- Disparity with a co-offender.115
- Where, although a particular sentence was inadequate, the overall sentence imposed was within the permissible range (the “totality principle”).116
- The forensic conduct of the Crown at first instance (such as lack of challenge by the Crown or positively leading the court into error).117
- The frustration and disappointment caused to the respondent by a variation in his anticipated release date.118
- The deteriorating health of the respondent since sentence.119

109  *R v Holder and Johnston* [1983] 3 NSWLR 245 at 256.
113  *R v Caridi* (unrep, NSWCCA, 3 December 1987).
114  *R v Tindle* (unrep, NSWCCA, 8 October 1998).
118  See *R v CJP* [2004] NSWCCA 188.
Re-sentencing following a successful appeal

If a Crown appeal against sentence is successful and the appellate court re-sentences the respondent, it does so in the light of all the facts and circumstances as at the time of re-sentencing. The element of double jeopardy involved in successful Crown appeals usually results in the substituted sentence being discounted and less than that which should have been imposed by the sentencing judge. It will generally be towards the lower end of the appropriate range of sentence. In *R v Baxter* Gleeson CJ said:

> “it is a well established practice, followed in many cases although by no means necessarily in all cases, that when the court re-sentences a respondent to a successful Crown appeal it imposes a penalty less than that which it considers ought to have been imposed in the first place.”

In *R v Salameh* Hunt CJ at CL put the re-sentencing principles in these terms:

> “[T]he distress occasioned to a respondent to a Crown appeal by twice being put in jeopardy usually requires a discount to be applied by this court. Indeed, so important is this consideration in Crown appeals that this court will not infrequently exercise its discretion to dismiss the appeal because of the unfairness or injustice which would otherwise be occasioned to the respondent by reason of his double jeopardy: *R v Holder and Johnston* (at 255–256). There is no tariff for the discount for the double jeopardy involved. In some cases, the fresh sentence imposed by this court will not be less (or not greatly less) than that which ought to have been imposed at first instance. *R v Holder and Johnston* (at 256) was a case in which such considerations did not lead to any discounting. In other cases, the discount may be substantial: see, for example, *R v Unto Kullervo Peuna* (unrep, NSWCCA, 15 July 1992 at 14). The extent of the discount must obviously enough vary according to the individual circumstances of the particular case. In most cases, the relevant circumstances are those subjective to the respondent himself.”

Gleeson CJ said later, in *R v Rose*, that the substituted sentence was the “least sentence that could properly have been imposed upon the respondent at first instance.” *Rose* was applied by the court in *R v Jurisic*. In *R v CJP* Howie J said, after making reference to Kirby J in *Dinsdale* at [62], that although it was customary to impose a substituted sentence at the lower end of the range, this was a rule of practice and his Honour doubted

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121 *R v Salameh* (unrep, NSWCCA, 9 June 1994); *R v Wall* [2004] NSWCCA 42 at [70].
123 (unrep, NSWCCA, 7 May 1991).
124 (unrep, NSWCCA, 9 June 1994).
125 (unrep, NSWCCA, 23 May 1996 at 3).
127 [2004] NSWCCA 188.
it was an “inviolable rule.” In *R v Mungomery* Hulme J said that, although sentences imposed on successful Crown appeals are towards the lower end of the appropriate range, the decisions:

“do provide an indication of either the sentence which should have been imposed at first instance or a sentence which is at the bottom of the range of appropriate sentences.”

**Restrictive in nature**

Crown appeals are therefore restrictive in a number of respects. They are restrictive because of the difficulty of establishing error. Even if error is demonstrated, the court’s discretion is further constrained — and its inclination not to intervene reinforced — by the presence of such factors as:

- whether any rehabilitation has been achieved by the respondent in the meantime,
- whether there was any delay in the proceedings, and
- the conduct of the Crown at first instance.

The principle of double jeopardy is always at the forefront, so that even if the Crown overcomes the error hurdle there is an “attitude of restraint” in imposing a substituted sentence.

**Other commentary about Crown appeals**

Notwithstanding the above restrictions on Crown appeals, legal commentators insist that they still have a vital role to play in sentencing. Just as severity appeals provide an opportunity to establish maximum figures in a sentencing range and sentencing principles in the area of severity of sentence, so do Crown appeals serve to establish minimum figures and principles regarding leniency of sentence. Just as offenders should not have to endure overly oppressive sentences, equally, the goal of society in containing the incidence of crime and protecting the community should not be jeopardised by allowing offenders to escape adequate punishment.

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128 Howie J (Hulme and Simpson JJ agreeing) said (at [77]): “It is customary where the Crown succeeds on an appeal for the court to impose a sentence at the lower end of the range that was available to the sentencing judge. I am prepared to follow that practice notwithstanding some doubts as to whether it should be adopted as an inviolable rule for the exercise of this court’s discretion following a successful Crown appeal.”


130 [2004] NSWCCA 450 at [34].


134 ibid at 4.
R Pattenden describes three benefits arising from Crown appeals:135

“[a Crown appeal] provides a corrective for serious under-sentencing, thereby strengthening the deterrent effect of the law and removing dangerous offenders from circulation for a longer period; it provides a lightening rod for public discontent; and it gives the Court of Appeal (Criminal Division) greater opportunity to guide the lower courts on minimum sentences within the matrix of facts presented by an actual case.”

D A Thomas, in “Increasing Sentences on Appeal — a Re-examination,”136 presents five reasons in favour of the prosecution right to appeal:

1. The danger to the public who may be exposed to a violent offender who has not been satisfactorily sentenced.
2. On individualised grounds where the offender escapes with a sentence which is too lenient for his own good and there is no deterrent.
3. To prevent unjustified disparity between co-offenders.
4. General parity grounds, where the individual offender is given a more lenient sentence than others who have committed a like crime in similar circumstances (inconsistency).
5. Where some major issue of sentencing principle is involved or some recently created offence is dealt with for the first time.

David Thiering, in 1992, said of Crown appeals in New South Wales: 137

“It appears that, until about 1988, Crown appeals were rare and restricted to extraordinary cases. However, Crown appeals are now common. This is most noticeable in cases which attract media attention. The current approach of the New South Wales Director of Public Prosecutions seems more concerned with correcting perceived errors in individual cases than in establishing general principles.”

Rinaldi also had earlier observed:138

“Leaving aside the spate of Crown appeals brought during the mid-1970s in New South Wales in an effort to establish tariffs in respect of the offences of escaping from open prisons and culpable driving causing death, Crown appeals can be seen to have been brought almost exclusively in situations where a trial judge appears to have departed from established sentencing principles without offering convincing justification.”

A recent Victorian study\textsuperscript{139} found that:

1. Crown appeals in Victoria can longer be regarded as rare and exceptional.
2. Forty of 55 Crown appeals (73\%) were allowed between 2002 and 2003.
3. In all but one successful appeal the respondent’s sentence was increased.

Put another way, the court in that State rarely invoked the residual discretion not to intervene.

General findings

The data

The data in this study were obtained from the Judicial Commission’s Court of Criminal Appeal database and the Judicial Information Research System (JIRS). Where there were multiple offences the principal offence was selected. The “principal offence” is the offence attracting the greatest penalty in the group of offences for which the offender has been convicted.\(^{140}\)

The Crown appealed in 2.5% of all first instance sentencing matters for the period January 2001 — September 2004. It is a matter of opinion whether this figure suggests Crown appeals are “rare.” What is clear, however, is that the DPP appeals mostly to correct sentences in individual cases. Crown appeals are not brought only to establish matters of principle.

This study focuses on 310 Crown appeals heard in the Court of Criminal Appeal between 2001 and 2004. The study analyses 293 of these cases because, in the other 17, the Crown appeal became irrelevant. Twelve of these 17 appeals were against conviction as well and resulted in an acquittal or new trial.\(^{141}\) The other five involved an appeal under s 5DA Criminal Appeal Act 1912, where a respondent has failed to fulfil a future promise to assist authorities. These five cases are discussed separately below.

In one case where a severity appeal was lodged in conjunction with a Crown appeal, the severity appeal was successful and the sentence was reduced\(^{142}\) and in another such case only the conditions attached to the suspended sentence imposed were amended.\(^{143}\) Both of these cases were included in our study.

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\(^{140}\) If more than one type of offence attracts the same penalty, then the offence with the greatest statutory penalty is selected. If more than one type of offence attracts the same penalty and has the same statutory penalty, then the first-mentioned offence is selected as the principal offence.

\(^{141}\) There were a total of eight “conviction, Crown and sentence severity” appeals and 20 “conviction and Crown” appeals, six of which resulted in a new trial, six of which resulted in an acquittal. Further, there were 12 “severity and Crown” appeals.

\(^{142}\) *R v Whelan* [2004] NSWCCA 379.

\(^{143}\) *R v Remilton* [2001] NSWCCA 546.
Of the 293 Crown appeals in our study, 43 cases (14.7%) involved Commonwealth offences and 250 (85.3%) involved State offences.

The Court of Criminal Appeal allowed the Crown appeal in 160 cases (54.6%). In 211 cases (72%) an error was identified by the court. Therefore, in 51 cases (17.4% of all Crown appeals), although error was found, the court exercised its residual discretion and declined to intervene and increase the sentence.

**Most common offences**

This study used the Australian Standard Offence Classification (ASOC) system to delineate the offences. The five most common offences for which the Crown appealed were:

- drug offences (70 cases, comprising 23.9% of all Crown appeals),
- robbery, extortion and related offences (58 cases, 19.8%),
- acts intended to cause injury (33 cases, 11.3%),
- homicide and related offences (29 cases, 9.9%), and
- sexual assault and related offences (25 cases, 8.5%).

Table 1 compares the distribution of Crown appeals for each ASOC offence category, with the first instance higher court cases for each ASOC category.

**Table 1 — Proportion of Crown appeals and higher court cases for each ASOC category.**

<table>
<thead>
<tr>
<th>Offence category</th>
<th>Crown appeals</th>
<th>Higher courts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Homicide and related (including driving occasioning death)</td>
<td>9.9</td>
<td>4.9</td>
</tr>
<tr>
<td>Acts intended to cause injury</td>
<td>11.3</td>
<td>12.2</td>
</tr>
<tr>
<td>Sexual assault and related</td>
<td>8.5</td>
<td>8.3</td>
</tr>
<tr>
<td>Dangerous or negligent acts (excluding driving occasioning death)</td>
<td>2.0</td>
<td>1.9</td>
</tr>
<tr>
<td>Abduction and related</td>
<td>3.8</td>
<td>1.3</td>
</tr>
<tr>
<td>Robbery, extortion and related</td>
<td>19.8</td>
<td>22.0</td>
</tr>
<tr>
<td>Unlawful entry/burglary</td>
<td>7.8</td>
<td>14.0</td>
</tr>
<tr>
<td>Theft and related</td>
<td>2.0</td>
<td>3.8</td>
</tr>
<tr>
<td>Deception and related</td>
<td>6.1</td>
<td>4.3</td>
</tr>
<tr>
<td>Illicit drug</td>
<td>23.9</td>
<td>21.8</td>
</tr>
<tr>
<td>Weapons and explosives</td>
<td>1.7</td>
<td>1.1</td>
</tr>
<tr>
<td>Property damage and environmental</td>
<td>0.7</td>
<td>1.0</td>
</tr>
<tr>
<td>Public order</td>
<td>0.3</td>
<td>1.0</td>
</tr>
<tr>
<td>Road traffic</td>
<td>0.0</td>
<td>0.0</td>
</tr>
<tr>
<td>Against justice/government</td>
<td>1.4</td>
<td>1.6</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>0.7</td>
<td>0.8</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>100</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>
The results indicate that no particular offence category was over or under-represented, with the possible exception of homicide and related offences (over-represented) and unlawful entry/burglary (under-represented).

**Appeals and the first instance disposition**

The most common sentences for which a Crown appeal was lodged were:

- full-time custodial sentences (196 cases, 66.9%),
- suspended sentences (44 cases, 15.0%),\(^{144}\)
- periodic detention (24 cases, 8.2%),
- good behaviour bonds (8 cases, 2.8%),\(^{145}\)
- non-conviction orders (7 cases, 2.4%),\(^{146}\)
- home detention orders (5 cases, 1.7%),
- community service orders and fines (2 cases, 0.7%),
- fines (2 cases, 0.7%), and
- s 11 deferred sentences (5 cases, 1.7%).

Obviously, the appeals against imprisonment concerned the length of the term of sentence, whereas in many of the non-custodial penalty cases, the Crown appeal concerned the type of penalty imposed. The success of the latter appeals were often related to an error concerning leniency of the penalty option chosen, which is discussed later.

**Standard non-parole period offences**

There were eight Crown appeals which involved offences caught by the new standard non-parole period legislation.\(^{147}\) In six of those cases, the Court of Criminal Appeal allowed the appeal and increased the sentence. In four of the cases where the appeal was allowed, the length of the custodial sentence was increased,\(^{148}\) in the fifth case the sentence was increased from a suspended sentence to periodic detention order, and in the

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144 There were 26 cases where a suspended sentence was imposed with supervision, 11 cases where the suspended sentence was imposed without supervision, five cases where a s 20 Commonwealth conditional release was imposed, and two cases were suspended control orders.

145 Of these, five were imposed with supervision, two were imposed without supervision, and one was a s 19B Commonwealth bond.

146 Of these, one was a Commonwealth s 19B dismissal.


sixth case the matter was remitted to the Drug Court for re-sentencing. In two of these six cases, the judge erred by misapplying the new legislation and associated case law, as articulated in *R v Way*.149

The s 5DA appeals

Between 2001 and 2004, inclusive, there were five appeals lodged under s 5DA of the *Criminal Appeal Act 1912*.150 These were excluded and treated separately for the purposes of our study. In four of the five cases the appeal was allowed.

Section 5DA provides:

1. The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any sentence imposed on a person that was reduced because the person undertook to assist law enforcement authorities, if the person fails wholly or partly to fulfil the undertaking.

