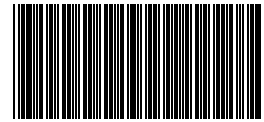




Filed: 5 September 2025 5:02 PM



D00027XNBE

Written Submissions

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
List	Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00085681

TITLE OF PROCEEDINGS

First Applicant	Director of Public Prosecutions
First Respondent	P D

FILING DETAILS

Filed for	Director of Public Prosecutions, Applicant 1
Legal representative	Craig Hyland
Legal representative reference	
Contact name and telephone	Jennifer Hoy (02) 9224 5000
Your reference	202316483

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (DPP (NSW) v PD - Reply Submissions of Director - 5.9.25.pdf)

[attach.]

IN THE SUPREME COURT OF NSW

COURT OF APPEAL

No. 2025/0085681

THE DIRECTOR OF PUBLIC PROSECUTIONS (NSW)

Applicant

-v-

PD¹

Respondent

APPLICANT’S WRITTEN SUBMISSIONS IN REPLY

1. On 5 May 2025, the Director filed a summons seeking leave to appeal from the whole of the decision of his Honour Basten AJ in *PD v Director of Public Prosecutions (NSW)* [2025] NSWSC 16 (“J”).² The Director’s Summary of Argument was also filed on 5 May 2025 (“AS”),³ and the Response was filed on 2 June 2025.⁴
2. On 16 June 2025, the Registrar made a pro bono referral for a Contradictor to be appointed in these proceedings. The Registrar also made orders for the filing and service of written submissions by the Contradictor⁵ (“CS”), and submissions in reply by the Respondent⁶ (“RS”) and the applicant (“AR”).

The Contradictor’s argument on construction

Section 33(1)(g) does not of itself permit a single control order for multiple offences

3. The Contradictor submits that the text of s 33(1)(g) of the *Children (Criminal Proceedings) Act 1987* (NSW) (“CCPA”) “says nothing” about the number of offences that can be the subject of an order pursuant to that sub-section, and that the power derived from s 33(1)(g) may be exercised in relation to one offence or multiple offences (CS [21]-[22]). In this regard, the Contradictor submits that the words “*If the Children’s Court*

¹ *Children (Criminal Proceedings) Act 1987* (NSW) s 15A prevents the publication of the name of the respondent.

² Tab F, Court Book.

³ Tab G, Court Book.

⁴ Tab H, Court Book.

⁵ Filed 18 August 2025.

⁶ Filed 26 August 2025.

finds a person guilty of an offence to which this Division applies, it shall do one of the following things” in the chapeau of s 33 “merely identify the precondition to the enlivenment of the power to make any of the orders set out in ss 33(1)(a)-(g)”: CS [22]. The Contradictor contends that the condition precedent is “equally satisfied” whether a person is being sentenced for one offence, or multiple offences, with the result that the words “not exceeding two years” must apply to any control order, including aggregate control orders: CS [22].

4. To the contrary, s 33(1) provides that upon finding a person guilty of *an offence* (singular) the court shall do *one* of the things contained within the various subsections. The constraint that the court may only do “one” of the things in the subsections, is a clear indication that the power to impose a penalty attaches to an individual offence (and not broadly and at large following satisfaction of a condition precedent). The specific reference to “one of the following things” is consistent with the interpretation contended for by the Director. Such interpretation of the provision also accords with general sentencing principles pursuant to the common law.⁷
5. That s 33(1) provides a power to impose a single penalty (or order) in respect of a *single* offence is also indicated by the balance of the text of s 33(1), including:
 - a. The reference to “the charge” (singular) in s 33(1)(a)(i);
 - b. The reference to “the offence” (singular) in s 33(1)(c)(i);
 - c. The reference to “the offence” (singular) in s 33(1)(c2); and
 - d. The inclusion of ss 33(1)(d), (e1) and (f1).
6. The characterisation contended for by the Contradictor is at odds with the clear meaning of the whole of the text of s 33 itself.
7. Further, the construction advanced by the Contradictor is inconsistent with s 53 of the *Crimes (Sentencing Procedure) 1999* (“**the Sentencing Act**”), which is picked up by s 33C of the CCPA. Applying the terminology change explained in s 33C(1)(a) of the CCPA, that provision provides that unless imposing an aggregate sentence in accordance with the power in s 53A, a court that is making a control order in relation to more than one offence must impose *a separate control order in relation to each offence*. This

