SUPREME COURT OF QUEENSLAND

CITATION:	*R v Shillingsworth* [2001] QCA 172
PARTIES:	**R** **v** **SHILLINGSWORTH, Richard Lloyd** (applicant)
FILE NO/S:	CA No 337 of 2000 DC No 3319 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	11 May 2001
DELIVERED AT:	Brisbane
HEARING DATE:	18 April 2001
JUDGES:	Thomas and Williams JJA, White J Separate reasons for judgment of each member of the Court, each concurring as the orders made
ORDER:	**1. Grant leave to appeal against sentence.** **2. Allow the appeal with respect to the sentence imposed on the counts of unlawful wounding and entering a dwelling with intent, and in lieu of the sentences imposed order that the applicant be imprisoned for a period of 12 months on the count of unlawful wounding and 12 months on the count of entering a dwelling with intent.** **3. Otherwise the orders made on sentence should stand.**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – MISCELLANEOUS MATTERS – OFFENCE COMMITTED WHILE ON BAIL OR PAROLE AND EFFECT OF BREACH OF PAROLE - where applicant on parole at time of committing offences – considering the statutory framework for sentencing, the 'totality principle' cannot be applied directly – the function of the sentencing judge is to impose a sentence having regard to the criminality of the current offences; in doing so s 9 *Penalties and Sentences Act* requires the Judge to consider that the sentence will be cumulative upon a sentence for past offences

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN GRANTED – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – where applicant pleaded guilty to unlawful wounding, being in a dwelling with intent to commit an indictable offence and wilfully and unlawfully destroying a toilet – a starting point of four to five years imprisonment is too high for the offence of wounding – a starting point of no more than three years is appropriate

Corrective Services Act 1988 (Qld), s 187, 190, 207B
Criminal Code (Qld), s 323
Penalties and Sentences Act 1992 (Qld), s 9(1)(a), s 9(2)(l) and (m), s 156A,
Supreme Court of Queensland Act 1991 (Qld), s 8, s 9

Harris v Muirhead [1993] 2 Qd R 527, cited
R v Anderson CA No 90 of 1998, 11 September 1998, considered
R v Bojovic [2000] 2 Qd R 183, applied
R v Booth [2001] 1 Qd R 393, considered
R v Briese ex parte A-G [1998] 1 Qd R 487; (1997) 92 A Crim R 75, cited
R v Coonan CA No 83 of 1995, 26 April 1995, applied
R v Byrnes CA No 126 of 1999, 18 June 1999, considered
R v Maclean and Bannerman [2000] QCA 367; CA Nos 71 and 98 of 2000, 12 September 2000, considered
R v Meehan CA No 128 of 1996, 5 June 1996, applied
R v Mill (1988) 166 CLR 59, cited
R v Pettigrew [1997] 1 Qd R 601, cited

COUNSEL: AW Moynihan for the applicant
C Heaton for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **THOMAS JA:** I agree with the reasons prepared by Williams JA, and in particular with his Honour's analysis of the relevant authorities.

[2] This 25 year old offender was sentenced on 24 November 2000 in respect of an unfortunate incident that occurred towards the end of his period of parole. The three year cumulative sentence imposed by the learned sentencing judge gave him a full-time discharge date almost eight years into the future, accompanied by bleak prospects of parole and limited rights of remission. That dismal picture was the result of three main factors. Firstly, there was the effect of s 187 of the *Corrective Services Act* 1988 which produces dire consequences when an offence is committed

towards the end of a parole period.[1] This is exacerbated by the mandatory requirement of a cumulative sentence in respect of the fresh offence.[2] Secondly, this particular applicant's prison terms had been swollen by other mandatory sentencing requirements for his breaches of the *Bail Act* and other offences under the *Corrective Services Act*. Thirdly, the sentence in question was a very severe addition.

