HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

THE KING APPELLANT

AND

ANDREW STUART McGREGOR RESPONDENT

The King v McGregor
[2026] HCA 3
Date of Hearing: 7 October 2025
Date of Judgment: 11 March 2026
S45/2025

ORDER

1. *Appeal dismissed.*

2. *The appellant pay the respondent's costs of the application for special leave and the appeal.*

On appeal from the Supreme Court of New South Wales

Representation

J T Gleeson SC with C J Tran for the appellant (instructed by Director of Public Prosecutions (Cth))

R J Wilson SC with T Quilter SC and C E O'Neill for the respondent (instructed by Legal Aid NSW)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

The King v McGregor

Criminal law – Sentencing – Aggregate sentence of imprisonment – Where offence attracted mandatory minimum sentence of imprisonment under s 16AAA of *Crimes Act 1914* (Cth) – Whether New South Wales courts can impose aggregate sentence with respect to multiple Commonwealth offences – Whether New South Wales courts can impose aggregate sentence where Commonwealth offence attracts mandatory minimum sentence of imprisonment – Whether s 53A of *Crimes (Sentencing Procedure) Act 1999* (NSW) capable of being picked up and applied by s 68(1) of *Judiciary Act 1903* (Cth) to sentencing for Commonwealth offences – Whether s 53A(2)(b) of *Crimes (Sentencing Procedure) Act 1999* (NSW) incompatible with Div 2 of Pt IB of *Crimes Act 1914* (Cth).

Words and phrases – "aggregate sentence", "deterrence", "different legal operation", "discount", "essential meaning", "federal jurisdiction", "federal offences", "general sentencing principles", "incompatibility", "inconsistency", "indication", "indicative sentence", "instinctive synthesis", "jurisdiction", "like jurisdiction", "mandatory minimum sentence", "mandatory minimum term of imprisonment", "minimum term", "multiple offences", "non-parole period", "operative sentence", "picked up", "sentence of imprisonment", "sentencing principles", "substantively different legal operation", "totality", "translation", "transparency", "yardstick".

Crimes Act 1914 (Cth), ss 16A, 16AAA, 16AAB, 16AAC, 19(2), 19AB(1).
Crimes (Sentencing Procedure) Act 1999 (NSW), s 53A.
Judiciary Act 1903 (Cth), s 68.

1 GAGELER CJ, GLEESON AND BEECH-JONES JJ. This is an appeal from a judgment of the New South Wales Court of Criminal Appeal, which granted the respondent leave to appeal against a sentence imposed by the District Court of New South Wales for four offences against a law of the Commonwealth,[1] one of which attracted a mandatory minimum term of imprisonment of 7 years under s 16AAA of the *Crimes Act 1914* (Cth).[2] The Court of Criminal Appeal allowed the appeal and resentenced the respondent[3] by imposing an aggregate sentence of imprisonment pursuant to s 53A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("the *Sentencing Procedure Act*").

2 The appellant advances two contentions concerning the ability of courts in New South Wales, in sentencing offenders for multiple offences against a law of the Commonwealth, to impose aggregate sentences of imprisonment pursuant to s 53A of the *Sentencing Procedure Act*. The appellant's wider contention is that they cannot do so at all. The appellant's narrower contention is that they cannot do so where at least one of the offences attracts a mandatory minimum term of imprisonment under s 16AAA of the *Crimes Act*.

3 Both contentions turn on the application to s 53A of the *Sentencing Procedure Act* of s 68(1) of the *Judiciary Act 1903* (Cth). For the reasons that follow, both contentions should be rejected. Accordingly, the appeal should be dismissed.

The District Court

4 Three of the four offences to which the respondent pleaded guilty were: engaging in persistent sexual abuse of a child outside Australia on two or more separate occasions in relation to the same child contrary to s 272.11(1)(c) of the *Criminal Code* (Cth) ("the Code"); causing child abuse material to be transmitted to himself using a carriage service contrary to s 474.22(1) of the Code; and engaging in conduct in relation to a person under 16 years of age with the intention of procuring that person to engage in sexual activity outside Australia, whilst the child was outside Australia, contrary to s 272.14(1) of the Code. An offence of using a carriage service to transmit an indecent communication to a person under the age of 16 years was also required to be taken into account under s 16BA of the *Crimes Act* in sentencing the respondent for the offence under s 272.14(1). These

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1 The *Criminal Code* (Cth) contained within the Schedule to the *Criminal Code Act 1995* (Cth).

2 *Criminal Code*, s 272.11.

3 *Criminal Appeal Act 1912* (NSW), ss 5(1)(c), 6(3).

offences all concerned the respondent's interactions over a two-month period via social media with a 15-year-old child in the Philippines, whilst the respondent was in Australia. The respondent's other offence was having possession or control of child abuse material held in a computer or data storage device and using a carriage service to obtain or access that material contrary to s 474.22A(1) of the Code. This material related to other children.

5 The respondent was sentenced in the District Court to an aggregate term of imprisonment of 11 years and 6 months with a non-parole period of 8 years. In determining this sentence, the sentencing judge allowed a reduction of 25 per cent for the respondent's guilty plea, and a further reduction of 5 per cent for the respondent's cooperation at the time of his arrest. Pursuant to s 53A(2)(b) of the *Sentencing Procedure Act*, the sentencing judge indicated to the respondent, and made a written record of, the sentences that would have been imposed for each offence had separate sentences been imposed instead of an aggregate sentence. In relation to the offence under s 272.11(1)(c) of the Code, the indicated sentence that would have been imposed was 5 years and 10 months. The sentencing judge's reasons reveal that, prior to any allowance for the respondent's guilty plea and cooperation, the sentence that would have been indicated was 8 years' imprisonment. The reduction from 8 years to 5 years and 10 months of imprisonment represents 30 per cent of *7 years* (being the mandatory minimum term of imprisonment for which s 16AAA of the *Crimes Act* provides for an offence under s 272.11(1)(c) of the Code) rounded down to the nearest month.

The Court of Criminal Appeal

6 The respondent sought leave to appeal to the Court of Criminal Appeal against the aggregate sentence.[4] The respondent contended that the sentencing judge misapplied s 16AAC(3) of the *Crimes Act* to the offence under s 272.11(1)(c) by treating that provision as requiring the application of the 30 per cent discount to the 7-year mandatory minimum sentence and subtracting the result (being 25.2 months) from the "starting point" of 8 years to yield, after rounding, an indicative sentence of 5 years and 10 months. The respondent contended that, properly construed, s 16AAC(3) permitted the sentencing judge to apply the 30 per cent discount to the "starting point" of 8 years (being a discount of 28.8 months) to yield, after rounding, an indicative sentence of 5 years and 7 months.

7 In the Court of Criminal Appeal, the appellant conceded that the respondent's construction of s 16AAC(3) of the *Crimes Act* was correct. The Court of Criminal Appeal accepted the respondent's construction and found that the

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4 *Criminal Appeal Act*, s 5(1)(c).

exercise of the sentencing discretion was affected by error. No issue concerning that construction is raised in this Court and it is not necessary to consider it further.

8 It followed from the finding of error that the Court of Criminal Appeal was required to re-exercise the sentencing discretion "afresh"[5] and determine whether any lesser sentence was warranted in law.[6]

9 The appellant contended that, in re-exercising the sentencing discretion, the Court of Criminal Appeal could not impose an aggregate sentence on the respondent. In support of this contention, the appellant made both the wider and narrower contentions, both of which the Court of Criminal Appeal rejected. That Court then resentenced the respondent by imposing an aggregate sentence of imprisonment of 10 years and 9 months with a non-parole period of 7 years and 6 months. Pursuant to s 53A(2)(b), the Court indicated the sentence that would have been imposed for the offence under s 272.11(1)(c) as being 5 years and 7 months.

The appeal to this Court

10 By a grant of special leave to appeal to this Court the appellant again pursues the wider and narrower contentions. These are reflected in grounds 2 and 1 of its notice of appeal respectively. It is convenient to address them in that order.

11 Before doing so, it is appropriate to explain the jurisdiction exercised by the District Court when sentencing the respondent and by the Court of Criminal Appeal in hearing and determining his application for leave to appeal and appeal against his sentence and with it to explain the source of the applicable sentencing law, and to set out the relevant provisions of Pt IB of the *Crimes Act* and of the *Sentencing Procedure Act*.

Section 68 of the *Judiciary Act* and the respondent's sentencing

12 Section 46(2) of the *Criminal Procedure Act 1986* (NSW) confers on the District Court jurisdiction in respect of all "indictable offences", save for certain offences prescribed by regulations. However, the proceedings against the respondent in the District Court involved a matter arising under a law of the Commonwealth, namely the Code, and thus the proceedings attracted federal jurisdiction.[7] Accordingly, it was beyond the legislative capacity of the Parliament

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5 *Kentwell v The Queen* (2014) 252 CLR 601 at 618 [42].

6 *Criminal Appeal Act*, s 6(3).

7 *Constitution*, s 76(ii).

of New South Wales to confer any jurisdiction on the District Court to hear and determine those proceedings,[8] or to otherwise regulate the exercise of any such jurisdiction.[9]

13 Instead, by s 68(2) of the *Judiciary Act*, the District Court was vested with a "like jurisdiction" to that conferred by s 46(2) of the *Criminal Procedure Act*, enabling that Court to hear and determine the proceedings against the respondent without any limits as to the locality of its jurisdiction that may be applicable under the laws of the State of New South Wales.[10] Also by s 68(2) of the *Judiciary Act* the Court of Criminal Appeal was vested with a "like jurisdiction" to that conferred by the *Criminal Appeal Act 1912* (NSW) to hear and determine any appeal or application for leave to appeal against conviction[11] and, relevantly, by s 5(1)(c) of the *Criminal Appeal Act* to hear and determine the respondent's application for leave to appeal and appeal against his sentence.[12]

14 The exercise of those like jurisdictions by the District Court and by the Court of Criminal Appeal is regulated by Pt IB of the *Crimes Act*. The exercise of those like jurisdictions by the District Court and by the Court of Criminal Appeal is also regulated by New South Wales laws picked up and applied by s 68(1) of the *Judiciary Act*. Section 68(1) relevantly provides that the laws of a State respecting the procedure for the trial and conviction on indictment and the hearing and determination of appeals arising out of any such trial or conviction "shall ... apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the several courts of that State" by s 68(2).

15 Consistent with the object of s 68 of the *Judiciary Act*, being to place "the administration of the criminal law of the Commonwealth in each State upon the same footing as that of the State and to avoid the establishment of two independent

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8 *Rizeq v Western Australia* (2017) 262 CLR 1 at 25 [60]; *Attorney-General (Cth) v Huynh* (2023) 280 CLR 341 at 357-358 [37].

9 *Rizeq* (2017) 262 CLR 1 at 41 [103].

10 *Judiciary Act 1903* (Cth), s 68(5C).

11 *R v LK* (2010) 241 CLR 177 at 191 [20], 215-216 [86].

12 *Williams v The King [No 2]* (1934) 50 CLR 551 at 560; *Peel v The Queen* (1971) 125 CLR 447 at 468.

systems of criminal justice",[13] State and Territory sentencing laws were held in *Putland v The Queen*[14] to come within the class of laws described by s 68(1).

16 When engaged, s 68(1) operates by picking up and applying the text of the State and Territory laws "without change to [their] meaning"[15] so far as they are "applicable" to persons who are charged with offences against a law of the Commonwealth. The appellant's submissions as to the limits on the extent to which s 68(1) picks up and applies the *Sentencing Procedure Act* were framed by reference to three "qualifications" on the operation of s 68(1) described by Kiefel CJ, Gageler and Gleeson JJ in *Attorney-General (Cth) v Huynh*[16] as follows.

17 The first qualification is that s 68(1) does not pick up and apply the text of a State or Territory law to the extent that, in so applying that law as Commonwealth law, the State or Territory law is inconsistent with the *Constitution*[17] or another Commonwealth law.[18] Thus, in *Putland* it was held that Pt 1B (as Pt IB was then called) of the *Crimes Act* did not intend to "cover the field"[19] or be "comprehensive"[20] or "exhaustive"[21] with respect to the sentencing of offenders who commit offences against a law of the Commonwealth.

18 The second qualification is that, similar to s 68(2) of the *Judiciary Act*, s 68(1) picks up and applies State and Territory laws "by analogy".[22] The process of picking up and applying by analogy has been described as involving a "translation" of the relevant State or Territory law but in a manner that leaves the

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13 *Williams* (1934) 50 CLR 551 at 560.

14 (2004) 218 CLR 174 at 178-179 [4], 188 [34], 215 [121].

15 *Huynh* (2023) 280 CLR 341 at 363 [57].

16 (2023) 280 CLR 341.

17 See *Brown v The Queen* (1986) 160 CLR 171 at 200-201, 206, 218; *Cheatle v The Queen* (1993) 177 CLR 541 at 563.

18 *Huynh* (2023) 280 CLR 341 at 363 [58], 390-391 [149], 433 [276].

19 *Putland v The Queen* (2004) 218 CLR 174 at 184-185 [20]-[24], 193 [53].

20 *Putland* (2004) 218 CLR 174 at 185 [23].

21 *Putland* (2004) 218 CLR 174 at 193 [53].

22 *Williams* (1934) 50 CLR 551 at 561.

law's meaning unchanged.[23] Thus, for example, where s 68(2) operates upon a law that contains a reference to the "Attorney-General" (for the State of New South Wales) having a right of appeal under the *Criminal Appeal Act*, that law can be "translated" to include the Attorney-General of the Commonwealth as having that right.[24] Similarly, a law upon which s 68(2) operates that contains a reference to the Director of Public Prosecutions (for Victoria) having a right of appeal under the *Crimes Act 1958* (Vic) against sentence can be "translated" to include the Attorney-General of the Commonwealth as having that right (with that right in turn capable of being exercised by the Commonwealth Director of Public Prosecutions).[25] With the similarly worded aspect of s 79(1) of the *Judiciary Act*, references to "courts" in State or Territory legislation can be taken to include references to federal courts[26] and even specific references to State or Territory courts are capable of being "translated" so as to include federal courts.[27]

19 The third qualification is that, where a particular provision of a State or Territory law is "an integral part of a State [or Territory] legislative scheme", s 68(1) does not pick up some but not all of the scheme "if to do so would be to give an altered meaning to the severed part of the State [or Territory] legislation".[28] That is to say, s 68(1) "does not apply the text of a State or Territory law where to apply the text divorced from its State or Territory context would give that text a substantively different legal operation".[29]

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23 *Huynh* (2023) 280 CLR 341 at 363 [59], 365 [62]-[63], 392 [152], 403 [184], 430 [269].

24 See *Peel* (1971) 125 CLR 447.

25 See *Rohde v Director of Public Prosecutions* (1986) 161 CLR 119.

26 *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 95.

27 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 140; *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 593 [72], 612 [137].

28 *Huynh* (2023) 280 CLR 341 at 366 [65]; see also at 392-393 [153], 403 [184], 431 [271]. See also *Putland* (2004) 218 CLR 174 at 188 [37].

29 *Huynh* (2023) 280 CLR 341 at 366 [66].

Part IB of the *Crimes Act*

20 Part IB of the *Crimes Act* is directed, amongst other things, to the sentencing of "federal offenders", being persons convicted of offences against laws of the Commonwealth. The numerous references to a "court" in Pt IB include a State court exercising federal jurisdiction in sentencing a person for offences against a law of the Commonwealth to which the *Crimes Act* applies.

21 Within Pt IB, Div 2 is entitled "General sentencing principles". Division 2 contains s 16A. Section 16A(1) provides that, "[i]n determining the sentence to be passed, or the order to be made [for offences against a law of the Commonwealth], ... a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence". Section 16A(2) specifies various factors that "the court" must take into account in doing so.

22 Division 2 of Pt IB also contains ss 16AAA, 16AAB and 16AAC, which were inserted by the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth) ("the Amending Act").

23 Section 16AAA provides:

> "Subject to section 16AAC, if a person is convicted of an offence described in column 1 of an item in the following table, the court must impose a sentence of imprisonment of at least the period specified in column 2 of that item."

24 Column 1 of the table set out in s 16AAA lists various offences, including at item 6 an offence against s 272.11 of the Code. The corresponding entry in column 2 of the table specifies a minimum term of 7 years.

25 Section 16AAB addresses the circumstance where an offender is convicted of a Commonwealth child sexual abuse offence (being a "current offence"), having been convicted "at an earlier sitting" of a child sexual abuse offence.[30] In such a case "the court must impose *for* the current offence a sentence of imprisonment of at least the period specified in column 2" for that offence.[31]

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30 *Crimes Act 1914* (Cth), s 16AAB(1).

31 *Crimes Act*, s 16AAB(2) (emphasis added).

26 Sections 16AAA and 16AAB were considered by this Court in *Hurt v The King*.[32] *Hurt* held that the specified minimum terms have two functions: restricting "sentencing power to the minimum period of imprisonment, subject to ... exceptions"; and providing a "yardstick", being the "opposite of the maximum term of imprisonment, for the exercise of the sentencing discretion".[33]

27 Section 16AAC(2) enables a court to impose a sentence of imprisonment less than the minimum period specified in the table in s 16AAA, but only "if the court considers it appropriate to reduce the sentence because" the court is taking into account the offender's plea of guilty under s 16A(2)(g), or the offender having cooperated with law enforcement agencies in the investigation of certain offences, including a Commonwealth child sex offence, under s 16A(2)(h), or both. Section 16AAC(3) limits the extent of that reduction by reference to a specified percentage of the minimum term depending on whether the court is taking into account the offender having pleaded guilty or having relevantly cooperated with law enforcement agencies,[34] or both.[35]

28 Division 3 of Pt IB of the *Crimes Act* includes s 16E, which makes State and Territory laws relating to the commencement of sentences and non-parole periods applicable to persons sentenced in that State or Territory for a federal offence in the same way as they apply to a person sentenced in that State or Territory for a State or Territory offence. The balance of Div 3 contains provisions imposing obligations and restrictions on a court imposing a "federal sentence".[36] Section 19(2) relevantly provides that, where a person is convicted of two or more "federal offences" and sentenced to imprisonment for more than one offence, the court "must, by order, direct when each sentence commences". Within Div 4 of Pt IB, s 19AB(1) obliges a court to fix a single non-parole period if, relevantly: a person is convicted of two or more federal offences; the court imposes the "sentence or sentences" on the person; any of the "sentences" is a federal life sentence, or the aggregate of the "sentences" exceeds 3 years; and, when the court

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32 (2024) 281 CLR 286.

33 *Hurt v The King* (2024) 281 CLR 286 at 310-311 [54]; see also at 302-303 [33], 311-312 [57]-[58].

34 In which case the specified percentage is 25 per cent: *Crimes Act*, s 16AAC(3)(a), (b).

35 In which case the specified percentage is 50 per cent: *Crimes Act*, s 16AAC(3)(c).

36 See especially *Crimes Act*, ss 16F, 19.

imposes the sentence or sentences, the person is not already serving or subject to a federal sentence.

29 Two points should be noted. First, the appellant did not contend that, so far as the provisions in Divs 3-4 of Pt IB might be taken to suggest that a separate "sentence" had to be imposed for each offence of which an offender was convicted, those provisions were inconsistent with the imposition of an aggregate sentence under s 53A of the *Sentencing Procedure Act*. The applicability of that proposition to s 52 of the *Sentencing Act 1995* (NT), which is similar to s 53A of the *Sentencing Procedure Act*, was adverted to and rejected by Gummow and Heydon JJ in *Putland*[37] and was only endorsed by Kirby J in dissent.[38] That proposition fails to address the interaction between the provisions in Divs 3-4 of Pt IB and sub-ss (3)-(4) of s 4K of the *Crimes Act*. Those provisions specifically authorise the imposition of an aggregate sentence where a person has been convicted of multiple summary offences joined in the same information, complaint or summons.[39] Instead of seeking to overturn *Putland*, the appellant contended that ss 19(2) and 19AB(1) and sub-ss (3)-(4) of s 4K of the *Crimes Act* did not undermine or contradict the submission the appellant makes about the incompatibility between s 53A(2)(b) on the one hand and provisions of Div 2 of Pt IB on the other.