⁷ *Pearce v The Queen* (1998) 194 CLR 610; [1998] HCA 57; *Mill v The Queen* (1988) 166 CLR 59.

supports the construction contended for by the Director, that the Children's Court is required to impose separate control orders for each offence (not a single control order for multiple offences) unless exercising the power to an aggregate sentence pursuant to s 53A of the Sentencing Act (picked up by s 33C of the CCPA).

8. Further, the Contradictor's suggestion that the text of s 33(1)(g) alone provides the power to impose a single control order as a sentence for multiple offences (i.e. without relying on the power in s 53A of the Sentencing Act) overlooks that s 33C, which incorporates Parts 3 and 4 of the Sentencing Act, was enacted in 1999,⁸ well prior to the aggregate sentencing provisions introduced in 2011: **AS** [23].

The source and limit of the aggregate sentencing power in the Children's Court

9. Contrary to the Contradictor's submissions:
 - a. The Director does not concede that s 33(1)(g) is the source of the power to impose an aggregate control order: cf **CS** [34], [39]. To the contrary **AS** [31] highlights that s 33(1)(g) provides a power to impose *an* order (singular) in respect of *an offence* (singular); and
 - b. The Director does not rely on s 33A(4) as providing the power to impose an aggregate control order of three years: cf **CS** [25]-[26]. The power to sentence a young person to an aggregate control order for multiple offences is provided by s 53A of the Sentencing Act (as picked up by s 33C of the CCPA). As outlined above at [7], in the absence of such a power, then s 53 of the Sentencing Act requires separate control orders for each offence. The limitation on the length of such an order is 3 years due to the constraint that s 53A is "subject to" the provisions in the CCPA, as discussed below at paragraphs [12] – [15] of these submissions.
10. It is accepted that none of the provisions referred to at **CS** [25] independently provides a source of power for the Children's Court to impose a control order exceeding 2 years' duration. Rather, the analysis in **AS** illustrates that a harmonious construction of ss 33 and 33A of the CCPA, and ss 53A and 53B of the Sentencing Act achieves this: **AS** [30] - [34], as follows:

⁸ See Sch 4, 4.4 [6] *Crimes Legislation Amendment (Sentencing) Act 1999* (NSW).

- a. As accepted by the Contradictor, s 33C of the CCPA picks up the provisions of Parts 3 and 4 of the Sentencing Act, subject to any provision of the CCPA: CS [13];
 - b. Section 53A provides the power for a court to sentence a person to a single sentence of imprisonment, or control order, for multiple offences: cf s 53 of the Sentencing Act. Section 53A does not, of itself, contain a limitation on the length of such aggregate sentences. The Contradictor concedes that s 33C picks up s 53A of the Sentencing Act: CS [22], [33] – [34]; and
 - c. Section 53B contains the declaratory provision, “to avoid doubt”, that the power to impose an aggregate sentence in the Local Court is subject to the limitation that it must not exceed 5 years.⁹ As explained at AS [25] – [27] and RS [3] - [5], this provision was introduced to clarify that when the Local Court imposes an aggregate sentence, the jurisdictional limit that operates when accumulating multiple sentences also applies to the aggregate sentence.
11. It is not correct to say that the Director does not rely on s 53B of the Sentencing Act in support of her suggested construction: see AS [24] – [27]; cf CS [25].
 12. Section 33C specifically provides that the provisions in Part 3 and Part 4 apply to the Children’s Court *in the same way as to the Local Court*. Section 53B therefore applies in the Children’s Court, subject to the change in terminology as provided for by ss 33C(1)(a) and (b); and “subject to [the CCPA]”: cf CS [24], [34], [37] – [38] and cf J [44].
 13. In considering whether any provision of the CCPA is inconsistent with s 53B of the Sentencing Act, attention must be given to s 33A(4) of the CCPA. Section 33A(4) provides that the Children’s Court must not make “a new control order” if the order would have the effect of requiring a person to be detained for a continuous period of more than 3 years. Thus, while s 33C of the CCPA picks up ss 53A and 53B of the Sentencing Act, that is subject to the other provisions of the CCPA. Thus, the Children’s Court is not relieved of the jurisdictional limit contained within s 33A(4), which operates as a limitation on any “new control order” imposed: cf CS [26] – [28], [34].
 14. Contrary to CS [26], for the reasons explained at AS [33] – [34], s 33A(4) should not be