[3] The sentence imposed in this particular case had to be cumulative, as demanded by s 156A of the *Penalties and Sentences Act*. But that did not require the sentencing court to be oblivious to the overall effect the sentence would produce on the applicant, or to fail to look at the wider picture. The passing of a sentence is a basic function belonging to courts in the exercise of their criminal jurisdiction whether the jurisdiction is inherent[3] or statutory,[4] or a combination of both. Section 9 of the *Penalties and Sentences Act* is, as its caption suggests, a legislative statement of "sentencing guidelines". It contains both a recognition of longstanding principles observed by the courts in exercising criminal jurisdiction, and, since the 1997 amendments, a requirement of greater emphasis upon deterrence and protection of the community in the case of violent offenders. The section does not purport to be a complete code of sentencing principles and inter alia recognises the right of the court to take into account "any other relevant circumstance".[5] But overall it is an affirmation of the need of a sentencing court to look at all possible sentencing options and their potential effect. As noted in *Bojovic*[6], sentencing is a practical exercise.

[4] The learned sentencing judge in the present matter could not have paid due regard to the effect of the sentence he was imposing. The imposition of a cumulative sentence of three (3) years in the circumstances as they stood imposed a crushing burden which would have the effect of blocking the light at the end of the tunnel for this relatively young offender. I do not say that a sentence should be imposed other than one that is appropriate for the criminality revealed by the conduct in question, or that courts should undermine harsh administrative results intended by the legislature. But on any realistic view of the matter this sentence was very excessive.

[5] I agree with Williams JA that cumulative sentences of 12 months imprisonment should be substituted.

[6] **WILLIAMS JA:** This is an application for leave to appeal against sentences imposed on 24 November 2000. On that date the applicant pleaded guilty to 1 count of unlawfully wounding, 1 count of being in a dwelling with intent to commit an indictable offence, and 1 count of wilfully and unlawfully destroying a toilet. Each of those offences occurred on 12 June 1999, and one Gregory Verwoerd was the complainant.

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1 *R v MacLean and Bannerman* [2000] QCA 367; CA No's 71 and 98 of 2000, 12 September 2000.

2 See 156A of the *Penalties and Sentences Act* 1992.

3 *Supreme Court of Queensland Act* 1991 ss 8, 9; *R v Pettigrew* [1997] 1 Qd R 601; *Harris v Muirhead* [1993] 2 Qd R 527.

4 eg *Penalties and Sentences Act* 1992.

5 Ibid s 9(2)(q).

6 *R v Bojovic* [2000] 2 Qd R 183, 191 (paras 31-33); cf *R v Briese* [1998] 1 Qd R 487, 489-490; [1997] 92 A Crim R 75.

[7] The applicant was sentenced to 3 years imprisonment on the count of unlawful wounding, 2 years imprisonment on the count of entering the dwelling with intent, and 6 months imprisonment on the wilful destruction charge. Those three sentences were ordered to be served concurrently.

[8] The applicant was on parole at the time of committing those offences and that had a number of consequences for him:

(i) because the offence of unlawful wounding was one listed in the Schedule to the *Penalties and Sentences Act* 1992, by virtue of s 156A of that Act the sentence imposed for that offence had to be cumulative with any other term of imprisonment the applicant was liable to serve;

(ii) by operation of s 187 of the *Corrective Services Act* 1988 upon conviction for the offences committed on 12 June 1999 his parole was automatically cancelled. However it appears that pursuant to s 185 of that Act his parole was suspended on 5 November 1999 and he was returned to custody on 21 June 2000;

(iii) by operation of s 190 of the *Corrective Services Act* the applicant was required to serve the balance of the term of imprisonment with respect to which he had been released on parole (the time between release on parole and return to custody not being regarded as time served with respect to that term) and with respect to that term of imprisonment the applicant's eligibility for remissions was taken to have been extinguished when he was released on parole by operation of s 207B of that Act.

[9] It will be necessary to return later to the practical consequences for the applicant of those matters.

[10] It appears from material placed before the sentencing judge that the applicant and the complainant had known each other for many years. The complainant was the defacto spouse of the applicant's mother's sister. The applicant had been working in Sydney but returned to Brisbane for a funeral, and remained for some time living at Redcliffe in the same block of units as the complainant. There was some bad blood between the applicant and the complainant apparently due to rumours the applicant had heard about the complainant saying things about the applicant and his mother. It was against that background that the events occurred which gave rise to the charges in question.