30 Second, nothing in *Putland* denies the potential for an inconsistency to arise between a particular provision or provisions of Pt IB and provisions of a State or Territory sentencing law. For example, a provision of a State or Territory law that purported to fix "guidelines" or a starting point for the assessment of the appropriate length of a sentence for certain types of narcotics importation offences may be inconsistent with the requirement in s 16A(2) to consider the range of factors specified in s 16A(2)(a)-(p) of the *Crimes Act*,[40] and accordingly may not be picked up and applied by s 68(1).

The *Sentencing Procedure Act*

31 Part 3 of the *Sentencing Procedure Act* is headed "Sentencing procedures generally". Within Div 1 of Pt 3, s 21A specifies various aggravating, mitigating and other factors the court is to take into account in sentencing for "an offence".

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37 (2004) 218 CLR 174 at 194-195 [57].

38 *Putland* (2004) 218 CLR 174 at 208 [97].

39 See *Putland* (2004) 218 CLR 174 at 181-182 [13]-[15], 189-192 [44]-[50], 193 [53].

40 See *Putland* (2004) 218 CLR 174 at 194 [55], citing *Wong v The Queen* (2001) 207 CLR 584 at 609-611 [71]-[73], 616 [87], 631-632 [129]-[131].

Save for s 21A(2)(d), which refers to an offender having a record of previous offences, all of the aggravating circumstances are directed to the circumstances of a particular offence or offences, such as whether the offence "involved the actual or threatened use of violence"[41] or involved "multiple victims".[42] The mitigating circumstances are applicable to either the particular offence,[43] or the circumstances of the particular offender (such as whether he or she is unlikely to re-offend[44] or has pleaded guilty[45]), or both, such as whether in committing the offence the offender acted under duress.[46]

32 Also within Div 1 of Pt 3, s 22 obliges a court to take into account an offender's plea of guilty in dealing with an offence summarily or on indictment to which Div 1A does not apply.[47] Division 1A of Pt 3 contains provisions specifying the quantum of discount that will be applied on account of a plea of guilty to certain indictable offences.[48] These provisions are also expressed to apply in relation to a particular offence or offences,[49] or to the circumstances of the particular offender,[50] or to both.[51]

33 The topics addressed in the balance of the provisions in Div 1 of Pt 3 of the *Sentencing Procedure Act* include matters such as the roles of sentencing patterns

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41 *Crimes (Sentencing Procedure) Act 1999* (NSW) ("*Sentencing Procedure Act*"), s 21A(2)(b).

42 *Sentencing Procedure Act*, s 21A(2)(m).

43 See, eg, *Sentencing Procedure Act*, s 21A(3)(a)-(b).

44 See, eg, *Sentencing Procedure Act*, s 21A(3)(g)-(h).

45 *Sentencing Procedure Act*, s 21A(3)(k).

46 *Sentencing Procedure Act*, s 21A(3)(d); see also s 21A(3)(c).

47 *Sentencing Procedure Act*, s 22(5).

48 *Sentencing Procedure Act*, s 25A. It specifically excludes offences under a law of the Commonwealth: s 25A(1)(a).

49 See, eg, *Sentencing Procedure Act*, ss 22, 25D(1).

50 See, eg, *Sentencing Procedure Act*, ss 23, 24, 24A, 24B.

51 See, eg, *Sentencing Procedure Act*, s 25F(2).

and practices,[52] the power to reduce penalties for assistance provided for facilitating the administration of justice and for assistance provided to law enforcement authorities,[53] and the requirement to disregard any registration and reporting obligations imposed on the offender by certain legislation,[54] to disregard the effect of any confiscation of the offender's assets,[55] and to disregard any loss of the offender's parliamentary pension.[56]

34 These provisions are expressed in terms that, in their own right, bind "courts" in sentencing offenders for an offence or offences. Thus, those provisions impose obligations on "a court" or "the court" when it is "determining the sentence for an offence",[57] "determining the appropriate sentence for an offence",[58] and "passing sentence" for an offence,[59] and "[i]n sentencing an offender".[60] However, as has been stated, in their own right these provisions do not bind courts sentencing offenders for offences against a law of the Commonwealth.[61] Instead, they can only do so to the extent that they are picked up and applied by s 68(1) of the *Judiciary Act* in accordance with the principles noted above.

35 Part 4 of the *Sentencing Procedure Act* is headed "Sentencing procedures for imprisonment". Division 1 of Pt 4 addresses the powers of a court in imposing terms of imprisonment. Within Div 1, s 53A relevantly provides:

> "(1) A court may, in sentencing an offender for more than one offence, impose an aggregate sentence of imprisonment with respect to all or

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52 *Sentencing Procedure Act*, s 21B.

53 *Sentencing Procedure Act*, ss 22A-23.

54 *Sentencing Procedure Act*, s 24A.

55 *Sentencing Procedure Act*, s 24B.

56 *Sentencing Procedure Act*, s 24C.

57 See, eg, *Sentencing Procedure Act*, ss 25D(1), 25E(1)-(2).

58 See, eg, *Sentencing Procedure Act*, s 21A(1)-(3).

59 See, eg, *Sentencing Procedure Act*, s 22(1)-(2).

60 See, eg, *Sentencing Procedure Act*, ss 24, 24A(1), 24B(1), 24C.

61 *Rizeq* (2017) 262 CLR 1 at 41 [103].

any 2 or more of those offences instead of imposing a separate sentence of imprisonment for each.

(2) A court that imposes an aggregate sentence of imprisonment under this section on an offender must indicate to the offender, and make a written record of, the following—

(a) the fact that an aggregate sentence is being imposed,

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

(3) Subsection (2) does not limit any requirement that a court has, apart from that subsection, to record the reasons for its decisions." (emphasis added)

36 Section 53A(1) empowers a court sentencing an offender for more than one offence to impose a single aggregate sentence with respect to any or all of two or more offences. In doing so, s 53A(2)(b) obliges a court when imposing such a sentence to "indicate" to the offender "the sentence that would have been imposed for each offence ... had separate sentences been imposed instead of an aggregate sentence" (the "indicative sentences").[62] However, as was noted by this Court in *Pearson v The Commonwealth*, such indicative sentences are not orders or sentences and cannot be the subject of an appeal in their own right.[63] The operative sentence is that imposed under s 53A(1).

The wider contention

37 The appellant submitted that s 53A of the *Sentencing Procedure Act* was not applicable to sentencing for multiple offences against a law of the Commonwealth because s 53A(2)(b) of the *Sentencing Procedure Act* directs the attention of a sentencing court to apply the provisions in Pt 3 of that Act, and that direction is inconsistent with the application of Pt IB of the *Crimes Act*.

38 The Court of Criminal Appeal rejected this argument on two bases. First, it found that the effect of s 53A(2)(b) was to "simply require[] the court to undertake

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62 *Pearson v The Commonwealth* (2024) 99 ALJR 110 at 119-120 [45]; 420 ALR 41 at 51.

63 *Pearson* (2024) 99 ALJR 110 at 120 [45]; 420 ALR 41 at 51.

on an indicative basis the same sentencing exercise for each offence as would have otherwise occurred". In the case of an offence against a Commonwealth law, satisfying this requirement would involve the application of Pt IB and such provisions of the *Sentencing Procedure Act* as would be "required to be taken into account if and to the extent they are relevant".

39 Second, the Court concluded in the alternative that, "[i]f the contrary view were taken, and the purpose of [s 53A] was understood to be indicating a sentence the court would otherwise have imposed under State law", there would be "no change to the essential meaning of [s 53A], nor to its substantive legal operation, to say that a law requiring the indication of a separate sentence for a State offence consistent with State sentencing principles would, when applied analogically at the federal level, be understood to mean the court must indicate a separate sentence for a federal offence consistently with applicable federal sentencing principles".

40 The appellant submitted that the first of these bases was misconceived as it wrongly assumed that s 53A and the balance of the *Sentencing Procedure Act* applied of their own force to courts sentencing offenders for offences against a law of the Commonwealth. If the Court of Criminal Appeal made that assumption then the first basis for rejecting the wider contention was erroneous.[64] However, having regard to the proper meaning and effect of s 53A(2)(b), regardless of whether or not the Court of Criminal Appeal made that assumption, the Court of Criminal Appeal was ultimately correct to reject the wider contention.

41 The appellant's argument focused upon the parenthetical words "(after taking into account such matters as are relevant under Part 3 or any other provision of this Act)" in s 53A(2)(b) of the *Sentencing Procedure Act*. It was contended that those words require a sentencing court in imposing an aggregate sentence to specify the indicative sentences by reference to only the provisions of the *Sentencing Procedure Act*, including Pt 3. This requirement was said to be inconsistent with the obligations imposed on courts by Pt IB of the *Crimes Act* in sentencing for offences against a law of the Commonwealth. It was further submitted that any attempt to translate s 53A(2)(b) to include Pt IB of the *Crimes Act* to overcome this difficulty would substantively alter the meaning of s 53A(2)(b).

42 This submission demonstrates how an assessment of whether picking up and applying a particular provision of a relevant State or Territory law would alter that provision's meaning or give the provision a "substantively different legal

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64 *Rizeq* (2017) 262 CLR 1 at 41 [103].

operation"[65] cannot be undertaken without first ascertaining the meaning and operation of that provision. Properly construed, the parenthetical words in s 53A(2)(b) are of such limited meaning and effect that the suggested inconsistency does not arise and no "translation" is required in the picking up and applying of s 53A(2)(b) of the *Sentencing Procedure Act* by s 68(1) of the *Judiciary Act*.

43 Absent s 53A of the *Sentencing Procedure Act*, judges in New South Wales would be required to sentence offenders for committing multiple offences in accordance with the approach identified by this Court in *Pearce v The Queen*,[66] namely "fix[ing] an appropriate sentence for each offence and then consider[ing] questions of cumulation or concurrence, as well ... as questions of totality".[67] As noted in *Pearson*, s 53A of the *Sentencing Procedure Act* was introduced to ameliorate the perceived difficulties that arose from applying *Pearce* when sentencing for multiple offences, including the need to specify staggered start and end dates for multiple individual sentences when accumulating the terms of such sentences and applying the totality principle.[68] However, aggregate sentences do not alleviate sentencing judges from considering the individual offences,[69] the individual offender and his or her circumstances, and the totality of criminality involved as part of the process of "instinctive synthesis" referred to in *Markarian v The Queen*.[70] Even where it has been determined that no penalty other than a sentence of imprisonment is appropriate for multiple offences,[71] a court is not obliged to impose an aggregate sentence of imprisonment for multiple offences[72] and, even if an aggregate sentence is imposed, the appropriate length of that sentence cannot be determined until that process of instinctive synthesis is undertaken. In the end result the "aggregate sentence ought to be the same as the

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65 *Huynh* (2023) 280 CLR 341 at 366 [66].

66 (1998) 194 CLR 610.

67 *Pearce v The Queen* (1998) 194 CLR 610 at 624 [45].

68 *Pearson* (2024) 99 ALJR 110 at 120 [46]; 420 ALR 41 at 51, citing *JM v The Queen* (2014) 246 A Crim R 528 at 535-536 [39(3)].

69 *JM* (2014) 246 A Crim R 528 at 536 [39(4)].

70 (2005) 228 CLR 357 at 375 [38]-[39]. See also *Wong* (2001) 207 CLR 584 at 611 [75].

71 *Sentencing Procedure Act*, s 5(1).

72 *Sentencing Procedure Act*, s 53A(1).

total effective sentence [that would have resulted] from the imposition of individual sentences".[73]

44 As noted, the relevant provisions of Pt 3 of the *Sentencing Procedure Act* are expressed in terms that apply to the sentencing exercise undertaken by courts in New South Wales in relation to offences against a law of the State of New South Wales. Those provisions require courts to consider the circumstances of the particular offence or offences,[74] the circumstances of the particular offender,[75] the totality of the criminality involved in the offending,[76] and, if a term of imprisonment must be imposed in relation to multiple offences, whether that punishment should be imposed via an aggregate sentence and the length of that sentence.

45 Thus, it is the substantive provisions of Pt 3 of the *Sentencing Procedure Act* and not the parenthetical words in s 53A(2)(b) that impose on sentencing courts an obligation to address so much of that Act that concerns the circumstances of the offence(s) and the offender, and the total criminality involved. The parenthetical words in s 53A(2)(b) are descriptive of the process that the sentencing court is otherwise obliged to undertake. At most, those parenthetical words simply acknowledge and confirm that certain substantive provisions of the *Sentencing Procedure Act* are, as the case may be, applicable to the determination of the length of the sentence that would have been imposed for each offence, had separate sentences been imposed (ie, the indicative sentences).[77] Hence, it has been observed that compliance with s 53A(2) exposes "how it is that the aggregate sentence was arrived at".[78]

46 When the limited effect of the parenthetical words in s 53A(2)(b) is exposed, it follows that there is no inconsistency between s 53A(2)(b) of the *Sentencing Procedure Act* and Pt IB of the *Crimes Act*, and no translation of those words is required to apply s 53A to courts sentencing offenders for multiple offences against a law of the Commonwealth. Section 68(1) of the *Judiciary Act*

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73 *Ibbotson (a pseudonym) v The Queen* [2020] NSWCCA 92 at [9].

74 See, eg, *Sentencing Procedure Act*, s 21A(2).

75 See, eg, *Sentencing Procedure Act*, s 21A(3).

76 See, eg, *Sentencing Procedure Act*, s 21A(2); see also *JM* (2014) 246 A Crim R 528 at 536 [39(5)].

77 See, eg, *PG v The Queen* (2017) 268 A Crim R 61 at 78 [72].

78 *R v Nykolyn* [2012] NSWCCA 219 at [58].

"applies the text of [s 53A of the *Sentencing Procedure Act*] without change to its meaning".[79]

47 The source(s) of the obligation on courts to address the provisions of Pt IB of the *Crimes Act*, including s 16A(1)-(2), are the commands to a court contained within those provisions. In imposing an aggregate sentence under s 53A, including in indicating and recording the sentence that "would have been imposed" for the individual offences, a court is still "determining the sentence to be passed",[80] "imposing a sentence",[81] "sentencing a person",[82] or "passing sentence"[83] as provided for in Pt IB of the *Crimes Act*. The parenthetical words in s 53A(2)(b) simply record, but do not of themselves require, that a court sentencing an offender for offences against a law of the Commonwealth should apply so much of the provisions of the *Sentencing Procedure Act*, including Pt 3, "as are relevant", in addition to Pt IB of the *Crimes Act*. Whether there are any such provisions that are "relevant" when sentencing for offences against a law of the Commonwealth will depend on the particular case and whether, consistent with the principles explained above,[84] s 68(1) of the *Judiciary Act* picks up and applies any of the relevant provisions of Pt 3, or other provisions of the *Sentencing Procedure Act*, said to be engaged. It is not necessary to decide whether any such provision of the *Sentencing Procedure Act*, aside from s 53A, is capable of being picked up and applied, including those provisions that specify the fixing of a non-parole period for an aggregate sentence.[85]

48 The Court of Criminal Appeal did not err in rejecting the "wider" contention that an aggregate sentence of imprisonment under s 53A of the *Sentencing Procedure Act* cannot be imposed for multiple offences against a law of the Commonwealth.

49 Ground 2 of the appeal should be rejected.

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79 *Huynh* (2023) 280 CLR 341 at 363 [57].

80 *Crimes Act*, s 16A(1).

81 *Crimes Act*, s 16AC(1).

82 *Crimes Act*, s 16B.

83 *Crimes Act*, s 16A.

84 See above at [16]-[19].

85 *Sentencing Procedure Act*, s 44(2A)-(2C); cf *Crimes Act*, ss 19AB, 19AG.

The narrower contention

50 The appellant submitted that s 53A of the *Sentencing Procedure Act* is inconsistent with s 16AAA of the *Crimes Act* because, subject to the operation of s 16AAC, s 16AAA required the respondent to be sentenced to a term of imprisonment of at least 7 years "for" the offence listed in column 1 of the table in s 16AAA yet the effect of applying s 53A is that a sentence of imprisonment is not imposed "for" that offence but instead an aggregate sentence is imposed "for" all of the offences. The appellant further submitted that, because an indicative sentence is not an operative sentence, the aggregate sentence does not constitute a sentence "for" an offence listed in column 1 of the table in s 16AAA and the legislative history of mandatory minimum sentences for offences against Commonwealth laws does not reveal any intention of the Commonwealth Parliament to permit aggregate sentences in respect of such offences. Lastly the appellant submitted that to permit such sentences would undermine the "clarity of the deterrent message" sought to be achieved through ss 16AAA-16AAC, because aggregate sentencing "threatens to obscure how the instinctive synthesis was resolved [by the sentencing court] to arrive at an indicative sentence for the relevant offence".

51 Section 16AAA of the *Crimes Act* does not expressly state that a person convicted of an offence listed in column 1 of the table must be sentenced to the specified minimum term of imprisonment "for" that offence. However, given that s 16AAB(2) provides that "the court must impose *for* the current offence a sentence of imprisonment of at least the period specified" (emphasis added), it can be accepted that such an obligation is implicit in s 16AAA. It can also be accepted that, as an indicative sentence is not an operative sentence, an indicative sentence is not a sentence of imprisonment for the purposes of s 16AAA. The Court of Criminal Appeal did not conclude to the contrary. Instead that Court accepted the respondent's contention that "if an aggregate sentence of at least the minimum term is imposed for offences in the tables in ss 16AAA and 16AAB, then the requirement that at least such a term has been imposed for that offence has been satisfied". Put another way, s 16AAA does not require that an offender be sentenced to a *separate* term of imprisonment s*olely* for the offence listed in column 1 of the table in the section. Instead, provided that the aggregate sentence is imposed *for* such an offence, and meets s 16AAA's requirements, then it is not inconsistent with s 16AAA that the aggregate sentence is also imposed for other offences as well.

52 This approach accords with *Pearson*, in which it was observed that the natural meaning of the word "sentence" in the context of imprisonment was a

"judicial judgment or pronouncement fixing a term of imprisonment"[86] and which held there was no textual basis for construing the definition of "sentence" in s 501(12) of the *Migration Act 1958* (Cth) so that it "*excludes* a single form of punishment for more than one offence".[87] Section 501(12) provided that "sentence includes any form of determination of the punishment for an offence". There is no textual or other reason for construing s 16AAA as requiring any different result in this case.

53 The appellant noted that nothing in the extrinsic material to the Amending Act refers to the possibility of imposing an aggregate sentence in respect of offences that carried minimum terms. A related submission was that it was "improbable" that Parliament intended to allow such sentences when the approach to aggregate sentences in different States and Territories is said to "exhibit[] ... much variation".[88]

54 These submissions do not advance the appellant's narrower contention.[89] The potential application of State and Territory aggregate sentencing regimes in respect of multiple offences against a law of the Commonwealth has been firmly established at least since *Putland* was decided in 2004. Provisions enacting mandatory minimum sentences similar to that found in ss 16AAA-16AAC have

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86 *Pearson* (2024) 99 ALJR 110 at 120 [50]; 420 ALR 41 at 51, quoting *Winsor v Boaden* (1953) 90 CLR 345 at 347.

87 *Pearson* (2024) 99 ALJR 110 at 120 [50], 122 [61]; 420 ALR 41 at 51-52, 54 (emphasis in original).