⁹ There is no limitation in respect of the District Court.

understood as applying only to a control order imposed for single offences pursuant to s 33(1)(g), but also to an aggregate control order. While textually the definition in s 33A(1) is accepted as referring to a control order pursuant to s 33(1)(g) of the CCPA (being a control order for a single offence) it ought to be read consistently with the intention of Parliament that the jurisdictional limit of the Children's Court be 3 years. If s 33A(4) of the CCPA is understood as applying only to a control order imposed for a single offence pursuant to s 33(1)(g), then the power to impose an aggregate sentence in the Children's Court would be limited only by s 53B of the Sentencing Act (as picked up by s 33C of the CCPA).¹⁰ That is, the aggregate control order could not exceed 5 years. Such an outcome would be inconsistent with the principles in s 6 of the CCPA, and the purpose and legislative intent of s 33A(4) of the CCPA.

15. This harmonious construction of the provisions achieves consistency with the manner in which aggregate sentencing operates in the Local Court. In particular, that s 58 of the Sentencing Act (being the analogous provision to s 33A of the CCPA) provided the 5 year limitation upon the operation of s 53A of the Sentencing Act in the Local Court prior to the introduction of the declaratory provision in s 53B in 2016: cf **J** [45]; see also **RS** [3] – [6].

Conclusion

16. The construction advanced by the Director gives effect to the language and purpose of the text of s 33, and the CCPA as a whole; together with the provisions of the Sentencing Act picked up by s 33C: cf **CS** [40].

Consideration of sentencing principles

17. The concerns about matters of principle and practice raised by the Director of Public Prosecutions and the Public Defender on behalf of the respondent should not be dismissed as issues of mere “administrative inconvenience for those presiding over the Children's Court”: cf **CS** [44]. In this respect, the Applicant respectfully adopts **RS** [7]-[8], which illustrate some of the practical complexities that arise.
18. Without the power to impose aggregate control orders of sufficient length to accommodate instances of serious multiple offending, the Children's Court will be

¹⁰ For the reasons already outlined at paragraphs [3] – [8] of these submissions, the limitation of two years in the words of s 33(1)(g) applies to a control order for a single offence.

required to engage in a significantly more complex sentencing exercise that may conflict with the proper application of sentencing principle: see **AS** [13] and [36].

19. One of these principles is the requirement for a non-parole period to reflect the minimum period of actual incarceration that the offender must spend in full-time custody, having regard to all the circumstances of the offending: *Power v R* (1974) 131 CLR 623; [1974] HCA 26 at 628–629.¹¹ Although a sentencing court does have the power to adjust the non-parole period to reflect special circumstances, there remains “*the ultimate constraint that the non-parole period must itself appropriately reflect the criminality involved in the offence[s]*”: *R v Simpson* (2001) 53 NSWLR 704; [2001] NSWCCA 534 at 718 [63] per Spigelman CJ (emphasis added):¹² cf **CS** [45]. This is not a matter of “form” or of “administrative convenience” but a matter of well-established principle: (cf **CS** [43] - [46]). So much was recognised by the primary judge who approached the resentencing exercise in the present matter “[n]ot without some misgivings”: **J** [52].
20. The present case illustrates the difficulty. The primary judge held, as did the Children’s Court President, that the objective seriousness of the respondent’s offending overall could not be addressed adequately by a lesser sentence than three years. The second tranche of offences was recognised as more serious, yet it was only possible to impose a non-parole period of 6 months in respect of those offences: **AS** [37].¹³