[11] On 12 June 1999 the applicant had consumed some beer in the course of the day and at about 6.30 pm, probably affected by alcohol, he decided to go and speak to the complainant about his concerns. He did not take any weapon with him, and the evidence would appear to support his contention that he had no premeditation so far as assaulting the complainant or using a weapon was concerned. The applicant apparently entered the home through an open door (he claimed he knocked and was invited in), but it must be remembered he pleaded guilty to entering the dwelling with intent to commit an indictable offence.

[12] It seems clear that the applicant made some abusive remarks directed to the complainant, accusing him of having made derogatory remarks about the applicant to other friends. It appears that the first punch was thrown by the applicant, but in the scuffle that followed the complainant got the better of the applicant; the complainant was pushing the applicant towards the door. Thereafter items were thrown in the course of the scuffling. It was at that point of time that the applicant

grabbed a pair of scissors which were on top of a coffee table and inflicted the wounds which gave rise to Count 1. The complainant broke free and ran out of the house. After that the applicant smashed a ceramic toilet bowl with a brick - Count 3.

[13] Photographs of the complainant's injuries were before the Court. They showed a deal of blood about the complainant's face and head. The complainant's injuries were treated at the local hospital by Dr Wong. He noted four lacerations as follows:

(1) his left temporal region had a cruciate-like laceration 3 cm x 3 cm x 5 cm. It was to the depth of the periosteum.
(2) his left frontal region had a gouge-like laceration 3 cm x 2 cm.
(3) he had an abrasion to his right eyebrow which was 4 cm long.
(4) he had a laceration to his lower lip.

[14] The lacerations were sutured under local anaesthetic and the complainant was discharged with an antibiotic. The complainant appears to have made exaggerated complaints in a victim impact statement, parts of which were read to the sentencing judge. It does not appear that any weight was placed on that material.

[15] The learned sentencing judge commenced his remarks by saying that the applicant "stormed into Gregory Verwoerd's premises and eventually attacked him in this dreadful way, causing these ghastly injuries to his head". Given all the material placed before the Court, that does appear to be an over-statement of the position. It appears to disregard the long-standing relationship between the applicant and the complainant and the background to the incident. The situation was far removed from that which is often described as a home invasion. Further, the injuries, particularly as recounted by the doctor, hardly justify the description of "ghastly". It is true to say that, from the point of view of both the applicant and the complainant, it is fortunate that more serious injuries were not sustained. The use of the scissors was not premeditated. It was something that happened in the heat of the struggle which was taking place between the two men.

[16] The learned sentencing judge said that were it not for mitigating factors (plea, not take weapon into premises, and sentence had to be served cumulatively) he would have imposed a sentence of about 5 years. The Crown prosecutor on sentence indicated that (given the applicant's criminal history, to which I will refer later) a sentence of 4 years was within range. On the hearing of the appeal, counsel for the respondent conceded that it was "difficult to support a starting position of 5 years imprisonment for this offence"; but he supported the actual sentence imposed of 3 years. The maximum penalty for wounding is 7 years imprisonment (s 323 of the Code). Counsel for the applicant submitted the appropriate starting point was 2 years imprisonment which should be discounted to 12-18 months because of the plea, co-operation with authorities and other relevant factors.

[17] Before considering the question of sentence further, it is necessary to say something of the applicant's history. He was born on 8 September 1973, making him 25 years at the time of the offence, and 27 when he stood for sentence. He was the youngest of 11 children; he was raised by his grandmother because his mother was an alcoholic. He never knew his father. After his release on parole in October 1997, he moved to Sydney with his girlfriend; they have two children. Apparently he is a

talented dancer and founded an Aboriginal dance company. He also obtained part-time work as a landscape gardener.