88 See, eg, *Sentencing Procedure Act*, s 53A. See also *Sentencing Act 1995* (NT), s 52; *Sentencing Act 2017* (SA), s 26; *Sentencing Act 1997* (Tas), s 11; *Sentencing Act 1991* (Vic), s 9. Aggregate sentencing is not available in the Australian Capital Territory, Queensland or Western Australia.

89 The respondent contended that the extrinsic materials, particularly the Royal Commission into Institutional Responses to Child Sexual Abuse in its *Criminal Justice Report*, supported his case. The *Criminal Justice Report* referred to aggregate sentences: Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017), Executive Summary at 99, 100, Part VIII at 300, 301, 307. The respondent contended that the *Criminal Justice Report* had been referred to when a previous, related Bill had been introduced into Parliament, and thus the respondent argued that the Amending Act contemplated the possibility of imposing an aggregate sentence. It is not necessary to address that contention.

been included in Commonwealth legislation since at least 2001,[90] and Commonwealth offences carrying mandatory minimum sentences have been created since.[91] Given that history, the absence of any reference in the extrinsic material to the Amending Act to aggregate sentences of imprisonment is more likely to suggest that the Commonwealth Parliament accepted that aggregate sentencing is applicable to offences against a law of the Commonwealth rather than that Parliament was disapproving of its application. This is especially so when, far from being concerned about the application of State or Territory laws that exhibit variation to the sentencing of persons who commit offences against laws of the Commonwealth, such a differential operation has been the foundation of s 68 of the *Judiciary Act* as identified as far back as 1934 by Dixon J in *Williams v The King [No 2]*.[92]

55 In relation to deterrence, the Explanatory Memorandum to the Bill that introduced ss 16AAA-16AAC referred to the deterrent effect of mandatory minimum sentences.[93] During the second reading speech the relevant Minister referred to the provisions as "send[ing] a clear message that society will not tolerate sexual crimes against children".[94] However, the deterrent effect of minimum sentences is reflected in their two functions identified in *Hurt*; namely, restricting the exercise of the sentencing power to the specified minimum periods, and providing a "yardstick" for sentencing which is "the opposite of the maximum term of imprisonment".[95] Once it is appreciated that the imposition of an aggregate sentence does not relieve the sentencing court of the obligation to address such sentencing criteria and other provisions as are applicable to the individual offence[96] and that s 53A(2)(b) requires the outcome of that process to be indicated and

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90 See *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth), Sch 2, item 5.

91 See, eg, *Anti-People Smuggling and Other Measures Act 2010* (Cth), Sch 1, item 10.

92 (1934) 50 CLR 551 at 560.

93 Australia, House of Representatives, *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019*, Explanatory Memorandum at 7 [27], 8 [33].

94 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 15 October 2019 at 4163; see also *Hurt* (2024) 281 CLR 286 at 306-307 [42], 322 [93].

95 *Hurt* (2024) 281 CLR 286 at 310-312 [54]-[57].

96 See above at [42]-[47].

recorded, it follows that neither of the functions of minimum terms identified in *Hurt* are compromised by the imposition of an aggregate sentence.

56 Lastly, so far as transparency in sentencing is concerned, in a passage from *R v Nykolyn*, to which reference has already been made,[97] R A Hulme J addressed the significance of s 53A(2)(b) as follows:[98]

> "The importance of proper compliance with the requirement to indicate the separate sentences that would have been imposed arises for at least four reasons. First, it assists a sentencing judge in application of the totality principle, an important factor in the assessment of the aggregate sentence to be imposed. Secondly, it exposes for appellate review how it is that the aggregate sentence was arrived at ... Thirdly, it allows victims of crime and the public at large to understand the level of seriousness with which a court has regarded an individual offence. Fourthly, it assists this Court to assess an appropriate new aggregate sentence if one or some of the underlying convictions are quashed on appeal."

57 This passage illustrates how sentences imposed under s 53A and in accordance with that provision's requirements facilitate "transparency". Usually all that will be lost in terms of "transparency" by the imposition of an aggregate sentence is an identification of the commencement and finishing dates of individual sentences. The step of identifying and specifying those dates does not often involve much elucidation. Legislation "rarely pursues a single purpose at all costs"[99] and nothing in the text, context or purpose of ss 16AAA-16AAC of the *Crimes Act* suggests that any marginal increase in transparency that may result from specifying the commencement and finishing dates for individual sentences was intended to be pursued to the exclusion of applying provisions such as s 53A of the *Sentencing Procedure Act*.

58 The Court of Criminal Appeal correctly rejected the appellant's narrower contention. Ground 1 of the appeal must be rejected.

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97 See above at [45].

98 *Nykolyn* [2012] NSWCCA 219 at [58].

99 *Carr v Western Australia* (2007) 232 CLR 138 at 143 [5]; *Construction Forestry Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at 632 [40]; *Kline v Official Secretary to the Governor-General* (2013) 249 CLR 645 at 661 [37].

Conclusion

59 The appeal should be dismissed. An order for costs should be made that reflects the condition on which the appellant was granted special leave to appeal.[100]

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100 See reasons of Gordon and Steward JJ at [105].

60 GORDON AND STEWARD JJ. The respondent, Mr McGregor, pleaded guilty to four offences against a law of the Commonwealth[101] relating to child sexual abuse. Mr McGregor was sentenced to an aggregate term of imprisonment of 11 years and six months, with a non-parole period of eight years, commencing on 5 October 2021. Count one[102] carried a mandatory minimum sentence of seven years' imprisonment under s 16AAA of the *Crimes Act 1914* (Cth).

61 Mr McGregor successfully appealed his sentence to the Court of Criminal Appeal of the Supreme Court of New South Wales ("the CCA") on the basis of an error conceded by the Crown and not relevant to this appeal.[103] It fell to the CCA to resentence Mr McGregor. The CCA imposed an aggregate sentence of imprisonment under s 53A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("the CSP Act") of 10 years and nine months, with a non-parole period of seven years and six months, commencing on 5 October 2021.

62 In this Court, the Crown contended that: (1) the CCA erred in imposing an aggregate sentence under s 53A of the CSP Act in respect of count one, to which a mandatory minimum sentence under s 16AAA of the *Crimes Act* applied, and (2) further, or in the alternative, the CCA erred in imposing an aggregate sentence under s 53A of the CSP Act in respect of Mr McGregor's four Commonwealth offences. Mr McGregor, by a notice of contention, contended that s 53A of the CSP Act may be picked up by s 68(1) of the *Judiciary Act 1903* (Cth) without picking up the words in parentheses in s 53A(2)(b), and thereby applied to the sentencing of federal offenders in New South Wales.

63 The issues raised by this appeal may be simply stated: can aggregate sentencing under s 53A of the CSP Act be picked up by s 68(1) of the *Judiciary Act* (a) consistently with s 16AAA of the *Crimes Act*; (b) and applied to the sentencing of federal offenders? As these reasons will explain, there is no inconsistency and s 53A of the CSP Act is capable of being picked up and applied (with a permissible degree of translation) to federal offences by s 68(1) of the *Judiciary Act*.

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101 The *Criminal Code* (Cth) in the Schedule to the *Criminal Code Act 1995* (Cth) ("the Code").

102 Code, s 272.11(1)(c): engaging in persistent sexual abuse of a child outside Australia on two or more separate occasions in relation to the same child.

103 The CCA's decision on this issue was consistent with the judgment of Edelman, Steward and Gleeson JJ in *Hurt v The King* (2024) 281 CLR 286 at 324 [102].

How does s 68 of the *Judiciary Act* operate?

64 Section 68(1) of the *Judiciary Act* has the effect that State and Territory sentencing laws apply "so far as they are applicable" to persons who are charged with an offence against the laws of the Commonwealth who come before State and Territory courts to be sentenced in the exercise of jurisdiction vested in those State and Territory courts pursuant to s 68(2) of the *Judiciary Act*.[104] The courts of New South Wales in issue in this appeal had jurisdiction for the purposes of s 68(2) of the *Judiciary Act*.

65 There was no dispute about the applicable principles relevant to the operation of s 68(1) of the *Judiciary Act*. The purpose of s 68(1) of the *Judiciary Act* is "to place the administration of the criminal law of the Commonwealth in each State upon the same footing as that of the State and to avoid the establishment of two independent systems of criminal justice".[105] State and Territory law is picked up with its meaning unchanged,[106] subject to a permissible degree of "translation" because s 68(1) of the *Judiciary Act* inevitably operates by way of analogy.[107] The meaning and scope of application of the law's text can be extended or narrowed in a limited way, without changing its essential meaning, from State or Territory circumstances to federal circumstances.[108]

66 The State and Territory laws to which s 68(1) refers apply "so far as they are applicable". As a result, s 68(1) of the *Judiciary Act* does not apply the text of a State or Territory law to the extent that in so applying as a Commonwealth law it would be inconsistent with the *Constitution* or another Commonwealth law.[109] Where a particular provision of State law is an integral part of a State legislative scheme, s 68(1) of the *Judiciary Act* could not operate to pick up some but not all

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104 *Putland v The Queen* (2004) 218 CLR 174 at 178-179 [4] confirmed that sentencing laws can be picked up and applied under s 68(1) of the *Judiciary Act*.

105 *Williams v The King [No 2]* (1934) 50 CLR 551 at 560.

106 *Attorney-General (Cth) v Huynh* (2023) 280 CLR 341 at 363 [57], 391 [150], 395-397 [161]-[166], 399-400 [170]-[174].

107 *Huynh* (2023) 280 CLR 341 at 363 [57], 365-366 [62]-[64], 392 [152].

108 *Huynh* (2023) 280 CLR 341 at 421 [237]-[238].

109 *Putland* (2004) 218 CLR 174 at 179-180 [7], 189 [41]; *Huynh* (2023) 280 CLR 341 at 363 [58]; see also 390-391 [149].

of it, if to do so would be to give an altered meaning to the severed part of the State legislation.[110]

Is s 53A of the CSP Act inconsistent with s 16AAA of the *Crimes Act*?

67 The *Crimes Act* does not contain any express provision that would allow a court sentencing a person for multiple federal offences dealt with on indictment to impose an aggregate sentence.[111] However, under s 53A(1) of the CSP Act, in sentencing an offender for more than one offence, a court may impose "an aggregate sentence of imprisonment with respect to all or any 2 or more of those offences instead of imposing a separate sentence of imprisonment for each". Whether s 53A of the CSP Act can be picked up by s 68(1) of the *Judiciary Act* depends on whether, if picked up as Commonwealth law, it would be inconsistent with s 16AAA of the *Crimes Act*.

68 Determining whether there would be any inconsistency requires examination of the operation of the *Crimes Act* and s 53A of the CSP Act before considering whether there would be any inconsistency with the *Crimes Act* if s 53A were picked up by s 68(1) of the *Judiciary Act*.

Crimes Act

69 Sections 16A, 16AAA, 16AAB and 16AAC in Pt IB of the *Crimes Act* deal with the sentencing, imprisonment and release of federal offenders. Section 16AAA, headed "Minimum penalties *for* certain offences",[112] imposes minimum sentences *for* specified offences. It is in an "if X, then Y" format:

> "Subject to section 16AAC, if a person is convicted of an offence described in column 1 of an item in the following table, the court must impose a sentence of imprisonment of at least the period specified in column 2 of that item."

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110 *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 135 [24]; *Huynh* (2023) 280 CLR 341 at 366 [65]-[66], 392-393 [153]-[155], 431 [271].

111 *Putland* (2004) 218 CLR 174 at 180 [9], 190 [44]-[46], 203-204 [86]. cf *Crimes Act*, ss 4K(3) and 4K(4), which permit the court to impose "one penalty" in respect of multiple charges "joined in the same information, complaint or summons".

112 Emphasis added. The heading is part of the statute: *Acts Interpretation Act 1901* (Cth), s 13.

70 The table in s 16AAA is relevantly as follows:

Minimum penalty		
Item	**Column 1** **Offence**	**Column 2** **Sentence of imprisonment**
...		
6	offence against section 272.11 of the *Criminal Code*	7 years

71 Section 16AAB of the *Crimes Act* addresses second or subsequent offences. Where an offender is to be sentenced for a Commonwealth child sexual abuse offence (described as a "current offence") and has been convicted "at an earlier sitting" of a child sexual abuse offence,[113] "the court must impose *for* the current offence a sentence of imprisonment of at least the period specified in column 2" of the table in s 16AAB(2) for that offence.[114]

72 The specified minimum terms in ss 16AAA and 16AAB have been described as serving a double function: restricting the "sentencing power to the minimum period of imprisonment, subject to ... exceptions"; and providing a "yardstick", being the "opposite of the maximum term of imprisonment, for the exercise of the sentencing discretion".[115]

73 Sections 16AAA and 16AAB(2) are subject to s 16AAC, which is headed "Exclusions and reductions – minimum penalties". Relevantly, s 16AAC(2) enables a court to impose a sentence of imprisonment of less than the minimum period specified in the table in s 16AAA or s 16AAB(2) only "if the court considers it appropriate to reduce the sentence because of" one or both of the following: (a) the court is taking into account the offender's plea of guilty under s 16A(2)(g); and (b) the court is taking into account the offender having cooperated with law enforcement agencies in the investigation of the offence or of a Commonwealth child sex offence, under s 16A(2)(h). Section 16AAC(3) then limits the extent of the discounts. It provides that a court may reduce the sentence by an amount "up to" a specified percentage of the minimum term,

113 *Crimes Act*, s 16AAB(1).

114 *Crimes Act*, s 16AAB(2) (emphasis added).

115 *Hurt* (2024) 281 CLR 286 at 311 [54]; see also 302-303 [33], 311-312 [57].

depending on whether the court is taking into account the person having pleaded guilty,[116] having cooperated with law enforcement agencies in the investigation of the offence or of a Commonwealth child sex offence,[117] or both.[118]

Section 53A of the CSP Act

74 Under s 53A(1) of the CSP Act, in sentencing an offender for more than one offence, a court may impose "an aggregate sentence of imprisonment with respect to all or any 2 or more of those offences instead of imposing a separate sentence of imprisonment for each". "Aggregate sentence of imprisonment" is defined in the CSP Act simply by reference to s 53A.[119] The natural meaning of the word "sentence" in the context of imprisonment is a "judicial judgment or pronouncement fixing a term of imprisonment".[120] "Sentence" is defined in the CSP Act as, "when used as a noun, the penalty imposed for an offence" and, "when used as a verb, to impose a penalty for an offence".[121]

75 The CCA has held that the aggregate sentence is the only operative sentence under s 53A.[122] The words "with respect to" in s 53A(1) suggest that the aggregate sentence is in relation to all the offences that are the subject of the aggregate sentence. It is therefore not correct to say that there is no sentence in relation to offences that are the subject of an aggregate sentence. That being said, the aggregate sentence is not expressed to be with respect to each of the individual offences, but rather "all or any 2 or more" of the offences. Where there is an aggregate sentence, there is no operative sentence specific to each individual offence.[123]

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116 In which case the specified percentage is 25 per cent: *Crimes Act*, s 16AAC(3)(a).

117 In which case the specified percentage is 25 per cent: *Crimes Act*, s 16AAC(3)(b).

118 In which case the specified percentage is 50 per cent: *Crimes Act*, s 16AAC(3)(c).

119 CSP Act, s 3(1) definition of "aggregate sentence of imprisonment".

120 *Pearson v The Commonwealth* (2024) 99 ALJR 110 at 120 [50]; 420 ALR 41 at 51, quoting *Winsor v Boaden* (1953) 90 CLR 345 at 347.

121 CSP Act, s 3(1) definition of "sentence".

122 *Vaughan v The Queen* [2020] NSWCCA 3 at [90].

123 *PD v The Queen* [2012] NSWCCA 242 at [44]. See also *PN v The King* [2024] NSWCCA 86 at [47]-[48].

76 Under s 53A(2), a court that imposes an aggregate sentence under s 53A must indicate to the offender, and make a written record of, (a) the fact that an aggregate sentence is being imposed; and (b) "the sentence that would have been imposed for each offence (after taking into account such matters as are relevant under Part 3 or any other provision of this Act) had separate sentences been imposed instead of an aggregate sentence". Section 53A(2)(b) refers to the sentence that "would have been" imposed. The use of hypothetical language makes clear that indicative sentences are not themselves the sentences imposed. The parties agree, and this Court has held, that the indicative sentences under s 53A(2)(b) are not sentences in their own right.[124]

77 There is no express requirement in the text of s 53A that the indicative sentences bear any arithmetical relationship with the aggregate sentence. However, it is plain by their inclusion in s 53A that they are not irrelevant. As this Court has observed, the indicative sentences assist in explaining how the aggregate sentence was arrived at.[125]

No inconsistency between s 53A of the CSP Act and s 16AAA of the Crimes Act

78 If picked up by s 68(1) of the *Judiciary Act*, s 53A of the CSP Act would not be inconsistent with s 16AAA of the *Crimes Act*. Although "[a]n aggregate sentence for a term of imprisonment plainly involves being 'sentenced to a term of imprisonment'",[126] it may be accepted that an aggregate sentence is not a sentence *exclusive* to each of the individual offences and that there is no operative sentence specific to each individual offence.[127] But there is nothing in the text, context or purpose of s 16AAA that supports the contention that the mandatory minimum sentence must be imposed exclusively for the specified offence.

79 First, the text of s 16AAA does not provide that the sentence be imposed *exclusively* for the specified offence. And there is no basis to read "for" in s 16AAA as meaning "exclusively for". The natural meaning of "for" readily encompasses a sentence "for" the specified offence as well as other offences. So much is apparent from this Court's decision in *Pearson v The Commonwealth*, which, albeit in a different context, stated that "given the natural meaning of 'sentence', there is no

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124 See *Pearson* (2024) 99 ALJR 110 at 120 [45]; 420 ALR 41 at 51.

125 *Park v The Queen* (2021) 273 CLR 303 at 314 [27].

126 *Pearson* (2024) 99 ALJR 110 at 122 [61]; 420 ALR 41 at 54.

127 *PD* [2012] NSWCCA 242 at [44]. See also *PN* [2024] NSWCCA 86 at [47]-[48].

textual basis for construing the definition of 'sentence' so that it *excludes* a single form of punishment for more than one offence".[128]

80 Second, the conclusion that there is no basis to read "for" in s 16AAA as meaning "exclusively for" and that s 16AAA does not exclude aggregate sentencing is reinforced by other provisions in the *Crimes Act*. As we have seen, s 16AAB, like s 16AAA, imposes mandatory minimum sentences, although in respect of repeat offenders. Section 16AAB(2) expressly requires that the mandatory minimum sentence be imposed "for the current offence". There is no apparent reason to differentiate between the schemes under s 16AAA and s 16AAB.

81 Indeed, some of the specified offences subject to mandatory minimum sentences under s 16AAB are able to be dealt with summarily.[129] Sections 4K(3) and 4K(4) of the *Crimes Act* expressly permit aggregate sentences to be imposed for summary offences, namely a single sentence in respect of two or more of those offences.[130] In other words, the *Crimes Act* accepts the co-existence of aggregate sentencing and mandatory minimum sentences.[131] It is true that the *Crimes Act* does not contain any express provision that would allow a court sentencing a person for multiple federal offences dealt with on *indictment* to impose a single sentence in respect of two or more of those offences. However, that omission does not provide any basis for concluding that Parliament intended to exclude aggregate sentencing for indictable offences.[132] There is nothing to support the Crown's assertion that aggregate sentencing under s 4K would not be applicable to mandatory minimum sentences in respect of summary offences under s 16AAB.

82 Third, a mandatory minimum sentence imposed in accordance with s 16AAA may be ordered to be served concurrently with another sentence. Section 19 of the *Crimes Act* provides for sentences to be served cumulatively, partly cumulatively or concurrently. Section 19(5) provides that sentences for Commonwealth child sex offences cannot be ordered to be served concurrently or partly cumulatively. However, s 19(6) provides an exception to the rule in s 19(5)

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128 (2024) 99 ALJR 110 at 120 [50]; 420 ALR 41 at 52 (emphasis in original).