2. On an appeal the Court of Criminal Appeal may, if it is satisfied that the person has failed wholly or partly to fulfil the undertaking, vary the sentence and impose such sentence as it thinks fit.

In *R v KS*151 Wood CJ at CL said of s 5DA:

“The ability of the Crown to invoke this section is a very important part of the criminal justice system. Persons who give undertakings and who receive the benefit of those undertakings by way of a discounted sentence can, subject to exceptional circumstances, expect to have their sentences increased if they renege on their undertaking to give evidence. The departure from an undertaking of that kind is not to be regarded lightly and it will normally justify appellate intervention.”

In *R v Waga*152 the offender failed to fulfil an undertaking to give evidence at a co-offender’s trial. The Court of Criminal Appeal held that s 5DA only applies where there has been a breach of an undertaking to provide future assistance. Where a discount has been allowed for past assistance, s 5DA has no role to play. It is therefore highly desirable for the sentencing judge to specify the proportion of the reduction referable to future and past assistance separately.

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149 (2004) 60 NSWLR 168. These were the cases of *R v Shi* [2004] NSWCCA 135 and *R v Pellew* [2004] NSWCCA 434.
151 [2005] NSWCCA 87 at [19].
The error principle

The court will not interfere with a sentence merely because it considers the sentence to be less than the court itself would have imposed. It will only intervene and re-sentence where a legal error has been established by the Crown. The concept of error is explained earlier in the discussion of the legal principles governing Crown appeals.

Identifying a specific error of sentencing principle alone is not enough to allow a Crown appeal. It is said that the sentence must also be manifestly inadequate before the Court of Criminal Appeal can intervene.\(^{153}\) However, a specific error of fact or law or procedure may explain how the manifest inadequacy resulted.

If the sentence imposed is shown to be manifestly inadequate, that by itself is enough to intervene. The basis of intervention in a case of that kind is the last referred to in *House v The King*, where the nature of the error may not be discoverable but “the result embodied in the order” is “unreasonable or plainly unjust.” In *R v Allpass*\(^{154}\) the Court of Criminal Appeal described this form of error in the following terms:

> “[T]he sentence itself may be manifestly excessive or inadequate, and thus disclose error.”

*Allpass* was cited with approval by all members of the High Court in *Lowndes v The Queen*\(^{155}\).

Recording the errors

This study sought to identify the sentencing errors, for the purpose of providing an impression of the mistakes that occurred, and to examine whether there were any discernible patterns. It was difficult to classify errors definitively. The fact is that some errors are intertwined with others. Sometimes the Court of Criminal Appeal did

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\(^{153}\) *R v Reynolds* [2004] NSWCCA 51 at [26].  
\(^{154}\) (1993) 72 A Crim R 561 at 562.  
not clearly and specifically identify the nature of the error and discrete categories of error were difficult to define because there was conceptual overlap between them. For example, failing to give sufficient weight to the objective seriousness of the offence would often be identified at the same time as other errors and would often be related to the error of giving excessive weight to the subjective features of the offender. Further, certain errors seem to be more closely related to the sentencing figure than others. For example, the failure to give due weight to the objective seriousness of the crime would directly affect the sentence length, while errors relating to the misapplication of a sentencing principle, such as attributing too much weight to the effect of imprisonment on a third party, would not directly affect the length or nature of sentence.

**Findings of error by offence categories**

Error was found in 211 of 293 cases (72% of all Crown appeals), as detailed in Table 2.

Errors were more likely to be identified when the Crown appeal was from a case involving:
- a weapons or explosives offence (100%, 5 of 5 cases),
- an offence against justice procedures and government (100%, 4 of 4 cases),
- an abduction offence (90.9%, 10 of 11 cases), or
- an offence involving an act intended to cause injury (87.9%, 29 of 33 cases).

Errors were least likely to be identified when the Crown appeal was from a case involving:
- deception offences (50%, 9 of 18 cases),
- sexual assault offences (60%, 15 of 25 cases) and
- homicide and related offences (62.1%, 18 of 29 cases).

**Multiple errors**

There were 151 cases (71.6%) where the judge made multiple errors when sentencing the offender. Multiple errors occurred mostly in abduction and related offences (90%, 9 of 10 cases), followed by homicide and related offences (83.3%, 15 of 18 cases), robbery and extortion offences (78%, 32 of 41 cases) or illicit drug offences (75.9%, 41 of 54 cases), when compared to other offences.

In some cases where there were multiple errors, the Court of Criminal Appeal held that one of the identified errors alone would not have led to the appeal being allowed but that the appeal was allowed on the basis of the cumulation of errors. Although it is difficult to say in these cases which error was responsible for an increase in the sentence, identifying the various types of error is useful to determine if there are any patterns in error committed by the sentencing judge. The success rate for a case with multiple errors was not significantly greater than that for cases involving single errors. There was also no significant correlation between the number of errors committed and the success rate in any particular case.
Grouping errors according to *House v The King*

The errors were grouped into the three *House v The King* categories:

1. Acting on a wrong principle or failing to apply a sentencing law correctly.
2. Factual errors where a finding was not open.
3. Where no specific error was found but the sentence was found to be plainly unjust or manifestly inadequate.

There were far more errors in regard to the judge acting on a wrong principle or failing to apply a sentencing law correctly (91%, 192 of 211 cases) as compared to factual errors (9%, 19 of 211 cases) or cases where no specific error was found but the sentence was found to be manifestly inadequate (termed for convenience plainly unjust sentences, as that term was employed in *House v The King*) (9%, 19 of 211 cases). This was to be expected, given that the Court of Criminal Appeal is a court of error and will be reluctant to overturn...
a finding of a trial judge. Further, the authorities suggest that Crown appeals in which the Crown simply asserts that the error is that the sentence is plainly unjust, are more difficult to succeed than severity appeals. Figure 1 presents the frequency of the three categories of error described in *House*.

The most common errors of principle were:

- failing to reflect the objective gravity of the offence in the sentence and have reasonable proportionality between the objective seriousness of the offence and the subjective circumstances (138 cases, 65.4% of all 211 appeals where an error was found),
- errors relating to the non-parole period (83 cases, 39.3%),
- totality errors (53 cases, 25.1%),
- errors of law not otherwise classified (56 cases, 26.5%),
- attributing too much weight to a particular feature (39 cases, 18.5%), and
- errors relating to the penalty option chosen by the judge (31 cases, 14.7%).

Table 3 on page 29 provides details of error types and their frequency. Ensuing chapters then examine in detail the main types of error in each of the three categories that were identified by the Court of Criminal Appeal and some specific examples.

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156 *R v Holder and Johnston* [1983] 3 NSWLR 245 per Street CJ at 255. In *R v Chua* [2004] NSWCCA 50 at [21], the court suggests that it will be less likely to intervene where it is an error of this kind.
Table 3 — Error types and their frequency

<table>
<thead>
<tr>
<th>Error type</th>
<th>Frequency</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Errors of principle</td>
<td>192</td>
<td>91.0</td>
</tr>
<tr>
<td>Objective seriousness</td>
<td>138</td>
<td>65.4</td>
</tr>
<tr>
<td>Non-parole period</td>
<td>83</td>
<td>39.3</td>
</tr>
<tr>
<td>Totality</td>
<td>53</td>
<td>25.1</td>
</tr>
<tr>
<td>Inappropriate penalty option</td>
<td>31</td>
<td>14.7</td>
</tr>
<tr>
<td>Misapplication of guideline judgment</td>
<td>22</td>
<td>10.4</td>
</tr>
<tr>
<td>Excessive weight given to a factor(^{(a)})</td>
<td>39</td>
<td>18.5</td>
</tr>
<tr>
<td>Error regarding purposes of sentencing</td>
<td>14</td>
<td>6.6</td>
</tr>
<tr>
<td>Form 1 matters not taken into account</td>
<td>14</td>
<td>6.6</td>
</tr>
<tr>
<td>Special circumstances</td>
<td>10</td>
<td>4.7</td>
</tr>
<tr>
<td>Unexplained departure from established range</td>
<td>5</td>
<td>2.4</td>
</tr>
<tr>
<td>Errors of principle not otherwise classified</td>
<td>56</td>
<td>26.5</td>
</tr>
<tr>
<td>Errors of fact</td>
<td>19</td>
<td>9.0</td>
</tr>
<tr>
<td>Failure to consider material fact(^{(b)})</td>
<td>9</td>
<td>4.3</td>
</tr>
<tr>
<td>Finding not open on evidence</td>
<td>10</td>
<td>4.7</td>
</tr>
<tr>
<td>Plainly unjust</td>
<td>19</td>
<td>9.0</td>
</tr>
</tbody>
</table>

\(n\) refers to number of cases with that type of error

\% refers to percentage of all cases where error was found

NB Plainly unjust errors were mutually exclusive to principle and factual errors: 82% principle only, 9% factual and principle, 9% plainly unjust. All factual errors also involved errors of principle

\(^{(a)}\) This included too much weight given to the offender’s guilty plea (10 cases), assistance to authorities (10), and the offender’s subjective features (24)

\(^{(b)}\) This error category involved a failure to take into account the fact that the offender was on bail (2 cases), had prior convictions (2 cases), was on parole (3 cases), was serving a Community Service Order or Bond (2 cases)
Errors involving misapplication of sentencing principle

In 91% of the cases where error was established (192 of 211 cases), the judge acted upon a wrong principle or allowed extraneous or irrelevant matters to guide or affect him or her. The following discussion identifies the areas of principle where the errors were committed and Table 4, on pages 32–33, sets out the relationship between type of error in principle and offence category.

Failure of sentence to reflect objective seriousness of crime

In the Crown appeal of *The Queen v Geddes* Sir Fredrick Jordan CJ pointed out that the sentence must reflect the objective seriousness of the offence and that there should be a reasonable proportionality between a sentence and the circumstances of the crime. Further, in *R v Dodd* the court held:

“Each crime, as *Veen v The Queen* (No 2) (1988) 164 CLR 465 at 472 stresses, has its own objective gravity meriting at the most a sentence proportionate to that gravity, the maximum sentence fixed by the legislature defining the limits of sentence for cases in the most grave category. The relative importance of the objective facts and subjective features of a case will vary. (See, for example, the passage from the judgment of Street CJ in *R v Todd* [1982] 2 NSWLR 517 quoted in *Mill v The Queen* (1988) 166 CLR 59 at 64). Even so, there is sometimes a risk that attention to persuasive subjective considerations may cause inadequate weight to be given to the objective circumstances of the case (*R v Rushby* [1977] 1 NSWLR 594).”

157 (1936) 36 SR (NSW) 554.
<table>
<thead>
<tr>
<th>Offence category</th>
<th>Proportionality</th>
<th>Non-parole period</th>
<th>Totality</th>
<th>Penalty option</th>
<th>Guideline judgment</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>N</td>
<td>n</td>
<td>%</td>
<td>n</td>
<td>%</td>
</tr>
<tr>
<td>Homicide and related</td>
<td>18</td>
<td>11</td>
<td>61.1</td>
<td>7</td>
<td>38.9</td>
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<tr>
<td>Acts intended to cause injury</td>
<td>29</td>
<td>17</td>
<td>58.6</td>
<td>8</td>
<td>27.6</td>
</tr>
<tr>
<td>Sexual assault and related</td>
<td>15</td>
<td>10</td>
<td>66.7</td>
<td>6</td>
<td>40.0</td>
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<tr>
<td>Dangerous or negligent acts endanger person</td>
<td>4</td>
<td>3</td>
<td>75.0</td>
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<td>25.0</td>
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</tr>
<tr>
<td>Robbery, extortion and related</td>
<td>41</td>
<td>28</td>
<td>68.3</td>
<td>22</td>
<td>53.7</td>
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<tr>
<td>Unlawful entry with intent, burglary, break and enter</td>
<td>16</td>
<td>10</td>
<td>62.5</td>
<td>5</td>
<td>31.3</td>
</tr>
<tr>
<td>Theft and related</td>
<td>4</td>
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<td>25.0</td>
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<td>25.0</td>
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<tr>
<td>Deception and related</td>
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<td>6</td>
<td>66.7</td>
<td>4</td>
<td>44.4</td>
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<tr>
<td>Illicit drug</td>
<td>54</td>
<td>37</td>
<td>68.5</td>
<td>22</td>
<td>40.7</td>
</tr>
<tr>
<td>Weapons and explosives</td>
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<td>3</td>
<td>60.0</td>
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<tr>
<td>Property damage and environmental pollution</td>
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<tr>
<td>Against justice procedures, government</td>
<td>4</td>
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<td>0.0</td>
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<tr>
<td>Miscellaneous</td>
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<tr>
<td>Total</td>
<td>211</td>
<td>138</td>
<td>65.4</td>
<td>83</td>
<td>39.3</td>
</tr>
</tbody>
</table>

N refers to number of cases of that offence category where an error occurred
n refers to number of cases within that offence category where the particular error type occurred
% refers to the proportion of cases where that type of error occurred for that offence category
<table>
<thead>
<tr>
<th>Excessive weight</th>
<th>Purposes</th>
<th>Form 1</th>
<th>Special circumstances</th>
<th>Unclassified</th>
<th>Failure to consider</th>
<th>Finding not open</th>
<th>Plainly unjust</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
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<td>%</td>
<td>n</td>
<td>%</td>
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<td>7</td>
<td>38.9</td>
<td>4</td>
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<td>7</td>
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<td>0</td>
<td>3</td>
<td>7.3</td>
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<tr>
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<td>12.5</td>
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<td>6.3</td>
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<td>2</td>
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<tr>
<td>10</td>
<td>18.5</td>
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<tr>
<td>39</td>
<td>18.5</td>
<td>14</td>
<td>14</td>
<td>6.6</td>
<td>10</td>
<td>4.7</td>
<td>56</td>
</tr>
</tbody>
</table>

Errors involving misapplication of sentencing principle
The vast majority of errors of principle fell into this category. Of the total number of Crown appeals, the error of failing to reflect the objective seriousness of the offence in the sentence occurred in 138 cases (65.4% of all cases where an error was identified).