[18] His criminal history, particularly in his late teens-early twenties, was quite bad. He had a number of convictions in the Childrens Court for property offences (break and enter, wilful damage, dangerous driving). On 20 November 1992 he appeared in the Brisbane District Court and was dealt with for a series of property offences; there appear to have been five charges of breaking and entering and stealing, seven charges of breaking and entering a dwelling house with intent, seven charges of stealing, and six charges of unlawful use of a motor vehicle for the purpose of facilitating the commission of an indictable offence. In addition, the court took into account 56 other offences. The head sentence was 7 years imprisonment with a recommendation that he be considered for parole after serving 12 months. A number of those offences apparently occurred when the applicant was 16 or 17 years of age. Later, on 6 January 1993, he again appeared in the Brisbane District Court on a robbery in company charge which occurred on 19 February 1989 (when he was aged 15). For that offence he was sentenced to 2 years imprisonment with a recommendation for parole after serving 10 months.

[19] The criminal history is complicated by the fact that on 20 July 1993 and 14 July 1994 he was dealt with for offences which appear to have occurred prior to his being dealt with in the District Court in November 1992. Significantly on 21 April 1994 he was convicted of the offence of being "unlawfully at large" on 3 March 1994. The particulars of that offence are not clear, but he was sentenced to 12 months imprisonment cumulative on his other sentences. At about that time he was also convicted of offences of assaulting police and obstructing police. Then on 25 March 1995 he breached home detention and for that was convicted in the Beenleigh Magistrates Court on 27 March 1995 and sentenced to 2 months imprisonment cumulative on the other sentences he was serving.

[20] It seems that he must have then been released into the community on some basis (home detention or parole is not clear), because on 22 May 1996 he committed the offences of unlawfully using a motor vehicle for the purpose of facilitating the commission of an indictable offence and wilful damage to property. He was also charged with dangerous driving. It seems that for all of those offences he received a combined sentence of 18 months cumulative on his other sentences.

[21] The criminal history is again somewhat confusing because in February 1997 he was dealt with for further offences which had been committed prior to his being dealt with in the Brisbane District Court on 20 November 1992. He was then released on parole on 27 October 1997, and was on parole until returned to custody as indicated above on 21 June 2000. He committed no further offences between 27 October 1997 and 12 June 1999 when the subject offences were committed. Since that latter date there have been some entries on his criminal history, but they can be disregarded for present purposes.

[22] While the history is lengthy and bad, it must be conceded that apart from the robbery with actual violence in February 1989, when he would have been aged 15, there is no offence involving serious violence. It can be said that when released on parole on 27 October 1997 he had completed 5 years of the 7 year sentence imposed on 20 November 1992. But, of course, there were the other sentences

imposed which were cumulative on that. That meant that when he was returned to custody on 21 June 2000 he had more than the 2 year balance of the 7 year term to serve. It was put to the sentencing judge, and this calculation was accepted on the hearing of this application, that the cancellation of parole resulted in a full-time discharge date of 4 September 2005, with an earliest discharge date of 24 September 2003. As indicated above, any sentence for the offences committed on 12 June 1999 would be served cumulatively upon that; with a 3 year sentence the new full time discharge date would be 4 September 2008.

[23] During the hearing there was much discussion concerning the relevance of certain observations made in *Booth* [2001] 1 Qd R 393 to the facts of the present case. The offender in that case committed a series of offences, including burglary and armed robbery, whilst on parole. By virtue of s 156A of the *Penalties and Sentences Act* the sentence of 12 years imprisonment had to be served cumulatively with the other sentences liable to be served. The point taken by counsel for the offender was that the sentence imposed contravened the "totality principle" derived from *Mill* (1988) 166 CLR 59, especially at 63. McPherson JA (with whom Thomas JA agreed) observed at 399 that the "real question now is whether his Honour ought specifically to have applied the totality principle so as to arrive at a different and lesser head sentence having regard to the circumstance that the statutory provision now requires . . .". The question for the court was whether or not the approach often adopted where the totality principle was being applied was still permissible given the new sentencing regime introduced by the amending legislation in July 1997. The question was answered by McPherson JA as follows at 400:

> "Did the application of the totality principle nevertheless require his Honour here to adjust the head sentence by reducing its duration so as to off-set the impact of the change in the law effected by s 156A(2)? In my respectful opinion, it did not. . . . It would have been a wrong exercise of the sentencing discretion to attempt to circumvent that quite specific legislative direction by reducing the sentence currently being imposed so as to reinstate the practice which s 156A(2) has plainly displaced".