129 In the table in s 16AAB, items 1, 2, 8, and 23 have maximum penalties of 10 years' imprisonment, items 3 and 4 have maximum penalties of seven years' imprisonment, and item 9 has a maximum penalty of five years' imprisonment. All are amenable to summary disposition: see s 4J(1) of the *Crimes Act*.

130 *Putland* (2004) 218 CLR 174 at 180 [9].

131 See *Putland* (2004) 218 CLR 174 at 182 [15].

132 *Putland* (2004) 218 CLR 174 at 181-182 [13]-[14]; see also 191-192 [48]-[50].

"if the court is satisfied that imposing the sentence in a different manner would still result in sentences that are of a severity appropriate in all the circumstances". Section 16AAA does not exclude the operation of s 19(6). A sentence can satisfy the mandatory minimum requirement in s 16AAA, even if it is ordered to be served concurrently with another sentence.

83 Thus, when a sentence is ordered to be served concurrently with another sentence, the *Crimes Act* accepts that a mandatory minimum sentence may, practically speaking, be partly or entirely subsumed into an "aggregate" sentence. Section 16(1) of the *Crimes Act* defines "aggregate" for the purposes of Pt IB, "in relation to 2 or more sentences or terms of imprisonment, or in relation to the unserved portions of such sentences or terms", to mean "the total effective sentence or term of imprisonment imposed, or remaining unserved, as the case may be, having regard to whether the sentences or terms are to be served cumulatively, partly cumulatively or concurrently". In other words, "aggregate", under Pt IB of the *Crimes Act*, means simply the total effective sentence arrived at by identifying individual sentences and then imposing any concurrency. Unlike in an aggregate sentence under s 53A of the CSP Act, the individual sentences in an "aggregate" sentence under Pt IB of the *Crimes Act* are operative sentences. However, the *practical effect* of imposing an aggregate sentence under s 53A of the CSP Act is that it is just a simpler way of arriving at an "aggregate" sentence, as defined in s 16(1) of the *Crimes Act*.

84 Fourth, s 19AB of the *Crimes Act* relevantly provides that a court must fix a single non-parole period when sentencing for more than one federal offence where the sentences, "in the aggregate", exceed three years. Given the lengths of the mandatory minimum sentences in s 16AAA, s 19AB would apply in most cases where an offender is being sentenced for more than one offence and at least one of the offences is specified in s 16AAA.

85 Fifth, aggregate sentencing is not inconsistent with the purpose of s 16AAA. The purpose for introducing the mandatory minimum sentence scheme under ss 16AAA and 16AAB[133] was to increase the sentences for serious child sex offending that were, at the time, being handed down by the courts, and to thereby reflect community condemnation of that offending and to increase personal and

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133 Introduced by the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), s 3, Sch 6.

general deterrence.[134] Imposing an aggregate sentence achieves this purpose to the same extent as imposing individual sentences.

86 Sixth, when s 16AAA was introduced, there were several authorities of this Court and intermediate appellate courts applying State aggregate sentencing schemes to federal offenders.[135] It can therefore be assumed that Parliament was aware that s 16AAA was being enacted in a context where State aggregate sentencing regimes might apply to federal offenders.[136] The fact that those cases did not concern mandatory minimum sentences does not detract from that conclusion.

87 Seventh, the aggregate sentence imposed cannot be less than the mandatory minimum sentence applying to an *individual* offence that is required to be imposed by the *Crimes Act*.[137] The reference to an individual offence is important because, as in this case, a plea of guilty attracts a discount. There are obvious comparisons to be drawn between aggregate sentencing and a total effective sentence where individual sentences are imposed. The short point is that the root of the requirement that the aggregate sentence cannot be less than the mandatory minimum sentence lies in the Commonwealth law because it is the Commonwealth law which imposes the mandatory minimum sentence.

88 For those reasons, aggregate sentencing is not inconsistent with s 16AAA of the *Crimes Act*.

Can aggregate sentencing under s 53A of the CSP Act be picked up by s 68(1) of the *Judiciary Act* in relation to federal offences?

89 The Crown's contention as to the alleged inconsistency between s 53A of the CSP Act and the *Crimes Act* was limited to the bracketed words in s 53A(2)(b) – namely, that the court must indicate the sentence that would have been imposed for each offence "(after taking into account such matters as are

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134 Australia, House of Representatives, *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019*, Explanatory Memorandum at 7 [24], [27]. See also Australia, House of Representatives, *Parliamentary Debates* (Hansard), 11 September 2019 at 2445.

135 See, eg, *R v Jackson* (1998) 72 SASR 490; *Putland* (2004) 218 CLR 174; *Director of Public Prosecutions (Cth) v Beattie* (2017) 270 A Crim R 556.

136 See, eg, *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 346-347 [81]; *Jackmain (a pseudonym) v The Queen* (2020) 102 NSWLR 847 at 888-889 [175].

137 CSP Act, s 49(2)(b).

relevant under Part 3 or any other provision of [the CSP Act])" had separate sentences been imposed instead of an aggregate sentence. Those bracketed words were said to give rise to an inconsistency with the *Crimes Act* because they refer to the sentencing factors in the CSP Act. The Crown's contention should be rejected. Section 53A of the CSP Act can be picked up and applied to the federal context, with a permissible degree of translation, without being inconsistent with the *Crimes Act*.

90 To explain that conclusion, it is necessary to explain how the *Crimes Act* intersects with the CSP Act. Sentencing is not a mechanical process but a question for judgment.[138] Informing that judgment in the present context are three relevant elements.

Element 1: Determine sentence to be imposed for individual offence

91 In sentencing for a federal offence, a court must apply, to the extent that they are relevant, the sentencing principles applicable to federal offences. Part IB of the *Crimes Act* contains a scheme for the sentencing of federal offenders. As recognised by this Court in *Putland v The Queen*, Pt IB is not an exhaustive code.[139] The Crown did not seek to reopen *Putland*, but rather submitted that a different conclusion would be reached in the circumstances of this case. That contention must be rejected.

92 Section 16A of the *Crimes Act* prescribes matters that the court must take into account, where relevant, in sentencing. As recognised by this Court, s 16A(2) expressly acknowledges that the matters in s 16A are "[i]n addition to any other matters", meaning that general common law principles of sentencing are applicable.[140] However, as also recognised by this Court, "peculiarly local or state statutory principles of sentencing" are not applicable matters under the *Crimes Act*.[141] Therefore, it may be accepted that the sentencing principles under the CSP Act, a State statute, do not apply to sentencing for federal offences under the *Crimes Act*. In other words, when dealing with an indictment containing

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138 *Markarian v The Queen* (2005) 228 CLR 357 at 371 [27]; *Elias v The Queen* (2013) 248 CLR 483 at 493 [25]; *Director of Public Prosecutions (Vic) v Dalgliesh (a pseudonym)* (2017) 262 CLR 428 at 434 [5]-[7], 452 [79].

139 (2004) 218 CLR 174 at 181 [12], 184 [20].

140 *Johnson v The Queen* (2004) 78 ALJR 616 at 622 [15]; 205 ALR 346 at 353; *R v Hatahet* (2024) 98 ALJR 863 at 868 [13]; 418 ALR 520 at 524.

141 *Johnson* (2004) 78 ALJR 616 at 622 [15]; 205 ALR 346 at 353, quoted in *Hatahet* (2024) 98 ALJR 863 at 868 [13]; 418 ALR 520 at 524.

multiple federal offences, the court must, regardless of whether it is imposing individual sentences or an aggregate sentence, first apply the relevant federal sentencing principles and arrive at sentences for each of the federal offences. But that is not the end of the sentencing process.

Element 2: Disposition

93 Once the court has applied the federal sentencing factors to arrive at individual sentences for each of the federal offences, the court must then address the disposition of the matter. Relevantly, the court has the power, under s 53A(1) of the CSP Act (picked up by s 68(1) of the *Judiciary Act*), to impose an aggregate sentence of imprisonment with respect to all or any two or more of those offences instead of imposing a separate sentence of imprisonment for each.

94 Section 53A(1) is the *empowering* provision. It contains the power to impose an aggregate sentence. Section 53A(1), in order to apply to federal offences, requires a degree of translation. Specifically, "offender" must be taken to mean a Commonwealth offender, and "offence" must be taken to mean a Commonwealth offence. This is a permissible degree of translation.[142] It does not change the essential meaning of "offender" or "offence",[143] but rather applies those terms by analogy to the Commonwealth context.[144] The practical effect of imposing an aggregate sentence under s 53A of the CSP Act is that it is just a simpler way of arriving at an "aggregate" sentence, as defined in the *Crimes Act*.[145] In other words, the operation of s 53A of the CSP Act is functionally consistent with the regime that already exists under the *Crimes Act*. Finally, s 49(2)(b) of the CSP Act provides that an aggregate sentence must not be less than the shortest term of imprisonment that must be imposed for any separate offence. Therefore, any mandatory minimum sentence imposed by the *Crimes Act* can and must be given effect in the manner described above.

95 While s 53A(1) of the CSP Act provides the *power*, s 53A(2) provides the *process*. Section 53A(2) requires the court, in imposing an aggregate sentence, to indicate to the offender, and to make a written record of, "(a) the fact that an aggregate sentence is being imposed" and "(b) the sentence that would have been imposed for each offence (after taking into account such matters as are

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142 See *Huynh* (2023) 280 CLR 341 at 363 [57], 365-366 [62]-[64], 392 [152].

143 See *Huynh* (2023) 280 CLR 341 at 392 [152].

144 See *Huynh* (2023) 280 CLR 341 at 363 [57], 365-366 [62]-[64], 392 [152].

145 See [83] above.

relevant under Part 3 or any other provision of this Act) had separate sentences been imposed instead of an aggregate sentence".

96 Section 53A(2)(b), once translated to the federal context, confirms what the court would have done in any event. The court would, regardless of whether it was imposing an aggregate sentence, have applied the relevant sentencing principles to arrive at the individual sentences. Put in different terms, the bracketed words in s 53A(2)(b) are merely descriptive of the process that was otherwise implicit, namely the process that the sentencing court would have undertaken in any event.

97 Whether at a State or federal level, a sentencing court arriving at the individual sentences that "would have been imposed" but for the aggregate sentence must necessarily have applied the relevant sentencing principles. Otherwise, the court has not properly identified the sentences that "would have been imposed". The bracketed words begin with the word "after", suggesting that those words simply recount the process that has already taken place. The word "after" suggests that s 53A(2)(b) refers to the process "after" the relevant sentencing principles have been applied.

98 Whether s 53A(2)(b) is being applied to federal or State sentencing, the bracketed words are not the source of the obligation on the court to apply Pt IB of the *Crimes Act* or Pt 3 of the CSP Act, as the case may be. The source of that obligation is the federal law and the State law respectively. The bracketed words only refer to "such matters as are relevant". In the federal context, matters are only relevant if picked up by federal law and if applicable to the circumstances. As has been explained, State sentencing principles under the CSP Act are not applicable to federal sentencing.[146]

99 Section 53A(2)(b) can readily be and should be translated, rather than picked up without translation, to sentencing for federal offences. The bracketed words can be translated by being read as "after taking into account such matters as are relevant under Pt IB or any other provision of the *Crimes Act*". This is a permissible degree of translation[147] because the essential meaning of s 53A(2) remains unchanged.[148] Put in different terms, the bracketed words (the only source of inconsistency relied on by the Crown) are merely descriptive of the process just

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146 See [92] above.

147 See *Huynh* (2023) 280 CLR 341 at 363 [57], 365-366 [62]-[64], 392 [152].

148 See *Huynh* (2023) 280 CLR 341 at 392 [152].

identified that would have happened in any event. Those words do not impose, and were not intended to impose, any substantive obligation.

100 The essential meaning of s 53A(2) – namely, that it confirms the *process* by which an aggregate sentence is to be arrived at – remains the same at the State and federal level. At the State level, the bracketed words merely describe that the indicative sentences were arrived at in the usual way of sentencing for State offences – that is, by reference to the requirements of the CSP Act. Section 53A was not intended to substantially change the sentencing process or impact the overall length of sentences.[149] It was intended to relieve the court from the task of fixing separate start and end dates and non-parole periods for offences, and specifying the precise detail of any overlap between sentences.[150]

101 The descriptive function of the bracketed words is not substantively changed when applied to federal sentencing. When applied to the federal context, the bracketed words describe that the indicative sentences were arrived at in the usual way for sentencing for federal offences – that is, by reference to the requirements of the *Crimes Act*. It may be accepted that the text of the bracketed words is changed in the sense that the court considers the relevant matters under the *Crimes Act* instead of under the CSP Act. However, that is a distinction without a difference and is inherent in applying the translated text. That change does not alter the court's function in imposing an aggregate sentence – the court, whether at the State or federal level, has the same power to impose an aggregate sentence and must undertake the same process to do so. The change in the bracketed words is merely a necessary change to describe the different principles involved in arriving at individual sentences for State and federal offences.

102 *Rohde v Director of Public Prosecutions*[151] is instructive. In *Rohde*, a provision of Victorian legislation conferred a right of appeal on the Director of Public Prosecutions of Victoria. Under federal law, the Commonwealth Director of Public Prosecutions did not have a power of appeal per se, but could exercise the Attorney-General of the Commonwealth's rights of appeal. This Court held that the Victorian provision conferred by analogy a right of appeal on the Attorney-General of the Commonwealth as the relevant proper officer to

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149 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 23 November 2010 at 27,870.

150 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 23 November 2010 at 27,867.

151 (1986) 161 CLR 119. See also *Williams* (1934) 50 CLR 551; *Peel v The Queen* (1971) 125 CLR 447.

represent the polity. The Attorney-General's power could then be exercised by the Commonwealth Director of Public Prosecutions. The Director of Public Prosecutions of Victoria and the Attorney-General of the Commonwealth were held to be analogous officers, despite having distinct types of office, because they had overlapping types of power.[152] Like the Victorian Director of Public Prosecutions and the Attorney-General of the Commonwealth in *Rohde*, the Commonwealth sentencing scheme and the New South Wales sentencing scheme are different but are nonetheless analogous. The Crown sought to distinguish *Rohde*, and the similar cases of *Williams v The King [No 2]*[153] and *Peel v The Queen*,[154] on the basis that it would have been "distinctly odd" to allow the Commonwealth Director of Public Prosecutions to prosecute the offence but then to require the State Director of Public Prosecutions to run the appeal. However, that submission does not alter or undermine the similarities between this case and *Rohde*.

Element 3: Non-parole period

103 The final element for the sentencing court is to identify the non-parole period. Section 19AB(1) of the *Crimes Act* provides that a court must fix a single non-parole period when sentencing for, relevantly, more than one federal offence where the sentences, "in the aggregate", exceed three years.

104 In other words, where a court is imposing an aggregate sentence for federal offences, provided that the aggregate sentence exceeds three years, the court must fix a single non-parole period in respect of the aggregate sentence. Where the aggregate sentence does not exceed three years, s 19AC(1) of the *Crimes Act* provides, in effect, that the court must make a single recognizance release order in respect of the aggregate sentence and must not fix a non-parole period.

Conclusion

105 The appeal should be dismissed. The Crown should be ordered to pay Mr McGregor's costs of the application for special leave and the appeal, consistent with the condition for the grant of special leave to appeal.

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152 See *Rohde* (1986) 161 CLR 119 at 127.

153 (1934) 50 CLR 551.

154 (1971) 125 CLR 447.

EDELMAN J.

Introduction

106 The issues on this appeal concern whether the aggregate sentencing regime in s 53A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("the NSW Sentencing Act") can apply in federal jurisdiction for sentencing under the *Crimes Act 1914* (Cth) generally or, more particularly, for sentencing where s 16AAA of the *Crimes Act* applies.

107 Mr McGregor pleaded guilty to four child sexual abuse offences under the *Criminal Code* (Cth).[155] He also admitted his guilt to a fifth offence which was taken into account in sentencing.[156] One of the offences attracted a mandatory minimum sentence (subject to exceptions) under s 16AAA of the *Crimes Act*. The District Court of New South Wales did not impose a separate sentence of imprisonment for any of the offences. Instead, the District Court, acting under the NSW Sentencing Act, sentenced Mr McGregor to a single aggregate term of imprisonment of 11 years and six months with a non-parole period of eight years. The District Court gave an indication of the sentences that would have been given to Mr McGregor for each of the individual offences had an aggregate sentence not been imposed.

108 The parties accepted, and the New South Wales Court of Criminal Appeal held, that the District Court made an error of law in imposing that sentence. The nature of that error is irrelevant to this appeal but it is addressed later in these reasons in the course of explaining the practical operation of mandatory minimum periods of imprisonment under s 16AAA. The relevant point is that the Court of Criminal Appeal was required to re-sentence Mr McGregor and it did so, like the District Court, by imposing an aggregate sentence of imprisonment. The aggregate term of imprisonment imposed was ten years and nine months with a non-parole period of seven years and six months. Like the District Court, the Court of Criminal Appeal gave an indication of the sentences that would have been imposed for the individual offences but did not impose a separate sentence for any of those offences.

109 Mr McGregor's sentencing was in federal jurisdiction. Before the Court of Criminal Appeal, and before this Court, the Crown (more accurately, the Executive

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155 See *Criminal Code Act 1995* (Cth), Schedule.

156 See *Crimes Act 1914* (Cth), s 16BA. Account was taken of the fifth offence in sentencing for count 4.

of the Commonwealth of Australia[157]) submitted that s 68(1) of the *Judiciary Act 1903* (Cth) does not extend to permit aggregate sentences under New South Wales legislation to be applied in federal jurisdiction or, if s 68(1) generally permits that application, that it does not permit such application when sentencing for offences which include those with a mandatory minimum term. The Court of Criminal Appeal rejected both submissions. For the reasons which follow, it was correct to do so.

Relevant provisions of the *Crimes Act*

110 The provisions of the *Criminal Code* concerning child sex offences for which Mr McGregor was liable to be sentenced[158] imposed criminal law duties as well as liabilities to criminal punishment for infringement. Those provisions operated of their own force to impose those duties and liabilities. The *Crimes Act* also conferred further sentencing powers upon the District Court and Court of Criminal Appeal (in re-sentencing) which those courts could exercise with the conferral of federal jurisdiction.

111 Section 16A(1) of the *Crimes Act* provides that "[i]n determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence". Section 16A(2) then provides for matters that the court must take into account "[i]n addition to any other matters". Section 16A(2AAA) also provides for additional matters to which the court must have regard: "the objective of rehabilitating the person", including by considering conditions about rehabilitation or treatment options.

112 The sentencing procedure required by s 16A involves a broad and general evaluative approach. The extent of any discounts in sentence for mitigating factors is within the discretion of the court. Hence the "[a]pplication of an automatic discount would not be consistent with the requirement of s 16A(1) that a sentence be appropriate in its severity in all the circumstances of the case".[159] That discretion is, however, reduced in some instances not merely by a maximum penalty but also by offences that have a mandatory minimum sentence.

113 Section 16AAA provides, with limited exceptions, for mandatory minimum penalties for certain offences: "the court must impose a sentence of imprisonment

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157 *Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks* (2024) 281 CLR 525 at 574-578 [139]-[149].

158 *Criminal Code* (Cth), s 272.11(1)(c) (count 1), s 474.22(1) (count 2), s 474.22A(1) (count 3), s 272.14(1) (count 4).

159 *Bui v Director of Public Prosecutions (Cth)* (2012) 244 CLR 638 at 651 [19].

of at least the [specified] period". There was a mandatory minimum penalty of seven years' imprisonment for one of the offences committed by Mr McGregor, the offence in count 1 of engaging in persistent sexual abuse of a child outside Australia on two or more separate occasions in relation to the same child contrary to s 272.11(1)(c) of the *Criminal Code*.