This error was more likely to be found in cases involving:
- abduction offences (90%),
- offences involving dangerous or negligent acts (75%) (excludes dangerous driving occasioning death),
- illicit drug offences (68.5%), and
- robbery and extortion offences (68.3%).

It was less likely to occur when the judge was sentencing an offender for:
- theft offences (25%),
- offences against a justice or government procedure (50%), or
- acts intended to cause injury (58.6%).

**Error in imposing non-parole period**

Closely related to the error of failing to impose a sentence proportionate to the gravity of the crime is the error of imposing a non-parole period which is too short. As Spigelman CJ said in *R v Simpson*, the sentencing judge needs to:

> “ensure that the time an offender must spend in prison reflects all of the circumstances of the offence and the offender — including the objective gravity of the offence and the need for general deterrence.”

The non-parole period should reflect matters such as the seriousness of the offence, deterrence and the prospects for rehabilitation:

> “The intention of the legislature in providing for the fixing of minimum terms is to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence.”

In 83 of 211 cases (39.3% of all cases where an error was identified), the non-parole period was considered too short having regard to the objective seriousness of the offence. This error type therefore heavily overlapped with the previous one — objective seriousness.

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159 (2001) 126 A Crim R 525 at [65].
Such an error was more likely to occur when the judge was sentencing the offender for:

- abduction offences (70.0%),
- robbery and extortion offences (53.7%), and
- deception offences (44.4%).

It was less likely to occur for:

- weapons and explosives offences (0.0%),
- against justice procedures (0.0%),
- theft offences (25.0%),
- offences involving dangerous and negligent acts (25.0%), and
- offences involving acts intended to cause injury (27.6%).

**Totality errors — Pearce v The Queen**

*Pearce v The Queen*¹⁶¹ is authority for the proposition that, when sentencing an offender for more than one offence, the sentencer must fix an appropriate sentence for each offence, determine whether the sentences should be served consecutively or concurrently and then, when reviewing the aggregate sentence, consider whether it is “just and appropriate” and reflects the criminality before the court.¹⁶² It is no secret that *Pearce*, although encouraging transparency, made the application of the principle of totality more technical.¹⁶³

This was a very common error identified by the Court of Criminal Appeal in Crown appeals. In 53 of 211 cases, the sentencing judge offended the totality principle by failing to apply *Pearce*. This comprised 25.1% of all cases where error was detected.

Understandably, this error was more likely to occur in cases involving offences which commonly contain multiple counts on the indictment. For example, property offences¹⁶⁴ and sexual assault offences (40%).

It is not known whether *Pearce* will be applied with the same rigour in terms of the identification of error following *Johnson v The Queen*.¹⁶⁵ There it was held that *Pearce* does not decree that a sentencing judge may never lower each sentence and then aggregate them for determining the time to be served, as suggested in *Mill v The Queen* (1988) 166 CLR 59.

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¹⁶² *Pearce v The Queen* (1998) 194 CLR 610 at 624.
¹⁶³ See His Honour Judge Norrish QC’s comment in “Sentencing Advocacy”, Public Defenders Conference, 14 May 2005 at p12: “The difficulty in underlying the implications of Pearce has been reflected in the apparent explosion of the Crown and prisoner appeals claiming error by sentencing judges. Even in 2003 it was observed in the Court of Criminal Appeal that the ‘full ramifications of this statement of sentencing principle have not been clearly established’ (*R v Basha* [2003] NSWCCA 36 at [63]).”
¹⁶⁴ Theft offences (50.0%), deception offences (44.4%), robbery and extortion (31.7%) and unlawful entry/burglary (31.3%).
Sentencing option selected inappropriate

There were 31 cases (14.7% of all cases where an error was identified) where the court found that the penalty option chosen was not appropriate, thus disclosing error.

This error was more likely to occur when the judge was sentencing the offender for:

- deception offences (33.3%),
- abduction and related offences (30%),
- theft offences (25%),
- offences against justice procedures (25%), and
- illicit drug offences (18.5%).

There were ten drug offence cases where the Court of Criminal Appeal found that the penalty imposed should have been of a type more severe on the hierarchy of penalties.\(^{166}\)

Many of the errors in this category relating to drug offences were affected by the principle that a custodial sentence should generally be imposed for drug traffickers, except in “exceptional circumstances.”\(^{167}\)

In *R v Dunlop*,\(^{168}\) a dangerous driving case, the Court of Criminal Appeal said:

“periodic detention in this case was not properly available, by reason of the leniency which is built into such a sentence: *Hallocoglu* (1992) 63 A Crim R 287. To that extent, error of law has been shown, in accordance with the principles expressed by the High Court in *House v The King*.”

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\(^{166}\) In *R v Togias* [2001] NSWCCA 522, a drug importation case, the Court of Criminal Appeal found that the suspended sentence imposed was outside the range for drug importation but applied the discretion not to intervene and remitted the matter to the District Court.

In *R v Canino* [2002] NSWCCA 76, a drug supply case, the Court of Criminal Appeal increased the sentence from a suspended sentence to full time imprisonment.

In *R v McVitie* [2002] NSWCCA 344, a drug supply case, the Court of Criminal Appeal increased the sentence from periodic detention to full time custody.

In *R v Bouney* (2002) 132 A Crim R 482, a drug supply case, the Court of Criminal Appeal increased the sentence from a suspended sentence to periodic detention.

In *R v McBride* [2003] NSWCCA 282, a drug supply case, the Court of Criminal Appeal increased the sentence from a community service order to periodic detention.

In *R v X* [2004] NSWCCA 93, a drug supply case, the Court of Criminal Appeal increased the sentence from a suspended sentence to periodic detention.

In *R v Tolley* [2004] NSWCCA 165, a drug supply case, the Court of Criminal Appeal increased the sentence from a suspended sentence to a full time custodial sentence.

In *R v Kipic and Elias* [2004] NSWCCA 452, a drug supply case, the Court of Criminal Appeal increased one of the sentences for each offender from home detention to periodic detention.

In *R v Ha* [2004] NSWCCA 386, a drug supply case, the Court of Criminal Appeal, although finding that the judge erred in imposing periodic detention as the penalty type, did not impose a more severe penalty but increased the length of the periodic detention sentence that was imposed by the sentencing judge.


\(^{168}\) [2001] NSWCC 435 at [43]–[44].
This type of error was less likely to occur where the offence involved:

- sexual assault and related (0.0%),
- dangerous or negligent acts endangering person (0.0%),
- robbery and extortion (9.8%),
- acts intended to cause injury (10.3%), and
- homicide offences (11.1%).

These offences are more likely to attract a sentence of full-time custody and so such an error is not possible.

Of the non-custodial penalty options, the court was more likely to find penalty option errors in sentences of:

- home detention (100%),
- bonds (100%),
- periodic detention orders (52.2%),
- community service orders (50%), and
- suspended sentences (47.8%).

### Misapplication of a guideline judgment

Guideline judgments have been promulgated by the court for the offences of armed robbery, break, enter and steal, dangerous driving occasioning death or grievous bodily harm, and for the discount for a plea of guilty. A bare failure to apply a guideline is not an error of law. The manner in which a guideline is applied in a particular case may reveal error in the reasoning process of the judge.

There were 22 cases (comprising 10.4% of all cases where an error was found) where the sentencing judge misapplied a guideline judgment. However, only half of these resulted in the Court of Criminal Appeal intervening to increase the sentence.

Most guideline judgment errors involved the judge departing significantly from the guideline judgment, misunderstanding the guideline, not referring to the guideline at all or ruling that the guideline was not applicable. In one case, the judge overlooked the fact that the guidelines in *R v Henry*\(^{170}\) already have built into them a plea of guilty and applied the *R v Thomson and Houlton*\(^{171}\) discount for guilty plea on top.\(^{172}\)

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\(^{169}\) In one case (*R v Edigrow* [2001] 125 A Crim R 551), the offender received a full-time custodial sentence (for the principle offence) as well as a suspended sentence for another offence. The court found that the judge erred in imposing the suspended sentence penalty and made errors in relation to the principle offence as well. Because we record principle offences only, this is entered in our database as imprisonment but the case was recorded as having an error in the penalty option chosen because of the non-principle offence.


By far the most common error in this group occurred in the application of the *R v Henry* guideline judgment for armed robbery. Consequently, a guideline judgment error was more likely to occur when the judge was dealing with a robbery offence (34.1%) or dangerous and negligent acts (25%).

It seems that, although guideline judgments were introduced with a goal of achieving greater consistency in sentencing, they are also a fertile ground for exposing error.

**Examples of guideline errors**

*Henry guideline*

*R v Cimone*[^174]

The judge erred in that the sentence involved a significant departure from the *Henry* guideline judgment.

*R v Hoschke*[^175]

The case was not one which could be taken out of the parameters set by *Henry* and the imposition of a full-time custodial sentence, albeit at this late stage, was inevitable.

*R v Poihipi*[^176]

An application of *R v Henry*[^177] indicated that the sentence was inadequate. There were no reasons given for departing from the guideline judgment and subjective features did not justify departure, at least to the level adopted for the non-parole period.

*R v Wilson*[^178]

The sentencing judge decided that the *Henry* guideline was not applicable, based upon his lengthy experience in sentencing offenders, and that drug addiction is a medical problem and not the proper province of the criminal law. Such an approach was contrary to principle.


The judge overlooked the fact that the guidelines in Henry already had built into them a discount for a plea of guilty, particularly where the significance of that plea is limited by a strong Crown case, and applied the Thomson discount on top.

**R v Cotter, Russell, Iremonger and Eter**\(^{180}\)

The sentencing judge failed to comply with the Henry guideline and the principles applicable to joint criminal enterprise. Although the sentencing judge correctly said that it was necessary for him to have regard to the guideline decision in Henry, even though the case before him was not on all fours, the sentences he imposed on Eter and Cotter do not come close to being reconcilable with that decision.

**R v SY and KS**\(^{181}\)

The sentence did not reflect the seriousness of the crime. The level of criminality was more serious than that delineated by the Henry guideline: the offenders were not young; the crime was premeditated and the violence was not “limited.”

**R v Reynolds**\(^{182}\)

The judge erred by not taking a more critical approach to the relationship between the Henry profile, the guideline judgment and features of the respondent’s case.

**R v Snider**\(^{183}\)

The sentence imposed was less than that suggested by the guideline judgment in Henry.\(^{184}\) The sentencing judge neither discussed this guideline in his sentencing remarks nor articulated those matters justifying a lesser sentence than that promulgated in the guideline: **R v Ceissman**\(^{185}\) applied.

In several respects the respondent’s position was worse than that envisaged in Henry.

**R v Jones**\(^{186}\)

The sentencing judge erred in not dealing with the offence other than in accordance with the guideline judgment in Henry\(^{187}\) and failing to give sufficient weight to the fact that the offence was committed while the respondent was on parole. It was not disputed that the sentencing judge did not refer to the Henry guideline judgment in his sentencing remarks.

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The subject offence, even if it had been dealt with at the time the judge sentenced the respondent, was significantly more serious than the offences in respect of which he was then sentenced. It would have been totally inappropriate for that offence to be merely taken into account on the Form 1. It would have been the primary offence for which the respondent was sentenced and the judge would have been obliged to apply the Henry guideline.

**Jurisic and Whyte guidelines**

*R v Begbie*\(^{188}\)

There was no proper basis for the judge to ignore the *Jurisic* guideline.

*R v Campton*\(^{189}\)

The departure from the guidelines of *Jurisic* and *Whyte* and the imposition of a periodic detention order were not justified. A period of full-time imprisonment was the appropriate sentence.

*R v Price*\(^{190}\)

The judge erred in regarding the case as a “typical case,” as referred to in *R v Whyte*.\(^{191}\) At least three matters took the case out of the ordinary class:

1. The plea of not guilty.
2. There was no contrition, as distinct from remorse.
3. There was more than one death involved.

The fact that the respondent was driving two passengers in his vehicle increased his moral culpability for driving in a manner dangerous or under the influence of alcohol.\(^{192}\)

Howie and Simpson JJ said:\(^{193}\)

“The Chief Justice should not be taken in *Whyte* to be suggesting that the number of persons put at risk cannot be a matter that can affect an offender’s moral culpability, but only that in the normal case it would not.”

**Thomson guideline**

The misapplication of this guideline for guilty pleas often overlapped with the next identified error — excessive weight given to the offender’s guilty plea.

\(^{188}\) [2001] NSWCCA 206.

\(^{189}\) [2004] NSWCCA 56.

\(^{190}\) [2004] NSWCCA 186.

\(^{191}\) (2002) 55 NSWLR 252.

\(^{192}\) *R v Skrill* [2002] NSWCCA 484.

\(^{193}\) [2004] NSWCCA 186 at [37].
The judge erred in stating that one of the four related components of the *Thomson* guideline (“in some cases the plea in connection with other relevant factors will change the nature of the sentence imposed”) may be treated as weakening the guidance given in a wholly different context by *Clark*.195

R v Speechley196
The judge misapplied the *Thomson* guideline.

Wong and Leung

R v Ceissman197
In departing from the range suggested as appropriate for a mid-range trafficable quantity, the sentencing judge observed that the decision in *Wong and Leung* was “merely to be used as a guideline.” This was to understate its effect as a considered pronouncement of the court. It is true that guideline judgments are not meant to be applied rigidly or to lay down binding precedent from which there is never to be a departure, however, they are intended to be indicative of the range of sentence that is regarded as appropriate following a considered examination by the court of the authorities and sentencing principle.

While a sentencing judge does retain a discretion within the guidelines, including a discretion to depart from them if the particular circumstances of the case justify, the court expects the reasoning for such a departure to be articulated with some precision and justified by reference to the subjective facts.