[24] His Honour concluded at 401 that "the harsher or more severe sentence, to which he is now required to submit, was not the consequence of any error in sentencing discretion on the part of the judge below, but of a change in the law, which it is not part of the proper function of the sentencing court to be astute in avoiding by imposing a reduced sentence designed to defeat or frustrate it". But nevertheless his Honour concluded that the sentencing discretion had miscarried in that a "more readily identifiable reduction" than that allowed for the plea of guilty ought to have been made. On that basis the sentence was reduced from 12 years to 10 years.

[25] The third member of the court, White J, whilst generally agreeing with the principal judgment, made the astute observation at 403: "It must be kept in mind that notwithstanding the new serious violent offence provisions, s 9(1) [of the *Penalties and Sentences Act*] still applies when sentencing such an offender who must be punished 'in a way which is just in all the circumstances'."

[26] The amendments made to the *Penalties and Sentences Act* in 1997 must be read as subject to the guidelines set out in s 9 of that Act. The legislature must be taken to have recognised that those guidelines would continue to apply to the new

sentencing regime. In addition to s 9(1)(a) referred to by White J in *Booth*, for present purposes s 9(2)(l) and (m) are of particular significance. When imposing sentence in this case the court was obliged by those provisions to have regard to "sentences already imposed on the offender that have not been served" and "sentences that the offender is liable to serve because of the revocation of orders made under this or another Act for contraventions of conditions by the offender". Those provisions were not expressly referred to in the majority judgment in *Booth*, and the reasoning in *Booth* must be read in the light of that. The essential proposition in the passage from the reasoning of McPherson JA quoted above is that the "totality principle" derived from *Mill* cannot directly apply. That is undoubtedly correct. The sentencing judge ought not endeavour to assess the overall criminality of the past and present offences and impose a sentence which reflects that total criminality. The function of the sentencing judge in the circumstances is to impose a sentence having regard to the criminality of the current offences. But in determining the appropriate penalty for that criminality the sentencing judge is required by s 9 of the *Penalties and Sentences Act* to place the sentence in its proper context, namely that the sentence will be imposed in circumstances where it will be cumulative upon completion of the sentence imposed for the past offences.

[27] So much was essentially recognised in *R v Maclean and Bannerman* ([2000] QCA 367; CA Nos 71 and 98 of 2000, 12 September 2000) where the principal judgment was written by Thomas JA with the concurrence of McPherson JA - the parties to the leading judgment in *Booth*. For present purposes the reasons for judgment with respect to Bannerman are most relevant. She had been sentenced in 1997 to 5 years imprisonment with respect to many offences of dishonesty and had been released on parole on 26 January 1998. Whilst on that parole she committed the offences with respect to which the court was primarily concerned. They included numerous charges of fraud and stealing. The court at first instance was informed that the further convictions caused her parole to be cancelled and made her liable to serve the balance of her earlier sentence; it appeared that some 2 years and 8 months remained to be served under that earlier sentence. Thomas JA (with whom McPherson JA and Atkinson J agreed) said:

> "The background to the imposition of the current sentences is the automatic cancellation of parole on the former matters that is required by s 187 of the *Corrective Services Act* 1988. Although the parole on the earlier sentence has ipso facto been cancelled, it will not necessarily be the case that the offender serves the whole of that term, because the Corrective Services Board has power (under s 190(2) of the *Corrective Services Act*) to order that the prisoner serve part only of the unexpired portion of the term. . . . The absence of any power in the courts to make a combined recommendation in relation to both consequences creates a difficulty. In such circumstances the courts must pass what seems to be an *appropriate sentence* on the current offences knowing that it is possible but not necessarily the case that the offender will serve the whole of the earlier term.
>
> The consequences of s 187 of the *Corrective Services Act* may be more drastic than may be thought appropriate as the measure of a sentence appropriate for the new offence that has been committed.

> Obviously the loss of benefit of parole is a consequence of the new offence, and *it cannot be ignored* by the sentencing court any more than other secondary disadvantages from the conviction such as loss of a profession, loss of a job, loss of the opportunity to travel or even physical injury consequential upon commission of the offence". (my emphasis)

In the end result the court allowed Bannerman's appeal to the extent that it recommended parole at a much earlier stage than otherwise would have been the case.