114 Although not applicable to the offences committed by Mr McGregor, s 16AAB provides for mandatory minimum sentences for various offences where, by s 16AAB(1)(a), a person has been convicted of a Commonwealth child sexual abuse offence (namely, the current offence before the court) and the person "has, at an earlier sitting, been convicted previously of a child sexual abuse offence". Section 16AAB(2) provides that in those circumstances, and with limited exceptions, "the court must impose for the current offence" a term of imprisonment of at least the specified minimum.

Aggregate sentences in New South Wales

115 Section 53A of the NSW Sentencing Act, which applies to courts including the District Court and the Court of Criminal Appeal,[160] relevantly provides as follows:

> "**Aggregate sentences of imprisonment**
>
> (1) A court may, in sentencing an offender for more than one offence, impose an aggregate sentence of imprisonment with respect to all or any 2 or more of those offences instead of imposing a separate sentence of imprisonment for each.
>
> (2) A court that imposes an aggregate sentence of imprisonment under this section on an offender must indicate to the offender, and make a written record of, the following—
>
> (a) the fact that an aggregate sentence is being imposed,
>
> (b) the sentence that would have been imposed for each offence (after taking into account such matters as are relevant under Part 3 or any other provision of this Act) had separate sentences been imposed instead of an aggregate sentence."

116 The "indicat[ion]" given by a judge, under s 53A(2), of the sentence that "would have been imposed for each offence" is not a sentence.[161] The indication

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160 *Crimes (Sentencing Procedure) Act 1999* (NSW), s 3(1) (definition of "court").

161 *Pearson v The Commonwealth* (2024) 99 ALJR 110 at 119-120 [45]; 420 ALR 41 at 51.

makes more transparent the judge's reasoning process in imposing the aggregate sentence.[162] But the indication itself has no binding effect on the party being sentenced. In short, an aggregate sentence involves a collective sentence being imposed for all the offences of which the offender is convicted without any individual sentence for each offence.

117 Section 53A concerns the procedure of sentencing. Section 53A regulates a New South Wales court's power to impose a sentence for which an offender is liable. Relevantly to Mr McGregor, the *Criminal Code* created the power for a court to impose a sentence, which corresponded with the liability imposed on Mr McGregor for his breaches of the *Criminal Code*. The provisions of the *Criminal Code* concerning child sexual abuse offences for which Mr McGregor was liable to be sentenced for up to a prescribed maximum sentence[163] operated of their own force upon Mr McGregor provided that the court in which they were operative had jurisdiction over person, subject matter, and place.

The operation of s 68 of the *Judiciary Act*

118 As recently explained in *Farshchi v The King*,[164] s 68 of the *Judiciary Act*:

> "'fulfils an important role in ensuring that federal criminal law is administered in each State upon the same footing as State law and avoids the establishment of two independent systems of justice'. Relevantly, s 68(2) of the *Judiciary Act* confers federal jurisdiction on State and Territory courts in 'the trial and conviction on indictment' of persons charged with offences against the laws of the Commonwealth and, within that federal jurisdiction, s 68(1) relevantly picks up and requires the application of the laws of a State or Territory respecting 'the procedure for ... trial and conviction on indictment' of persons charged with offences against the laws of the Commonwealth. In other words, the starting point is s 68(2), which confers federal jurisdiction, before considering s 68(1), which confers the power within that jurisdiction."

119 The jurisdiction (ie authority) in s 68(2) is needed because the jurisdiction or authority of State or Territory courts is State or Territory authority. Without

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162 See *Park v The Queen* (2021) 273 CLR 303 at 314 [27].

163 *Criminal Code* (Cth), s 272.11(1)(c) (30 years' imprisonment), s 474.22(1) (15 years' imprisonment), s 474.22A(1) (15 years' imprisonment), s 272.14(1) (15 years' imprisonment).

164 (2025) 100 ALJR 6 at 14-15 [25] (footnotes omitted); 426 ALR 185 at 192.

statutory conferral of federal jurisdiction, State or Territory courts have no authority to exercise power in federal jurisdiction.

120 The powers in s 68(1) are needed because even with the grant of federal jurisdiction by s 68(2) for State or Territory courts to exercise their powers (from whatever source the powers are derived), the exercise of those powers in federal jurisdiction can only be governed and regulated by Commonwealth law.[165] Although the "ill-defined notion of governing or regulating federal jurisdiction has no clear boundaries",[166] s 68(1) ensures that such State or Territory laws, including those concerning particular criminal "procedure", will "apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth".

121 One category of such regulation of State or Territory court powers is, in s 68(1), "the procedure for ... (c) ... trial and conviction on indictment". Another category is "the procedure for ... (d) the hearing and determination of appeals arising out of any ... conviction or out of any proceedings connected therewith". In each case, laws that regulate sentencing powers "come within that description".[167] They are also laws "in relation to the offence".[168]

122 There are three ways that s 68(1) might operate to permit such State or Territory laws relating to those procedures to be applied in federal jurisdiction despite those laws being expressed in terms that, on their face, only apply to State or Territory offences: (i) by reading down (or reading up[169]) the words in the course of interpretation of their meaning; (ii) by severance of words that might limit the application of the law; or (iii) by partial disapplication of the scope of the application of the words as interpreted.[170] But the essential meaning of the State or Territory law cannot be changed. That would be to create a power for the judiciary, in effect, to legislate.[171]

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165 See *Masson v Parsons* (2019) 266 CLR 554 at 564 [1], 574 [30].

166 *Attorney-General (Cth) v Huynh* (2023) 280 CLR 341 at 418 [226].

167 *Putland v The Queen* (2004) 218 CLR 174 at 178-179 [4]. See also at 188 [34] and *Williams v The King [No 2]* (1934) 50 CLR 551 at 560-561.

168 *Judiciary Act 1903* (Cth), s 68B(1)(b).

169 *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531 at 547-548 [36]-[37]; *Clubb v Edwards* (2019) 267 CLR 171 at 314 [417].

170 *Attorney-General (Cth) v Huynh* (2023) 280 CLR 341 at 421 [238].

171 *Attorney-General (Cth) v Huynh* (2023) 280 CLR 341 at 420 [236].

123 The application of a State or Territory law in federal jurisdiction by s 68(1) has been described as involving the "text of [State] provisions" being "translated" into federal jurisdiction.[172] "Translation" is a loose analogy which could be either too narrow or too broad.

124 "Translation" is often used in common parlance in relation to written words while "interpretation" is often used in common parlance in relation to spoken words. In law, the two have become interchangeable to convey the process of identifying the meaning of words at the level of a sentence.[173] But, in that legal usage, "translation" is too narrow a concept to describe the process sometimes required by s 68(1) because any of the three techniques used to adapt the State or Territory law in federal jurisdiction operate *after* the essential meaning of the State or Territory law has been interpreted and ascertained at least on a preliminary basis.

125 On the other hand, references to "translating" the State or Territory law might also be too broad if "translation" is seen as a flexible mandate unconstrained by the essential meaning of the legislation. For instance, the unchangeable nature of the essential meaning of the legislation, without transgressing the boundaries of judicial power, is the reason that if the essential meaning of the State or Territory law is inconsistent with a Commonwealth law then the "basal character" of s 68(1) prevents it being used to apply the State or Territory law in federal jurisdiction.[174]

126 The proper approach to the application of s 68(1) is therefore to interpret the meaning of the State or Territory law and then to apply these established techniques of reading down/reading up of the law, severance, or partial disapplication to apply that law, as far as it is possible to do, in federal jurisdiction without changing the essential meaning of the State or Territory law. For instance, in *Attorney-General (Cth) v Huynh*,[175] a majority of this Court: (i) "read up" references to the Crown in right of the State of New South Wales and the Attorney-General of the State so that they were also references to the Crown in right of the Commonwealth and the Attorney-General of the Commonwealth;[176] and,

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172 *Attorney-General (Cth) v Huynh* (2023) 280 CLR 341 at 365 [62]. See also at 369 [79], 392-393 [152]-[153], 395-396 [163]-[164], 399 [171], 440-441 [298].

173 *DVO16 v Minister for Immigration and Border Protection* (2021) 273 CLR 177 at 186 [4], 200 [51].

174 *Putland v The Queen* (2004) 218 CLR 174 at 189 [41].

175 (2023) 280 CLR 341.

176 *Attorney-General (Cth) v Huynh* (2023) 280 CLR 341 at 365 [62], 429 [266].

(ii) arguably in the teeth of the unitary purpose of the provision,[177] severed the operation in federal jurisdiction of part of the provision of the State law.[178]

The application of s 68 of the *Judiciary Act*

127 As explained above, Mr McGregor was subject to the duties and liabilities set out in the relevant provisions of the *Criminal Code*, which operated of their own force. Section 68(2) of the *Judiciary Act* conferred criminal jurisdiction upon the District Court and the Court of Criminal Appeal to exercise sentencing powers in federal jurisdiction. And s 68(1) empowered the District Court and the Court of Criminal Appeal, in sentencing, to apply State laws of criminal sentencing procedure "so far as they are applicable" to Mr McGregor.

128 The application of s 68(1) to aggregate sentences was considered by this Court in *Putland v The Queen*.[179] In that case, a majority of this Court held that aggregate sentencing provisions enacted by the Northern Territory Parliament, which bore "similarity"[180] to the "aggregated sentencing provision"[181] in s 4K(4) of the *Crimes Act* for trials that are not on indictment, could be "picked up" and applied by s 68(1) of the *Judiciary Act*. In this case, the Crown did not challenge any aspect of the decision in *Putland*. The Crown focused instead upon two submissions that had not been made in *Putland* with respect to any analogous Northern Territory legislation and for which the decision in *Putland* plainly cannot therefore be an authority.[182] The first was an asserted inconsistency between s 53A of the NSW Sentencing Act and the sentencing provisions of the *Crimes Act* generally. The second was an asserted inconsistency between s 53A of the NSW Sentencing Act and s 16AAA of the *Crimes Act*.

Inconsistency between s 53A of the NSW Sentencing Act and the sentencing provisions of the Crimes Act

129 The Crown submitted that s 68(1) of the *Judiciary Act* could not apply the aggregate sentencing provision in s 53A of the NSW Sentencing Act because to

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177 *Attorney-General (Cth) v Huynh* (2023) 280 CLR 341 at 420 [236].

178 *Attorney-General (Cth) v Huynh* (2023) 280 CLR 341 at 368-369 [76], 429 [266].

179 (2004) 218 CLR 174.

180 *Putland v The Queen* (2004) 218 CLR 174 at 180 [9].

181 *Putland v The Queen* (2004) 218 CLR 174 at 191 [47].

182 *R v Warner* (1661) 1 Keb 66 at 67 [83 ER 814 at 815]; *CSR Ltd v Eddy* (2005) 226 CLR 1 at 11 [13]; *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 346 [28]. See also Cross and Harris, *Precedent in English Law*, 4th ed (1991) at 158-161.

do so would be inconsistent with the sentencing provisions of the *Crimes Act*. The inconsistency was said to arise due to the words of s 53A(2)(b) of the NSW Sentencing Act which require the indication of the sentence that would have been imposed for each offence "(after taking into account such matters as are relevant under Part 3 or any other provision of this Act)". Part 3 of the NSW Sentencing Act is entitled "Sentencing procedures generally". Part 3 includes Div 1A, which is concerned with sentencing discounts for guilty pleas to indictable offences.

130 Within Div 1A, s 25D provides what the Crown described as a "structured process" to discounts for pleas of guilty with particular mathematical discounts. The Crown submitted, with much force, that the sentencing process for federal offences could not apply Pt 3 of the NSW Sentencing Act because that structured process of mathematical discounts was inconsistent with the essence of the broad, evaluative sentencing approach required by s 16A of the *Crimes Act*. Hence, it was argued, s 53A of the NSW Sentencing Act could not be "translated" to apply in a different manner in federal jurisdiction from the manner in which it applies in State jurisdiction.

131 Despite the considerable force of this submission, the premise of the submission cannot be accepted. Section 53A(2)(b) does not impose any requirement to take account of "such matters as are relevant under Part 3 or any other provision of this Act". Rather, in regulating the sentencing powers of a court, s 53A(2) imposes upon a court giving an aggregate sentence a transparency requirement of exposing the court's intellectual process of reasoning by articulating the sentence that would have been imposed for each offence. The words of s 53A(2)(b) in parentheses—"after taking into account such matters as are relevant under Part 3 or any other provision of this Act"—are descriptive of that intellectual process in State jurisdiction. Those words do not inform the essential meaning of s 53A. Indeed, in the application of s 53A in federal jurisdiction, those words do not even need to be severed. The "matters ... under Part 3" ("Sentencing procedures generally") are not relevant to the sentencing process under s 16A of the *Crimes Act* unless specifically picked up and applied by s 68(1) of the *Judiciary Act*.

Inconsistency between s 53A of the NSW Sentencing Act and s 16AAA of the Crimes Act

132 The Crown separately argued that the essential meaning of s 53A of the NSW Sentencing Act was inconsistent with the mandatory minimum penalties required for some offences under s 16AAA of the *Crimes Act* so that the essential meaning of s 53A could not be applied by s 68(1) of the *Judiciary Act*. The essence of this argument had a textual aspect and, more importantly, a purposive aspect.

133 The textual aspect to the Crown's submission focused upon the requirement in s 16AAA that the minimum sentence must be imposed upon a person who is convicted of "an offence described". The Crown submitted that s 16AAA requires

the mandatory minimum sentence to be imposed *for* that offence and that an aggregate sentence is not a sentence only *for* that offence. The heading to s 16AAA is "Minimum penalties for certain offences". And for the second or subsequent offences with which s 16AAB(2) is concerned, that section refers to the minimum penalty that the court must impose "for the current offence". In relation to people aged under 18 years at the time of their offending, s 16AAC(1) qualifies s 16AAA and speaks of "the offence that the relevant provision specifies a minimum penalty for".

134 The difficulty with the textual aspect of the Crown's submission, however, is that a sentence can be "for" one offence and concurrently "for" other offences. As Gummow and Heydon JJ said in the majority in *Putland*, the use of the "singular 'sentence' throughout [Pt IB of the *Crimes Act*] ... does not imply that, according to the context, the plural cannot be meant".[183] The real import of the Crown's submission is that the requirement in the *Crimes Act* that a sentence be given "for" an offence means that the sentence must be given only for that single offence and for no other offence. The force of the Crown's argument for adoption of that interpretation depends upon the purpose of s 16AAA.

135 The Crown submitted that an interpretation of s 16AAA that required that a sentence should be given only for a single offence would better serve the purpose of the Commonwealth Parliament than an interpretation that permitted aggregate sentences because greater transparency would be achieved by the articulation of a specific sentence for each offence. The purposes of mandatory minimum penalties include establishing increased deterrence for "child sexual abuse by addressing inadequacies in the criminal justice system that result in outcomes that insufficiently punish, deter or rehabilitate offenders"[184] by sending "a clear message that society will not tolerate sexual crimes against children".[185] The Commonwealth Parliament aims to achieve that purpose by setting, as a minimum, a period of imprisonment at one end of the sentencing yardstick with the other end established by the maximum penalty of imprisonment.[186]

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183 *Putland v The Queen* (2004) 218 CLR 174 at 194-195 [57]. Compare at 208 [97].

184 Australia, House of Representatives, *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019*, Explanatory Memorandum at 2 [1].

185 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 15 October 2019 at 4163.

186 See *Hurt v The King* (2024) 281 CLR 286 at 320-321 [88]-[90], referring, inter alia, to Australia, House of Representatives, *Parliamentary Debates* (Hansard), 15 October 2019 at 4163-4164.

136 Whether or not mandatory minimum penalties actually operate as an effective general and specific deterrent, the relevant point is that one premise of the Commonwealth Parliament's amending legislation which introduced s 16AAA of the *Crimes Act* was that mandatory minimum penalties were capable of operating as such a deterrent. And, on the assumption that mandatory minimum penalties operate as a general and specific deterrent, the assumed deterrent effect is likely to be enhanced by, as the Crown submitted, "a sentence which transparently identifies to the offender, to the community [and] to potential offenders" the length of the sentence for the particular offence.

137 Consider Mr McGregor's re-sentencing in the Court of Criminal Appeal. The Court of Criminal Appeal held that after "the 30% discount for the combined effect of Mr McGregor's plea and assistance to authorities", which was comprised of 25% discount for a plea of guilty and 5% discount for co-operation with authorities (not exceeding the threshold of 50% of the mandatory minimum penalty[187]), his indicative sentences were: (i) count 1 – five years and seven months; (ii) count 2 – two years and nine months; (iii) count 3 – four years; (iv) count 4 – four years and six months. His aggregate sentence was a term of imprisonment of ten years and nine months with a non-parole period of seven years and six months.[188]

138 There are numerous respects in which such sentencing is deprived of transparency by the operation of s 53A of the NSW Sentencing Act together with the *Crimes Act*. How did the total from the indicative sentences (16 years and ten months) get reduced to the aggregate sentence of ten years and nine months? Which indicative sentences would have been concurrent with each other? Which sentences would have been made cumulative if the indicative sentences had been imposed? Would there have been a reduction, consistent with the totality principle but not greater than 50% of the mandatory minimum period, of any of the individual sentences if the indicative sentences had been imposed?

139 The lack of transparency might also conceal an erroneously low sentence, further impairing the assumed deterrence. For instance, consider the mandatory minimum for count 1 of seven years. As the Crown conceded in the Court of Criminal Appeal (leading to the appeal being allowed) and as the Court of Criminal Appeal correctly concluded,[189] following the authority of three members of this

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187 See *Crimes Act 1914* (Cth), s 16AAC(3)(c).

188 *McGregor v The King* (2024) 116 NSWLR 81 at 110 [112]-[113]. See also at 87 [9].

189 *McGregor v The King* (2024) 116 NSWLR 81 at 88 [13], 89 [16], 92 [35]. Correctly observing that the alternative construction was "somewhat arbitrary and capricious": at 90 [27].

Court,[190] the effect of s 16AAC(3)(c) was to lower the mandatory minimum for count 1 to three years and six months, in circumstances where a discount and reduction in sentence could be applied for both a plea of guilty and co-operation with authorities. The reduced sentence indicated by the Court of Criminal Appeal of five years and seven months, after the (slightly more than) 30% reduction for the plea of guilty and co-operation, was above that lowered mandatory minimum. But suppose that, for reasons of totality, in calculating the aggregate sentence, the Court of Criminal Appeal had erroneously reduced the indicative sentence further to three years and five months with cumulation with other sentences leading to the aggregate sentence of ten years and nine months' imprisonment. Although the Court of Criminal Appeal was highly unlikely to have made such an error, such an error in the reduction in sentence would have been concealed by the lack of transparency.

140 The Crown's submission is attractive. If the universe of interpretations of s 16AAA were binary—in every case, either a single sentence for an offence or an aggregate sentence for that offence and others—then it might be difficult to resist the Crown's submission. But there is a third possible interpretation. The third interpretation is that the Commonwealth Parliament intended that a single sentence be given for every offence with a mandatory minimum penalty unless an aggregate sentencing regime applied to that offence and the court decided to give an aggregate sentence in accordance with that regime (which might also provide additional transparency if the regime provided for an indicative sentence).

141 Even assuming that there is potential for less transparency as a consequence of the third interpretation, and that this potentially lesser transparency might result in a reduction in any general or specific deterrence when compared with a regime which excluded the possibility of aggregate sentencing, it is clear that the Commonwealth Parliament has not pursued the pure theory of deterrence at all costs. For instance, s 19AB of the *Crimes Act* requires the court in some circumstances to impose a single non-parole period when sentencing for multiple federal offences. In those circumstances, the offender might not be aware of the non-parole period (where applicable) for all federal offences committed. As Gleeson CJ said in *Carr v Western Australia*:[191]

> "Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent

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190 *Hurt v The King* (2024) 281 CLR 286 at 324 [102]-[103]. See *McGregor v The King* (2024) 116 NSWLR 81 at 92 [32].