Excessive weight given to particular factors
In 39 cases (18.5%), the judge gave too much weight to a particular circumstance in the case such as the plea of guilty, assistance to authorities or the offender’s subjective features.

(a) Guilty plea
This error refers to cases where the sentencing judge gave too much discount for the plea of guilty and failed to accord with the principles set out in the *R v Thomson and Houlton*198 guideline judgment. According to the guideline, the reduction for the utilitarian value of the plea alone should be in the range of 10–25%.

194 [2004] NSWCCA 452.
197 [2001] NSWCCA 73.
In our study, there were ten cases (4.7% of cases where an error was found) where too much weight was given to the fact that the offender pleaded guilty and too large a discount was provided. It was much more likely to occur where the judge was sentencing the offender for a homicide offence (16.7%). It is not possible to draw any further conclusions from this error, regarding offence type, because of the relatively small number of cases.

(b) Assistance to authorities

In ten cases (4.7%), the judge was found to give too much weight to the fact that the offender assisted authorities. Half of these cases occurred when the judge was sentencing the offender for an illicit drug offence. It was therefore more likely that the judge would commit this error when sentencing an offender for a drug offence (9.3%). This is understandable given the nature of drug offences and the fact that conviction of co-offenders often depends on the co-operation of the offender.

In addition to these errors, there were five appeals pursuant to s 5DA of the Criminal Appeal Act 1912 (discussed on page 24).

(c) Subjective factors

This error included matters such as too much weight given to rehabilitation prospects, mental condition at time of offence, effect on the offender’s family, considering an offender’s background “tragic and absolutely unique,” and too much weight given to forgiveness by the victim’s family.

Subjective factors errors are related to errors involving the objective seriousness of the offence. If the subjective circumstances are given too much weight, not enough weight will have been afforded to the objective circumstances and the required balance would have been disturbed.

This error occurred in 24 cases (11.4% of all cases where an error was detected). Subjective factors errors were mostly found in sentences for:

- homicide offences (22.2%),
- abduction offences (20%),
- weapons and explosives offences (20%), and
- offences involving acts intended to cause injury (17.2%).

199 Sentences for theft offences were most likely to experience this error type (25%), however the number of cases in this offence group was only four.
They were less likely for:

- deception offences (0.0%),
- dangerous or negligent acts (0.0%),
- theft offences (0.0%),
- offences against justice procedures (0.0%),
- property damage (0.0%),
- unlawful entry offences (6.3%),
- sexual assault offences (6.7%), and
- drug offences (7.4%).

**Purposes of sentencing as a source of error**

This error type refers to cases where the sentencing judge failed to sentence in accordance with the declared purposes of sentencing, including those outlined in s 3A of the *Crimes (Sentencing Procedure) Act 1999*, such as deterrence,\(^{205}\) denunciation\(^{206}\) and community protection.\(^{207}\)

In 14 cases (6.6% of the cases where error was identified), the judge erred by failing to sentence in accordance with the declared purposes of sentencing. This error was more likely to occur where the judge was sentencing the offender for:

- dangerous or negligent acts (25%),
- homicide offences (22.2%),
- sexual assault offences (20%), or
- unlawful entry offences (12.5%).

**Insufficient weight given to Form 1 offences**

There were 14 cases (6.6%) where the judge failed to give sufficient weight to the Form 1 offences attached to the indictment. This error was more likely to occur where the judge was sentencing:

- sexual assault matters (26.7%),
- weapons and explosives offences (20%),
- abduction offences (10%), and
- robbery and extortion offences (7.3%).


\(^{207}\) For example, *R v MA* [2004] NSWCCA 92.
Apart from the abduction offence, it is understandable that offences which commonly involve multiple counts would more often lead to this type of error.

**Errors of sentencing principle not otherwise classified**

These errors include general errors of law in the application of sentencing principles and legislation, such as:

- Taking into account irrelevant considerations.
- Not giving sufficient weight to an aggravating feature.
- Misstating the maximum penalty for an offence.
- Erring in the application of other Court of Criminal Appeal (NSW) cases in assessing an appropriate sentence.
- Misapplication of the *Fernando* principle.
- Error in the weight given to a victim impact statement.
- Errors in the procedures by which a home detention order is imposed.
- Errors in the manner in which *R v Way* was applied.
- Errors in post-dating suspended sentences.
- Approaching the sentencing order in accordance with the *Crimes (Sentencing Procedure) Act* as it stood prior to the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*.
- Errors in regard to the application of the now repealed s 16G *Crimes Act 1914 (Cth)*.
- Erroneously taking into account concurrent custody and backdating sentences, as occurred in *R v Hickling and Avery*, where the judge said, upon sentencing the two Aboriginal offenders, that he “did not propose to … add to their misfortune as young men, who are spending more of their time in gaol than out.”

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208 There was only one case out of the ten abduction cases where this occurred so the sample size was relatively small.


210 Such as the fact that the offender was on bail or parole at the time of the offence. See for example, *R v Al-Zaabi* [2001] NSWCCA 538, *R v Loh* [2002] NSWCCA 23 and *R v McVittie* [2002] NSWCCA 344.


The errors included in this broad group occurred in 56 cases (26.5% of all cases where error was identified) and were most likely to occur where the judge was sentencing an offender for:

- homicide offences (44.4%),
- weapons and explosives offences (40%),
- acts intended to cause injury (37.9%), and
- sexual assault (33.3%).

**Special circumstances**

Section 44(2) of the *Crimes (Sentencing Procedure) Act 1999* provides that the balance of the term of the sentence must not exceed one-third of the non-parole period of the sentence, unless the court decides there are special circumstances.

In ten cases (4.7%), the judge erred in relation to special circumstances. In some instances, the finding of special circumstances was not open in the circumstances. In other cases, too much weight was given to the finding and, in others, the judge misapplied the case law relating to special circumstances or failed to give reasons for the finding of special circumstances.

For example, in *R v Smith* the judge failed to specify that special circumstances had been established yet varied the non-parole period. His Honour did not identify the circumstances which might have the necessary character and thereby might attract such significance as to warrant the variation of the statutory proportions. His Honour failed, in that regard, to give adequate reasons for variation of the proportions. However, despite the error in this case, the sentence was appropriate and the appeal was dismissed.

Judges were more likely to make these errors in relation to homicide offences (16.7%), deception offences (11.1%) and abduction offences (10%).

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224 *R v Edigarov* [2001] NSWCCA 436. In this case the finding of special circumstances by the sentencing judge was related to the fact the offence of kidnapping was seen to be a “by-product of the respondent’s anger, frustration and disappointment in relation to the breakdown of the marriage and the imposition of an apprehended violence order.” That finding was unjustified in law. The Court of Criminal Appeal held that the special circumstances are those which are related to the need to reduce the proportion between the head sentence and the non-parole period, in most cases being referable to the need for an extended period of post release supervision, or for access to some form of treatment which is not readily available within the prison system. The purpose in each case is to foster rehabilitation and a lawful return of the offender to the community. It was not appropriate to give a double discount, by treating as special circumstances, those objective or subjective considerations which otherwise justify leniency in relation to the head sentence.


Unexplained departure from an established range

In *R v Bezan*227 Wood CJ at CL said:

“It remains appropriate, however, to look at the sentence imposed by reference to comparative sentences to see whether there is a reason, including a general sentencing discretion, to support the result of a substantial and unexplained departure from an established range in order to ensure that a reasonable degree of consistency is maintained. Prima facie, a departure from an established range manifests error in failing to maintain consistency: *Griffiths v The Queen* (1977) 137 CLR 293; see also *R v Whyte* (2002) 55 NSWLR 252 at 278 [168] – 280 [179] and 282 [190].”

In this study, there were five cases (2.4%) where error was found due to a departure from the established range of sentences. The small number of cases where this error occurred makes it difficult to draw conclusions related to offence type.

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227 [2004] NSWCCA 342 at [31].
Errors of fact

These errors relate to the second limb of *House v The King* — that is, the judge mistook the facts or did not take into account some material consideration. Of the 211 cases in which error was identified, 19 (9.0%) involved errors of fact.

**Failure to consider a material fact**

In nine of 211 cases (4.3% of cases where error was detected), the judge failed to consider a material fact. This included failure to consider that the offender:

- was on bail,
- was on parole,
- was serving a community service order or bond, or
- had a prior criminal record at the time of the offence.\(^{228}\)

In some cases, the judge failed to give consideration to more than one of these factors.\(^{229}\) Because of the small number of cases with this type of error, no conclusions regarding trends or offence types can be made.

In three cases the judge failed to have regard to the fact that the offender was on parole at the time of the offence.\(^{230}\) In two cases the sentencing judge made no reference to the fact that the offence was committed whilst the offender was on bail.\(^{231}\) And in two cases the sentencing judge failed to take into account the offender’s prior convictions.\(^{232}\) For example, in *R v Eustice*\(^{233}\) the judge erred in finding that the respondent had no criminal record. The respondent was subject to a good behaviour bond for a similar offence at the time the subsequent offences were committed.

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228 There was also one case where the judge failed to consider another material fact — a letter which had been written by the offender prior to the offence which was of relevance to his state of mind: *R v Miles* [2002] NSWCCA 276.


In two cases the judge erred in not considering the fact that the offender was serving a community service order and/or was on a bond at the time of the offence. For example, in *R v Nasr*\textsuperscript{234} the sentencing judge failed to consider the fact that the offender was on a bond and a CSO at the time of the offence; and in *R v Cicekdag*\textsuperscript{235} the sentencing judge failed to consider the fact that the offender was on a CSO at the time of the offence.

**Finding not open**

In ten cases (4.7%) the judge erred in finding facts that were not open on the evidence. For example, in *R v Wigney*\textsuperscript{236} the evidence did not sustain a finding that the firing of the pistol by the respondent was “almost reflexive.” The discharge was deliberate and incontrovertible. In *R v Boundy*\textsuperscript{237} the offender was charged with a drug offence. The court held that it was not open for the judge to find that the circumstances were exceptional enough to allow the offender to escape a custodial sentence being imposed.

There was no particular offence for which this error was more likely to occur.

\textsuperscript{234} [2004] NSWCCA 441.
\textsuperscript{235} [2004] NSWCCA 357.
\textsuperscript{236} [2004] NSWCCA 171.
\textsuperscript{237} (2002) 132 A Crim R 482.
Error — sentence plainly unjust

This category of error is the last limb of *House v The King*. That is, while it may not be apparent how the primary judge reached the result embodied in his or her order, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure to exercise properly the discretion which the law reposes in the court of first instance. It is referred to by the High Court in *Markarian v The Queen*. There were 19 cases (9% of cases where error was detected) where, although no specific error was found, the sentence length was manifestly inadequate, disclosing error. This type of error was more likely to occur where the offender was being sentenced for:

- unlawful burglary offences (31.3%),
- offences involving dangerous or negligent acts (25%),
- theft offences (25%),
- offences against justice procedures (25%), and
- weapons and explosives offences (20%).

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238 [2005] HCA 25 at [25].
Error in cases where the appeal was allowed

The following discussion further analyses error but only in cases where the appeal was actually allowed. In 54.6% (160 of 293 cases) of all Crown appeals, error was found and the appeal was allowed. Crown appeals were more likely to succeed where the first instance penalty imposed was:

- community service orders (100.0%, although there were only two cases),
- periodic detention (66.7%),
- home detention (60%), and
- full-time custody (58.7%).

Appeals were less likely to succeed where the penalty imposed was a bond (37.5%) or a suspended sentence (38.6%).

In 160 (75.8%) of the 211 cases where an error was found, the appeal was allowed. Factual errors had the greatest chance of success (89.5%), followed by errors of principle (76.6%) and plainly unjust sentence (68.4%).

Figure 2 sets out the success rate for each of the three main types of error.

**Figure 2 — Type of error and success rate**
In relation to specific errors, the chance of success was highest for errors involving:
- failure to consider a material fact (100%),
- not taking into account Form 1 matters (92.9%), and
- error in the penalty option chosen (87.1%).

 Appeals were less likely to be allowed where the error was in relation to:
- misapplication of a guideline judgment (50%),
- special circumstances (60%), and
- plainly unjust errors (68.4%).

 Table 5 sets out the different error types and the success rate of Crown appeals and Table 6 sets out the success rate for the various penalty options.

### Table 5 — Error type and success rate

<table>
<thead>
<tr>
<th>Error type</th>
<th>N</th>
<th>n</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Errors of principle</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Objective seriousness</td>
<td>138</td>
<td>111</td>
<td>80.4</td>
</tr>
<tr>
<td>Non-parole period</td>
<td>83</td>
<td>68</td>
<td>81.9</td>
</tr>
<tr>
<td>Totality (Pearce)</td>
<td>53</td>
<td>44</td>
<td>83.0</td>
</tr>
<tr>
<td>Inappropriate penalty option</td>
<td>31</td>
<td>27</td>
<td>87.1</td>
</tr>
<tr>
<td>Misapplication of guideline judgment</td>
<td>22</td>
<td>11</td>
<td>50.0</td>
</tr>
<tr>
<td>Excessive weight given to a factor (a)</td>
<td>39</td>
<td>32</td>
<td>82.1</td>
</tr>
<tr>
<td>Error regarding purposes of sentencing</td>
<td>14</td>
<td>11</td>
<td>78.6</td>
</tr>
<tr>
<td>Form 1 matters</td>
<td>14</td>
<td>13</td>
<td>92.9</td>
</tr>
<tr>
<td>Special circumstances</td>
<td>10</td>
<td>6</td>
<td>60.0</td>
</tr>
<tr>
<td>Range</td>
<td>5</td>
<td>4</td>
<td>80.0</td>
</tr>
<tr>
<td>Errors of principle not otherwise classified</td>
<td>56</td>
<td>42</td>
<td>75.0</td>
</tr>
<tr>
<td>Errors of fact</td>
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</tr>
<tr>
<td>Failure to consider material fact (b)</td>
<td>9</td>
<td>9</td>
<td>100.0</td>
</tr>
<tr>
<td>Finding not open on evidence</td>
<td>10</td>
<td>8</td>
<td>80.0</td>
</tr>
<tr>
<td>Plainly unjust sentence</td>
<td>19</td>
<td>13</td>
<td>68.4</td>
</tr>
<tr>
<td>Total</td>
<td>211</td>
<td>160</td>
<td>75.8</td>
</tr>
</tbody>
</table>

N refers to number of cases with that type of error  
\(n\) refers to number of cases where appeal was allowed with that type of error  
% refers to proportion of cases where that type of error occurred and the appeal was allowed (success rate for that error type)  

(a) This included too much weight given to the offender’s guilty plea (10 cases), assistance to authorities (10), and the offender’s subjective features (24)  

(b) This error category involves failure to take into account the fact that the offender was on bail (2 cases), had prior convictions (2 cases), was on parole (3), was serving a Community Service Order or Bond (2)
In *R v Baker*\(^{240}\) Spigelman CJ said:

“[S]uccessful Crown appeals should be rare. This is particularly so with respect to that category of appeals in which no particular error can be identified in the sentencing process and the Crown must rely on an assertion of manifest inadequacy as a basis for a conclusion that some error of principle must have occurred.”