[28] In *Anderson* (CA No 90 of 1998, 11 September 1998), which preceded *Booth* and the July 1997 amendments to the legislation, the court was concerned with a situation where the current offences had been committed whilst on parole which had been cancelled prior to the sentence in question. Thomas JA, with the concurrence of McPherson JA, said:

> "It follows that if the present sentences are to be made cumulative upon those he was already serving, it would not commence until 30 April 2000. The six year cumulative term which would not end until 30 April 2006 would in my view be manifestly excessive. Although some cumulative effect seems appropriate in the present exercise having regard to the sequence and separate criminality of the various offences, the oppressive effect of cumulative sentences is well recognised, especially when a cumulative sentence is ordered to commence after completing the unexpired portion of a previous sentence when the benefit of parole and remission is completely lost".

Though the July 1997 amendments did not apply, the judgment was delivered on 11 September 1998 at a time when the court would have been aware of what was in those amendments.

[29] The next relevant decision is *Byrnes* (CA No 126 of 1999, 18 June 1999). Thomas JA wrote the judgment with which Davies JA and Demack J agreed. The 1997 amendments applied in the matter of *Byrnes*. He committed offences whilst on parole and became liable to serve the balance of an unexpired term of over 1½ years. The later sentence was for entering a motor vehicle with intent to steal and possession of things used in connection with unlawful entry. For that he was initially sentenced to 9 months imprisonment cumulative upon the unexpired portion of the previous sentence. A recommendation for parole was made. In that case the court reduced the term of the cumulative sentence and it seems to me that it is implicit in the reasoning that it did so because, having regard to the overall impact of the cumulative sentence, the sentence initially imposed was considered to be manifestly excessive.

[30] Though there is no reference in *Bannerman*, *Byrnes* and *Anderson* to s 9 of the *Penalties and Sentences Act* it seems reasonably clear that the court was applying the guidelines therein, particularly those matters specified in (1)(a) and (2)(l) and (m). Given the reasoning in those authorities (particularly bearing in mind the composition of the courts) I am satisfied that *Booth* is not an authority for the proposition that a sentencing judge cannot have any regard to the impact on the

sentence to be imposed for the current offences of the circumstance that the offender has to serve a balance of a term of imprisonment for earlier offences.

[31] Regardless of those considerations a perusal of comparable authorities for the offence of wounding clearly establishes, in my view, that a starting point of 4 to 5 years for this offence is far too high. Cases such as *Coonan* (CA No 83 of 1995, 26 April 1995, and *Meehan* CA No 128 of 1996, 5 June 1996) indicate that a starting point of no more than 3 years imprisonment was appropriate for an offence of this kind. In the latter case, where there was a plea of guilty, there was a recommendation for release on parole after serving 12 months.

[32] Having regard to the circumstances of this offence which has been outlined above, in particular the age of the applicant, the fact that he co-operated with the police and made admissions, the fact that the committal was by way of full hand-up brief, the fact that there was no premeditation, the fact that there was an early plea of guilty and the fact that the injuries occasioned were not so serious as to require more than suturing, I am of the view that a sentence of about 18 months imprisonment would be the appropriate sentence. But bearing in mind the considerations stated in s 9 of the *Penalties and Sentences Act* to which I have referred, and the reasoning in the authorities to which I have referred, I am of the view, given the circumstances in which this sentence must be served cumulatively and the practical consequences thereof, a sentence of more than 12 months imprisonment would be excessive.

[33] In those circumstances I would substitute a term of 12 months imprisonment for the offences of unlawful wounding and entering a dwelling with intent.

[34] The orders of the Court should therefore be:

(1) Grant leave to appeal against sentence;

(2) Allow the appeal with respect to the sentences imposed on the counts of unlawful wounding and entering a dwelling with intent, and in lieu of the sentences imposed order that the applicant be imprisoned for a period of 12 months on the count of unlawful wounding and 12 months on the count of entering a dwelling with intent;

(3) Otherwise the orders made on sentence should stand.

[35] **WHITE J:** I agree with the orders proposed by Williams JA for the reasons which he gives.