191 (2007) 232 CLR 138 at 143 [5].

may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose."

142 The manifest intention of the Commonwealth Parliament to adopt the more flexible (third) interpretation is particularly apparent from the express adoption of aggregate sentencing in s 4K(4) of the *Crimes Act* in relation to summary offences. Indeed, at the time of Mr McGregor's sentencing and re-sentencing, although none of the offences referred to in s 16AAA could have been tried summarily, there were eight offences referred to in s 16AAB that could have been tried summarily.[192]

143 The model for the mandatory minimum sentences in the *Crimes Act* was mandatory minimum sentences that had been introduced into the *Migration Act 1958* (Cth) in 2001.[193] Even at that time there were three aggregate sentencing regimes in States and Territories.[194] And prior to the introduction of s 16AAA, the indicative sentencing model of the NSW Sentencing Act, with its further support of transparency and enhancement of the assumed deterrence, existed to some extent in two of those regimes, Tasmania[195] and South Australia.[196] In 1998, the South Australian model, as it was then, was held to be applicable in federal jurisdiction.[197] In 2004, the Northern Territory model was held by this Court in *Putland* to be applicable in federal jurisdiction. And in 2017, the New South Wales model was held to be applicable in federal jurisdiction.[198]

144 Despite this background, the amendments that introduced s 16AAA did not expressly exclude aggregate sentences for offences that could not be prosecuted

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192 *Crimes Act*, s 4J(1) read with items 1, 2, 3, 4, 8, 9, 23, and 35 of the table to s 16AAB(2). See also *Criminal Code* (Cth), ss 272.12(1), 272.12(2), 272.13(1), 272.13(2), 272.20(1), 272.20(2), 471.26(1), 474.27A(1).

193 *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth), Sch 2, item 5.

194 *Sentencing Act 1995* (NT), s 52; *Criminal Law (Sentencing) Act 1988* (SA), s 18A, inserted by *Statutes Amendment (Sentencing) Act 1992* (SA); *Sentencing Act 1997* (Tas), s 11.

195 *Sentencing Act 1997* (Tas), s 11(3).

196 *Sentencing Act 2017* (SA), s 26(2a).

197 *R v Jackson* (1998) 72 SASR 490.

198 *Director of Public Prosecutions (Cth) v Beattie* (2017) 270 A Crim R 556.

summarily.[199] The manifest intention of the Commonwealth Parliament was that for those regimes, and any new regimes, of aggregate sentencing, "the question of the existence of any power of aggregated sentencing upon charges tried on indictment was left to the operation of s 68(1) of the *Judiciary Act*".[200]

Conclusion

145 The appeal should be dismissed.

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199 See *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 346-347 [81].

200 *Putland v The Queen* (2004) 218 CLR 174 at 192 [50].

JAGOT J.

The appeal

146 This appeal concerns two aspects of the operation of s 68(1) of the *Judiciary Act 1903* (Cth), which applies State and Territory criminal and sentencing laws to persons charged with Commonwealth offences being tried in State or Territory courts so far as those laws are "applicable" to those persons.

147 The first aspect is where: (a) the Commonwealth law, the *Crimes Act 1914* (Cth) ("the Commonwealth Crimes Act"), specifies a mandatory minimum sentence of imprisonment for a Commonwealth offence;[201] and (b) the State sentencing law, the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("the NSW Sentencing Act"), enables the imposition of an aggregate sentence of imprisonment with respect to all or any two or more offences which is not less than the minimum sentence for any such offence.[202] Ground one of the Crown's appeal, to which the first aspect relates, contends that the "Court of Criminal Appeal [of the Supreme Court of New South Wales] erred in imposing [on the respondent] an aggregate sentence under s 53A of the [NSW Sentencing Act] in respect of count one, to which a mandatory minimum sentence under s 16AAA of the [Commonwealth Crimes Act] applied".

148 The second aspect is where: (a) the Commonwealth law, the Commonwealth Crimes Act, specifies that a court must impose a sentence for a Commonwealth offence that is of a severity appropriate in all the circumstances and must take into account specified matters as are relevant and known to the court,[203] and (b) the State law, the NSW Sentencing Act, provides that, in imposing an aggregate sentence of imprisonment with respect to all or any two or more offences, the court must indicate the sentence that would have been imposed for each offence "(after taking into account such matters as are relevant under Part 3 or any other provision of this Act)" had separate sentences been imposed instead of an aggregate sentence.[204] Ground two of the Crown's appeal, to which the second aspect relates, contends that "[f]urther or in the alternative to ground one, the Court of Criminal Appeal erred in imposing [on the respondent] an aggregate sentence under s 53A of the [NSW Sentencing Act] in respect of the respondent's four Commonwealth offences".

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201 Commonwealth Crimes Act, ss 16AAA and 16AAB.

202 NSW Sentencing Act, ss 53A and 49(2)(b).

203 Commonwealth Crimes Act, s 16A.

204 NSW Sentencing Act, s 53A(2)(b).

149 In both cases the question is whether the State law, the NSW Sentencing Act, was "applicable" to the respondent as a person charged with and convicted of Commonwealth offences under a Commonwealth law: (1) in the first aspect of the operation of s 68(1) of the *Judiciary Act*, where the Commonwealth Crimes Act sets a mandatory minimum period of imprisonment which a court must "at least" impose for a specified Commonwealth offence; and (2) in the second aspect of the operation of s 68(1) of the *Judiciary Act*, for any Commonwealth offence that specifies a maximum period of imprisonment a court may impose.

150 Dealing with the two aspects of the operation of s 68(1) of the *Judiciary Act* in reverse order, the conclusion I have reached in respect of the second aspect is that the Crown's contention is precluded by *Putland v The Queen*,[205] the correctness of which the Crown did not challenge but which the Crown sought to distinguish. As *Putland* is not distinguishable, ground two of the appeal must be dismissed.

151 The conclusion I have reached in respect of the first aspect is that s 53A of the NSW Sentencing Act is "applicable" to a person convicted of an offence described in s 16AAA of the Commonwealth Crimes Act (a "s 16AAA offence") only to the extent that it permits a court to include a s 16AAA offence in an aggregate sentence of imprisonment to be imposed on a person if the aggregate sentence of imprisonment includes a period of imprisonment of at least the minimum period that s 16AAA requires to be imposed for that offence, but s 53A is not otherwise "applicable" to such a person. The aggregate sentence of imprisonment imposed on a person for a s 16AAA offence must comply, and be able to be seen to comply, with s 16AAA of the Commonwealth Crimes Act because, as will be explained, s 16AAA imposes a positive duty on a court imposing a sentence of imprisonment to so comply.

152 As will also be explained, the aggregate sentence the Court of Criminal Appeal (Bell CJ, Kirk JA, Harrison CJ at CL, Davies and Sweeney JJ) imposed on the respondent in the present case[206] does not and cannot be seen to comply with the duty which s 16AAA of the Commonwealth Crimes Act imposed on that Court in re-sentencing the respondent on conviction of four Commonwealth offences, one being a s 16AAA offence. Therefore, the appeal should be allowed and the matter remitted to the Court of Criminal Appeal so that the respondent may be re-sentenced according to law.

153 My reasons follow.

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205 (2004) 218 CLR 174.

206 *McGregor v The King* (2024) 116 NSWLR 81.

The statutory schemes

Judiciary Act

154 Section 68(1) of the *Judiciary Act* provides that:

> "The laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences, and the procedure for:
>
> (a) their summary conviction; and
>
> (b) their examination and commitment for trial on indictment; and
>
> (c) their trial and conviction on indictment; and
>
> (d) the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith;
>
> and for holding accused persons to bail, *shall, subject to this section, apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth* in respect of whom jurisdiction is conferred on the several courts of that State or Territory by this section." (emphasis added)

155 Section 68(2) of the *Judiciary Act* confers "like jurisdiction" with respect to persons who are charged with offences against the laws of the Commonwealth on "Courts of a State or Territory exercising jurisdiction with respect to", relevantly, "the trial and conviction on indictment" of persons charged with offences under State or Territory laws.

156 These provisions form part of a legislative scheme, "the general policy" of which is to "place the administration of the criminal law of the Commonwealth in each State upon the same footing as that of the State and to avoid the establishment of two independent systems of criminal justice".[207]

157 In referring to laws of a State or Territory respecting the procedure for the trial and conviction on indictment of persons charged with offences against laws of the Commonwealth, s 68(1)(c) of the *Judiciary Act* encompasses laws of a State or Territory concerning the sentencing of offenders.[208]

158 Whether a State or Territory sentencing law, including such a law providing for the imposition of an aggregate sentence for two or more offences, is

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207 *Williams v The King [No 2]* (1934) 50 CLR 551 at 560.

208 *Putland* (2004) 218 CLR 174.

"applicable" to the person convicted of an offence under a Commonwealth law within the meaning of s 68(1) of the *Judiciary Act* involves deciding if the "Commonwealth law expressly or by implication [makes] contrary provision" to the State or Territory sentencing law; if the Commonwealth law is "'complete upon its face' and can 'be seen to have left no room' for the operation of" the State or Territory sentencing law;[209] or if the Commonwealth law "cover[s] the field" or the State or Territory sentencing law would "significantly undermine the scheme" of the Commonwealth law.[210]

159 Further, although State or Territory sentencing laws necessarily apply under s 68(1) of the *Judiciary Act* to persons charged with Commonwealth offences by a process of "analogy" or "translation", if the purported application of the State or Territory sentencing law to a Commonwealth offence would involve "severing and 'picking up' part, but not the whole, of an integrated legislative scheme and giving an altered meaning to that severed part of the State [or Territory] legislation",[211] that outcome would involve an impermissible extension of the judicial task of determining and reconciling the meaning of legislative provisions. The analogical or translative process which s 68(1) of the *Judiciary Act* permits is limited and cannot extend to the giving of "a substantively different legal operation" to the State or Territory law.[212]

160 However, it is no objection to the application of a State or Territory sentencing law under s 68(1) of the *Judiciary Act* to a person charged with a Commonwealth offence that "the State law adopted varies in the different States".[213] This reflects that "the administration of the criminal law of the Commonwealth is organized upon a State by State basis".[214]

Commonwealth Crimes Act

Extrinsic material

161 Section 16AAA of the Commonwealth Crimes Act and related provisions were inserted into that Act by the *Crimes Legislation Amendment (Sexual Crimes*

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209 *Putland* (2004) 218 CLR 174 at 179-180 [7].

210 *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55 at 66.

211 *Putland* (2004) 218 CLR 174 at 188 [37].

212 *Attorney-General (Cth) v Huynh* (2023) 280 CLR 341 at 366 [66].

213 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 467, quoting *Williams v The King [No 2]* (1934) 50 CLR 551 at 560.

214 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 467.

Against Children and Community Protection Measures) Act 2020 (Cth). The Second Reading Speech for the associated Bill[215] records that the government "is evidently wholeheartedly committed to protecting communities, especially children, from the dangers of child sex offenders". It records further that the "increased maximum penalties [in the Bill] reflect the gravity and the higher level of culpability of these most serious offences. However, the proposal to simply increase maximum penalties will not be enough to shift sentencing practices." Sentencing statistics for "Commonwealth child sex offenders who even received a custodial sentence" were "alarming and clearly demonstrate[d]" a "need to act to ensure that child sex offenders receive the sentences that they deserve". The Second Reading Speech states that the "introduction of mandatory minimum sentencing for the most serious offences and repeat child sex offenders is necessary to send a clear message that society will not tolerate sexual crimes against children and to ensure that criminal penalties appropriately reflect the gravity of the offending". It states also that the "mandatory minimum sentencing scheme is a sensible solution that reflects community expectations and ensures that sentences for child sex offences actually reflect the gravity of those crimes".[216]

162 The Explanatory Memorandum for the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019* (Cth) explains that the "Bill better protects the community from the dangers of child sexual abuse by addressing inadequacies in the criminal justice system that result in outcomes that insufficiently punish, deter or rehabilitate offenders". Amongst other things, the Bill "increase[s] the maximum penalties for certain Commonwealth child sex offences" and "introduce[s] a mandatory minimum sentencing scheme to apply to the Commonwealth child sex offences that attract the highest maximum penalties, and all other Commonwealth child sex offences if the offender is a repeat child sex offender".[217] The Explanatory Memorandum states that "[m]andatory minimum sentences reflect the seriousness of child sexual abuse, including the significant harm suffered by victims. They keep offenders out of the community where they may further offend against children and may also

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215 *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019* (Cth).

216 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 15 October 2019 at 4162-4163.

217 Australia, House of Representatives, *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019*, Explanatory Memorandum at 2 [1], [3].

deter others from engaging in such behaviour."[218] In respect of s 16AAA, the Explanatory Memorandum states that the "proposed section 16AAA and relevant table establishes that if a person is subject to an offence or offences in column 1, the court must impose a sentence of imprisonment of at least the period specified in column 2".[219]

Legislative provisions

163 Section 4J of the Commonwealth Crimes Act regulates the circumstances in which an indictable offence may be dealt with summarily and the consequences of doing so. Beyond this, it is convenient to defer consideration of the terms of s 4J until their relevance to the present case can be explained.

164 Section 4K of the Commonwealth Crimes Act provides in part that:

> "(3) Charges against the same person for any number of offences against the same provision of a law of the Commonwealth may be joined in the same information, complaint or summons if those charges are founded on the same facts, or form, or are part of, a series of offences of the same or a similar character.
>
> (4) If a person is convicted of 2 or more offences referred to in subsection (3), the court may impose one penalty in respect of both or all of those offences, but that penalty shall not exceed the sum of the maximum penalties that could be imposed if a separate penalty were imposed in respect of each offence."

165 Section 16AAA in Pt IB of the Commonwealth Crimes Act provides that:

> "Subject to section 16AAC, if a person is convicted of an offence described in column 1 of an item in the following table, the court must impose a sentence of imprisonment of at least the period specified in column 2 of that item."

166 Section 16AAB(2) of the Commonwealth Crimes Act is in similar terms to s 16AAA but, by s 16AAB(1), that provision applies if "the person is convicted of a Commonwealth child sexual abuse offence (a ***current offence***)" and has, "at an

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218 Australia, House of Representatives, *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019*, Explanatory Memorandum at 7 [27].

219 Australia, House of Representatives, *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019*, Explanatory Memorandum at 46 [198].

earlier sitting, been convicted previously of a child sexual abuse offence". The mandatory minimum sentence specified applies to the court imposing the sentence for the current offence.

167 Section 16AAC of the Commonwealth Crimes Act, to which s 16AAA is subject, sets out exclusions and permissible reductions to the mandatory minimum penalties. By s 16AAC(1), s 16AAA does not apply to a person who was aged under 18 years when the offence that the relevant provision specifies a minimum penalty for was committed. Section 16AAC otherwise provides that:

> "(2) A court may impose a sentence of imprisonment of less than the period specified in column 2 of an item of a table in section 16AAA or subsection 16AAB(2) only if the court considers it appropriate to reduce the sentence because of either or both of the following:
>
> (a) the court is taking into account, under paragraph 16A(2)(g), the person pleading guilty;
>
> (b) the court is taking into account, under paragraph 16A(2)(h), the person having cooperated with law enforcement agencies in the investigation of the offence or of a Commonwealth child sex offence.
>
> (3) If a court may reduce a sentence, the court may reduce the sentence as follows:
>
> (a) if the court is taking into account, under paragraph 16A(2)(g), the person pleading guilty – by an amount that is up to 25% of the period specified in column 2 of the applicable item in the relevant table;
>
> (b) if the court is taking into account, under paragraph 16A(2)(h), the person having cooperated with law enforcement agencies in the investigation of the offence or of a Commonwealth child sex offence – by an amount that is up to 25% of the period specified in column 2 of the applicable item in the relevant table;
>
> (c) if the court is taking into account both of the matters in paragraphs (a) and (b) – by an amount that is up to 50% of the period specified in column 2 of the applicable item in the relevant table."

168 Column 1 of item 6 in the table to s 16AAA, the s 16AAA offence of which the respondent was convicted, identifies an "offence against section 272.11 of the *Criminal Code*". Section 272.11(1) of the *Criminal Code* (in the Schedule to the *Criminal Code Act 1995* (Cth)) provides that a "person commits an offence against

this section if the person commits an offence (the ***underlying offence***) against one or more of the following provisions in relation to the same person (the ***child***) on 2 or more separate occasions during any period: ... (c) subsection 272.9(1) (engaging in sexual activity (other than sexual intercourse) with child outside Australia)". The maximum penalty for an offence against s 272.11(1) is imprisonment for 30 years. The minimum period specified in column 2 of item 6 for an offence against s 272.11 is a sentence of imprisonment of 7 years.

169 Section 272.9(1), the underlying offence for the offence against s 272.11(1), provides that a "person commits an offence if: (a) the person engages in sexual activity (other than sexual intercourse) with another person (the ***child***); and (b) the child is under 16; and (c) the sexual activity is engaged in outside Australia". The maximum penalty for an offence against s 272.9(1) is imprisonment for 20 years. The minimum period specified in column 2 of item 3 for an offence against s 272.9(1) is a sentence of imprisonment of 5 years.

170 For example, subject to s 16AAC of the Commonwealth Crimes Act, if a person commits a single offence against s 272.9(1) of the *Criminal Code* the maximum penalty is imprisonment for 20 years and there is a mandatory minimum sentence of imprisonment of "at least" 5 years for that offence.[220] If, however, a person commits an offence against s 272.9(1) of the *Criminal Code* "in relation to the same person (the ***child***) on 2 or more separate occasions during any period", s 272.11(1) applies and the maximum penalty is a sentence of imprisonment for 30 years and there is a mandatory minimum sentence of imprisonment of "at least" 7 years for that offence.[221]

171 Further, s 16A(1) of the Commonwealth Crimes Act provides that:

> "In determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.
>
> Note: Minimum penalties apply for certain offences – see sections 16AAA, 16AAB and 16AAC."

172 Section 16E of the Commonwealth Crimes Act, in effect, provides that State or Territory laws relating to commencement of sentences and of non-parole periods also apply to persons convicted of a Commonwealth offence.

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220 Commonwealth Crimes Act, item 3 in the table to s 16AAA.

221 Commonwealth Crimes Act, item 6 in the table to s 16AAA.

173 Section 17A of the Commonwealth Crimes Act provides in part that:

> "(1) A court shall not pass a sentence of imprisonment on any person for a federal offence, or for an offence against the law of an external Territory that is prescribed for the purposes of this section, unless the court, after having considered all other available sentences, is satisfied that no other sentence is appropriate in all the circumstances of the case.
>
> ...
>
> (4) This section applies subject to any contrary intention in the law creating the offence."

174 Other relevant provisions of the Commonwealth Crimes Act include: (1) ss 4G-4J, concerning summary and indictable offences and enabling certain indictable offences to be dealt with summarily; (2) s 19, concerning cumulative, partly cumulative or concurrent sentences; (3) s 19AB, which requires a court to fix a single non-parole period in the specified circumstances; (4) s 19B, enabling a court to discharge an offender without conviction where a charge is proved in the specified circumstances; and (5) s 20, which enables a court to conditionally release an offender without imposing a sentence on the offender.

NSW Sentencing Act

Extrinsic material

175 As noted by the Court of Criminal Appeal, the object of s 53A of the NSW Sentencing Act, as recorded in the Second Reading Speech for the associated Bill which introduced the relevant provisions,[222] is to "simplify the sentencing process" by allowing a court to "set one overall sentence and one non-parole period, provided that the court first indicates the appropriate sentence that would have been given for each offence had it been sentenced individually".[223] Further, s 53A "offers the benefit when sentencing for multiple offences of obviating the need to engage in the laborious and sometimes complicated task of creating a 'cascading or "stairway" sentencing structure' when the principle of totality requires some

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222 *Crimes (Sentencing Procedure) Amendment Bill 2010* (NSW), enacted as the *Crimes (Sentencing Procedure) Amendment Act 2010* (NSW).