Similarly, in *R v Holder and Johnston*\(^{241}\) Street CJ said:

“… the approach taken to the detection of error where the ground relied upon is manifest excess or manifest inadequacy is identical in both cases (cf per Isaacs J in *Whittaker v The King*), it is frequently more difficult to detect error in the form of manifest inadequacy.”

The results of this study suggest that the Court of Criminal Appeal seems to be dealing with Crown appeals in accordance with the principles enunciated above.

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\(^{240}\) [2002] NSWCCA 85 at [19].

\(^{241}\) [1983] 3 NSWLR 245 at 255.
The residual discretion not to intervene

The residual discretion to dismiss an appeal

The court has an overriding discretion to decline to intervene, even if it comes to the conclusion that error has been shown in the original sentencing process and despite the fact that the sentence is shown to be too lenient: *R v Holder and Johnston.* Street CJ said:

“An important element in determination of a Crown appeal is the exercise of the residual discretion to dismiss an appeal notwithstanding that error of one or other of the categories mentioned above may have been established by the Crown. This discretion is a real and live discretion. In practice, it is exercised not infrequently. It enables the court to keep an ultimate control by protecting a convicted person against unfairness or injustice if that would flow from an adverse appellate decision. It is in this ultimate discretionary field that considerations of what has been called double jeopardy are of particular relevance. Within this field, also, the court’s understandable reluctance to detect manifest inadequacy may be given, so to speak, a second opportunity of operating in the convicted person’s favour. I forbear from citing examples of the exercise of this discretion in favour of a convicted person lest in so doing they could be thought to have some controlling significance in a general sense. The discretion, where it is exercised, necessitates an immediate and highly subjective assessment of the circumstances of the case in hand.”

As stated earlier, many factors influence the discretion not to interfere with the original sentence.

**Double jeopardy**

When a court decides to re-sentence an offender following a successful Crown appeal, it ordinarily gives recognition to the element of double jeopardy involved (in twice standing for sentence) by imposing a sentence that is somewhat less than the sentence it considers should have been imposed at first instance.\(^{244}\) The consideration of double jeopardy is so important in Crown appeals that the court will not infrequently exercise its discretion to dismiss the appeal because of the unfairness or injustice which would otherwise be occasioned to the respondent.\(^{245}\)

In *R v Copping*,\(^{246}\) the English Court of Appeal held that it is doubly unfortunate when sentences which are plainly too lenient are passed on young offenders because being sentenced twice and being placed in double jeopardy is likely to have a far greater impact on them than it would on older persons. In this case, that was a factor that was taken into account in favour of the young offenders.

**Coding the residual discretion**

In this study there were 51 instances (24.2%) where error was discovered but the court exercised its residual discretion and declined to intervene to increase the sentence. Similar to the difficulties encountered in identifying and recording the errors, it was often difficult to code the discretion, as there was often more than one reason why the court chose not to intervene, despite finding error.

Rehabilitation of the offender was the most common reason for the court declining to intervene and increase the sentence (16 cases), followed by delay in hearing the appeal (15 cases).

Table 7 sets out the various reasons given by the sentencing judge in support of his or her decision not to intervene and increase the sentence.

The following discussion outlines the main reasons found why the court chose not to intervene in the sentence, despite a finding of error.

**Rehabilitation**

The principle that Crown appeals should be rare is particularly pertinent where the offender has been released from custody, has resumed his or her place in the community and is well on the way to rehabilitation.\(^{247}\) The Court of Criminal Appeal has held that, in a Crown appeal against sentence, there is a public interest in not interfering with the demonstrated rehabilitation of the offender, particularly in a sentence involving supply

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245 *R v Holder and Johnston* [1983] 3 NSWLR 245 at 255–256.
The residual discretion not to intervene

and possession of drugs (in *Ramos*, the offender had served the minimum term, had been released and had returned to gainful employment).\(^{248}\) Similarly, in *R v Sloane*,\(^ {249}\) the court said:

“this court exercises a restraint in relation to Crown appeals, not only by reason of the discretion which has long been recognised, but also by reason of the principle of double jeopardy. That principle has particular importance when an offender has already been released from custody and has resumed his place in the community and is on the way to rehabilitation. It is also relevant where the sentencing order is one which does not involve full-time custody, since to send an offender subject to periodic or home detention to prison on a full-time basis can involve considerable hardship, and can interfere with rehabilitation.”

\(^{248}\) *R v Ramos* [2000] NSWCCA 189 at [14].

\(^{249}\) [2001] NSWCCA 421 at [41].
In this study, there were 16 cases where the court exercised the discretion not to intervene because of the rehabilitation of the offender. Included in this figure was a case where the court declined to intervene because the respondent had assisted a prison officer who was being attacked by another prisoner, earning her a written commendation from the Governor of the Correctional Centre where she was housed.250

**Offender released from custody, in the community or the release date is imminent**

There were nine cases where, although error was found, the court declined to intervene because the offender had been released from custody (three cases)251 or the release date for the offender was imminent (six cases).252

In *R v Crowley*253 the offender had almost completed his sentence and received the “custodial shock that was needed.”254

In *R v Hansel*255 the court declined to intervene and dismissed the appeal because the offender had been at liberty on a suspended sentence for six months and intervention would constitute “an unacceptably harsh correction” of the sentencing errors.

**Delay in instituting an appeal**

While the right of the prosecuting authorities to appeal cannot be fettered, unjustifiable delay in bringing an appeal may lead the Court of Criminal Appeal to exercise its discretion to decline to interfere in a Crown appeal. Matters to be considered are prejudice which may be occasioned to the respondent and whether the prosecuting authority is at fault.256 Such prejudice may occur when the prisoner has already served the custodial part of the original sentence; however, the seriousness of the crime may outweigh that prejudice.257

In *R v Hernando*,258 after referring to a number of authorities on the impact of Crown delay in instituting appeals, the court held that, where there is a delay in the Crown’s announcement of its dissatisfaction with the sentences, the uncertainty and strain involved in a Crown appeal will “cruelly impact on respondents who are the beneficiaries

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253 [2004] NSWCCA 256.
254 [2004] NSWCCA 256 at [56].
255 [2004] NSWCCA 436 at [44].
of a legally flawed generosity. Such a source of distress may point powerfully against the imposition of any further imprisonment. R v Hernando is a prime example.

The unavailability of court transcripts may not excuse delay. However, this is not an absolute rule and the seriousness of offences and any prejudice from the Crown’s delay must also be brought into account.

In R v Price, a case where two months had expired between the date of sentence and the filing of the Crown appeal, Howie J said:

“A delay of that order is generally unacceptable, particularly where an offender has a period of 12 months or less to serve before release at the expiration of the sentence or on parole, and especially where he or she is serving a first gaol sentence. No good reason was given for the delay and it is a weighty matter in deciding whether to intervene.”

**Delay in the resolution of the appeal**

In R v Parsons & Poore, Sully J dismissed a Crown appeal against a sentence of periodic detention following conviction for armed robbery with an offensive weapon, solely on the basis of delay — some eight months had passed between sentencing and the determination of the appeal.

Similarly, in R v Price (a case where the Crown appeal would have been allowed and the sentence increased had the matter been capable of being determined closer to the date when the sentence was imposed) Howie J said:

“the delay between the sentencing in the District Court and the resolution of the appeal is a very significant matter in the exercise of this court’s discretion to intervene at the behest of the Crown.”

In this study there were 16 cases where the court chose not to intervene because of delay in the hearing of the appeal.

**Parity**

The Crown should not invite intervention on the ground that the community might feel a sense of grievance because of disparity in sentencing co-offenders. The test, subject to a residual discretion, is whether the sentence was manifestly inadequate.

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262 R v Church (unrep, NSWCCA, 6 November 1998, per Barr J).
263 [2004] NSWCCA 186 at [54].
266 [2004] NSWCCA 186 at [60].
267 R v Moore (unrep, NSWCCA, 11 August 1992 per Wood J); see also R v Radloff (1996) 88 A Crim R 26 at 31–33.
Where the Crown appeals against the leniency of sentence imposed upon the respondent but does not appeal against the sentence imposed on a co-offender, the fact that the latter received a light sentence does not preclude the Court of Criminal Appeal from intervening. However, restraint must be exercised in determining the increased sentence so as to take into account any “remarkably light” sentence imposed on the co-offender.268

In *R v McIvor*269 the sentence of the respondent was not increased on Crown appeal, although an appealable error was demonstrated. The identical sentence of a co-offender remained unchanged upon Crown appeal due to the gross delay of the Crown in lodging the appeal. A justifiable sense of grievance would otherwise have been likely, as the difference in their sentences would not depend on anything in the objective circumstances of the crimes or the subjective circumstances of each co-offender’s background, but rather by reason of the adventitious circumstances of the Crown’s gross delay relating to one offender.

Parity was found to be responsible for the exercise of the discretion not to intervene in six instances.

For example, in *R v Cimone*,270 the court held that the Crown had shut itself out of an appeal in the co-offender’s case by accepting that the co-offender should be sentenced by way of parity with the respondent. However, if a full-time custodial sentence was now imposed on the respondent, he would have a legitimate grievance within the test laid down in *R v Lowe*.271

**Conduct of the Crown**

The Crown has an obligation to assist the court to avoid appealable error.272 Furthermore, in the exercise of the discretion to allow a Crown appeal, the appeal court must take into account the attitude of the Crown in the sentencing court.273

In this regard, in *Everett v The Queen*,274 McHugh J said:

> “Even when it appears that the sentencing judge has erred in a fundamental way that may affect the administration of justice, fairness to the sentenced person requires that the Crown’s concurrence with, or failure to object to, a proposed course of action by the sentencing judge must be weighed in the exercise of the discretion. This is particularly so when the convicted person has been given a non-custodial sentence.”

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270  [2001] NSWCCA 98.
While in *Everett* the Crown required leave to appeal, the decision was based on *R v Wilton*,275 which has been followed in this State.276

While the conduct of the Crown Prosecutor — submitting that the sentencing judge should pass a particular sentence — cannot bind the court, the stance taken by the Crown during sentencing proceedings may induce the Court of Criminal Appeal not to intervene or to do so lightly, even where the sentence is found to be inadequate.277 Similarly, where the Crown has acquiesced in the course adopted at sentence, or appeals against a non-custodial sentence when it urged or advocated a non-custodial sentence at trial, the Court of Criminal Appeal may in its discretion refuse to intervene.278

In *R v Chad*279 Hunt CJ at CL, applying *R v Allpass*,280 said:

“[I]t does not in my view mean that the Crown is necessarily debarred, on appeal, from taking a stance different from that taken at first instance, but this court, in the exercise of its discretion, is entitled to take account of the fact that, at first instance, the Crown acquiesced in the course which was taken by the sentencing judge; the weight to be given to such a consideration depends upon the circumstances of the particular case, but it may be of considerable significance if the respondent was given a non-custodial sentence at first instance, and its weight may also vary with the degree to which this court thinks that the sentencing judge fell into error.”

In *R v Elfar*,281 the court held that an omission by the Crown in sentence proceedings to object to the tender of hearsay and self-serving material by an offender or to dispute its contents (as provided by the *Evidence Act* 1995) precludes the subsequent challenge of this material in a Crown appeal against sentence, even when the sentencing judge had afforded to it inappropriate weight.

In *GAS v The Queen*282 the court considered what the Crown is precluded from agreeing to in a plea agreement (for example, matters of sentencing principle). There may be an understanding between counsel as to the submissions of law that they will make, but that does not bind the judge in any sense.

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278  *R v Milsom* (unrep, NSWCCA, 10 December 1997, per Abadee J).
279  (unrep, NSWCCA, 13 May 1997 at 12).
In *R v Foster*, the Crown on appeal was restricted in the manner in which it could argue that the sentence was manifestly inadequate. The court applied *R v Tait and Bartley*, where it was said:

“It would be unjust to a defendant, whose freedom is in jeopardy for the second time, to consider on appeal a case made against him on a new basis — a basis which he might have successfully challenged had the case against him been fully presented before the sentencing court. As McClemens CJ at CL said in *R v Jacombe* … ‘we would not seem to encourage any system which meant that cases were brought here under s 5D, of the *Criminal Appeal Act* on bases which were not argued before the judge below.’”

The court in *R v Foster* concluded:

“(T)his court should not allow the Crown so far to depart from the way in which the case was argued below as to suggest now that this was a case in which his Honour was bound to apply the second *Jurisic* guideline. The matters argued by the Crown in support of the appeal remain, of course, relevant to an evaluation of the objective gravity of the offence; but … [the court is] not persuaded that his Honour overlooked such of them as were supported by evidence.”