Conclusion

21. For the reasons set out above and in the **AS**, the primary judge erred in finding that the President of the Children’s Court did not have the power to impose the aggregate control order of three years. Leave should be granted and the appeal upheld.

Annexure

22. In compliance with paragraph [33] of Practice Note SC CA 01, a procedural chronology is annexed to these submissions.

¹¹ See also *Deakin v The Queen* (1984) 11 A Crim R 88 at 89; *Lowe v The Queen* (1984) 154 CLR 606 at 615; *Bugmy v The Queen* (1990) 169 CLR 525 at 536; *Muldrock v The Queen* (2011) 244 CLR 120; [2011] HCA 39 at [57].

¹² See also *R v Sharrouf* [2023] NSWCCA 137 at [207]; *R v SS* (a pseudonym) [2022] NSWCCA 528 at [102]; *R v MA* [2004] NSWCCA 92; (2004) 145 A Crim R 434 at [33].

¹³ See **J** [21], [52]-[53], Tab F, pp. 54, 62-63 Court Book; see also T36.03-22, T42.18-24, Tab 5, pp. 130, 136 Court Book.

Certification

23. In compliance with paragraphs [27] and [28] of Practice Note SC CA 01, the Director certifies that these submissions, and those filed by the Director on 5 May 2025 are suitable for publication on the internet.

Dated: 5 September 2025



Helen Roberts SC
Deputy Director of Public Prosecutions (NSW)
Tel: (02) 9285 8890
eadpp@odpp.nsw.gov.au

Elizabeth Nicholson
A/Deputy Senior Crown Prosecutor
Tel: (02) 9285 8890
eadpp@odpp.nsw.gov.au

PROCEDURAL CHRONOLOGY

Date	Event
20 January 2022 – 20 January 2023	Over various dates, PD committed the offences in items 1-9 in the Table of Offences (Exhibit 3).
28 January 2023 – 21 February 2023	PD remanded in custody in relation to index offences.
6 January 2023 – 7 January 2023	PD committed the offence in item 10 in the Table of Offences (Exhibit 3).
23 March 2023 – 23 May 2023	PD remanded in custody in relation to index offences.
30 September 2023 – 2 October 2023	PD committed the offences in items 11-19 in the Table of Offences (Exhibit 3).
2 October 2023 – 18 March 2024	PD remanded in custody in relation to index offences.
18 March 2024	PD entered pleas of guilty to the index offences and was sentenced by President Skinner.
8 April 2024	Notice of Appeal against severity of sentence emailed to Port Macquarie Local Court Registry.
3 October 2024	Notice of Appeal against sentence filed in the Court of Criminal Appeal.
10 October 2024	Notice of Appeal listed before Court of Criminal Appeal Registrar Galanis.
30 October 2024	Summons commencing an appeal filed in Supreme Court of NSW.
27 November 2024	Summons listed before Supreme Court Registrar Hedge. Timetabling orders made listing the matter for hearing on 4 February 2025.
4 February 2025	Matter listed for hearing before Basten AJ. His Honour made orders at the conclusion of the hearing to set aside the 3-yr aggregate control order imposed by President Skinner on 18 March 2024 and impose an aggregate control order for a fixed term of 12 months and an aggregate control order for 2yrs, with a non-parole period of 6 months.
6 February 2025	Reasons for judgment delivered by Basten AJ.
4 March 2025	Notice of Intention to Appeal filed and served by Director of Public Prosecutions (NSW).