223 *McGregor v The King* (2024) 116 NSWLR 81 at 93-94 [42], quoting New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 23 November 2010 at 27867.

accumulation of sentences".[224] Further again, the amendments which inserted s 53A were "not intended to alter the way offenders are sentenced in any substantial way, or to have any impact on the overall length of sentences".[225]

176 In respect of the requirement in s 53A(2) of the NSW Sentencing Act for the court to make a written record of "the sentence that would have been imposed for each offence (after taking into account such matters as are relevant under Part 3 or any other provision of this Act) had separate sentences been imposed instead of an aggregate sentence" (an "indicative sentence"), the Second Reading Speech records that:[226]

> "The reasons for setting out the precise details of each sentence are to ensure transparency, reflect criminality and ensure that victims get due recognition. This also makes it easier to adjust an overall sentence when one sentence is changed on appeal. Those principles remain important, but in order to simplify the sentencing process for the judiciary, and for the community's understanding of it, the Government has decided to remove the requirement to specify the precise detail of any overlap between the sentences by allowing it to set one overall sentence and one non-parole period, provided that the court first indicates the appropriate sentence that would have been given for each offence had it been sentenced individually. The amendments will allow the judge to approach sentencing for multiple offences in a simple way when appropriate and lead to a sentence which is simpler and more easily understood by all."

Legislative provisions

177 Section 21A(1) in Pt 3 of the NSW Sentencing Act provides that:

"**General** In determining the appropriate sentence for an offence, the court is to take into account the following matters –

(a) the aggravating factors referred to in subsection (2) that are relevant and known to the court,

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224 *McGregor v The King* (2024) 116 NSWLR 81 at 94 [43], quoting *JM v The Queen* (2014) 246 A Crim R 528 at 535 [39(1)].

225 *McGregor v The King* (2024) 116 NSWLR 81 at 94 [44], quoting New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 23 November 2010 at 27870.

226 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 23 November 2010 at 27867.

(b) the mitigating factors referred to in subsection (3) that are relevant and known to the court,

(c) any other objective or subjective factor that affects the relative seriousness of the offence.

The matters referred to in this subsection are in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law."

178 Section 21A(2) specifies the "aggravating factors to be taken into account in determining the appropriate sentence for an offence". Section 21A(3) specifies the "mitigating factors to be taken into account in determining the appropriate sentence for an offence". By s 21A(4) the "court is not to have regard to any such aggravating or mitigating factor in sentencing if it would be contrary to any Act or rule of law to do so". By s 21A(5) the "fact that any such aggravating or mitigating factor is relevant and known to the court does not require the court to increase or reduce the sentence for the offence".

179 Section 49(2) in Pt 4 of the NSW Sentencing Act provides that:

"The term of an aggregate sentence of imprisonment –

(a) must not be more than the sum of the maximum periods of imprisonment that could have been imposed if separate sentences of imprisonment had been imposed in respect of each offence to which the sentence relates, and

(b) must not be less than the shortest term of imprisonment (if any) that must be imposed for any separate offence or, if the sentence relates to more than one such offence, must not be less than the shortest term of imprisonment that must be imposed for any of the offences."

180 Section 53(1) in Pt 4 of the NSW Sentencing Act provides that:[227]

"When a court imposes a sentence of imprisonment on an offender in relation to more than one offence, the court must (unless imposing an aggregate sentence of imprisonment in accordance with section 53A) comply with the requirements of this Division by imposing a separate sentence in relation to each offence."

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227 See also *Pearce v The Queen* (1998) 194 CLR 610 at 623-624 [45]; *Pearson v The Commonwealth* (2024) 99 ALJR 110 at 120 [46]; 420 ALR 41 at 51.

181 Section 53A, also in Pt 4 of the NSW Sentencing Act, is in part in these terms:

> "(1) A court may, in sentencing an offender for more than one offence, impose an aggregate sentence of imprisonment with respect to all or any 2 or more of those offences instead of imposing a separate sentence of imprisonment for each.
>
> (2) A court that imposes an aggregate sentence of imprisonment under this section on an offender must indicate to the offender, and make a written record of, the following –
>
> (a) the fact that an aggregate sentence is being imposed,
>
> (b) the sentence that would have been imposed for each offence (after taking into account such matters as are relevant under Part 3 or any other provision of this Act) had separate sentences been imposed instead of an aggregate sentence."

Second aspect of s 68(1) of the *Judiciary Act* – general application to Commonwealth offences

182 In *Putland* it was explained that the insertion of s 4K(4) into the Commonwealth Crimes Act applying only to summary offences did not disclose an intention contrary to the application of s 52(1) of the *Sentencing Act 1995* (NT) ("the Territory Sentencing Act"), which enabled the imposition of an aggregate sentence of imprisonment for two or more offences, summary or indictable, where: (1) the Commonwealth laws creating the offences of which the person was convicted specified a maximum penalty for the offences;[228] and (2) s 52(1) of the Territory Sentencing Act provided that "[w]here an offender is found guilty of 2 or more offences joined in the same information, complaint or indictment, the court may impose one term of imprisonment in respect of both or all of those offences but the term of imprisonment shall not exceed the maximum term of imprisonment that could be imposed if a separate term were imposed in respect of each offence".[229]

183 The reasoning in *Putland* included that the context of the enactment of s 4K(3) of the Commonwealth Crimes Act exposed its intended application to charges dealt with summarily, not to trials on indictment. Therefore, s 4K(4), in

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228 (2004) 218 CLR 174 at 185-186 [27] – the "maximum penalty for each of the bankruptcy offences was three years imprisonment and that for the contravention of s 29D of the [Commonwealth Crimes Act] was ten years imprisonment".

229 (2004) 218 CLR 174.

referring to "2 or more offences referred to in subsection (3)", also applied only to charges dealt with summarily, not to trials on indictment.[230]

184 Because Pt IB of the Commonwealth Crimes Act, which deals with sentencing for federal offences, was inserted into that Act after the insertion of s 4K(4) (and therefore in contemplation of s 4K(4) applying to summary offences), it was held in *Putland* that there was no inconsistency between the Commonwealth sentencing law (Pt IB of the Commonwealth Crimes Act) and the provision of the Territory Sentencing Act which enabled the imposition of an aggregate sentence for two or more offences, including indictable offences. As Gleeson CJ put it, "the provisions of [Pt IB] of the [Commonwealth Crimes Act] ... were enacted in the knowledge that the [Commonwealth Crimes Act] itself provided for aggregate sentencing in the case of some offences to which [Pt IB] was to apply, that is to say, offences dealt with summarily".[231] This circumstance was held not to give rise to any negative implication to the effect that s 52(1) of the Territory Sentencing Act could not apply to Commonwealth offences triable on indictment (to which s 4K(4) did not apply), because any such negative implication also would have to apply to s 4K(3), resulting in a "most curious and oblique method of excluding the possibility of joinder of charges in the case of proceedings on indictment in respect of federal offences" when such joinder "is convenient, and is common in practice". Further, as Pt IB of the Commonwealth Crimes Act applies to summary and indictable offences, it "covers cases to which s 4K(4) applies".[232] From this, Gleeson CJ said:[233]

> "It follows that aggregate sentencing, as provided for in s 4K(4), is not antithetical to the provisions of [Pt IB]. Those provisions must be able to co-exist with aggregate sentencing, because they exist together in the legislation, and [Pt IB] was introduced into legislation that already provided (in relation to summary proceedings) for aggregate sentencing."

185 Finally, from the context of the insertion of Pt IB into the Commonwealth Crimes Act, it was held in *Putland* that it was "impossible to conclude that [Pt IB] left no room for the application of, or was inconsistent with, s 52 of the [Territory Sentencing Act]. Such a conclusion depends upon a misunderstanding of [Pt IB's] history, an exaggeration of [Pt IB's] comprehensiveness, and the attribution to the legislature of a policy which cannot be discerned in the [Commonwealth Crimes

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230 *Putland* (2004) 218 CLR 174 at 180 [8]-[9], 189-190 [44]-[46], 192 [50], 215 [121].

231 *Putland* (2004) 218 CLR 174 at 180-181 [10].

232 *Putland* (2004) 218 CLR 174 at 182 [14]-[15].

233 *Putland* (2004) 218 CLR 174 at 182 [15].

Act]."[234] Putting it another way, the "presence of s 4K denies any proposition that [Pt IB] 'covered a field' as an exhaustive statement of the will of the Parliament with respect to sentencing for federal offences".[235]

186 It is important to recognise that the terms of s 4K(4) of the Commonwealth Crimes Act reinforce that *Putland* concerned only Commonwealth offences subject to a maximum (not a mandatory minimum) sentence of imprisonment. So much is clear from the express qualification in s 4K(4) that the penalty imposed by the aggregate sentence (for a Commonwealth summary offence) "shall not exceed the sum of the maximum penalties that could be imposed if a separate penalty were imposed in respect of each offence". *Putland*, moreover, did not consider the operation of s 4K(4) with s 4J of the Commonwealth Crimes Act (enabling some indictable offences to be dealt with summarily) as it did not need to do so in circumstances where the relevant offences were subject only to a maximum and not a mandatory minimum sentence of imprisonment. This point is explained further below in the context of the first aspect of the Crown's case, which specifically concerns the mandatory minimum sentencing provision, s 16AAA of the Commonwealth Crimes Act.

187 As noted, in the present case, the Crown did not challenge the correctness of *Putland*. Rather, it sought to distinguish *Putland* on the basis that s 52(1) of the Territory Sentencing Act did not contain words to the effect of those in s 53A(2)(b) of the NSW Sentencing Act: "(after taking into account such matters as are relevant under Part 3 or any other provision of this Act)". As the Crown put it, these words mean that the sentencing court must apply the provisions in the NSW Sentencing Act applicable in New South Wales to sentencing, whereas in *Putland*, under the "different language of s 52(1) of the [Territory Sentencing Act], a Territory court sentencing a Territory offender [was] not expressly required to apply Territory sentencing factors".

188 The distinction the Crown draws between s 52(1) of the Territory Sentencing Act and s 53A(2)(b) of the NSW Sentencing Act is an insufficient basis upon which to purport to distinguish the reasoning in *Putland* insofar as that reasoning concerns a Commonwealth offence subject to a maximum (and not a mandatory minimum) sentence of imprisonment. Section 52(1) of the Territory Sentencing Act required the Territory court to apply to the sentencing of a person convicted of a Commonwealth offence subject to a maximum sentence of imprisonment the provisions of the Territory Sentencing Act relevant to the sentencing of the offender which were "applicable" to that person within the meaning of s 68(1) of the *Judiciary Act*. The words in brackets in s 53A(2)(b) of

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234 *Putland* (2004) 218 CLR 174 at 185 [23].

235 *Putland* (2004) 218 CLR 174 at 193 [53].

the NSW Sentencing Act do no more than make express that which remained implicit in s 52(1) of the Territory Sentencing Act.

189 Given that *Putland* held that Pt IB of the Commonwealth Crimes Act did not cover the field and was not an exhaustive code excluding any potential application of State or Territory sentencing laws, and the Crown identified no relevant amendment to the Commonwealth Crimes Act which would have the effect of Pt IB operating as an exhaustive code, the necessary consequence is that the reasoning in *Putland* is indistinguishable.

190 The reasoning in *Putland*, however, left open the question of inconsistency between the provisions of the Territory Sentencing Act and Pt IB of the Commonwealth Crimes Act other than that provision of the Territory Sentencing Act which enabled a Commonwealth offence imposing a maximum penalty (not a mandatory minimum penalty) to be the subject of aggregate sentencing.

191 Beyond this, which dictates that the Crown's second appeal ground must be rejected, two observations should be made.

192 First, no specific dispute about the potential inconsistency of Pt 3 of the NSW Sentencing Act and Pt IB of the Commonwealth Crimes Act arises on the facts of this case. *Putland* does not eliminate the possibility of any such inconsistency of provisions arising. If any such inconsistency were to be found then, in the context of the operation of s 68(1) of the *Judiciary Act*, the question of severance or partial disapplication of the inconsistent provisions of the NSW Sentencing Act would arise. Such matters, however, cannot be dealt with in the abstract.

193 Second, if, as suggested by the Crown, the potential for such inconsistency involves intolerable inconvenience or uncertainty for State or Territory courts dealing with Commonwealth offences, the Commonwealth has the power to rectify the position by amending Pt IB of the Commonwealth Crimes Act either so that it operates as an exhaustive code for Commonwealth offences or so that it operates as an exclusive code for Commonwealth offences as specified albeit subject to clearly identified exceptions. Again, *Putland* does not eliminate either possibility.

First aspect of s 68(1) of the *Judiciary Act* – application to s 16AAA offences

Applying s 68(1) of the Judiciary Act

194 The question in respect of the first aspect of the operation of s 68(1) of the *Judiciary Act* is whether s 53A of the NSW Sentencing Act is "applicable", within the meaning of s 68(1) of the *Judiciary Act*, to a person convicted of an offence described in the table to s 16AAA of the Commonwealth Crimes Act and of another offence or other offences. That question is not answered by *Putland*, which did not consider the application of a State or Territory aggregate sentencing regime to a person convicted of a Commonwealth offence subject to a mandatory

minimum sentence of imprisonment such as s 16AAA and s 16AAB(2) of the Commonwealth Crimes Act.

195 For ease of explanation, it is to be assumed in the following discussion that the court is satisfied that no sentence other than imprisonment of the person for the s 16AAA offence and at least one of the other offences is appropriate. The consequence of this assumption is that it enables consideration of, for example, ss 17A(1) and (4), 19B and 20 of the Commonwealth Crimes Act to be put to one side. As will be explained, those provisions have a different field of operation from s 16AAA of the Commonwealth Crimes Act and s 53A of the NSW Sentencing Act, the common field of operation of which is the imposing of a sentence of imprisonment on a convicted person.

196 The text, context and purpose of the provisions under consideration lead to the conclusion that s 53A of the NSW Sentencing Act is "applicable" to the sentence to be imposed on a person for a s 16AAA offence and another offence or other offences only so far as the sentence imposed on that person complies and can be seen to comply with the minimum period of imprisonment as required by the terms of s 16AAA of the Commonwealth Crimes Act in the circumstances relevant to that person. Because s 68(1) of the *Judiciary Act*, in terms, relates to the application of State or Territory laws to "persons charged with offences" and not simply to "offences", the question whether s 53A of the NSW Sentencing Act is "applicable" to a person depends on the circumstances of the sentencing of that person, which will be different in each case.

197 Although an "indicative sentence" of imprisonment, as required to be indicated to the convicted person and recorded in writing by s 53A(2) of the NSW Sentencing Act, is not in fact a sentence of imprisonment against which an appeal might be instituted, an "indicative sentence", together with the aggregate sentence imposed, may expose error by the court, including, as presently relevant, a failure by the court to comply with the duty imposed by s 16AAA of the Commonwealth Crimes Act. As R A Hulme J said in *R v Nykolyn*:[236]

> "The importance of proper compliance with the requirement to indicate the separate sentences that would have been imposed arises for at least four reasons. First, it assists a sentencing judge in application of the totality principle, an important factor in the assessment of the aggregate sentence to be imposed. Secondly, it exposes for appellate review how it is that the aggregate sentence was arrived at ... Thirdly, it allows victims of crime and the public at large to understand the level of seriousness with which a court has regarded an individual offence. Fourthly, it assists this

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236 [2012] NSWCCA 219 at [58].

Court to assess an appropriate new aggregate sentence if one or some of the underlying convictions are quashed on appeal."

198 To these functions may be added that compliance with s 53A(2) of the NSW Sentencing Act will both direct the mind of the court to the need to comply also with s 16AAA of the Commonwealth Crimes Act for a s 16AAA offence and enable effective appellate review to determine if the court has or has not complied with the duty imposed on it by s 16AAA.

199 Unlike the Court of Criminal Appeal, I do not accept that every aggregate sentence imposed on a person for more than one offence under s 53A of the NSW Sentencing Act complies with the duty in s 16AAA if the aggregate sentence exceeds the minimum required to be imposed for a s 16AAA offence. Such an aggregate sentence imposed on a person may or may not comply with the s 16AAA duty. This is because, unlike the Court of Criminal Appeal, I consider that the s 16AAA duty requires the minimum sentence of imprisonment to be imposed exclusively for each s 16AAA offence and for no other offence. Several matters support this conclusion.

200 First, effect must be given to the text of s 16AAA. The terms of s 16AAA of the Commonwealth Crimes Act creating a mandatory minimum period of imprisonment for "an offence described" are that "the court must impose a sentence of imprisonment of at least the period specified ...". These terms create a duty with which the court must comply. They also, by necessary implication from the words "of at least the period specified", ensure that the minimum period of imprisonment specified must be for each offence described and for no other offence.

201 That s 16AAA does not expressly state that the minimum period of imprisonment is *for* the offence for which the person has been convicted is immaterial. The plain and obvious meaning of s 16AAA, in referring to "a person ... convicted of *an offence* described",[237] is that "at least" the minimum period of imprisonment is to be imposed by way of sentence for *each* s 16AAA offence as described and for no other offence. If not so construed, the words "an offence" would be meaningless and the words "of at least" would be superfluous. To explain: as a matter of ordinary English, it would suffice to create a mandatory minimum sentencing regime for "an" (meaning each) offence described in s 16AAA to say no more than that, for an offence so described, "the court must impose a sentence of imprisonment of the period specified ...". The words "of at least", however, appear in s 16AAA as enacted and are not to be understood as mere words of emphasis or as surplusage.[238] The function of those words, in the

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237 Emphasis added.

238 eg, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71].

context of referring to "an offence described", is to ensure that the minimum sentence of imprisonment for *each* offence so described is "of *at least* the period specified ...".[239]

202 Second, the terms of s 16AAC, a provision to which s 16AAA is expressly subject, provide contextual reinforcement for this construction of s 16AAA. Leaving aside s 16AAC(1) (which provides that ss 16AAA and 16AAB, the mandatory minimum sentencing provisions, do not apply to a person aged under 18 years when the person committed the offence), s 16AAC(2) provides a specific power enabling a court to impose a "sentence of imprisonment of less than the period specified" in the tables to those provisions (inferentially, for an, meaning each, offence so described) if the court is taking into account a plea of guilty or if the court is taking into account the person having cooperated with law enforcement agencies. Section 16AAC(3) specifies that if "a court may reduce a sentence, the court may reduce the sentence" only by the percentages "of the period specified" in the tables as set out in s 16AAC(3)(a)-(c). If a court could reduce the period of imprisonment for an offence specified in s 16AAA (or s 16AAB) merely by imposing an aggregate sentence, the careful discounting scheme in respect of the period of imprisonment to be imposed by way of sentence which s 16AAC represents would be largely defeated.

203 Third, it is self-evident that this construction best accords with the object of the introduction of mandatory minimum sentences of imprisonment for certain Commonwealth offences, which was to increase the periods of imprisonment to be imposed by courts sentencing persons convicted of those offences.

204 For example, assume that a person is convicted of a single s 16AAA offence and that s 16AAC does not apply. In accordance with the duty imposed by s 16AAA of the Commonwealth Crimes Act, the court must impose a sentence of at least the minimum period specified in the table to s 16AAA – for example, 7 years for an offence against s 272.11 of the *Criminal Code*. If the person is convicted of two such s 16AAA offences then, on the same assumptions, the court must impose a sentence of imprisonment of at least 7 years for one s 16AAA offence and at least 7 years for the other s 16AAA offence. If s 53A of the NSW Sentencing Act applies to the second example, the Court of Criminal Appeal's reasoning would permit a court to impose a single sentence of 7 years as the sentence is of "at least" 7 years for each such s 16AAA offence (and so on for three or more s 16AAA offences).