In *R v Dawes* Dunford J (with whom Hoeben J agreed) held that it is only in exceptional cases that the court will uphold an appeal against a non-custodial sentence and re-sentence the offender to imprisonment where the Crown had not pressed for a custodial sentence at first instance. While the conduct of the Crown does not fetter an appellate court, the fact that the Crown did not press for a custodial sentence and had conceded that a non-custodial sentence may be appropriate is a relevant consideration. In *R v J & H*, although the Crown at first instance wrongly invited the judge to give the respondents allowance for the loss of s 16G of the *Crimes Act 1914*, this was not considered enough to dismiss the appeal in the exercise of the discretion. No range with respect to the starting point was proposed by the Crown at the sentence hearing.

In this study, the conduct of the Crown at first instance was broken down into two categories:

1. Where the Crown acquiesced as to the sentence length or penalty type and did not advance an argument against the sentence imposed at the time of the hearing.
2. Where there was a plea bargain.

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There were five cases where the appeal was dismissed despite error because the Crown acquiesced and did not advance the ground of appeal at first instance, and one case where the Crown led the court into error at first instance.

### Health of offender

There were three cases where the poor health of the offender resulted in the court exercising its discretion to decline from intervening. In *R v Szabo* the court stated:

> “Having regard … in particular to the constant medical attention required by the applicant, … [the court has] come to the conclusion that although this sentence is manifestly inadequate, indeed grossly inadequate, that this is a case in which the residual discretion of this court to dismiss an appeal should be invoked.”

In *R v Yang* the court held:

> “In view of the fragile state of the respondent’s health, which may in some way have contributed to the commission of the subject offence … this is a case which calls for the exercise of the court’s residual discretion.”

In *R v Hansel* the court said:

> “No appellate court could lightly send now into full-time custody a person with those health conditions and problems. To do so would be, I think, an unacceptably harsh correction even of a primary sentencing exercise that has seriously miscarried.”

### Other residual discretion factors

There were five cases where, although there was an error identified, the court declined to intervene and increase the sentence because the sentence was within range or the effective aggregate was not so manifestly inadequate as to warrant intervention by the court. For example, in *R v Cuff* the court said:

> “[T]his is a case where, as the Crown does not seek any variation to the effective overall terms of imprisonment to be served by the respondent, this court, in the exercise of its discretion should decline to interfere.”

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290 *R v Bavin* [2001] NSWCCA 167

291 [2003] NSWCCA 341 at [23].


293 [2004] NSWCCA 436 at [44].


Aberration
In *R v Kwon* 296 the court declined to intervene because the offence was “an aberration in what seems to have been an otherwise very worthwhile life.” 297

Cross-roads
There were two cases where the court held that the offender was at a “cross-roads” or turning point in his or her life, and declined to intervene to increase the sentence. 298

Tinkering
There were three cases where the court found that, although there was error in the sentence, to re-sentence would be “tinkering.” 299

Not specified
There were two cases where the court said, without being more specific, that the general principles relevant to re-sentencing for a Crown appeal justified the exercise of the discretion to decline to intervene and re-sentence. 300

Double jeopardy
In many cases the courts applied the principle of double jeopardy when it came to the decision whether to re-sentence the offender following an error. However, in only two cases was the double jeopardy factor alone enough to engage the discretion not to re-sentence. 301 In *R v Togias* 302 the offender had been subject to two Crown appeals and sentence proceedings on four occasions.

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297 [2004] NSWCCA 456 at [24].
Re-sentencing following a successful appeal

The principles that apply when the Court of Criminal Appeal decides to re-sentence are set out earlier under the heading “Legal principles governing Crown appeals” (on page 13) and it is not necessary to repeat them all here. If a Crown appeal against sentence is successful and the appellate court re-sentences the respondent, it does so in the light of all the facts and circumstances at the time of re-sentencing and will ordinarily give recognition to the element of double jeopardy involved by imposing a sentence that is the least sentence that could properly have been imposed upon the respondent at first instance.303

Events which might have occurred after the original sentencing may be relevant.304 When the difference between the original sentence and the sentence determined to be appropriate on appeal is not great, the appeal may be dismissed, but not when the discrepancy is very large.305

In R v Holder and Johnston,306 Street CJ, citing R v Tliege,307 said:

“In determining what the quantum of sentence should be we have, as not infrequently occurs in the case of Crown appeals, borne in mind that the respondent has been twice in jeopardy in the matter of sentence. It will be distressing in the extreme for him to suffer the sentence passed on him some time ago being increased. This leads us to determine a sentence which is more lenient than would properly be appropriate if the matter were coming forward for sentence for the first time.”

305  R v Moffitt (1990) NSWLR 114 at 129.
307  (unrep, NSWCCA, 19 November 1982).
In *R v CJP*[^308] Howie J said that, although it is customary practice for an appeal court to impose a sentence at the lower end of the permissible range following a successful Crown appeal, this practice is not to be taken as an “inviolable rule.” The factors relevant to determining whether the court shall intervene and increase the sentence imposed are also relevant to re-sentencing. In *R v Rose*[^309] Gleeson CJ said:

“I would accept a submission made by senior counsel for the respondent that the court should reflect the delay in any sentence the court imposes.”

There is no tariff for the discount for the double jeopardy involved and, in some cases, the sentence imposed by the Court of Criminal Appeal will not be less than that which ought to have been imposed at first instance.[^310] In other cases, the discount may be substantial, depending on the individual circumstances of the particular case. In most cases, the relevant circumstances are those subjective to the respondent.[^311]

It has been said that the need to take double jeopardy into account when imposing sentences after a Crown appeal renders the sentences imposed by the Court of Criminal Appeal of little value in ascertaining the appropriate range of sentences to be imposed by trial courts.[^312] However, in *R v Mungomery*[^313] Hulme J said that, although sentences imposed on successful Crown appeals are towards the lower end of the appropriate range, the decisions:[^314]

“do provide an indication of either the sentence which should have been imposed at first instance or a sentence which is at the bottom of the range of appropriate sentences.”

It is often assumed that the sentences imposed following a successful Crown appeal fall at the bottom of the range of the population of sentences for any given offence. As the analysis below reveals, this is not necessarily the case. The reason is obvious. The substituted sentence should fall at the lower end of the range for the particular case before the court — not the population of sentences for a given offence. The use of the word “range” is important, as the High Court said in *Pearce v The Queen*[^315]:

“Sentencing is not a process that leads to a single correct answer arrived at by some process admitting of mathematical precision [cf *House v The King* (1936) 55 CLR 499].”

[^308]: [2004] NSWCCA 188.
[^309]: (Unrep, NSWCCA, 23 May 1996).
[^314]: [2004] NSWCCA 450 at [34].
Further, the analysis reveals that the first instance sentences appealed by the Crown are often above the median of the population of sentences for a given offence because the DPP takes the view that the circumstances of the offence and the antecedents of the offender are more serious than assessed at first instance.

This study selected five common offences where the court re-sentenced:
1. murder
2. manslaughter
3. malicious wounding with intent to inflict grievous bodily harm
4. aggravated sexual assault and
5. armed robbery.

The first instance sentences and the substituted sentences were compared to the median term of sentence for each offence. Appendix F sets out the first instance results and re-sentencing for these offences. The following findings can be drawn from the analysis.

**Murder — s 19A**

- N = 126
- full-time custody = 100%
- median term of sentence = 18 years
- consecutive sentences = 14.3% (or 20 cases)
- median non-parole period (excluding consecutive sentences) = 13.5 years

Court of Criminal Appeal re-sentences
- N = 3
  - Before re-sentence
    - 1 case was greater than the median (25 years)
    - 2 cases were less than the median (13 years 6 months and 13 years 8 months)
  - After re-sentence
    - 1 case was greater than the median (life)
    - 2 cases were less than the median (16 years and 16 years 3 months)

**Manslaughter — s 24**

- N = 103
- full-time custody = 94.2% (or 97 cases)
- median term of sentence = 7 years
- consecutive sentences = 11.3% (or 11 cases)
- median non-parole period (excluding consecutive sentences) = 4 years
Court of Criminal Appeal re-sentences

- **N = 4**
  - Before re-sentence
    - 1 case was greater than the median (11 years)
    - 3 cases were less than the median (5 years (2 cases), and 5 years 6 months)
  - After re-sentence
    - 3 cases were greater than the median (14 years 4 months and 10 years (2))
    - 1 case was less than the median (6 years)

**Maliciously wound or inflict grievous bodily harm — s 33**


- **N = 140**
  - full-time custody = 94.3% (or 132 cases)
  - median term of sentence = 6 years
  - consecutive sentences = 21.2% (or 28 cases)
  - median non-parole period (excluding consecutive sentences) = 3 years

Court of Criminal Appeal re-sentences

- **N = 10**
  - Before re-sentence
    - 3 cases did not receive full-time custody (s 12 suspended sentence (2) and s 9 bond (1))
    - 1 case was greater than the median (10 years)
    - 2 cases equalled the median (6 years each)
    - 4 cases were less than the median (5 years each)
  - After re-sentence
    - 3 cases did not receive full-time custody but were given penalties higher in the hierarchy (periodic detention (2) and suspended sentence (1))
    - 3 cases were greater than the median (12 years, 10 years and 7 years)
    - 1 case equalled the median (6 years)
    - 3 cases were less than the median (5 years each), however, the Court of Criminal Appeal restructured sentences to be consecutive (aggregate terms imposed were 7 years (2) and 6 years 3 months)

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316 Excludes one case where the Court of Criminal Appeal restructured dates to have the practical effect of increasing sentence to be served on an existing sentence.
Aggravated sexual assault — s 61J

- N = 154
- full-time custody = 94.8% (or 146 cases)
- median term of sentence = 6 years
- consecutive sentences = 38.4% (or 56 cases)
- median non-parole period (excluding consecutive sentences) = 3 years

Court of Criminal Appeal re-sentences
- N = 5\(^{317}\)
- Before re-sentence
  - 1 case was greater than the median (9 years)
  - 2 cases equalled the median (6 years each)
  - 2 cases were less than the median (5 years and 5 years 7 months)
- After re-sentence
  - 5 cases were greater than the median (9 years, 11 years (2), 12 years and 13 years)

Robbery being armed or in company — s 97(1)

- N = 1148
- full-time custody = 82.5% (or 947 cases)
- median term of sentence = 4 years
- consecutive sentences = 18.2% (or 172 cases)
- median non-parole period (excluding consecutive sentences) = 2 years

Court of Criminal Appeal re-sentences
- N = 9\(^{318}\)
- Before re-sentence
  - 2 cases did not receive full-time custody (periodic detention and suspended control order)

\(^{317}\) Excludes one case where the Court of Criminal Appeal restructured sentences to be partly consecutive without altering the term of sentence or non-parole period, one case where the sentence for the principal offence was unchanged but the sentences for secondary offences were increased and made partly consecutive, and one case where the sentence for the principal offence was reduced while the sentences for secondary offences were increased and restructured to be partly consecutive.

\(^{318}\) Excludes one case where the Court of Criminal Appeal remitted the matter for re-sentence in the District Court and five cases where the Court of Criminal Appeal restructured sentences to be partly consecutive without altering the term of the sentence or non-parole period.
– 1 case was greater than the median (5 years 6 months)
– 1 case equalled the median (4 years)
– 5 cases were less than the median (6 months, 18 months, 3 years (2) and 3 years 9 months)

● After re-sentence
– 5 cases were greater than the median (4 years 6 months, 5 years, 5 years 6 months (2) and 8 years 6 months)
– 4 cases were less than the median (18 months, 2 years, 2 years 9 months and 3 years)

The substituted sentences are small in number. They may indicate the bottom of the range but they cannot be used as precedents for other cases. As Spigelman CJ said in *R v Mungomery*:319

“Prior sentences are in no way precedents that need to be distinguished. They may be relevant as a guide and issues of consistency are of significance. Nevertheless, the broad judgment required for the determination of an appropriate sentence turns on the facts of a particular case and the facts of other cases are virtually never so similar as to require detailed exposition. It will often be appropriate for a sentencing judge to refer only to an impression that s/he acquires from reading relevant prior judgments and from the range of statistics available on the Judicial Commission’s database.”

“In any event the particular Crown appeals to which his Honour did refer were appropriate, as Hulme J shows, as indicating the bottom of the range.”

**The effect of other residual discretion factors on re-sentencing**

As stated above, the factors that influence the discretion not to intervene also affect the quantum of the substituted sentence. The following are some examples found in this study. In *R v Boundy*320 the Court of Criminal Appeal said:

“The delay and the favourable prospects of rehabilitation, including that the offender had been trained for and gained full-time employment, preclude the imposition of full-time custody. It would not be in the interests of justice to disrupt the progress of the offender’s rehabilitation and employment by imposing a full-time custodial sentence. On the other hand, the major offence was a serious one and warranted a full-time custodial sentence. There is no ideal or wholly satisfactory solution to the dilemma which exists.”

319  *R v Mungomery* [2004] NSWCCA 450 at [5]–[6].
In *R v Rajapaske*\(^{321}\) the court made a finding of special circumstances when re-sentencing the offender because of the reasons given by the sentencing judge but also because of the fact that the appeal was a Crown appeal and there had been rehabilitation in custody. The court said:\(^{322}\)

“The sentences which … should be imposed involve a reduction in the non-parole period, required, in the absence of special circumstances, by s 44(2) of the *Crimes (Sentencing Procedure) Act* 1999. I think there are special circumstances here, for the reasons stated by Judge Hosking and for the further reasons that the appeal is by the Crown, the sentences are partly cumulative, and there has been some rehabilitation while the respondent has been in custody.”