205 In the case of, say, the offence against s 272.11 in item 6 in the table to s 16AAA (involving the underlying offence in s 272.9(1) of engaging in sexual activity (other than sexual intercourse) with a child outside Australia, where the underlying offence is committed against the same child on two or more separate

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239 Emphasis added.

occasions), the result of the Court of Criminal Appeal's reasoning in respect of the applicability of s 53A of the NSW Sentencing Act is to enable the same sentence of imprisonment of not less than 7 years to be imposed no matter how many separate offences against s 272.11 are committed, meaning no matter how many different children have been the victims of the offending. Such an approach to the mandatory minimum sentence specified in s 16AAA would not address the perceived inadequacies in the criminal justice system identified in the extrinsic material and would not "keep offenders out of the community" for a longer period relative to the gravity of the harm inflicted by the multiple offences. Rather, the offender would be given a perverse incentive to commit more than one offence against s 272.11 (that is, an offence against more than one child on two or more separate occasions).

206 Extending the example above of a court sentencing for two or more s 16AAA offences (each against s 272.11 of the *Criminal Code*) where s 16AAC does not apply to any of the offences, the imposition of a single sentence of imprisonment of 7 years for both or all such offences does not satisfy the duty in s 16AAA. Such a sentence of imprisonment is not a sentence "of at least" 7 years for "an offence" described in the table to s 16AAA. In the case of two such offences, a sentence of imprisonment for both offences of 7 years might be a sentence of 7 years for one of the s 16AAA offences only in compliance with s 16AAA but, if that were so, then it would also follow that the court has imposed no sentence of imprisonment at all on the offender for the other s 16AAA offence, in contravention of its duty in s 16AAA and contrary to the terms of s 53A of the NSW Sentencing Act (which applies only if there is to be imposed a sentence of imprisonment for more than one offence). Section 68(1) of the *Judiciary Act* cannot operate to make s 53A of the NSW Sentencing Act applicable to sentencing of a person for s 16AAA offences so far as to do so would disable a court from satisfying the duty imposed on it by s 16AAA of the Commonwealth Crimes Act.

207 Fourth, that a court may order that any sentence of imprisonment imposed on a person for a Commonwealth offence be served concurrently or cumulatively provided that the requirements of s 19 of the Commonwealth Crimes Act are satisfied, including s 19(5)-(7) for Commonwealth child sex offences, provides no support for the contrary construction of s 16AAA adopted by the Court of Criminal Appeal. Nor is it to the point that a court must fix a single non-parole period in respect of two or more Commonwealth offences where the person is convicted of those offences at the same sitting in accordance with s 19AB of the Commonwealth Crimes Act. Concurrent and cumulative terms do not concern the period of imprisonment *imposed* by way of sentence, but the period during which separate sentences are to be *served*. Non-parole periods also do not concern the period of imprisonment imposed by way of sentence, but the minimum period of imprisonment which the offender must serve before being eligible for release. This is why the field of operation of concurrent and cumulative sentencing provisions and non-parole provisions is different from the field of operation of the imposing

of a sentence of imprisonment which is the subject of both s 16AAA of the Commonwealth Crimes Act and s 53A of the NSW Sentencing Act.

208 Fifth, and in contrast to the position in *Putland*, s 4K of the Commonwealth Crimes Act does not weigh against this construction. As noted, s 4K(4) is concerned with summary offences subject to a maximum penalty, not indictable offences subject to a mandatory minimum penalty. By s 4G "[o]ffences against a law of the Commonwealth punishable by imprisonment for a period exceeding 12 months are indictable offences, unless the contrary intention appears". By s 4H offences against a law of the Commonwealth punishable by imprisonment for a period not exceeding 12 months or not punishable by imprisonment "are summary offences, unless the contrary intention appears". By s 4J(1) an indictable offence "against a law of the Commonwealth, being an offence punishable by imprisonment for a period not exceeding 10 years, may, *unless the contrary intention appears*, be heard and determined, with the consent of the prosecutor and the defendant, by a court of summary jurisdiction".[240] By s 4J(3), "[s]ubject to subsection (6), where an offence is dealt with by a court of summary jurisdiction under subsection (1), the court may impose: (a) where the offence is punishable by imprisonment for a period not exceeding 5 years – a sentence of imprisonment for a period not exceeding 12 months or a fine not exceeding 60 penalty units, or both; or (b) where the offence is punishable by imprisonment for a period exceeding 5 years but not exceeding 10 years – a sentence of imprisonment for a period not exceeding 2 years or a fine not exceeding 120 penalty units, or both". Section 4J(6) is not presently relevant.

209 Section 16AAA does not describe "an offence punishable by imprisonment for a period not exceeding 10 years" and therefore no such offence can be summarily tried and no such offence can be subject to s 4K(4) in consequence. Section 16AAB, however, describes several offences punishable by imprisonment for a period not exceeding 10 years. In circumstances where s 16AAA and s 16AAB(2) use the same language,[241] they are to be construed consistently with one another. In providing that for an offence "the court must impose ... a sentence of imprisonment of at least the period specified" in the table to s 16AAB(2), s 16AAB(2) evinces a clear contrary intention to the application of s 4J(1) (and therefore s 4K(4)). Section 16AAB(2) does so because, if s 4J(1) applied, then by s 4J(3) the maximum sentence of imprisonment a court of summary jurisdiction could impose would be a period not exceeding 12 months or 2 years (as applicable). If so constrained by s 4J(3), a court of summary jurisdiction may be

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240 Emphasis added.

241 Section 16AAB(2) provides that: "Subject to section 16AAC, if the person is convicted of a current offence described in column 1 of an item in the following table, the court must impose for the current offence a sentence of imprisonment of at least the period specified in column 2 of that item."

unable to fulfil its duty in accordance with s 16AAB(2). The resulting contrariety between s 16AAB(2) and s 4J(1) and (3) would be resolved on the basis that s 16AAB(2), a specific provision imposing a specific duty to impose a mandatory minimum sentence of imprisonment for specific offences, prevails over the more general provision of s 4J(1), which relates to all indictable offences punishable by a sentence of imprisonment not exceeding 10 years and is expressly said to be subject to the appearance of a "contrary intention". That is, as between s 16AAB(2) and s 4J(1) (and therefore s 4K(4)) of the Commonwealth Crimes Act, s 16AAB(2) is the "leading provision" and s 4J is the "subordinate provision" giving way to s 16AAB(2). It is by recognising such "hierarchy of the provisions" that "each provision [can be given] the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme".[242]

210 Accordingly, s 4J(1) of the Commonwealth Crimes Act, by being expressly subject to a "contrary intention" appearing in any other provision, provides no support for the contention that s 16AAB, and therefore s 16AAA, as mandatory minimum sentencing provisions, are contemplated by that Act to be subject to aggregate sentencing (and, indeed, indicates to the contrary). In *Putland*, the conclusion could be and was reached that s 4K(4) supported the application of s 52(1) of the Territory Sentencing Act enabling an aggregate sentence to be imposed because the relevant Commonwealth offences to which s 52(1) of that Act was applicable, although indictable offences, were subject to maximum penalties only.

211 Sixth, the potential for inconsistency or contrariety between s 16AAA of the Commonwealth Crimes Act and s 53A of the NSW Sentencing Act arises because those provisions have a single common field of operation – the function of a court in imposing a sentence of imprisonment on a person who has been convicted of an offence. The consequence is that nothing in either provision extends beyond this field into other powers a court may have in respect of a person charged with an offence. For example, s 19B of the Commonwealth Crimes Act gives a court a power to dismiss a charge or discharge a person without conviction. Section 16AAA of the Commonwealth Crimes Act does not affect the power in s 19B because the s 16AAA duty on a court is confined to a person who has been convicted. By way of further example, it may be said that the interaction between s 16AAA and s 20 of the Commonwealth Crimes Act (enabling a court to order the release of a convicted person without passing sentence if certain other conditions are satisfied) is more difficult than the first example because both s 16AAA and s 20 apply only to a person who has been convicted. The conflict is to be resolved according to the ordinary principles of statutory construction

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242 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [70].

discussed above, having regard to the text, context and purpose of the provisions, including, for example, s 17A of the Commonwealth Crimes Act.[243]

212 Seventh, it may be accepted that, as the Court of Criminal Appeal said, the object of s 16AAA is "to set 'mandatory minimum penalties' for the identified offences", as stated in the Explanatory Memorandum.[244] The Court of Criminal Appeal's next proposition, however, is problematic. The Court of Criminal Appeal said that the purpose of the mandatory minimum sentencing provisions was not:[245]

> "to prevent the principle of totality being applied with respect to such offences or to preclude concurrency of sentencing when the person was being sentenced for more than one offence at the same time (where the other offence(s) might or might not be the child sexual abuse offences which s 16AAA and s 16AAB address). The operation of s 19(2) of the [Commonwealth Crimes Act] – which expressly permits concurrency, as discussed above – is not excluded (note 2019 Explanatory Memorandum at par 284)."

213 The problem is that the proposition is expressed in absolute terms. As noted, the power of a court to order two or more sentences of imprisonment to be served concurrently or cumulatively in s 19 of the Commonwealth Crimes Act (including for Commonwealth child sex offences in accordance with s 19(5)-(7)) remains unaffected by s 16AAA. The power to so order enables effect to be given to the principle of totality to enable the period of imprisonment to be served to reflect the overall gravity of all the offences. But powers relating to the service of a sentence of imprisonment are distinct from powers relating to the imposition of a sentence of imprisonment. Insofar as the power to impose a sentence of imprisonment is concerned, the mandatory minimum sentencing provisions, by subjecting the court to a duty to impose a sentence of imprisonment of at least the minimum period specified for an (meaning each) offence described in the provision, confine the application of the totality principle. By the terms of s 16AAA, the principle of totality cannot be applied to the imposition of a sentence for a s 16AAA offence to the extent that to do so would result in the imposition of less than the minimum period of imprisonment that must be imposed for each and every such offence. So

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243 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [70]. See also *Hurt v The King* (2024) 281 CLR 286 at 303 [34]-[35].

244 *McGregor v The King* (2024) 116 NSWLR 81 at 106 [98], referring to Australia, House of Representatives, *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019*, Explanatory Memorandum at 46 [194]. See also *Hurt v The King* (2024) 281 CLR 286 at 310 [54].

245 *McGregor v The King* (2024) 116 NSWLR 81 at 106 [98].

much appears plainly from the example of two s 16AAA offences (each against s 272.11 of the *Criminal Code*). In such a case the sentences of imprisonment must be at least 7 years for each s 16AAA offence (subject only to s 16AAC). There is no scope for the totality principle to apply to the imposition of those sentences. There is scope for the totality principle to apply in the court deciding how those sentences should be served in accordance with s 19 of the Commonwealth Crimes Act. That is the choice the Commonwealth Parliament has made and to which effect is to be given.

214 Eighth, that the extrinsic material relating to the insertion of the relevant mandatory minimum sentencing provisions (s 16AAA and s 16AAB) does not refer to the anticipated interaction of the provisions with State or Territory aggregate sentencing laws is not indicative of the proper construction of the relevant mandatory minimum sentencing provisions one way or another. Nor is the fact that *Putland* was decided before the Commonwealth Crimes Act was amended to introduce mandatory minimum sentences of imprisonment, as *Putland* says nothing about offences subject to mandatory minimum sentencing regimes.

215 Ninth, s 49(2)(b) of the NSW Sentencing Act, which provides that an aggregate sentence of imprisonment must not be less than the shortest term of imprisonment (if any) that must be imposed for any separate offence, may operate to remove any inconsistency between s 53A of that Act and a mandatory minimum sentencing provision in another New South Wales Act (depending on the terms of the mandatory minimum sentencing provision). The terms of s 49(2), however, are directly inconsistent with s 16AAA of the Commonwealth Crimes Act, which provides that the court must impose a sentence of at least the minimum period of imprisonment for an (meaning each) offence described in s 16AAA. It follows that s 49(2) of the NSW Sentencing Act is not "applicable" within the meaning of s 68(1) of the *Judiciary Act* to any person convicted of an offence described in s 16AAA of the Commonwealth Crimes Act.[246]

216 Finally, the reasoning in *Pearson v The Commonwealth*,[247] concerning the operation of provisions of the *Migration Act 1958* (Cth), is not to the contrary. That the ordinary meaning of a "sentence", in the context of the imposition of a sentence for a criminal offence, is a "judicial judgment or pronouncement fixing a term of imprisonment" and can include a sentence for more than one offence[248] does not weigh against the conclusion that, in s 16AAA saying "the court must impose a sentence of imprisonment of at least the period specified", the sentence so imposed

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246 cf *McGregor v The King* (2024) 116 NSWLR 81 at 107 [100].

247 (2024) 99 ALJR 110; 420 ALR 41.

248 *Pearson v The Commonwealth* (2024) 99 ALJR 110 at 120 [50]; 420 ALR 41 at 51-52, quoting *Winsor v Boaden* (1953) 90 CLR 345 at 347.

must satisfy the specified minimum for the offence described in the section and no other offence. Moreover, in *Pearson*, apart from the context being entirely different from the present case, the relevant statutory provisions provided a criterion in terms that "the person has been sentenced to a term of imprisonment of ..." and the definition of "sentence" was that a "sentence includes any form of determination of the punishment for an offence".[249]

217 In the present context, to return to the language of s 68(1) of the *Judiciary Act*, that the relevant State or Territory laws shall "apply and be applied *so far as they are applicable to persons* who are charged with offences against the laws of the Commonwealth"[250] is important. Section 68(1), in applying to "persons who are charged with offences against the laws of the Commonwealth" and not simply to "offences against the laws of the Commonwealth", ensures flexibility in the application of relevant State or Territory laws on a person-by-person and not an offence-by-offence basis. That is, insofar as relevant State or Territory laws can apply to such a person without altering their substance, they do apply. Many examples could be given where s 53A of the NSW Sentencing Act could apply to a person convicted of a s 16AAA offence and other offences without conflict with s 16AAA and without altering the substance of s 53A. That, however, does not mean that s 53A can and does so apply via s 68(1) of the *Judiciary Act* to *every person* convicted of a s 16AAA offence and at least one other offence.

218 As an example of a case in which s 53A of the NSW Sentencing Act can and therefore does apply in accordance with s 68(1) of the *Judiciary Act*, assume a person is convicted of a s 16AAA offence (to which s 16AAC is inapplicable) and another offence. Assume the mandatory minimum sentence of imprisonment for the s 16AAA offence is 7 years and the maximum sentence for the s 16AAA offence is 30 years. Assume the maximum sentence for the other offence is 5 years. Assume the court is satisfied that it should impose a sentence of imprisonment for the s 16AAA offence of 12 years and for the other offence of 1 year. Assume the court identifies those periods as the "indicative sentences" in accordance with s 53A(2). Assume the court then imposes an aggregate sentence of 9 years. That aggregate sentence of 9 years would comply (and would be able to be seen to comply) with s 16AAA because it must include a sentence of at least 7 years for the s 16AAA offence. It would comply (and would be able to be seen to comply) with s 16AAA because the "indicative sentence" for the other offence, being 1 year, exposes that the sentence for the s 16AAA offence embedded in the aggregate sentence of 9 years must be a period of at least 7 years.

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249 *Pearson v The Commonwealth* (2024) 99 ALJR 110 at 115 [6]-[7]; 420 ALR 41 at 44.

250 Emphasis added.

219 As an example of a case in which s 53A of the NSW Sentencing Act cannot and does not apply, assume all the same matters as in the previous example except that the court records "indicative sentences" of imprisonment for the s 16AAA offence of 7 years and for the other offence of 1 year and imposes an "aggregate" sentence of imprisonment of 7 years. In such a case, there is no scope for s 53A to apply because it applies only where there are two sentences of imprisonment to be imposed. In this example, the sentence imposed would involve either: (1) a sentence of 7 years' imprisonment for the s 16AAA offence alone and no sentence of imprisonment for the other offence (which is not within the scope of s 53A, so that s 53 of the NSW Sentencing Act, requiring separate sentences to be imposed for each offence, would apply); or (2) a sentence of less than 7 years' imprisonment for the s 16AAA offence in contravention of the court's duty in s 16AAA. Section 68(1) of the *Judiciary Act* could not and does not make s 53A of the NSW Sentencing Act "applicable" in either case to the person convicted of and to be sentenced for the s 16AAA offence.

220 Accordingly, to say, as the Court of Criminal Appeal did, that "[t]he fact that the sentence is also imposed in punishment of other offences does not alter the fact that the aggregate and operative sentence is imposed in punishment of the [s 16AAA] offence(s)" obscures as much as it reveals. To say further that "if an aggregate sentence of at least the minimum term is imposed for offences in the tables in s 16AAA and s 16AAB, then the requirement that at least such a term has been imposed for that offence has been satisfied",[251] for the reasons given, is incorrect.

Present case

221 The Court of Criminal Appeal imposed an aggregate term of imprisonment of 10 years and 9 months for all four offences including the s 16AAA offence. In so doing, in accordance with s 53A(2)(b) and after allowing for a discount of 30% under s 16AAC(3)(c), it recorded "indicative sentences" as follows, count 1 being the s 16AAA offence:

> "**Count 1** - 5 years and 7 months
>
> **Count 2** - 2 years and 9 months
>
> **Count 3** - 4 years
>
> **Count 4** - 4 years and 6 months".

222 That I consider that s 16AAC(3)(c) operates to create a permissible mandatory minimum period of imprisonment by reference to the actual percentage

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251 *McGregor v The King* (2024) 116 NSWLR 81 at 106 [97].

discount the court decides is appropriate (being 30% in this case) and not the maximum discount allowable under that provision (being 50% as concluded by the Court of Criminal Appeal[252]) raises an issue not the subject of the appeal and may be put to one side. It makes no difference if the floor created by s 16AAC(3)(c) was 70% of 7 years based on a 30% discount (a floor of 4 years and 10 months) or 50% of 7 years based on a 50% discount (a floor of 3 years and 6 months, as the Court of Criminal Appeal concluded).

223 What matters is that, in the circumstances of this case, the only way in which the Court of Criminal Appeal could comply with its duty under s 16AAA in sentencing the respondent was not to include the s 16AAA offence in the aggregate sentence under s 53A of the NSW Sentencing Act. This is because the "indicative sentences" and the aggregate sentence imposed do not enable it to be seen that the Court of Criminal Appeal, by imposing on the respondent a sentence of imprisonment of at least 4 years and 10 months (or 3 years and 6 months, on the Court of Criminal Appeal's reasoning) for the s 16AAA offence, allowing for the permissible discount in accordance with s 16AAC(3)(c), complied with s 16AAA. While the "indicative sentence" for the s 16AAA offence was 5 years and 7 months (greater than the floor created by s 16AAC(3)(c) on either view of its operation), the "indicative sentences" for the other offences totalled 11 years and 3 months. The aggregate sentence of 10 years and 9 months for all four offences, accordingly, may not have included a sentence of imprisonment for the s 16AAA offence of at least 4 years and 10 months (or 3 years and 6 months, on the Court of Criminal Appeal's reasoning). Given the Court of Criminal Appeal's duty under s 16AAA to impose such a minimum sentence of imprisonment, s 68(1) of the *Judiciary Act* could not make s 53A of the NSW Sentencing Act "applicable" to the respondent for the s 16AAA offence.

224 Accordingly, I would allow the Crown's appeal on ground one and remit the matter to the Court of Criminal Appeal for the respondent to be re-sentenced in accordance with law.

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252 *McGregor v The King* (2024) 116 NSWLR 81 at 88 [13].