In *R v Galati*\(^{323}\) the court held:

“In the ordinary course [the court] would have no hesitation in concluding that the respondent should have been sentenced, and should now be sentenced, to a period of three years in full-time custody, with an appropriate non-parole period. However, having regard to the delays in bringing the matter to a conclusion before the sentencing judge, replicated by the delays in filing and serving the Notice of Appeal, together with deficiencies in the manner in which the case was presented (in the District Court) on behalf of the Crown, and the special considerations that apply when re-sentencing after a successful Crown appeal … this court allow[s] the Crown appeal, set[s] aside the sentence, and in lieu thereof impose[s] a sentence of a fixed term of imprisonment for three years, to be served by way of periodic detention.”

\(^{321}\) [2001] NSWCCA 126.

\(^{322}\) [2001] NSWCCA 126 at [34].

\(^{323}\) [2002] NSWCCA 366 at [49].
Appendix A — Cases in study

1. Homicide and related offences

Solicit to murder
Potier [2004] NSWCCA 136
Outami [2001] NSWCCA 353

Murder
Holton [2004] NSWCCA 214
Kane [2001] NSWCCA 150
MA [2004] NSWCCA 92
Miles [2002] NSWCCA 276
Park [2003] NSWCCA 142
Penisini [2004] NSWCCA 339
Walkington [2003] NSWCCA 285
Wigney [2004] NSWCCA 171

Manslaughter
Adams [2002] NSWCCA 448
Bolt [2001] NSWCCA 487
Clissold [2002] NSWCCA 356
Dawes [2004] NSWCCA 363
Hoerler [2004] NSWCCA 184
Kwon [2004] NSWCCA 456
McNamara [2004] NSWCCA 42
Namalauulu [2004] NSWCCA 158

Sotheren [2001] NSWCCA 425
Treverna [2004] NSWCCA 43
Vongsouvanh [2004] NSWCCA 158

Dangerous driving occasioning death
Begbie [2001] NSWCCA 206
Clampitt-Wotton [2002] NSWCCA 383
Cousins [2002] NSWCCA 81
Dunlop [2001] NSWCCA 435
Foster [2001] NSWCCA 215
Price [2004] NSWCCA 186
Skrill [2002] NSWCCA 484
Y [2002] NSWCCA 191

2. Acts intended to cause injury
Avery [2004] NSWCCA 168
Baquayee [2003] NSWCCA 401
Barton [2001] NSWCCA 63
Bembrick [2002] NSWCCA 534
Best [2001] NSWCCA 401
Bett [2001] NSWCCA 482
Brownlow [2002] NSWCCA 404
Croaker [2004] NSWCCA 470
Crowley [2004] NSWCCA 256
Dickinson [2004] NSWCCA 457
DSW [2003] NSWCCA 322
El-Farra [2003] NSWCCA 140
Eustice [2004] NSWCCA 14
Galati [2002] NSWCCA 366
Guivarra [2002] NSWCCA 69
Hamze [2004] NSWCCA 423
Hickling [2004] NSWCCA 168
Hoskins [2004] NSWCCA 236
King [2004] NSWCCA 444
Kumar [2003] NSWCCA 254
LRS [2001] NSWCCA 338
Main [2003] NSWCCA 268
Nguyen J [2004] NSWCCA 65
Nguyen L [2004] NSWCCA 65
Paris [2001] NSWCCA 83
Remilton [2001] NSWCCA 546
Samuelu S [2004] NSWCCA 331
Samuelu T [2004] NSWCCA 331
Sloane [2001] NSWCCA 421
Tran [2004] NSWCCA 65
Turner [2003] NSWCCA 268
WM [2004] NSWCCA 53
Zamagias [2002] NSWCCA 17

3. Sexual assault and related
AEM (Snr) [2002] NSWCCA 58
Anderson [2002] NSWCCA 304
CAD [2003] NSWCCA 187
Capar [2002] NSWCCA 285
CJP [2003] NSWCCA 187
CJP [2004] NSWCCA 188
Fitzgerald [2004] NSWCCA 5
Fong [2002] NSWCCA 320
Gorman [2002] NSWCCA 516
Hopkins [2004] NSWCCA 105
Jones [2003] NSWCCA 54
KEM [2002] NSWCCA 58
Manners [2004] NSWCCA 181
MES [2003] NSWCCA 187
MM [2002] NSWCCA 58
Musso [2002] NSWCCA 487
Newbigging [2004] NSWCCA 239
Pellew [2004] NSWCCA 434
Puskas [2001] NSWCCA 43
Schwenke [2004] NSWCCA 289
Selsby [2004] NSWCCA 381
Shepherd [2003] NSWCCA 9
Silcock [2004] NSWCCA 442
Szabo [2003] NSWCCA 341

4. Dangerous driving occasioning grievous bodily harm
Campton [2004] NSWCCA 56
King [2001] NSWCCA 18
Royal [2003] NSWCCA 275
Shannon [2003] NSWCCA 106
Whelan [2004] NSWCCA 379
Whyte [2002] NSWCCA 343

5. Abduction and related offences
Anderson [2002] NSWCCA 485
Anforth [2003] NSWCCA 222
Antaredjo [2003] NSWCCA 161
Bahsa [2003] NSWCCA 36
Edigarov [2001] NSWCCA 436
Francis [2002] NSWCCA 51
Gamgee [2001] NSWCCA 251
Hendradinata [2003] NSWCCA 161
KM [2004] NSWCCA 65
McGourty [2002] NSWCCA 335
Rossi [2003] NSWCCA 161
6. Robbery, extortion and related

Azzi [2003] NSWCCA 10
Barre [2002] NSWCCA 432
Bavin [2001] NSWCCA 167
Bendt [2003] NSWCCA 78
Bethune [2001] NSWCCA 303
Blackman [2001] NSWCCA 121
Carberry [2002] NSWCCA 475
Chase [2002] NSWCCA 231
Christian [2002] NSWCCA 264
Cimone [2001] NSWCCA 98
Cotter [2003] NSWCCA 273
Cuff [2004] NSWCCA 157
Dickson [2002] NSWCCA 327
Donovan [2003] NSWCCA 324
Drollett [2002] NSWCCA 13
DT [2004] NSWCCA 349
Etchami [2001] NSWCCA 285
Eter [2003] NSWCCA 273
Fernando [2002] NSWCCA 28
Fry [2004] NSWCCA 238
Gardener [2003] NSWCCA 2
Hernando [2002] NSWCCA 489
Hickey J [2003] NSWCCA 110
Hickey T [2003] NSWCCA 110
Hoschke [2001] NSWCCA 317
Iremonger [2003] NSWCCA 273
Israil [2002] NSWCCA 255
Jones [2004] NSWCCA 432
KS [2003] NSWCCA 291
Leahy [2004] NSWCCA 148
Maloukis [2002] NSWCCA 155
Martin [2001] NSWCCA 442
Mclvor [2002] NSWCCA 490
Nair [2003] NSWCCA 368
Pamplin [2001] NSWCCA 327
Parsons [2002] NSWCCA 296
Penalosa-Munoz [2004] NSWCCA 33

Pohipi [2001] NSWCCA 306
Poore [2002] NSWCCA 296
Rai [2002] NSWCCA 506
Reynolds [2004] NSWCCA 51
Russell [2003] NSWCCA 273
Sharma [2002] NSWCCA 142
Smith [2001] NSWCCA 152
Smith [2003] NSWCCA 381
Snider [2004] NSWCCA 134
Speeding [2001] NSWCCA 105
SY [2003] NSWCCA 291
Sydney [2004] NSWCCA 63
Thompson [2004] NSWCCA 304
Vincent [2003] NSWCCA 112
Walter [2004] NSWCCA 304
Walters [2001] NSWCCA 121
Weldon [2002] NSWCCA 475
Wilson [2001] NSWCCA 399
Wilson [2002] NSWCCA 65
Zahab [2002] NSWCCA 430

7. Unlawful entry with intent, burglary, break and enter offences

Ceissman [2004] NSWCCA 466
Di Gregorio [2004] NSWCCA 9
Duncombe [2001] NSWCCA 483
Dunn [2004] NSWCCA 41
Elmir [2003] NSWCCA 192
Guthrie [2002] NSWCCA 77
Harrison [2001] NSWCCA 79
Hickey [2003] NSWCCA 344
Home [2004] NSWCCA 8
Johnson [2004] NSWCCA 140
Kessey [2001] NSWCCA 469
King [2003] NSWCCA 352
Kollas [2002] NSWCCA 491
Lord [2001] NSWCCA 533
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<th>Case</th>
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<td>Miles</td>
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</table>

### 8. Theft and related offences

- Elfar [2003] NSWCCA 358
- Fields [2002] NSWCCA 523
- Mathieson [2002] NSWCCA 97
- Ohar [2004] NSWCCA 83
- Thomas [2003] NSWCCA 165
- Uyrun [2004] NSWCCA 103

### 9. Deception and related

- Al-Zaabi [2001] NSWCCA 538
- Ailler [2004] NSWCCA 378
- Cappadona D [2001] NSWCCA 194
- Cappadona T [2001] NSWCCA 194
- Carr [2002] NSWCCA 434
- Fell [2004] NSWCCA 235
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- Hunt [2002] NSWCCA 482
- Institoris [2002] NSWCCA 8
- Jackson [2001] NSWCCA 355
- Lo [2004] NSWCCA 382
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- Mustang [2004] NSWCCA 450
- Murtaza [2001] NSWCCA 336
- O’Connor [2002] NSWCCA 156
- O’Driscoll [2004] NSWCCA 119
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### 10. Illicit drug offences

- Aksu [2004] NSWCCA 284
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- Bartle [2003] NSWCCA 329
- Bezan [2004] NSWCCA 342
- Baudry [2002] NSWCCA 319
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- Hamzy [2001] NSWCCA 539
- Hansel [2004] NSWCCA 436
- Harris [2001] NSWCCA 322
- Hoete [2004] NSWCCA 448
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- Kaldor [2004] NSWCCA 425
- Kalpaxis [2001] NSWCCA 119
- Kevenaar [2004] NSWCCA 210
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- Klein [2001] NSWCCA 120
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15. Miscellaneous
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Appendix B — List of authorities

Bond v The Queen (2000) 201 CLR 213
Bugmy v The Queen (1990) 169 CLR 525
Comptroller-General of Customs v D’Aquino Bros Pty Ltd (1996) 135 ALR 649
Deakin v The Queen (1984) 58 ALJR 367
Dinsdale v The Queen (2000) 202 CLR 321
Everett v The Queen (1994) 181 CLR 295
GAS v The Queen (2004) 78 ALJR 499
Howarth v United Kingdom (2000) 31 EHR 86
Johnson v The Queen [2004] HCA 15
Lowndes v The Queen (1999) 195 CLR 665
Malvaso v The Queen (1989) 168 CLR 227
Mill v The Queen (1988) 166 CLR 59
Pearce v The Queen (1998) 194 CLR 610
People (DPP) v Byrne [1995] 1 ILRM 279
People (DPP) v Egan [2001] 2 ILRM 299
People (DPP) v McCormack [2000] 4 IR 356
People (DPP) v McAuley [2001] IR 160
Power v The Queen (1974) 131 CLR 623
R v Alpass (1993) 72 A Crim R 561
R v Baker [2002] NSWCCA 85
R v Bang, unrep, NSWCCA, 1 September 1992
R v Baugh [1999] NSWCCA 131
R v Bezan [2004] NSWCCA 342
R v Boundy (2002) 132 A Crim R 482
R v Cardi, unrep, NSWCCA, 3 December 1987
R v Chad, unrep, NSWCCA, 13 May 1997
R v Chua [2004] NSWCCA 50
R v CJP [2004] NSWCCA 188
R v Copping & Anor [1998] EWCA 875
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R v Foster [2001] NSWCCA 215
R v Geddes [1936] 36 SR (NSW) 554
R v Guthrie [2002] NSWCCA 77
R v Halocoglu (1992) 63 A Crim R 287
R v Hansel [2004] NSWCCA 436
R v Henry (1999) 46 NSWLR 346
R v Holder & Johnston (1983) 3 NSWLR 245
R v Hughesman, unrep, NSWCCA 5 April 1995
R v J & H [2005] NSWCCA 1
R v Jermyn (1985) 2 NSWLR 194
R v Jurisic (1998) 45 NSWLR 209
R v Kalache (2000) 111 A Crim R 152
R v King (1925) SR (NSW) 218
R v King [2004] NSWCCA 444
R v Lowe (1984) 154 CLR 606
R v McIvor [2002] NSWCCA 490
R v Millsom, unrep, NSWCCA 10 December 1997
R v Moffitt (1990) 20 NSWLR 114
R v Moore, unrep, NSWCCA, 11 August 1992
R v Mongomery [2004] NSWCCA 450
R v Ngo, unrep, NSWCCA, 15 November 1996
R v O’Connor (2002) 129 A Crim R 505
R v O’Hara [2004] NSWCCA 83
R v Osenkowski (1982) 5 A Crim R 394
R v Parsons & Poore [2002] NSWCCA 296
R v Patison [2003] NSWCCA 171
R v Pham & Ly (1991) 55 A Crim R 128
R v Price [2004] NSWCCA 186
R v Proulx [2000] 1 SCR 61
R v Radoff (1996) 88 A Crim R 26
R v Ramos [2000] NSWCCA 189
R v Reynolds [2004] NSWCCA 51
R v Rose, unrep, NSWCCA, 23 May 1996
R v Rushby [1977] 1 NSWLR 594
R v Tait & Bartley (1979) 46 FLR 386; 24 ALR 473
R v Thompson & Houlton [2000] 49 NSWLR 383
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R v Tindle, unrep, NSWCCA, 8 October 1998
R v Tliege, unrep, NSWCCA, 19 November 1982
R v Todd [1982] 2 NSWLR 517
R v Waqa (No 2) [2005] NSWCCA 33
R v Warfield (1994) 34 NSWLR 200
R v Way (2004) 60 NSWLR 168
R v Whyte (2002) 55 NSWLR 252

R v Young [2002] NSWCCA 322
The Queen v Cranssen (1936) 55 CLR 509
Veen v The Queen (No 2) (1988) 164 CLR 465
Whittaker v The King [1928] 41 CLR 230
Wong & Leung v The Queen (2001) 207 CLR 584
Appendix C — DPP (NSW) Prosecution Guideline for Crown appeals

29 Appeals Against Sentences [Furnished on 20th October 2003]

The prosecutor in any case conducted by the ODPP should assess any sentence imposed. If (and only if) it is considered to be appellable or it is a matter likely to attract significant public interest, a report should be provided promptly to the Director for determination of whether or not an appeal will be instituted.

In determining whether or not to appeal against a sentence imposed by a judge or magistrate, the Director will have regard to the following matters:

(i) whether or not the sentencer made a material error of law or fact, misunderstood or misapplied proper sentencing principles, or wrongly assessed or omitted to consider some salient feature of the evidence, apparent from the remarks on sentence;

(ii) manifest inadequacy of the sentence which may imply an error of principle by the sentencer;

(iii) the range of sentences (having regard to official statistics and comparable cases) legitimately open to the sentencer on the facts;

(iv) the conduct of the proceedings at first instance, including the prosecution’s opportunity to be heard and the conduct of its case;

(v) the element of double jeopardy involved in a prosecution/Crown appeal and its likely effect on the outcome (the probable imposition of a lesser sentence than was appropriate at first instance);

(vi) the appeal court’s residual discretion not to intervene, even if the sentence is considered too lenient; and/or

(vii) whether the appeal is considered likely to succeed.

In addition to the above matters prosecutors should be aware that:

- prosecution/Crown appeals are and ought to be rare, as an exception to the general conduct of the administration of criminal justice. They should be brought to enable the courts to establish and maintain adequate standards of punishment for crime, to enable idiosyncratic approaches to be corrected and to correct sentences that are so disproportionate to the seriousness of the crime as to lead to a loss of confidence in the administration of criminal justice;

- the appellate court will intervene only where it is clear that the sentencer has made a material error of fact or law or has imposed a sentence that is manifestly inadequate (which in the exercise of discretion may still not be sufficient cause);

- the appellate court will take into account the advantages enjoyed by the sentencer which are denied to it;

- the appellate court will not be concerned whether or not it would have found the facts differently, but will consider whether or not it was open to the sentencer to find the facts as he or she did;

- a respondent to a prosecution/Crown appeal suffers a species of double jeopardy which is undesirable;

- apparent leniency or inadequacy alone may not be enough to justify appellate correction;

- scope must remain for the exercise of mercy by the primary sentencer;

- the range of appropriate sentences with respect to a particular offence is a matter on which reasonable minds may differ; and

- if an appeal is to be instituted, it must be done promptly.
Prosecutors should refer also to Guideline 28 (Sentence).

When a Crown appeal against sentence is being considered, the offender should be so advised if time reasonably permits and again when a direction has been given. Such advice should be given before any information about the appeal or the process is released publicly.

The spirit and intent of Barristers’ and Solicitors’ Rules 71 and A71 (see Appendix B) should also guide the approach taken by prosecutors appearing in the Court of Criminal Appeal (in both Crown and offender appeals).

In some appeals the circumstances may justify the Crown submitting that the particular case falls within the “worst case” category and so should attract the maximum penalty or a penalty close to the maximum. In other appeals it may be appropriate to inform the court of the range of sentences which the Crown considers to be appropriate, having regard to official statistics and comparable cases. A specific sentence should not be suggested unless the court expressly seeks assistance in the calculation of an appropriate term of imprisonment.
Appendix D — Coding sheet

Did the sentencing judge err?
Were there multiple errors?

Nature of error

Was it an error of principle?
Objective seriousness
Non-parole period
Totality
Inappropriate sentencing option
Misapplication of guideline judgment
Excessive weight given to a factor:
  • The offender’s guilty plea
  • Assistance to authorities
  • The offender’s subjective features
Error regarding the purposes of sentencing
Not enough weight given to Form 1 matters
Error relating to special circumstances
Outside the range
Errors of principle not otherwise classified

Was it a factual error?
Failure to consider a material fact
  • That the offender was on bail at time of offence
  • That the offender was on parole at time of offence
  • That the offender had prior convictions
  • That the offender was serving a community service order or bond at time of offence
Finding not open on the evidence

Was the sentence plainly unjust/manifestly inadequate (last limb of House)?

Was the appeal allowed?
Reason for exercise of discretion not to intervene
Rehabilitation
Parity
Delay
Crown conduct
Released or almost released from custody
Offender’s health
Sentence within range
Conduct was an aberration
Double jeopardy
Offender at the cross-roads
To re-sentence would be tinkering
Reason not specified
Other
Appendix E — Other common law jurisdictions

Ireland

In cases on indictment, s 2 of the Criminal Justice Act 1993 provides that if it appears to the Director of Public Prosecutions that the sentence imposed by the trial judge in the Circuit Criminal Court, the Central Criminal Court or the Special Criminal Court is unduly lenient, the Director may apply to the Court of Criminal Appeal to review the sentence.

The onus of proof rests on the DPP to show that the sentence called into question is “unduly lenient”. The court should afford great weight to the trial judge’s reasons for imposing the sentence that is in question, as “he is the one that receives the evidence at first hand … [and he may detect nuances that may not be readily discernible to an appellate court].” If the trial judge keeps the balance between the particular circumstances of the commission of the offence and the personal details of the person sentenced, his or her decision should not be disturbed. The finding must be one of undue leniency. Only a substantial departure from what would be regarded as the appropriate sentence would justify the intervention of the court.

“Undue leniency” connotes a “clear divergence by the court of trial from the norm, and would, save perhaps in exceptional circumstances, have been caused by an obvious error in principle … It is only when the penalty is below the range as determined on this basis that the question of undue leniency may be considered. The concept of an “error in principle” guides the courts in determining whether the sentence is unduly lenient and must be present for the court to alter the sentence.

Where there is a delay in bringing an application under s 2, the court in People (DPP) v Egan [2001] 2 ILRM 299 held that although the sentence was unduly lenient, in the interests of society as well as the accused, the court should take into account that by the time the appeal was heard, the accused had gone to prison, served the sentence and been released. Also in People (DPP) v Doherty (CCA 29 April 2003), the court in allowing the appeal because it was unduly lenient discounted the sentence having regard to the delay and state of uncertainty that the offender was in.

The appeal power should be limited to a small percentage of cases:

“Power to seek review under s 2 is of course a major departure from the traditional common law position. It also trenches upon the general right of a convicted person to presume that the sentence he receives from the trial judge is final unless he appeals it himself.”

DPP Statement of General Guidelines for Prosecutors (Oct 2001):

“It is inappropriate to seek a sentence review because of a mere disagreement with the severity of the sentence imposed. It is necessary that there be a substantial departure from the accepted range of appropriate sentence for the offence in the circumstances of the case, including the specific elements relating to the offender, or an error of principle on the way in which the trial judge approached the sentencing”

Between 1993 and 1997 only 4 appeals were heard. In 1998 this rose to 12 (0.8% of convictions on indictment). In 1999 and 2000 there was a significant rise to 34 and 31 (2% of convictions on indictment). In almost 50% of Crown appeals, the court increased the sentence.

324 People (DPP) v Byrne [1995] 1 ILRM 279.
325 People (DPP) v McCormack [2000] 4 IR 356.
326 People (DPP) v McAuley [2001] IR 160.
327 People (DPP) v Egan [2001] 2 ILRM 299.
Scotland

Section 108 of the Criminal Procedure (Scotland) Act 1995 provides for appeals on the ground of undue leniency in prosecutions on indictment. Appeals by the Prosecution are infrequent, there being only 40 such appeals between 1993 and 2000. The test for a successful appeal was set out in Her Majesty’s Advocate v Bell [1995] SCCR 244:

“... a person is not to be subjected to the risk of an increase in sentence just because the appeal court considers that it would have passed a more severe sentence than that which was passed at first instance. The sentence must be seen to be unduly lenient. This means that it must fall outside the range of sentences which the judge at first instance, applying his mind to all the relevant factors, could reasonably have considered appropriate … It is only if it can be properly be said to be unduly lenient that the appeal court is entitled to interfere with it …”

In cases where the court discretion is narrow the court should increase the sentence if a more severe sentence is necessary for the protection of the public, or because the offence is a very serious one and a more severe sentence is required in order to provide guidance to sentencers generally: Her Majesty’s Advocate v Bell.

New Zealand

Section 383 of the Crimes Act 1961 headed “Right of appeal against conviction or sentence” provides the right of a Crown appeal against sentence in s 383(2):

“The Solicitor-General, with the leave of the court appealed to, may appeal to the Court of Appeal or the Supreme Court against the sentence passed on the conviction of any person on indictment, unless the sentence is one fixed by law.”

Section 383A headed “383A Appeal against decision of Court of Appeal on appeal against conviction or sentence” provides:

“(1) With the leave of the Supreme Court, a convicted person may appeal to the Supreme Court against a decision of the Court of Appeal on appeal under section 383.

(2) With the leave of the Supreme Court, the Solicitor-General may appeal to the Supreme Court against a decision of the Court of Appeal on appeal under section 383(2) …”

Section 383A is discussed in the Supreme Court decision of Clark v The Queen [2005] NZSC 23. R v Wihapi [1976] 1 NZLR 422 is a relevant authority on the subject of Crown appeals.

UK and Wales

Section 36 of the Criminal Justice Act 1988 introduced prosecution appeals against sentence. Under s 36, if it appears to the Attorney General that the sentence is lenient, and the offence is one triable only on indictment, the Attorney General may, with leave of the Court of Appeal, refer the case to them for review. The Court of Appeal may quash any sentence passed and in place pass such sentence as they think appropriate for the case. It applies only to cases of an indictable nature and the Court applies the test of “undue leniency” or unless the sentence is “manifestly not sufficiently severe”. The English position was described by the Lord Chief Justice in Attorney General’s Reference Nos. 31, 45, 43, 42, 50 & 51 of 2003 [2004] EWCA Crim 1934 at [1]-[3]:

“Section 36 sets out the conditions which have to be fulfilled before this Court can interfere with a sentence. The relevant provisions of section 36 are as follows:

‘36 (1) If it appears to the Attorney General:


(a) that the sentencing of a person in a proceeding in the Crown Court has been unduly lenient; and
(b) that the case is one to which this Part of this Act applies, he may, with the leave of the Court of Appeal, refer the case to them for them to review the sentencing of that person; and on such a reference the Court of Appeal may:

(i) quash any sentence passed on him in the proceeding; and
(ii) in place of it pass such sentence as they think appropriate for the case and as the court below had power to pass when dealing with him.

(2) Without prejudice to the generality of subsection (1) above, the condition specified in paragraph (a) of that subsection may be satisfied if it appears to the Attorney General that the judge erred in law as to his powers of sentencing or failed to impose a sentence required by section 109(2), 110(2) or 111(2) of the Powers of Criminal Courts (Sentencing) Act 2000.

(3) For the purposes of this Part of this Act any two or more sentences are to be treated as passed in the same proceeding if they would be so treated for the purposes of section 10 of the Criminal Appeal Act 1968.

The application of Her Majesty’s Attorney General can only be made (as is stated in section 36(1)) if it ‘appears’ to him that the sentence is unduly lenient. The section does not identify what should be the approach of this Court when a case is referred. Instead the section indicates that the courts power, if it decides to intervene, is to substitute a sentence that the court thinks is “appropriate”. The discretion on the court is, therefore, extremely wide. Assistance is, however, given as to when the court should intervene in Attorney General’s Reference (No. 4 of 1989) 90 Cr. App. R. 366 and (No. 5 of 1989) (R v Hill-Trevor) 90 Cr. App. R. 358. In those cases it was indicated that this Court should not intervene unless it was shown that there was some error of principle in the judge’s sentence, so that public confidence would be damaged if the sentence were not altered.

It is most important that this Court should adhere to this test in deciding whether to interfere with a sentence after having reviewed it under section 36. This Court does not interfere with a sentence which is said to be too severe unless it is manifestly excessive. Similarly, this Court will not interfere with a sentence on an Attorney General’s reference unless it is manifestly not sufficiently severe.”

Canada

Crown appeals were introduced in Canada in 1923. Section 676(1)(d) of the Criminal Code R.S. 1985 c. C–46 provides that the Attorney General may appeal to the Court of Appeal, with leave of the Court of Appeal or a judge thereof, against the sentence passed by a trial court in proceedings by indictment, unless that sentence is one fixed by law.

In R v Proulx [2000] 1 SCR 61, it was held that sentencing judges have a wide discretion in the choice of the appropriate sentence and are entitled to considerable deference from appellate courts. Absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.
Appendices

United States Code
TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART II - CRIMINAL PROCEDURE
CHAPTER 235 - APPEAL
Section 3742. Review of a sentence

(b) Appeal by the Government. — The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence:

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) (Footnote 1) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) Plea Agreements. — In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure:

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) Record on Review. — If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals:

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) Consideration. — Upon review of the record, the court of appeals shall determine whether the sentence:

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and is unreasonable, having regard for:

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable. The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court’s application of the guidelines to the facts.
Decision and Disposition. — If the court of appeals determines that the sentence:

(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and:
   (A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;
   (B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(3) is not described in paragraph (1) or (2), it shall affirm the sentence.

Application to a Sentence by a Magistrate Judge. — An appeal of an otherwise final sentence imposed by a United States magistrate judge may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

Guideline Not Expressed as a Range. — For the purpose of this section, the term “guideline range” includes a guideline range having the same upper and lower limits.

The Supreme Court recently considered the Federal Guidelines in United States v Booker (2005) 73 USLW 4056.
## Appendix F


<table>
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<th>Crimes Act 1900</th>
<th>First instance sentence</th>
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<td><strong>s 24 – manslaughter</strong></td>
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<td>Hoerler [2004] NSWCCA 184</td>
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<td><strong>s 33 – malicious wounding or inflict gbh with intent to do bodily harm or resist arrest</strong></td>
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